Incomplete Integration, Disintegration, and National Response Strategies: The Liberalization of Service Provision in the European Union and National Migration Policy Initiatives

Georg MENZ

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Panel: Incomplete European Integration and its Unintended Effects: Immigration and Labor Markets

Chair: Adrian Favell, University of Sussex
Discussant: Martin Schain, New York University

Georg Menz
Department of Political Science
University of Pittsburgh
4 L01 Posvar Hall
Pittsburgh, PA 15260
USA
Email: gemst16@pitt.edu
Phone: 1-412-648-7250
Fax: 1-412-648-7277

1. Introduction

Though the process of European integration has rapidly increased its scope and speed over the past fifteen years, its underlying fundamental logic has remained economic in nature. The more recent commitment to a more "political" character notwithstanding, European integration is primarily and fundamentally a market driven project of liberalization. Social policy has thus never been more than an add-on to this central agenda, being resigned to post-hoc regulation of the repercussions of liberalization, notably of the liberalization of worker mobility and service provision. The early example of the regulation on the social security regime covering workers employed in other member states of 1971 (cf. EC 1408/71) illustrates this point quite well: Workers remain embedded in their home country system of social security for sojourns abroad of up to a year, beyond which they presumably either return or become part of a foreign comapny and its scheme. The regulatory pattern has been that of a "safety net", which safeguards and maintains existing national regulatory régimes. In other words, European Union (EU) social policy has intervened little, come after the deed of liberalization, and remains active. Through negative integration, national systems of labor market access control are being broken up and abolished, yet often very little positive and active efforts at creating a supranational regime in lieu of it seem in sight.

The polity which is being constructed is therefore political only to the extent that it reshapes the contours of its member states behind the backdrop of pursuing such Single Market. Efforts to set into motion policy-making in non-market related issue areas all are relatively recent endeavors, have been less than successful, and, it might be argued, are the somewhat half-hearted products of public debate and attention by the media. As policy fields thus become the object of public and media attention, they become "securitized" (Buzan et al. 1998) and thus are being pushed forward. Accordingly, the conflict in the former Yugoslavia has helped give birth to a –fairly chaotic and often haphazard - Common Foreign and Security Policy (CFSP). Similarly, EU efforts at creating a common immigration policy, including harmonized regulations on political asylum, have grown out of the increase in actual immigration Western Europe has experienced in the wake of the disintegration of Eastern European state socialism, a rise in the number of applicants for political asylum, and the electoral successes of far-right xenophobic populist parties in key countries such as France and Germany.

Insofar as immigration policy is related to the project of European integration it has come under the auspices of the EU. Until recently, critics could rightfully charge the construction of a "Fortress Europe" (Geddes 2000), which stepped up border controls and rendered its visa policy more restrictive, while abolishing interior borders. While it is true that abolishing internal borders raised the issue of dealing with extracommunal citizens, the current path of EU immigration policy was not predetermined; it seemed to grow out of national or multilateral initiatives. Lumping immigration and political asylum into the first pillar of the October 2, 1997 Treaty of Amsterdam (cf. Art. 61 and 62) - and therefore within the realm of responsibilities of ministers for police, justice, and domestic security affairs -seemed indicative of this trend towards securitization and the perpetuation of withdrawing important policy areas from the scrutiny of national parliaments and placing them into the obscurity and opaqueness of the Council of Ministers.

2. The Key Argument

This paper seeks to examine the shape of EU immigration policy for discernible regularities in a deductive fashion. I argue that the overarching pattern of regulation in immigration policy is congruent with and indeed to some extent part of EU social policy. A vague, broadly inclusive and non-intrusive "safety net" emerges, within which national arrangements can unfold. Though this safety net is often based on individual national intiatives, it is watered down so much that it presents little more than a "lowest common denominator" solution.

The nature of these national forms of regulation (or, perhaps more accurately, re-regulation) is in turn heavily colored by the influence and relative potency of domestic level players, more specifically labor market interest associations such as trade unions and employers' associations.

The emerging pattern is both complex and somewhat confusing in that the causal arrow may point in both directions: The EU clears the way towards more internal migration as part of its market-driven agenda, yet it tolerates national re-regulatory responses in lieu of an autonomous social policy of its own. The regulation that it offers itself are cautious, come late, and avoid being intrusive. Even though Amsterdam has set forth the ambitious agenda of creating a common asylum law, a visa policy and control of outside borders within three years, little is to be expected that would intrude into national arrangements. At the same time, "bottom-up" national level initiatives to encourage migration from the outside are tolerated and may begin gradually to influence the policy agenda at the EU level. This plays a role in the current discussion of national and European steps towards opening Fortress Europe to third country immigrants, preferably, though not exclusively highly skilled.

The empirical case studies from which this regulatory pattern are distilled are firstly the EU driven liberalization of service provision (LSP) and national response strategies addressing this attempt to foster internal labor migration in Austria, France, the Netherlands, and Germany. Secondly, national initiatives at promoting immigration from third countries are considered, among which are Germany and Austria's programs on seasonal and contract labor (*Saisonarbeitskräfte - Werkvertragsarbeitnehmer*) and the new programs to invite highly skilled IT professionals on a temporary basis.

3. The argument in more detail

More recent attempts at creating an outright political or even cultural European Union notwithstanding, the fundamental underlying logic of its basic architecture composed of the key treaties of Rome, the Single European Act and Maastricht, and finally Amsterdam, is one of market integration. In this framework, internal *labor* migration was encouraged as it was seen as contributing towards this overall goal. The Treaty of Rome (1957) therefore lays the framework for the liberalization of movement of people (again: conceived of as labor) and of service provision, though the latter only became effective after a transition period as of January 1, 1970. The Maastricht Treaty of 1992 reiterated these two goals, subsuming them under the so-called "four freedoms" of capital, goods, services, and labor. Transition periods for labor mobility, as are currently demanded by several members states in the context of the EU eastward enlargement, including for obvious geographic reasons Austria and Germany (Wirtschaftswoche 1996, Frankfurter Rundschau 1997, 1998, Der Standard 1999, Die Furche 1999, Die Zeit 2000), are nothing new. They were imposed upon the latecomers from Southern Europe, including Greece until 1987, Spain and Portugal until 1993, but notably not founding member Italy. Labor mobility within the European Union was thus limited to migration from Italy to France and Germany until the late 1980s, while migration to and from

members countries resorted to little more than a trickle (Straubhaar 1988). This is perhaps unsurprising if we consider the push and pull factors (Ehrenberg and Smith 1997) involved at this time: wage differentials and differences in the unemployment rates among member states were relatively low. The one exception to this observation, Italy, therefore served as a pool of migration. In this phase, labor recruitment from third countries was left entirely to member states, which used their former colonies or, in the case of West Germany, Southeastern Europe, as their reservoirs for labor recruitment.

This relatively tranquil picture began to change in the late 1980s as notably the liberalization of service provision (LSP) began to have an actual impact on internal labor migration. Companies from high wage member states such as France, the Netherlands, and Germany found it advantageous to employ subcontractor from low wage countries such as Ireland, Portugal and the UK which then posted their employers to "northern" construction sites to perform services at home country wage levels. This exploitation of the LSP and its extension to countries presumably still covered by the transition period were not least the result of a remarkable European Court of Justice (ECJ) decision (Société Rush Portuguesa Lda vs. Office National d'Immigration 27 March 1990; C-118/89), which explicitly permitted the posting of workers from low-wage Portugal within this framework of the provision of services.

Simultaneously, the EU was beginning to make cautious endeavors towards a common policy on immigration, notably through the 1990 Dublin and Schengen agreements. Yet, both agreements emerged out of bilateral initiatives of individual member states and were only later integrated into the subsequent treaties, notably Maastricht (cf. Art. K ff.) and Amsterdam. They are thus best perceived of as a bottom to top affair. This flow was a result of "securitization" of immigration as an issue at the national level in key countries France and Germany[1]. Though the future shape of EU immigration policy is still somewhat in flux, such bottom to top flow of initiatives seems particularly likely within the five year transition period established in the 1997 Amsterdam Treaty, according to which "an unanimous vote based on a proposal of the Commission or based on the initiative of a member country" (Art. 67, my translation from the German[2]) is to lie at the root of all European Council initiative.

