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REPORTS

Modes of Migration Regulation and Control in Europe

JEROEN DOOMERNIK & MICHAEL JANDL (EDS.)

AMSTERDAM UNIVERSITY PRESS

Modes of Migration Regulation and Control in Europe

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Modes of Migration Regulation and Control in Europe

Edited by Jeroen Doomernik & Michael Jandl

IMISCOE Reports

AMSTERDAM UNIVERSITY PRESS

Cover design: Studio Jan de Boer BNO, Amsterdam
Layout: The DocWorkers, Almere

ISBN 978 90 5356 689 3
e-ISBN 978 90 4850 136 6
NUR 741 / 763

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Foreword

This volume results from a project that was formulated by a group of IMISCOE researchers who deal with, as the very title of this book states, international migration and its regulation. The reports contained herein arose from some general observations and subsequent questions about the nature of migration processes in relation to government interventions in those processes. First, we ground these reports with a number of common understandings. Migration has gone from being a veritable non-issue in European politics to being one of high political preoccupation. In Western Europe, this development began as shortly ago as the 1970s, while it was even more recent in Southern and Central Europe, into one of high politics. States are consequently investing more and more resources into limiting unsolicited immigration such as illegal migrants, asylum seekers, and controlling migration overall. The extent to which states succeed in doing so appears to have limits (though we do not otherwise know what the effect of non-intervention would be). Interventions often seem to produce unexpected and perverse outcomes. To this end, governments increasingly resort to measures that stem from traditional control-oriented policy fields such as justice, home affairs and defence. In view of the European situation as we see it, we thus must ask: why is this happening? And can we expect further investment in these particular measures to be effective in reaching their aim?

While it could not be the ambition of this project to find comprehensive answers to important questions such as these, our foremost purpose was to assess the European situation and then take the necessary first steps towards a possible follow-up stage in which we could more closely come upon some answers. Stocktaking and discussions took place at a number of meetings held between 2004 and 2007, each of which was generously hosted by a local IMISCOE partner institute in Vienna, Coimbra, Osnabrück, Istanbul and Rome.

We wish to thank all those who participated in these meetings, sharing their papers and ventilating ideas for a refreshing exchange of information. Above all, we would like to thank the contributors to this vo-

lume for their dedicated work on the country chapters and for their patience in seeing this project long in the works come to fruition.

Jeroen Doomernik, Amsterdam

Michael Jandl, Vienna

April 2008

Introduction

Jeroen Doomernik and Michael Jandl

1. Migration as a European policy challenge

Two concerns are presently at the forefront of migration policymaking, be it among the European Union's member states themselves or within the European Commission. The first issue presents a dilemma: how to reduce or altogether eliminate irregular labour migration while simultaneously satisfying a growing demand among employers to import low-skilled labour from outside the EU. The solution championed by the European Commission is to introduce circular migration programmes that would satisfy three needs. First, there are the needs of employers and economies of Europe, in general. Conversely, there are the needs of migrant workers hoping to earn a better living abroad than would be possible locally and who thus send part of their earnings home or invest them in an otherwise productive fashion. Finally, there are the needs of countries of origin, the subsequent recipients of inflows whose hard currency enters into their monetary systems.¹ Among policymakers there is a growing belief that through imposing strict controls, circular migration can mean something different than the 'guest worker' policies we know from decades ago; these new policies would have the capacity for markedly different outcomes. There is also some hope that such policies could considerably reduce irregular arrivals or residence by migrants from outside the EU. How warranted are these expectations in terms of effective regulation and control? And where should – or even could – such measures be located: at the borders, in the workplace, by means of residence permits, at the bureaucratic gates of social security systems? Or, should new policies take a reactionary stance, aiming to expel those who overstay their leave? How far can states go in the implementation of their controls, particularly in terms of human rights for migrants and refugees? All the measures just mentioned have been tried and/or are in current use throughout the EU. These measures will be among those paraded in this volume, as we seek to understand their suitability within national contexts.

The second issue at the forefront of EU migration policymaking is how to satisfy employers' needs at the other end of the spectrum.