Thus, two trends became discernible in the late 1980s and early 1990s, which remain pivotal towards an understanding of current EU immigration policy: In terms of internal labor migration, the market project of European integration began to have a real impact since the LSP now was extended to member states with considerable lower wage levels and higher

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[1] In the early 1990s, immigration emerged as a contested issue in France, as a heated discussion surrounded the question of citizenship and thus national self-identity. On the far right the populist *Front Nationale* emerged under its tough and ready leader Jean-Marie Le Pen. Meanwhile, immigration, political asylum and its abuse were hotly debated topics on the other side of the Rhine. The far right *Republikaner* scored electoral successes in a few regional successes and violent xenophobia culminated in a series of violent attacks on the quarters of asylum seekers and ethnic minorities. In the end, French citizenship laws were not rendered more restrictive, but the German law on political asylum was. If my proposition about national initiatives is accurate, a future EU asylum policy will therefore resemble the new restrictive post-1993 German asylum legislation more than the old legislation. Note that the German government possesses the dubious honor in pioneering the so-called "safe third country" regulation according to which applicants which had passed through any third countries en route could be immediately deported. This concept has found its way into the Amsterdam Treaty.

"Securitizing" immigration has also paid off well in terms of electoral success for Austria's far right *Die Freiheitlichen*, which weaseled their way into a national government coalition in 2000, but had been on the rise since 1994.

[2] I have consulted the German version of the treaty available at http///195.88.0.198/TEXTE/EUROPE/MAASTR/DOK2.htm

unemployment figures. This, then, is a clear instance of a top to bottom flow: European level liberalization curtailed the amount of control member states could exercise over immigration from member states.

At the same time, a nascent common immigration policy vis-à-vis third countries began to distinguish itself; yet here the initiative and impetus seemed to stem from individual member states. This, then, is an instance of a bottom up flow of impact. Perhaps motivated by what I have designated a process of "securitization" in terms of popular discourse, media attention, and, not least, the rise of far right populist parties, member states began to form the contours of a common immigration policy. The 1990 Dublin and Schengen agreements were thus born. In a similar fashion, though under notably different circumstances, national initiatives have been launched to allow for the temporary employment of seasonal workers from third countries. The perceived need for such workers was voiced and popularized by the business community, but skillfully portrayed as a necessity for the country in question itself. What is good for Siemens, is thus portrayed to be good for Germany. In order to maintain international competitiveness and remain an attractive locale to foreign investors such agreements were in the interest of the country as a whole (Gaserow 2000, Die Zeit 2000). The otherwise embattled *Wirtschaftsstandort Deutschland* would otherwise come under siege. This, too, can be the language of "securitization".

European Union-driven liberalization and attempts to create a Single Market	European Union level policies
---> lead to	--->lead to
Internal (labor) migration which may then be re-regulated by member states at the national level	member states launch initiatives concerning third country nationals/ border controls often as the result of public debate and media attention ("securitization")

Table 1: The flow of impetus in EU immigration policy

4. The LSP and National Response Strategies

The liberalization of service provision had been included in the original 1957 Rome Treaty (Art. 59 and 60) and went into effect as of January 1, 1970. It permitted companies registered in any member state to carry out or perform a service in any other member state. Implicitly this article permitted the temporary posting of workers to such second country in order to carry out an assignment. Thus, member states' capacity and ability to regulate the access to their labor markets through imposition of work visa requirements, quotas, and similar measures were being undermined in the interest of creating a Single Market. The LSP

in some ways complemented the freedom of mobility, while its implications were much less obvious and thus captured much less of the limelight. Indeed, its impact began to unfold only after the admission of member states with much lower wage levels. Even though the ramifications of the LSP are much better known today, in the current discussion on a temporary limitation on labor migration from future eastern EU members it seems to receive little attention.

French construction companies were among the first actors to capitalize on wage savings made possible by the LSP. The impetus stemming from the EU was geared at liberalizing and thus deregulating access to the labor market, but no provision had been made to (re-)regulate the question of wage levels for such posted workers[3]. In the absence of such communal regulation, the 1980 extra-Communal Rome Convention on international private law stipulated that two parties setting up a labor contract possessed the right to choose between either the law of the country in which the company sending the workers was registered in **or** the receiving country. An exception to this is a hard core of social and labor standards considered binding laws and thus part of the *ordre publique* of the recipient country. Since wages generally did not qualify as such, Portuguese subcontractors posting their employees to France could legally reimburse these individuals according to Portuguese standards[4]. The public National Office for Immigration (*Office Nationale d'Immigration*) considered this practice not only an infraction of its monopoly on labor recruitment, but a violation of the temporary ban on labor mobility applicable to Portugal until 1993. It therefore imposed a fine on a Portuguese subcontractor of French construction giant Bouygues Construction SA by the name of Rush Portuguesa. Given the European aspects of this case, the French Tribunal de Versailles referred it to the ECJ, which in a March 1990 decision ruled that this case of posting was indeed a legitimate exercise of the freedom of transnational service provision not affected by the temporary ban on labor mobility for Portuguese citizens. At the same time, the ECJ decision did mention that member states were permitted to impose their own labor and social standards along with certain wage levels on such posted workers[5].

An aura of legitimacy had thus been bestowed upon the practice of French construction companies. The official goal of encouraging labor migration was indeed fostered as companies from other high wage member states began to copy the French example, notably in Belgium, the Netherlands, and most prominently in Germany. 124,000 workers were posted to Belgium in 1994. In Germany, the number of posted workers in the construction sector rose from a mere 20,000 in 1993 to 106,000 in 1994 and 138,000 in 1995 (Bosch and Zühlke 2000). The liberalization of service provision, a theoretical aspect of EU induced liberalization, lay dormant for many years until it was utilized by enterprising construction

[3] There was a 1991 Commission draft proposal for a directive, which I discuss later in this paper.

[4] We will note in passing that the French authorities did consider the national minimum wage SMIC to constitute part of the French *ordre publique* (as indicated in the Ministry of Labor's « Circulaire du 2 mai 1991 précisant les règles à appliquer aux entreprises de la Communauté Européenne venant temporairement effectuer une prestation de services en France dans le domaine du bâtiment et du génie civil » p. 11), an assessment shared by an employers' representative (interview Medef). Yet this was far from established: The minimum wage had not been explicitly made applicable to posted workers and companies were able to insist on Portuguese wages and law under the Rome Convention.

[5] The ECJ pointed out that « ...le droit communautaire ne s'oppose pas à ce que les Etats membres étendent leur législation, ou les conventions collectives de travail conclues par les partenaires sociaux, à toute personne effectuant un travail salairé...sur leur territoire... » ; it was thus permissible for the member states to « imposer le respect de ces règles par les moyens appropriés ».

companies as a legal mechanism for exiting a high wage environment. Consequently, it had a tremendous amount of impact in encouraging labor migration within the European Union, the core source countries being Ireland, Portugal, Italy and Britain, while the main recipient countries were first France, Belgium, and Germany, and soon thereafter almost exclusively the latter.

While the initial impetus for liberalization of access to labor markets and intra-Union migration had emerged from the EU level, responses to this impact at the national level were possible. The ECJ ruling opened up room for what I term national response strategies or domestic re-regulation of the wage levels and labor conditions for posted workers. Even so, the fundamental freedom of service provision, included in the Rome Treaty and explicitly restated in the 1993 Maastricht Treaty, could under no circumstances be banned outright at the national level. These national response strategies were shaped and colored by the relative power and position of actors in the field of labor market policy, namely trade unions, employers' organizations, and the state. Consequently, different high wage member states found arrived at very distinct policy responses.

In Austria, France, Germany, and the Netherlands, the four countries considered for purposes of this study, different constellations among the actors led to different outcomes, the overall regulation reflecting the preference of the strongest actor. Since government action was necessary to bestow legal character upon any regulation found in neocorporatist arrangements[6], the variable "strength" ought to take the relation to the government and its ideological coloring into account as well as including aspects of coverage, internal organizational coherency, and degree of hierarchy. Preferences were thus enshrined into laws and hence translated into outcomes.

coverage internal coherency degree of hierarchy	+(access to government) ---------->	stronger labor market interest association shapes outcome

Table 2: Strength of labor market interest associations translates into policy outcome

In ***France***, national re-regulation of the LSP was initiated by a center-right coalition of neo-Gaullist RPR and the center-right UDF under Prime Minister Edouard Balladur in 1993. Though individual trade unions, notably the CFTC and the CFDT, had repeatedly criticized illegal forms of employment and substandard wages in the construction sector, they had not presented a precise or coherent proposal for a re-regulatory measure. The French trade union movement is hampered by a low degree of density (8 to 10 percent coverage), an organizational structure which is relatively weak at the micro-level, yet strongly hierarchical, and a reserved attitude towards the government (Mouriaux 1997, Hancké 1997, Goetschy 1998). The French state commonly intervenes into labor market policy directly and sets the legalistic framework of industrial relations through occasional grand reform packages, or "great leaps forward". This tradition of the state acting as an *ersatz* union has the undesired side effect of further weakening the union movement. The interest of the French trade unions was unanimous in this question despite its ideological fragmentation; all unions supported a

[6] However, extra-governmental regulations could be found amongst the social partners, which were then complied with by employers and trade unions, as was the case in the Netherlands, Denmark, and Sweden.

re-regulation guaranteeing the payment of standard French wages to posted workers (interviews CFDT, CGT, CFTC).

The employers' association CNPF (since renamed: Medef) is the unitary representation of French major businesses, organizing about 80 percent of its clientele, with a smaller rival organization organizing small and medium sized companies (CNPME). It is organized in a hierarchical fashion but leaves large margins of autonomy to its sectoral submembers, notably in questions of wage determination. Though CNPF representatives participate along with union members in the Economic and Social Council (*Conseil Economique et Sociale*), an institution one might rightfully call a pseudo-corporatist think tank, the employers act and liaise with government officials in an informal fashion. Given the common socialization of the French elite in institutions of higher learning and a common career pattern of private sector activity following government service, the amount of leverage business can wield is considerable (Hall 1986, Levy 1994, Hancké 1999). There were some concerns among the sectoral construction employers' association about the implications of continued "wage dumping" and a downward spiral of prices. Notwithstanding that its very members had engaged in such practices before, the sectoral association urged the government to consider legislative action and voiced its concerns to CNPF (interviews FNTP, CNPF/Medef). The CNPF was therefore broadly sympathetic towards a regulation which would shield off undesired and "unfair" competition from low-wage countries ("*concurrence déloyale*") and sustain the price level for French companies.

The Minister of Labor Jean Giraud presented a major reform package in mid-1993, aimed at liberalizing the French labor market and thus curb rampant unemployment. Though this package, known as the Five Year Law on Employment and Education (*Loi Quinqennale relative à l'emploi, au travail et à la formation*) was coolly received by the trade unions (*Le Monde* 21 August 1993, 26 August 1993), both camps could agree on the efforts against illegal employment which was the heading chosen for the re-regulation.

The modified Article 341-5 of the Code du Travail henceforth specified that

"In consideration of international treaties and agreements it is established that if a company not registered in France provides a service on the national territory the employees which are being posted temporarily for the provision of this service are to be subject of all legislative, regulatory and wage dispositions that are applicable to employees of a company in the same sector registered in France concerning social security, additional sector-specific arrangements based on title III of book VII of the Social Security Code, remuneration, working time and work conditions according to the specifications to be set forth in an administrative decree."
(Journal Officiel de la République Française, Débats Parlementaires, Assemblée Nationale, Compte-Rendu Intégral; Séance du 18 novembre 1993, 6090)[78]

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[7] This decree was issued on July 11, 1994 : «Décret No. 94-573 du 11 juillet 1994 pris pour l'application de l'article 36 de la loi quinquennale relative à l'emploi, au travail, et à la formation professionnelle» ; Journal Officielle de la République Française of July 12, 1994, pp . 10041

[8] In the original French, the text reads: «Sous réserve des traités et accords internationaux, lorsqu'une entreprise non établie en France effectue sur le territoire national une prestation de services, les salaries qu'elle détache temporairement pour l'accomplissement de cette prestation sont soumis aux dispositions, législatives, réglementaires et conventionnelles applicables aux salariés employés par les entreprises de la même branche établie en France, en matière de Sécurité sociale , de régimes complémentaires interprofessionnels ou professionnels relevant du titre II du livre VII du Code de la Sécurité sociale, de rémunération, de durée du travail et de conditions de travail, dans les limites et selon des modalités déterminés par décret.»

Through this regulation, the French government had effectively re-regulated the wage level for posted workers, making obligatory the payment of the national minimum wage SMIC or even, where it existed and had been declared generally binding (*extension*), a sectoral frame of wage levels based on qualification levels (*coefficient hierarchiques*). Such *extension* applied to the general framework of *conventions collectives*[9], but the sectoral and/or regional wage agreements are also routinely examined (*entendu*) by the Ministry and declared universally applicable. The national response strategy could thus rest on a consensus between the social partners in this question.

In ***Austria***, re-regulation occurred as part of the process of coping with the *acquis communitaire* in labor and social policy. Since the country joined the EU on January 1, 1995 it would have had to adopt the LSP and abandon its previous relatively tight immigration régime. The Grand Coalition composed of the conservative Peoples' Party ÖVP and the Social Democratic SPÖ presided over the 1993 Law on Changes to the Labor Code (*Arbeitsvertragsrechts-Anpassungsgesetz = AVRAG*). The crucial paragraph 7 was based on a suggested draft bill prepared by the sectoral construction union Bau Holz and seconded by the umbrella union federation ÖGB.

The Austrian union movement is traditionally characterized by a relatively high degree of coverage (approximately 50 percent) and a high degree of centralization and hierarchy. The umbrella federation ÖGB presides over its sectoral members, coordinates overall policy, and signs off on wage agreements negotiated by its sectoral members. It has traditionally enjoyed a very high degree of access to government based on the particular Austrian tradition of Social Partnership, a formal and informal system of interest intermediation and extensive consultation of trade unions, employers' associations, and farmers' associations (Greif 1998, Traxler 1998). Interest associations were traditionally consulted before major initiatives in labor market and social policy were even presented to parliament[10].The particular advantage enjoyed by the union in 1993 was that the Minister of Social Affairs Josef Hesoun had previously served as head of the sectoral construction union and was hence particularly well inclined towards his former constituents' woes. The draft bill proposed by the sectoral union and later elaborated by the Ministry included an extension of Austrian wage agreements, labor and social regulations to posted workers (interviews ÖGB, Gewerkschaft Bau Holz).

The employers are organized in the Economic Chamber (WK), which is virtually all-encompassing thanks to the mandatory character of membership. It is subdivided along both regional and sectoral lines for organizational purposes, yet characterized by a very high degree of hierarchy and centralization just as its union counterpart. The Austrian employers' association's decision-making process is dominated by small and medium sized business, firstly as these companies make up the lion share of the economy (OECD 1999) and secondly

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[9] In these documents working time, conditions, qualification levels, job descriptions, etc. are set forth. For the construction sector, the most important document is the 29 May 1958 "Convention collective nationale des employés, techniciens et agents de maîtrise du bâtiment ».

[10] Since there was considerable overlap between the interests of the conservative ÖVP and farmers and business on the one hand and the trade union and the Social Democratic SPÖ on the other hand, these informal negotiations more often than not preempted and essentially substituted parliamentary debate. The social partners used to be consulted on issues of economic policy in the broadest sense. I choose the past tense in this description as there is substantial evidence that under the new "Black-Blue" coalition of ÖVP and Freedomites since spring 2000 the social partnership is waning in importance and social partners, especially the union, are commonly no longer being consulted (Wirtschaftsblatt 1999, Salzburger Nachrichten 2000).

since each member enjoys one vote regardless of its actual size or business volume (Traxler 1998). Traditionally, the employers were also incorporated into the Social Partnership, which allowed them a considerable amount of influence on policy-making. The employers were willing to accept the proposed draft bill as its clientele –medium and small sized companies – stood more to lose through low wage competition than to gain through massive outsourcing to cheaper subcontractors. Though not necessarily enthused about the project, it accepted it without significant resistance (interview WK).