Highly skilled migrant workers are hardly on the radar when it comes to migration control. European governments are not significantly concerned with reducing or controlling the arrival of such migrants. Rather, their ambitions are usually to attract them as much as possible. The scope of this volume does not cover this part of the migration discussion in detail, for its focus is on the restriction of immigration. It would, however, be interesting to see at some future point whether it is possible to create control systems that effectively suppress certain migratory phenomena while, at the same time, are truly inviting for particular categories of immigrants. The unexpected by-products of this volume's chief concern thus are a few suggestions in that direction.

2. States and migration

In most European countries, immigration has always been viewed as an exceptional phenomenon. If in the form of arrivals related to colonies and post-colonial independence, this tended to be perceived as a one-time influx. If in the form of migration related to labour market needs, as was the case in North-Western Europe during the 1960s and 1970s, it was generally viewed to be of a temporary nature. It was assumed that labour migrants, often labelled 'guest workers', would return home once they had accumulated the earnings they had come for or once their employment was no longer needed. On both counts, these impressions were mostly proven wrong: governments had clearly misunderstood the mechanisms that govern migration processes and, in general, overestimated the extent to which they were able to exert influence over the behaviour of migrants. To give cases in point, we know that post-colonial migration has continued to this very day, that the former so-called guest workers have settled in receiving country in large numbers and that this, together with the secondary arrivals of spouses and relatives, has resulted in sizeable immigrant and ethnic communities that continue to grow.

From the mid-1980s onwards, new challenges to controlling immigration appeared on the horizon: European states became confronted with migrants – often claiming asylum – from rather unexpected countries of origin. Prior to this influx, the origin of newcomers had been largely predictable on the basis of existing links (i.e. colonial relationships) or active labour recruitment, but by the end of the cold war, this was no longer the case (Doomernik et al. 1997). Asylum seekers seemed to arrive in European countries in a more or less random fashion albeit in consistently rapid-growing numbers. It also became clear that migration beyond formal channels had transmogrified into a market in which entrepreneurs – human smugglers, for example – thrived,

and states could only react in an *ad hoc* fashion (Neske & Doornik 2006). This unpredictability must have been one cause for frantic reactions by governments of the largest receiving countries of asylum seekers. No doubt adding to the frenzy was the limited capacity governments had, even on a purely administrative level, for dealing with these many requests for protection.

Throughout the past decade, we have observed throughout Europe how states have tried to regain control over immigration and, in particular, asylum seeking. Although some of these attempts first and foremost aimed at making asylum seeking a less attractive alternative and thus boiled down to neighbouring states carrying the burden (Lahav & Guiraudon 2006), multi-lateral and EU-wide steps have also been taken to curb unsolicited migration. The Dublin Convention (now part of the EU's community law) is just one of a number of collective agreements endeavouring to deal with illegal migration, asylum seekers, human smuggling and trafficking.

Furthermore, in a number of countries – notably, the Northern welfare states with more efficient administrative means – increasing measures have been developed to better differentiate between residents with access to employment, welfare provisions and other scarce resources like housing and health care and those who should be excluded according to government regulations from all those domains. One important reason for such exclusion would be to discourage irregular immigration and unmerited asylum seeking.

Some would argue that these policies have been effective, for more or less in conjunction with their implementation, the numbers of asylum seekers have dropped dramatically all over Europe. And yet, it should also be noted that the numbers of migrants who reside in European welfare states in an irregular fashion appear to have remained substantial or actually increased in the same period (Jandl 2004). In Southern Europe, by contrast, it is relatively easy to switch from an irregular status to a regular one. The fact that neither most nor, for that matter, all irregular migrants thus move south or go home for fear of attrition suggests that there are niches all over Europe, including in those welfare state economies where informal labour remains in demand.