The Law on Changes to the Labor Code thus passed on June 17, 1993 and was to apply as of July 1. The relevant paragraph 7 read as follows:

1. If an employer without seat in Austria who is not member of an organization capable of negotiating wage agreements in Austria employs an employee whose regular locale of employment is Austria then this employee is entitled to at least those wages set forth by law or wage agreement which are applicable to employees employed in the same locale and performing similar work for similar employers.
2. Notwithstanding the law applicable to the labor contract, Art. 1 applies also to employees which are posted to Austria for continuing a labor contract or are sent there as contract workers by an employer without a seat in Austria for activities which in total take more than four weeks to accomplish. [11]

(Bundesgesetzblatt für die Republik Österreich, 172. Stück, No. 459, 9. Juli 1993)

This law made clear that posted employees were to be compensated at the level of standard Austrian wages. In addition, a hard core of labor and social regulations applied. A regulation worth mentioning is the so-called compensation for separation (*Trennungsgeld*), which has to be paid to employees posted to sites away from their regular locale of employment. In practice, this implied the employers' responsibility for travel expenses incurred by the employee. In the case of posted workers this could amount to substantial sums, obviously weakening the advantages derived from outsourcing to low wage companies. The four week transition period during which home country wages could continued to be paid was meant to avoid excessive red tape and secure the agreement of the employers. Since it was subsequently used as a loophole in some instances, it was eventually abolished in a 1996 revision of the law[12].

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[11] In the original German, the text reads as follows: « 1.Beschäftigt ein Arbeitgeber ohne Sitz in Österreich, der nicht Mitglied einer kollektivvertragsfähigen Körperschaft in Österreich ist, einen Arbeitnehmer mit gewöhnlichem Arbeitsort in Österreich, so hat dieser Arbeitnehmer Anspruch zumindest auf jenes gestezliche oder kollektivvertagliche Entgelt, das am Arbeitsort vergleichbaren Arbeitnehmern gebührt.

2. Absatz 1 gilt, unbeschadet des auf das Arbeitsverhältnis anzuwendenden Rechts, auch für einen Arbeitnehmer, der von einem Arbeitgeber ohne Sitz in Österreich für Arbeiten, die insgesamt länger als einen Monat dauern, im Rahmen einer Arbeitskräfteüberlassung oder zur Erbringung einer fortgesetzten Arbeitsleistung nach Österreich entsandt wird.»

[12] This was done in the 1996 "Law Against Abuses" (*Antimissbrauchsgesetz*) which abolished the four week window, stepped up enforcement efforts, and increased fines for employers found to employ illegal migrants or i any other way in violation of the labor law. In addition, general contractors could be held legally responsible for violations against labor or immigration laws incurred by any of their subcontractors. This law was not least a result of intense public and media debate about immigration to Austria in the mid-1990s, accompanied by the electoral successes of the far-right Freedomite Party. One could thus reasonably make the case that the law grew out of the "securitization" of the immigration issue.

A national response strategy could therefore be found in Austria even before actual entry into the EU. This initiative grew out of the situational advantage enjoyed by the trade union, while its organizational power otherwise resembles that of the employers' association. Business was willing to accept the re-regulation as its interests were more served by a modestly protectionist regulation than an aggressive deregulation which only few of the mainly small and medium sized companies in Austria could have taken advantage of. The compromise was found under the auspices of a grand coalition.

In the ***Netherlands***, the minimum wage (*Minimumloon*) had always possessed statutory character and thus could be considered part of the *ordre publique*. For this reason, posting of workers to the Netherlands in the framework of the LSP occurred in much smaller proportions than in either France or in Germany. The trade unions and employers in the construction sector were able to agree on a compromise solution amongst themselves incorporated into the 1996 collective wage agreement (*CAO = Collectieve Arbeidsovereenkomst*) as Article 1a. In doing so, the social partners avoided government intervention into the wage setting process[13]. Though this agreement did not posses the same legal strength of a law, it made mandatory the payment of standard Dutch wages after a transition period of four weeks by either Dutch or foreign subcontractors.

The relevant wage clause read:
"Art. 1A Foreign Employees

a. Unlike what has been said in Article 1, section 5, this wage agreement – under consideration of the applicable legislation of the home country – is applicable to employees living abroad and sent to the Netherlands by employers registered outside of the Netherlands for a labor contract extending for more than one month. [...]"[14]

(Collectieve Arbeidsovereenkomst voor het Bouwbedrijf 1993)

The unions, notably the FNV and its sectoral construction subcomponent Bouw- en Houtbond FNV, much less so the CNV and its Hout-en Bouwbond CNV, had exerted significant pressure on the employers to accept such addition to the wage contract. The Dutch union movement is characterized by a moderate degree of coverage (30 percent), internal ideological division between a social democratic FNV and the Christian confessional CNV, yet internally relatively hierarchical (Visser 1998, Sprenger et al. 1998). The trade union had an interest in extending domestic wages to posted workers to avoid an undercutting of these standard wages by subcontractors (interviews FNV, FNV-Bouw).

The Dutch employers' association VNO-NCW has gained organizational coherence and puissance having united the two associations VNO and Christian NCW and thus overcome ideological cleavages. It is characterized by a relatively high degree of coverage (60 percent,

[13] Indeed, this was the motive for both sides to sign off on the famous 1982 Wassenaar Agreement. Note that the employers did not agree to a regulation covering the entire economy (interview VNO-NCW). A law was passed much later (1999) to implement the EU Directive EC 96/71 on posted workers, but this regulation did not cover the question of wages (interview MinSozZAk en Werk, EIRO 1999).

[14] In the original Dutch, the article reads as follows: «In tegenstelling tot het bepaalde in artikel 1, lid 5, is deze CAO – met inachtneming van de wettelijke regelgeving van het woonland – eerst van toepassing op degene die in het buitenland woonachtig is en in Nederland, in dienst van een in het buitenlad gevestigde werkgever, werkzaam is, indien deze werkzaamheden langer dan één maand achtereen duren.»

nearly complete among medium and large companies) and a significant degree of organizational hierarchy, following major organizational restructuring. The umbrella association agreed to the sectoral association AVBB's initiative because this was a clearly sectorally limited affair and seemed to constitute a compromise solution (interview VNO-NCW). The sectoral employers AVBB were willing to give in to union pressure to avoid labor unrest over a proposal which was liberal enough to incorporate their interests (interview AVBB). The four week window permitted short term posting at the minimum wage level. In a sector characterized mainly by small and medium sized companies and only a few major players (van der Meer 2000), outsourcing to foreign subcontractors appeared not particularly attractive. In addition, giving in to government pressure the lowest wage bracket in Dutch construction has been lowered to approach the *Miminumloon* (Visser 1998, 292), leaving a minute wage gap of six percent between the two. This further reduces the incentive to use foreign subcotractors extensively.

The Dutch national response strategy therefore consisted of a compromise solution found between the social partners. Though it was based on a union initiative, the employers were willing to concede to a regulation leaving some room open for temporarily limited posting at the minimum wage level. The regulation applied Dutch wages for contracts extending four weeks, while the Dutch minimum wage presented the floor for shorter postings. This solution avoided social dumping without being quite as rigid as either the French or the Austrian response.

In ***Germany***, the process of finding a re-regulation of the European LSP was long drawn-out and particularly embattled. The center right coalition of the liberal Free Democrats FDP and the Christian Democratic parties CDU and CSU had been approached as early as 1994 by both employers' associations and trade unions in the construction sector about a possible response strategy. The German government attempted to orchestrate a European directive on this issue and preferred this to a national response at first. Having failed to gather the necessary majority even under the German Presidency of the second semester of 1994, the Ministry of Labor and Social Affairs then began to draft a bill which would eventually result in the 1996 Law on Posted Workers (*Arbeitnehmerentsendegesetz*) (interview Min für Arb und Soz).

In the process of elaboration and especially implementation of this law, the particular structure of German industrial relations played a pivotal role. While the German union movement is neither as encompassing (27 percent of employees) nor as hierarchical or centralized (Jacobi et al. 1998) as is perhaps commonly assumed, the umbrella federation DGB can act as a potent player if it gathers the support of the much more mighty and very much autonomous sectoral associations behind it. Yet this was only partially the case. The centrally concerned sectoral construction union IG BAU was most active in lobbying the ministry to find a quick and comprehensive regulatory response, including the extension of the entire framework of German wages to posted workers. It received some support from the potent metalworkers union IG METALL, since the latter organizes electricians and some of the construction-related branches (installation of sanitary, heating, and climate control systems) (interview IG METALL). However, other powerful sectoral unions, including the chemical workers IG CHEMIE and the public sector ÖTV (recently renamed to verdi), stayed on the sidelines. The relative autonomy of the sectoral associations and comparative weakness of the umbrella association DGB therefore did not lead to a particularly powerful position of the union movement. In addition, while it is true that even the conservative CDU contains an employers' interest association (CDA) and that the Minister of Labor and Social Affairs at the

time, Norbert Blüm, was a union member and thus open to the movement's concerns, this must be counterbalanced by the resistance of the liberal Free Democrats and their Minister of Economic Affairs Günther Rexrodt. The general employers' association BDA was also vehemently opposed to this law.

The German employers are generally organized analogously to the union along sectoral and regional subdivisions. The umbrella federation BDA sits on top of relatively powerful individual sectoral associations. Just as the DGB, the BDA depends on the organizational and logistical support of its sectoral members and acts based on their consensus or at least their majority opinion. While the sectoral construction employers were very much interested in finding a national response strategy quickly, the other sectoral employers and with it the BDA strictly opposed such measure both on purely ideological grounds and for more practical reasons. The employers were wary of what they considered a limitation of the liberalizing impetus from the EU. They also suspected a possible wage drift from the construction sector if an excessively high minimum wage was applied to posted workers in the construction sector (interviews BDA, Gesamtmetall). Finally, the textile employers deemed the necessary adjustment process of the construction sector in face of foreign competition the immediate equivalent to its own painful restructuring process of the 1970s (interview Gesamttextil). The employers were thus generally opposed to this law.

The Law on Posted Workers passed on February 26, 1996 read as follows:

1. The legal norms of a wage treaty declared universally applicable in the construction sector defined by Art. 1 and 2 of the construction sector decree of 28 October 1980 (Bundesgesetzblatt I p. 2033) as modified by decree of 24 October 1980 (Bundesgesetzblatt I p. 1318) apply mandatorily, if a company performs primarily construction-related activities...and if German law is not applicable to the labor contract anyway, to a labor contract between an employer abroad and his employee employed in the geographical field of coverage of such wage agreement if and to the extent that

1. the wage treaty does contain a unitary minimum wage for all employees covered by its geographical field of coverage and
2. domestic employers, which have their seat outside of the geographical field of coverage of this wage treaty, are required to grant their employees within the geographical field of coverage at least the minimal conditions applicable there as stipulated by a wage treaty.[15]

[...]

[15] In the original German, the text reads as follows:» 1. Die Rechtsnormen eines für allgemeinverbindlich erklärten Tarifvertrages des Baugewerbes im Sinne der Paragraphen 1 und 22 der Baubetriebe-Verordnung vom 28. Oktober 1980 (BGBl. I S ; 2033) geändert durch Verordnung vom 24. Oktober 1984 (BGBl. I S. 1318) finden, soweit der Betrieb überwiegend Bauleistungen...erbringt und nicht ohnehin deutsches Recht für das Arbeitsverhältnis massgeblich ist, auch auf ein Arbeitsverhältnis zwischen einem Arbeitgeber mit Sitz im Ausland und seinem im räumlichen Geltungsbereich dieses Tarifvertrages beschäftigten Arbetinehmer zwingend Anwendung, wenn und soweit

1. der Tarifvertrag ein für alle unter seinen Geltungsbereich fallenden Arbeitnhemer einheitliches Mindestentgelt enthält und

2. auch inländische Arbeitgeber, die ihren Sitz ausserhalb des räumlichen Geltungsbereichs dieses Tarifvertrages haben, ihren im räumlichen Geltungsbereiches des Tarifvertrages beschäftigten Arbeitnehmern mindestens diese am Arbeitsort geltende tarifvertagliche Arbeitsbedingung gewähren müssen.»

(Gesetz über zwingende Arbeitsbedingungen bei grenzüberschreitenden Dienstleistungen (Arbeitnehmer-Entsendegesetz) vom 26. Februar 1996 in Bundesgesetzblatt 1996, I, Nr. 11 of February 29, 1996)

This law presented a compromise both between the labor-friendly Ministry of Labor and the staunchly liberal Ministry of Economic Affairs and thus also between the labor-friendly wing in the Christian Democratic Party and the liberal Free Democrats. Rather than imposing standard German wages, the law made mandatory the payment of a minimum wage to posted workers. However, the government shied away from imposing a national or even sectoral minimum wage and left this up to the social partners, respecting their time-honored autonomy to set wages (*Tarifautonomie*), dating back to the Weimar Republic.

In the drawn-out negotiations of this minimum wage a clear conflict emerged within the employers' camp between the sectoral employers associations ZDB and HDB, which were willing to compromise and accept a relatively generous minimum wage, and all other sectoral employers' associations and with them the BDA which insisted on a truly "minimal" minimum wage so as to avoid on upward wage development in other sectors. In order for such minimum wage to become generally applicable (*allgemeinverbindlich*) to all companies operating on German territory, the majority of a committee within the Ministry of Labor consisting of three employers and union representatives had to agree to it (interviews BDA, Gesamtmetall, Gesamttextil, HDB, ZDB)[16]. The employers' camp could therefore veto wage propositions it deemed unacceptable. Even though its own sectoral construction members were desperate to reach an agreement and willing to compromise, even threatening to exit the BDA, the other employers and the umbrella association itself remained firm in their demands, eventually agreeing to a minimum wage of DM 16.00 in the Western *Länder* and DM 15.14 in the East.

Based on its organizational puissance, its ideological allies in the Ministry of Economic Affairs and among the Free Democrats, relative unity among all sectoral employers not directly concerned, and not least the veto power in the committee, the employers camp therefore succeeded in significantly coloring the German national response strategy. It is limited to the construction sector and does not encompass all sectors of the economy as in Austria and France. The mandatory wage for posted workers is significantly below that for directly employed workers in Germany. Thus, an incentive to employ subcontractors and posted workers continues to exist in Germany. As I have argued elsewhere, this promotes a

[16] This somewhat peculiar arrangement warrants some explanation. Wage agreements in Germany are traditionally negotiated between unions and employers and then adhered to by all companies which are members of the employers' federation and, for practical purposes, often even by non-members. This worked well during a time in which most companies did indeed adhere to the employers' federation even though this was never mandatory as in Austria. However, wage agreements are rarely officially declared universally applicable and thus made mandatory for non-members. This has to do with both the constitutionally guaranteed principle of freedom of association (*negative Koalitionsfreiheit*, set forth in Art. 9 Section 9 of the German Basic Law) or the right **not** to adhere to a employers' federation and aforementioned *Tarifautonomie*. In a system in which state intervention into wage regulation is suspiciously regarded by both camps, it warrants particular circumstances and agreement by both sides.

stratification of the labor market into various tiers and further weakens the union in future negotiations (Menz 2001a)[17].

Having said that, the employers were unable to avoid such national law altogether thanks chiefly to the access to government enjoyed by the union, more specifically to IG METALL member Minister of Labor Blüm who took personal interest and showed significant initiative on this issue. Nevertheless, the union movement demonstrated that the sectoral subdivision and decentralization it is characterized by may result in significant weaknesses if it is unable to mobilize sectoral associations not directly concerned.

The German national response strategy may therefore be described as being the most liberal among the ones examined in this paper, since it does not eradicate the cost advantages enjoyed by subcontractor companies from low-wage member states. Therefore, the EU induced liberalization and consequent incentive for migration continues to exist. This is indeed reflected in the figures of workers posted to Germany:

1992 : 13,000	1997 : 165,000	(Netherlands since mid-1990s):
1993 : 20,000	1998 : 150,000	a few hundred
1994 : 106,000	(Belgium 1994) : 140,000	
1995 : 132,000	(Austria 1995) : a few dozen	
1996 : 165,000	(France since 1993): negligible number	

Table 3: Estimates of numbers of posted workers in Germany, other European countries for comparative purposes (source: for Germany: Hauptverband 1997 quoted in Bosch and Zühlke 2000, 31, for Belgium: EIRO 1999, for Austria: interviews ÖGB, Bundmin Wirt, for France: interviews CNPF/Medef, CFDT-FTP, FNTP, Min Trav, for the Netherlands: interviews AVBB, FNV Bouw, interview Min SozZAk en Werk)

In sum, the four high wage member states developed distinct re-regulatory national response strategies conditioned by the relative organizational strength and the access to government of labor market interest associations. Different national "models" of interest intermediation thus generated different wage regulations for posted workers and re-regulated EU induced liberalization and migration incentives in distinct fashions. From the empirical evidence it seems fair to deduce that both highly neocorporatist Austria and statist France developed the most comprehensive and inclusive re-regulatory response strategies, while intermediate neocorporatist Germany and Netherlands arrived at much more liberal regulations, which continue to provide some incentives for the provision of services by

[17] The establishment of a special minimum wage well below the lowest wage bracket for direct employees of domestic companies establishes an incentive for such domestic companies to outsource to foreign subcontractors. It also leads to a stratification into two tiers of workers, to which can be added a third tier of illegal, "black market" labor contract relationships. The existence of such stratification leads to a further deterioration of the union's bargaining position.

construction companies from low-wage countries[18]. National responses to the impetus for deregulation of labor market access is hence conditioned by the relative position of interest associations in these member states. While national governments may not re-regulate this access so as overtly close it again, it is quite clear that the regulation of wage limits provides a pivotal mechanism of creating or limiting wage differentials and thus *migration incentives*. Such incentives exist in Germany and to a much weaker extent in the Netherlands, while they were avoided in Austria and France.