3. States and labour markets

From the work of Massey and others, we have learned to understand migration as a process that has strong internal dynamics. This is a consequence of cumulative causation: as soon as a migrant leaves the place of origin and arrives elsewhere, conditions in both locations have

changed irrevocably. As a result, more migration becomes more likely. This is, for instance, the case when migrants start remitting money to relatives back home. These households then become better economically placed than their neighbours. They, in turn, are likely to experience relative deprivation. One way of redressing this deprivation is by sending a household member abroad. Because migration tends to run along established social ties, new migrants are likely to end up at the same location as their predecessors in migration (Massey & Goldring 1994; Massey et al. 2002). The process can continue until a large section of the working-age population has moved to a limited set of locations abroad. This resettlement can serve a means to an end, to save up sufficient resources to invest upon return and thus be temporary in nature (this is the intention of 'target earners', to borrow terminology of the New Economics of Labour Migration (cf. Stark 1991)). Or, the resettlement can be indefinite, with remittances being seen as a permanent addition to the household economy. Those migrant workers who are 'utility maximizers' (a phrase we can borrow from a more traditional neo-classical economic perspective; cf. Djajic 1989) may also ultimately opt to reunite with their households in the country of resettlement (Constant & Massey 2002). Such distinctions are not empirical, but theoretical in nature: one motivation can bleed into another over time.

Labour market theories also give us reason to believe that European economies have a permanent, and possibly growing, demand for immigrant labour at the top rung, which includes the highly skilled migrants whom countries compete for, and at the bottom (Piore 1979; Portes 1997). This process of divergent demand is closely related to the gradual character changes of European economies away from primary and secondary activities (natural resources and manufacturing) towards tertiary service-based ones. As Sassen (1991, 1996) argues, service-based economies, on the one hand, require highly skilled workers who by definition are very mobile (for instance, by being employed abroad by transnational companies, or by being in scarce supply and subsequent high demand domestically). On the other hand, the reproduction of these highly skilled workers requires the help of many unskilled workers. The latter will perform much of the household chores and do many of the less pleasant and flexible jobs at the bottom end of the service economy. Almost always, these jobs are the typical domain of those who are not yet – or never will be – part of the regular domestic labour force.² Migrants are a clear case in point. However, despite seeking to satisfy such demands for labour, states – especially welfare states – may be reluctant to facilitate immigration. They may fear the competition that could arise with the native labour force as well as potentially prolonged welfare dependency by migrants once they are allowed to settle. Nevertheless, it appears time and again to be very difficult to

motivate native workers to fulfil certain types of jobs due to their low status, poor working conditions and insufficient pay. In effect, when these vacancies cannot be filled by immigrant labour there is bound to be structural inflation (Joly 2000: 29).

Structural conditions in large parts of the underdeveloped world create sizeable and, in many cases, growing numbers of young individuals with few prospects for gainful employment. Moreover, their countries are often politically unstable and rarely able to offer hope for improved living conditions in the future. In short: what we are witnessing is a considerable supply of labour – both actual and potential – in many parts of the world and a significant demand for it in capitalist industrialised and post-industrial countries.

Under these circumstances, it should be no big surprise that most European countries are confronted with high numbers of irregularly employed workers, often from abroad. Most European states from the mid-1980s onwards have also experienced the arrival of unsolicited migrants whose main concern was not so much securing employment as it was finding safety from persecution and other immediate threats to their lives. Whatever their motives for migration, however, they too add to the supply of people who are willing to work – regularly or not.

4. States and control

At the same time, it is crucial to recognise the need for governments to have control over their economies – more specifically, their labour markets – and the borders of their territory. After all, this is what state sovereignty is by and large about. The extent to which irregular labour is a serious issue, however, is related to the extent to which citizens expect their state to take care of them. A comprehensive welfare state functions differently in this respect from a state that restricts itself to setting only the broad rules of societal engagement. The former will experience a strong desire to protect domestic labour against competition from newcomers, the latter type, a *laissez-faire* state, is likely to experience less pressure from its constituents. To better understand the mechanisms at work in differing types of states, we need a clearer understanding of the methods states employ in order to achieve and maintain migration control. Such controls can broadly be described as one of two types: external and internal (see e.g. Brochmann & Hammar 1999). External controls focus on the country's borders and gates of entry (which can also be located at the gates of foreign airports or harbours); internal controls are largely administration-based, centring on access to welfare entitlements and public resources. Across European countries, both types of measures are identifiable. Some countries

strongly rely on border controls. Others, which are typically welfare states, put much trust in their internal control mechanisms. Frequently, however, countries employ a mix of both types of measures. Also impacting a country's stance on unsolicited migration is its tradition vis-à-vis newcomers, as well as the methods with which its labour market has been regulated and to what extents.