5. National Initiatives towards Migration from third countries

While in the previous section I have examined national attempts to cope with EU attempts to deregulate the flows of intra-communal migration as an example of top to bottom EU immigration policy, this flow of impetus may also function in the reverse direction, as I argue. Member states develop initiatives on immigration and the treatment of third country nationals, which may then transmit to the EU level. Aspects of EU immigration policy may grow out of agreements among member states, as was the case of Schengen, or they may be co-opted at the European level through a process of policy learning. In this section, I analyze briefly Austrian and German arrangements pertaining to the labor market access for seasonal workers from third countries. I then proceed to examine the extent to which such agreements can and will EU future immigration policy in a bottom-up fashion. Such flow hinges on the assumption that the current restrictive immigration policy both at the European and at the national level is coming under scrutiny in light of the unfavorable demographic developments throughout Europe and increasing demands among business leaders for skilled professionals. These demands are often dressed up in the language of securitization: Europe's future competitiveness hinges upon its ability to maintain cutting-edge industries and research and development facilities. Yet maintaining such industries and attracting new foreign investment presumably is facilitated by inducing skilled third country professionals to settle within the EU. Thus, the continuation of the restrictive immigration policy pursued by member states since the first oil crisis seems unlikely. Yet, curiously, in some cases the old concept of *temporary labor migrants* or *Gastarbeiter* seems to be reinvented. This ignores both past experience and common sense – more often than not individuals emigrate permanently not temporarily and not just for purposes of work – and the negative ramifications for third countries which yet again lose their best and brightest ("brain drain").

Three other facets bear worth mentioning: First, in seeking to attract the most talented upwardly mobile worldwide another battlefield of globalization for human capital as a resource has begun. While previously, the quest towards becoming a "competition state" (Hirsch 1998) had been limited to attracting foreign capital and investment, human capital is

[18] Owing to space constraints I cannot examine the Nordic countries Finland, Sweden, Denmark and EEA member Norway and Iceland in much detail. Suffice it to say that re-regulation in the "Nordic model" consisted of "gentlemen's agreements" between unions and employers' associations to pay standard wages to posted workers. In Norway, a regulation similar to the French and Austrian one was implemented in 1993, the year in which the country entered EEA and commenced negotiations about EU entry. Here the organizational strength of the Norwegian union movement coupled with good access to the Ministry of Labor and the Social Democratic Party facilitated passage of this law. The Norwegian employers, similar to their counterparts in Austria, regarded the LSP as a potential threat to the level of prices and much less as a chance to escape a high wage environment. Belgium and Luxemburg has found legalistic solutions, enshrining their collective agreements into laws and thus *ordre publique*. However, the Luxemburg solution was found in tripartite negotiations between employers, unions, and the government (email interview Lux Min du Trav), while the Belgian government simply bestowed legal and thus *ordre publique* character on all collective agreements (*arrêts royales*). The relatively weak social partners did not resist this step (Vilrokx 1998).

now also being discovered as a valuable resource by Western European countries. In doing so, they enter into a competition with the classic countries of immigration, the United States and Britain's former "white dominions".

Secondly, and relatedly, it points to the already discernible distinction made between useful exploitable human capital and human byproducts of global crises, which are accepted only under great pain, moaning and complaining, and in lip service to the Geneva Convention on Refugees[19]. The delicate words of the Bavarian Minister of the Interior are indicative of this line of argument: "We need to distinguish between people who will do us good and those who take advantage of us" ("...Menschen, die uns nützen, und jenen, die uns ausnützen.") (Die Zeit 2000b).

Thirdly, immigration is carefully channeled to perpetuate and not uproot existing class and gender divisions in Western Europe. The desired immigrants either fill the ranks of the high-skill well-paid elite as in the case of the IT sector or they are temporarily permitted to enter low-skill low-paid sectors unattractive to current residents. Rather than seeking to encourage increased labor market participation of the unemployed and/or females, for instance through extensive retraining programs, increased child support and day care facilities, governments seem to prefer to turn abroad to import labor. In importing skilled labor, it is possible to take a free ride on these individuals' home countries' tertiary or advanced secondary education systems.

German and Austrian exceptions to the generally restrictive character of immigration policy there – just like in other EU member states - has resulted in arrangements with third countries permitting temporary or seasonal access to their labor markets. Since no such initiative were forthcoming at the EU level, both countries engaged in negotiations with their eastern neighbors on their own. That the impetus came from these two countries and that they should focus on Central and Eastern Europe (CEE) as potential reservoirs for labor has both obvious geographical reasons and is based on historical (pre-war) precedent [20]. The initial motive on the part of the two countries was thus to channel and control the migration pressure resulting from the fall of the Iron Curtain and fulfilling the needs for personnel in relatively low-wage jobs with harsh conditions and little prestige: construction in Germany and tourism and gastronomy in Austria. The underlying principle was relatively similar: based on annual quotas for individual CEE countries, its nationals were permitted to find temporary employment in specified sectors and were presumably to receive standard domestic wages.

The German government thus concluded bilateral labor contracts with most CEE countries and Turkey on permitting an annual quota from each country to fill jobs in relatively low-skill sectors such as construction, agriculture and tourism (Werner 1996, Menz 2001b). Though the sectoral employers associations had welcomed this new pool of labor at first, their skepticism grew, particularly among the small and medium sized companies (interview ZDB). It had become clear that larger companies had substantial logistical advantages in gaining access to the quotas and that CEE workers were reimbursed at substandard rates permitting such companies substantial bidding advantages. Rather than leading to the transfer of know-how to CEE workers paid at standard German wage levels, these individuals served as a freely

[19] Presumably this convention still forms the basis of EU asylum policy. We will note that the aforementioned "safe third country" regulation is not in accordance with the Geneva Protocol (Roth and Hanf 1998).

[20] We will note in passing similar agreements between France and the Maghreb countries and between Spain and Morocco (Malgesini and Fischer 1998). Even Portugal, possibly the least likely Western European country to be thought of as a country of immigration, has recently introduced a limited time visa program for third country nationals (NZZ 2000).

disposable and poorly paid labor pool at the margins. As the initial post-unification building boom was beginning to slow down in 1993, both sectoral employers' associations signed the joint Frankfurt Declaration with the unions, urging the government to replace the system of CEE companies as subcontractors posting their workers to Germany with temporary working permits for individual CEE workers. In the course of the heated debate surrounding immigration during that year, in light of growing often violent xenophobia, the rise of far right party *Die Republikaner*, and given the substantial limitation of the formerly generous law on political asylum, the government heeded some of the concerns of the construction employers. It linked the quotas for individual German regions to their unemployment rate, which led to a de facto reduction of overall numbers. The government did not want to abolish the programs altogether, since it was hesitant to alienate its eastern neighbor countries which bore the brunt of new regulations concerning the facilitated deportation of applicants for political asylum (Menz 2001b). Introducing this linkage to regional unemployment led to a rapidly deteriorating quota because unemployment among domestic workers shot upwards as posting of workers from EU countries commenced in earnest in 1993. CEE workers were thus both squeezed out of the market and priced out of it, since officially they were to receive standard wages, while EU workers could be paid initially at home country wages. The Portuguese thus took over where the Poles had worked before. The results had been mixed on both sides (Menz 2001b): Illegal side effects of the treaties drained additional workers out of CEE and encouraged illegal migrants to revert to vaguely legal forms of employment. Yet the overall situation of the labor market in countries like Poland remained barely affected. In Germany, CEE workers were used to substitute domestic workers at substandard wages. In organizational terms, the structure of main contractor-subcontractor as a typical business arrangement in the construction sector emerged. Contacts between companies on both sides were then later used to facilitate illegal migration and employment.

In Austria, seasonal employment was encouraged in the relatively unattractive highly demanding and poorly paid service positions in the country's important tourism industry. Sending countries were the eastern neighbor states Czech Republic, Slovakia, Poland, Romania and the successor republic to Yugoslavia (Der Standard 10 October 2000). Labor shortages occurred partially because of the favorable economic development of Austria in the early 1990s, partially due to said conditions. Ironically, Austria's winter sports resorts where substantial labor shortages occur are also in the wealthy and expensive West of the country. The so-called *Saisonniers* or seasonal employees are presumably employed according to standard wages and working conditions, but within a sector characterized by low wages and already the employer of 15.8 percent of all regular foreign residents in Austria and made up of a total of 29 percent foreigners (Wirtschaftswoche 1 August 1996).

More recently, both countries have sought to establish annual or total quotas for high-skilled IT professionals, established at 20,000 in Germany and 1,985 in Austria (Gaserow 2000, Der Standard 10 October 2000). Such individuals were permitted to enter for up to five years, provided they had an employment offer. A result of business pressure for skilled workers of which there was presumably a shortage, this initiative came to be known as the "green card" initiative[21]. Though both programs are very recent, the most substantial program seems to consist of attracting applicants from Southeastern Asia as had been planned. Only

[21] This is an obvious misnomer, since the United States Permanent Resident status, from whence the term seems to be lifted, bestows a permanent, not a temporary working and residency permit upon its bearer. The US Green Card is actually pink, not green. The name might be more indicative of Germany's infatuation with Anglicisms then of any influence actual US immigration policy might have had.

about 10 percent of the German quota has been filled so far, mainly with applicants from Romania. That Germany would be more attractive to immigrants from Southeastern Europe then from Southeastern Asia was no surprise to those either aware of the ethnic network concept developed in the migration literature (Castles and Miller 1994, 23) or bestowed with plain common sense (the country has cold winters and is not Anglophone), but seems to have taken local politicians by surprise.

Bilateral labor agreements with third countries, such as the ones described, may transpire to the European level as member states attempt to harmonize their dealings with third country nations, asylum and border control. The 1997 Amsterdam treaty mandated such harmonization within five years, making outcomes within the next year likely. In light of the low birth rate throughout Europe, an ageing population, and already apparent labor shortages in some sectors, some adaptation of an immigration program at the European level seeks likely. Member states may introduce such proposals for harmonization within the first five years. In doing so, they might hope to secure the advantages enjoyed by the first mover and the agenda setter described by Héritier (1996) in imposing their own regulation upon others. After 2002, this right of initiative passes on to the Commission alone. However, given that all decisions are to be taken unanimously, a "safety net lowest common denominator" outcome seems likely.

While today unemployment rates are used by neoliberal pundits to demand the "flexibilization" or rather deregulation of the labor market in Continental Europe, an end to excess supply of labor is already in sight based on demographic data. The future challenge might thus lie in attracting the human resources needed to fill the needs of either high-skilled or very low skilled service sector businesses, which for obvious geographical reasons cannot relocate to low-wage countries themselves and are thus dependent on *importing labor instead of outsourcing production* (Menz 2001b).

6. EU Immigration and Social Policy as a Safety Net: *Cui bono ?*

The process of European integration has been guided first and foremost by economic concerns and principles. The less obvious and more traditional "political" aspects have been added more recently and often smack of being just that, "add-ons". Quickly proceeding towards integration meant relying on the principle of negative integration and thus breaking up national regimes of immigration and social policy in the interest of forming a common market. In the framework of this top-down approach member states have been able to formulate national response strategies to liberalization, which, however, are by definition modest in scope since they cannot directly tamper with the underlying principles of the Single Market project. Attempts to re-regulate at the national level are, in addition, always colored and influenced by the relative position of labor market interest associations and the state. If we consider the opposite flow direction of the arrow, we will find that national initiatives in immigration policy may transfer to the EU level through a type of osmosis. That is to say that new and innovative approaches more often than not are generated at the national or bilateral level and subsequently transpire to the European level. However, such European regimes in immigration and social policy are geared at protecting already existing national and bilateral arrangements and thus tend to be vague, encompassing affairs, resembling a type of umbrella.

In this section, I examine the European attempt at re-regulating the LSP. I argue that this exercise in positive integration in social and immigration policy came very late, was very

limited, and did not intervene into already existing national regimes and national response strategies. In a final section, the implications for the construction of a coherent EU immigration and welfare regime are being discussed.

It would be unfair to charge that the European Commission had been oblivious to the effects of deregulation implicit in the LSP. Member states' interests diverged considerably. The result was thus a least common denominator regulation, which stood at the end of a long and protracted attempt at arriving at a mutually agreeable solution. On August 1, 1991 the Commission had prepared a draft council directive which would have imposed on member states the duty to "see to it that, whatever the law applicable to the employment relationship, the undertaking does not deprive the worker of the terms and conditions of employment which apply for work of the same character at the place where the work is temporarily carried out..." and proceeded to define a number of minimal rights, including working time, minimum wage, and health and safety standards (COM (91) 230 final, Art. 3, p.21)[22]. This initiative was then debated by the European Parliament. The Economic and Social Council was consulted as well. Based on their suggestions, the Commission presented a second and revised proposal on June 16, 1993 (COM 593) 225 final). The discussion about the exact coverage and the hard core of applicable labor conditions continued, as did the debate about temporary exceptions for postings of less than three or one month. Yet essentially the draft was blocked in the Council of Ministers for Labor and Social Affairs. During the deliberation a clear front of countries emerged, which were explicitly against any such regulation, namely Great Britain and Portugal. France, Denmark, and the Benelux countries were clearly in favor, while Germany oscillated between the liberal position of its Ministry of Economics and its labor-friendly Ministry of Labor until it assumed the presidency in late 1994. Ireland, Greece, Spain, and Italy though less categorical in their refusal were not to be convinced of the benefits of such European directive for the longest time. The German presidency failed to deliver a concrete regulation as well, despite the activist role of Minister of Labor Blüm who attempted to find a compromise solution and scheduled meeting of the Council on July 8, September 22, and December 6 and 21 in 1994 (interview Min für Arb und Soz).

During the French Presidency in the first half of 1995, French Minister of Labor Michel Giraud who had initiated the *Loi Quinquennale* took up the ball from the Germans and presented a new and revised version of the directive. This directive was already limited to the construction sector, and left a large number of items up to the discretion of the member states, including the hard core of labor conditions applicable. Yet it included no transition period, during which home country wages could continued to be paid, unlike previous versions. Even so, Britain, Portugal, Spain, Italy, and Ireland were opposed to the French initiative (Eichhorst 1998, 243). The 1995 accession of Finland, Sweden, and Austria, all of which supported the French proposal therefore did not suffice to turn the table and result in a qualified majority. In early 1996, the Italian presidency finally managed to spindoctor a compromise solution, which was able to garner the support of both the high wage northern European countries, which had already expressed their sympathy for the French, and to some extent the German proposal, and the low wage Southern and Western European countries. In essence, the Italian

[22] In this draft, the authors also pointed out that « a particular problem arises, however, where a Member State places obligations, notably with regard to pay, on firms based in and working on its territory, and these firms are faced with competition...from a firm based elsewhere and not subject to the same obligations. Legitimate competition between firms is the overlaid by potentially distortive [sic] effects between national requirements." (COM (91) 230 final, 9bis, p. 4). The wording seems very indicative indeed: The problem of unfair competition is thus certainly acknowledged, but from a business point of view and not from the perspective of workers and in consideration of social dumping.

version modified the French proposition by limiting a transition period, during which home country wages and labor conditions would continue to apply, to four weeks and simultaneously making the introduction of this very period optional. The skeptical group of low wage Southern and Western European countries could be convinced, not least because Italy, Ireland, and Greece could secure minor concessions[23]. Portugal and Britain continued to block and veto even this proposal.