Authors such as Lahav and Guiraudon (2006) have pointed out that, apart from the important distinction between internal and external controls, we also need to be aware of the different levels at which the controls may be exercised. The authors observe the tendency among nation states to shift responsibility for restrictive migration controls away from central government. Instead, the movement may be: downwards, to lower local governments and other actors who, by the nature of their work, are gatekeepers of public resources; upwards to international bodies such as the European Union; or outwards to private actors including airline companies and other carriers. Welfare states that have both the administrative capacity and need to exclude are most likely to shift control measures downwards. Shifting outwards is also becoming more common, being practised, for example, through imposing sanctions on carriers who bring in undocumented passengers.

5. Methodology and structure of the study

The project we undertook to assess the situation of European migration control coincided with a period in which most EU member states were jointly going through a phase of shifting upwards: a process of policy harmonisation in the framework of the EU's commitment to creating an area of freedom, security and justice, as formulated in the 1997 Amsterdam Treaty. To this end, an agreement on a number of migration-related measures was reached by 1 May 2004. The Hague Programme (agreed upon in November 2004 by heads of states under the EU's Dutch presidency) produced an expectation for greater investment in the direction of common policies and practices. Among a limited number of states, the harmonisation of some instruments went back even further because they were requisite for implementation of the Schengen Agreement in which they had participated. It is thus interesting not only to track trends of convergence, but also to see where states could not employ certain measures – despite the general trend otherwise – because they lacked the relevant capacities. In this regard, states may not have the tools to employ certain measures such as internal administrative controls, or states may have developed measures that stray from a common approach because it does not coincide with their own individually established goals.

Because the countries examined in this volume have diverse practices and traditions in all forms of migration control, our stock-taking exercise yielded a rich harvest of information. We find that the following chapters comprehensively cover modes of migration regulation as they can be employed by liberal-democratic states. We are also confident that this volume adequately covers experiences and practices as they differ between Northern and Southern European states and those that primarily rely on border or internal controls.³ Our volume comprises country chapters on Austria, Belgium, France, Germany, Italy, the Netherlands, Spain, Switzerland and the United Kingdom. The collection concludes with an overview of common trends as we have observed them in the countries studied and, moreover, we highlight instances of lagging or missing convergence and nation-specific idiosyncrasies. We also ask where the common trends we detect are likely to go next and what the consequences of these developments might be for the effectiveness of migration control and for migration and migrant policies, in general.

Briefly summarised, the authors of each country report were asked to include the following in their chapters:

- a) a general history of modes of immigration controls as far back as deemed relevant;
- b) a detailed overview of modes of external control, especially as they existed before, and have been developed since, the Schengen Agreement came into effect (1993/1995);
- c) a detailed overview of internal controls in all their varieties – something along the lines of Brochmann and Hammer's *Mechanisms of Immigration Control* (1999) – and their development over time.

Contributors were also asked to reflect on whether they could detect whether European countries shared particular common trends such as greater reliance on biometrics.

Notes

- 1 See the European Commission's green paper 'On an EU Approach to Managing Economic Migration'. Some authors echoing the conclusions of the 2005 Global Commission on International Migration's report even speak of a possible 'triple win'. See e.g. the German Minister of the Interior's speech at the Euromed Ministerial meeting on 19 November 2007, available at: www.bmi.bund.de/cln_012/nn_769658/Internet/Content/Nachrichten/Reden/2007/11/BM_EuroMed_en.html.
- 2 In economies with low female participation rates, these jobs would traditionally be the domain of housewives seeking some additional household income. Students needing supplementary income are also typically employed in these jobs.

- 3 Admittedly, we would have welcomed other valuable additions to this volume, such as chapters on Greece – which reputedly knows few formal controls, Scandinavia – where comprehensive internal controls have a long tradition, and Portugal – which has shown to be very open to newcomers.

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Report from Austria

Michael Jandl

1. Introduction

In Austria, migration had long been seen solely as a labour market issue. It was only in the 1970s and 1980s that the surrounding public and political debate expanded to include broader issues of family reunification, integration, asylum and the control of territory access. In 1989, the fall of the Iron Curtain heightened the perceived threat of illegal migration, thereby boosting the attention that public authorities paid to the control of illegal migration and human smuggling. At the beginning of this period, however, public perceptions of the impending migration wave from 'the East' were met more with rhetoric than actually imposed restrictions. The economic boom at the beginning of the 1990s actually led to a liberalisation of the labour migration regime, responding to severe labour shortages and boosting foreign employment in Austria. Most of the new foreign workers did not come from the newly liberalised Eastern Bloc countries as much as from Austria's traditional recruiting countries of labour, i.e. the former Yugoslavia and Turkey. It was also during this time of extraordinarily high migration that Austria instituted its only ever 1990 'legalisation' campaign. This permitted foreign workers to regularise their status after very brief periods of residence with no questions asked (approximately 30,000 individuals took advantage of these special administrative procedures). In addition to this new wave of labour migrants and the ensuing migration of their family members, Austria admitted around 95,000 war refugees from Bosnia-Herzegovina between 1992 and 1995. As a result of all these developments, the number of foreigners in Austria nearly doubled, from 344,000 in 1988 to 690,000 in 1993 (or around 9 per cent of the population), a level which has since more or less stabilised (Jandl & Kraler 2003).¹

Facing mounting public pressure to curtail both legal and illegal migration, the government decided to step on the brakes. It instituted a series of progressively tightening measures related to immigration, entry, residence, employment and asylum.² Already in force by April 1990, an amendment to the Austrian Asylum Law introduced new accelerated procedures for asylum seekers without valid entry permits. Later in 1990, a quota for the employment of foreigners was intro-

duced and, in 1992, a new Aliens Act tightened regulations on entry and residence. In the same year, a new Asylum Act introduced the principles of 'safe third countries' and 'safe countries of origin', which was reflective of Austria's anticipation for acceding to the EU's 1990 Dublin Convention. A new 1993 Residence Act established quotas for different categories of migrants, thus limiting the number of residence permits to be issued each year. A new 1997 Aliens Act (entry into force in 1998) merged the 1992 Aliens Act and the 1993 Residence Act to introduce new provisions on the integration of foreign residents, thereby following the principle of 'integration before immigration'. A new 1997 Asylum Law (entry into force 1998) adapted Austrian asylum legislation to the Schengen and Dublin treaties, modified the safe-third-country principle and introduced rapid procedures for unfounded asylum claims.³ In the following years, further amendments to the Aliens Act and the Asylum Law took place until, on 1 May 2004, a new 2004 Asylum Law went into force. This law adapted Austrian legislation to the EU's accession of four of its neighbouring states, thereby allowing, among other things, easier readmission procedures to these countries. In 2005 further revisions to the Aliens Act were adopted to enter into force in 2006.

2. Externalised border controls

By 1990, just after the fall of the Iron Curtain, the government decided to strengthen external border controls by the custom authorities and border police through a special border surveillance and support operation,⁴ which was staffed by recruits of the Austrian Federal Army. The support operation at Austria's external border to Hungary (as well as Slovakia, since 1999) has an average strength of about 2,000 recruits, each of whom would spend approximately six-week rotations at the border. Although intended to be a temporary measure, the programme has been kept in place permanently and, between 1990 and 2005, involved a total of some 295,000 army recruits. In addition, Austria's borders are controlled by some 3,200 gendarmes and 200 police officers on duty, and are supplemented by some 800 custom officials. The number of personnel deployed on Austria's border has steadily increased since the early 1990s through shifts in placement. For example, former customs officials were assigned to border-control tasks after Austria's accession to the European Economic Area in 1994 and to the EU in 1995. In May 2004, when four of the country's neighbours entered the EU, thus removing the need for Austrian custom controls at their borders, the 800 customs officials simply assumed other border-control duties along Austria's external Schengen boundary. Exact fig-

ures have been hard to come by, but to illustrate, in 1994, there were only 680 on-duty gendarmes along the Hungarian border in the federal province of Burgenland; by early 2005, there were 1,635.⁵ Finally, in a major organisational restructuring that took effect on 1 July 2005, the police and gendarmerie became fully merged into a single Austrian police force so as to further strengthen capacities for the control of illegal migration.