The EU directive 96/71/EC "concerning the posting of workers in the framework of the provision of services" (COM 96/71/EC final) was finally passed on December 16, 1996 and was to be implemented by the member states by December 16, 1999 (EIRO 1999). Upon closer inspection, the impact of this directive is very limited indeed and amounts to **little more than a safety net** for the existing national response strategies:

→ It defines a hard core of labor conditions such as working time, paid annual holidays, minimum wages, and health and safety standards which now have to be applied to posted workers if they are part of the legal code or the collective agreements declared universally applicable in the target countries of posting (Art. 3, Section 1).

→ This essentially changes very little, since such standards to the extent that they were part of the *ordre publique* could (and theoretically had to) be applied already. To the extent that they were part of the collective agreements they were applied to posted workers anyway in practice, if this solution was agreeable to both labor market interest associations, as the Austrian regulation demonstrates.

→ It leaves the question of the transition period up to the member states, though it limits such period, if it is indeed chosen, to a maximum of four weeks. Again, this is lowest common denominator solution, which is not intrusive into member state arrangements at all. Thus, member states can find either relatively restrictive regulations with no such period as in France or a relatively liberal solution with a period of four weeks as in the Netherlands[24]

→ Though it is true that both high wage Northern European countries and low wage Southern European countries are now forced to implement this directive, the practical effect of this requirement is minimal. The high wage members already disposed of either legalistic solutions or response strategies based on agreements between the social partners. Low wage countries without such regulations, such as Greece, Italy, Spain, Portugal, Ireland, Britain, and Italy, do have to find such response strategies, but since they are de facto not or hardly affected by the posting of workers and "wage dumping", the impact will be minimal. Even so, these countries are under no obligation to modify their own régime of social and labor conditions or to modify their minimum wages.

7. Conclusion

In this paper I have argued that EU immigration policy may either emerge in a top-down fashion through negative integration and the implications of economic liberalization. Within certain limits, national members states can then generate their national response strategies to

[23] For Italy and Ireland exceptions were made for short-term installation projects of less than eight days (Article 3, Section 2), which were explicitly not covered by this directive. The concession made for Greece was that the merchant navy was not included, either (Article 2, section 1).

[24] The original four week transition period embedded in the first Austrian legislation was later abolished in the 1996 modification of the legislation.

this impetus. Conversely, policy initiatives arrived at the national or bilateral level may transpire to the European level in a bottom-up fashion. However, these example of the liberalization of service provision seems to indicate that little if anything is to be expected from a re-regulation at the European level in immigration and social policy, which does little more than serve as a safety net for already existing national arrangements. Decision-making in the Council permits veto players to water down policy proposals to the extent that they present mere lowest common denominator solutions with little bite.

Rather than reiterating the empirical evidence provided in this paper, I would like to formulate three key observations from "bottom down" and "bottom up" flow of impact and the implications of this case for the future of EU immigration and welfare policy:

"Erst muss das Kind in den Brunnen fallen, dann werden wir es retten" – "First, the child has to fall into the well, then we are going to rescue it"

1. European integration over the past two decades has proceeded with great haste and was driven by the principle of negative integration and economic liberalization. Yet in trying to shake the image of a tedious debating club over issues such as the permissible noise level for lawn mowers the EC/EU has proceed to deregulate issues at the heart of the nation-state (such as access to the labor market and territory), while its own institutional repertoire and fallacies thereof prevent it from generating a positive and active social policy. Though the EU has had no qualms in other policy sectors to intervene into the affairs of nation-states, in social and immigration policy, such intervention seems to be based a) on the lowest common denominator principle: safety net regulations are being found, which do not hurt anybody, nor effect much b) on the impetus from below, i.e. national or bilateral initiatives already accepted in one or better yet several member states, as was the case with the national response strategies, and will be, as I argue, with innovative programs permitting immigration from third countries c) it arrives late and often too late.

What is good for Siemens/ Alcatel/ Ericson/ Nokia is good for Europe – or is it?

2. If we acknowledge the degree of blockage based on conflicting interests of the member states, not only a "Social Europe" may appear illusionary, but indeed any proactive EU measure which does not serve liberal economic interests may do so. This does not mean, however, that the future immigration policy of the EU will continue to be characterized by rhetoric, national initiatives, and the haphazard outcome of economic liberalization. As has been argued, such national initiatives may transpire to the European level. In light of the demographic trend towards an ageing population and a decreasing birth rate, the latter in both Western and Eastern Europe, national initiatives "beyond fortress Europe" seem more than likely. In fact, business leaders and employers organizations are advocating such developments themselves, making them even more likely. However, perhaps not coincidentally, immigration seems to be favored in sectors in which trade unions have great difficulties organizing: the high tech information technology sector and low-skill tourism and construction jobs. It is far from clear that the trade unions will succeed in organizing these new immigrant workers; particularly if they are officially only there on a temporary basis. The fragmentation and disintegration of formerly relatively unified labor markets thus appear possible. "Brain draining" developing countries of their human capital might well mark another important stepping stone in increased global competition. Europe is in this respect challenging its own enclaves in North and South America and Oceania. Whether it will or can be successful remains to be seen, but it is notable that such

initiatives are carefully geared at feeding into only certain segments of the social stratification and comes at the expense of active labor market policy encouraging female participation in the labor market.

3. It bears mentioning that while nation-state autonomy may be curtailed by European integration, this does not quite turn nation-states into the helpless vessels in the stormy oceans of Europeanization and globalization that they are portrayed as by some of the more simplistic advocates of these expressions. If we conceive of Europeanization as a top down (Cowles et al. 2001) **and** bottom up flow of impetus, it becomes quite clear that member states may both develop policy initiatives in otherwise poorly defined fields such as immigration and may respond to the impact from the European level. These national response strategies obviously occur at the national level and are thus flavored by national interest groups, the political orientation of the government, and the process of public debate, media, and, not least, far right parties, which I have referred to as "securitization" in borrowing Buzan's expression. Beyond the sterile debate on neofunctionalism and liberal intergovernmentalism which thankfully seems to be overcome by now, there lies a much more fruitful and exciting field for future scholarly inquiry. The impact, implementation and *response* to Europeanization at the national level deserves our attention beyond fatalistic lullabies to the nation-state and utopian hopes in a future Euro-polity.

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Interviews:

Austria:
interviews ÖGB – *Österreichischer Gewerkschaftsbund* – Vienna
Gewerkschaft Bau-Holz – Vienna
BundMin Arb und Wirt – *Bundesministerium für Arbeit und Wirtschaft* – Vienna
WK – *Wirtschaftskammer Österreich* – Vienna
major Austrian construction company - Vienna

France:
interviews CFDT – *Confédération française démocratique du travail* – Paris
CFDT-FNCB - *Confédération française démocratique du travail- Fédération nationale du construction et du bois* – Paris
CGT – *Confédération générale du travail* - Paris
CFTC – *Confédération française des travailleurs chrétiens* – Paris

CNPF/Medef – *Conseil national du patronat français/ Mouvement des entreprises françaises* – Paris
Min du Trav –*Ministère de l'emploi et de la solidarité*– Paris
FNTP – *Fédération National des travaux publiques* - Paris

Germany :
interviews BDA – *Bundesvereinigung der deutschen Arbeitgeberverbände* – Berlin
HDB – *Hauptverband der deutschen Bauindustrie* – Berlin
ZDB – *Zentralverband des deutschen Handwerks* - Berlin
DGB – *Deutscher Gewerkschaftsbund* – Berlin
IG BAU – *Industriegewerkschaft Bauen-Agrar-Umwelt* – Frankfurt
IG METALL – Industriegewerkschaft metallverarbeitende Branchen – Frankfurt
Gesamtmetall – Arbeitgeberverbände der metallverarbeitenden Branchen – Berlin
Gesamttextil – Arbeitgeberverbände der Textilindustrie – Eschborn
Min für Arb und Soz – Bundesministerium für Arbeit und Sozialordnung – Bonn
major German construction company – Frankfurt

Luxembourg:

interview Min du Trav – email interview with Ministère du Travail – Luxembourg

Netherlands :

interviews FNV – *Federatie Nederlandse Vakvereniging* - Amsterdam
FNV-Bouw – *Bouw en houtbond - Federatie Nederlandse Vakvereniging* - Woerden
AVBB – *Algemeen Verbond Bouwbedrijf* – The Hague
VNO-NCW – Vereniging Nederlandse Ondernemingen-Nederlands Christelijk Werkgeversverbond – The Hague
MinSozZak en Werk – *Ministerie voor Sociale Zaken en Werkangelegenheiden* – The Hague

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