Along Austria's external Schengen borders⁶ there are basically three mechanisms of control. The first is aimed directly at border-crossing points or at the so-called green and blue borders, referring to land and river crossings. The second consists of surveillance troops and a search group. Known as the *Überwachungstruppen* and the *Fahndungstruppe*, respectively, these groups were introduced in 1989 as part of the 'compensatory measures' for the abolition of border controls within the Schengen Area. They operate in daily control patrols in the vicinity of external and internal borders. The third mechanism takes the form of a support unit under the central direction of the border service. The unit can be deployed anywhere in the country, according to concrete needs and tasks. Since 1999, the unit has comprised six teams in civilian clothes operating at the main roads and in international trains (NCPA 2005).

Austria's technical equipment has been constantly upgraded to meet contemporary standards. More and more, the Austrian border guards use modern technology such as night-vision, thermal imaging, microwave devices, endoscopes and CO² detectors. They have special UV lamps and scanners to detect forged documents, in addition to both the stationary and mobile IT equipment that can be linked to personal databases. Twenty surveillance helicopters control the green border, five of which are equipped with thermal image devices.

Along with the relatively high level of deployed border troops and a considerable investment in high-tech equipment for border control, Austria has worked to intensify the investigative battle against illegal migration and human smugglers. During the 1990s, the government legally defined new criminal offences and progressively raised penalty scales for human smugglers. An amendment of the 1997 Aliens Act and the penal code entered into force on 1 July 2000. The maximum penalty for 'alien smuggling on a commercial basis' was increased from three to five years of imprisonment. At the same time, the technical definition of 'alien smuggling on a commercial basis' was expanded to implicate more offenders. Moreover, as of July 2000, persons who have demonstrably engaged 'in alien smuggling as a member of a criminal group' face up to five years of imprisonment even if they are first-timers. Sentences concerning the 'facilitating of the illegal entry of an alien into a member state of the European Union' for money (even

in a non-commercial context) – that is entry on an irregular basis – were also made more severe. Even if the defendants concerned had carried out a smuggling operation only once, they could be sentenced to a term of imprisonment for up to one year. Such legal changes are in line with the sustained efforts by the European Commission and the Council of the EU to create minimum standards for legislative instruments in the fight against human smuggling, both on the national and international levels.⁷

Besides sharpening the legal instruments with which to combat human smuggling, structural changes have been implemented as well. Special police and border guard units were created for the task of apprehending human smugglers. Control of migration flows and the prevention of illegal migration has become more and more linked to security policies and the control of crime overall (Sohler 1999: 5). Special task forces can be created and deployed in order to deal with particular problems of illegal migration and to coordinate international cooperation in the fight against human smugglers. For example, with a view to coordinate law enforcement efforts at Austria's eastern border, in 2001, a special command to combat organised human smuggling at national borders (SOKO Grenze) was established. As of 2002, the Central Service Combating Alien Smuggling, up until then part of the former state police (known as the *Staatspolizei*), merged with the Criminal Intelligence Service (known as the *Bundeskriminalamt*) and has been enhanced with more personnel. Together the services coordinate Austria's international cooperation with neighbouring countries and EU bodies (e.g. Europol, Eurojust).

All these organisational changes have been carried out both for internal and external reasons. On the one hand, such developments have worked to strengthen law enforcement in Austria's own campaign against illegal migration and human smuggling. On the other hand, they have fine-tuned Austrian legislative structures to be in keeping with EU and Schengen requirements. When Austria acceded to the EU on 1 January 1995, it also acceded to the Schengen Agreements of the EU. The first two years thereafter were a period of preparation and evaluation, during which Austria had to demonstrate its capacity to fully meet Schengen standards. Total implementation of the Schengen Agreements (and therefore the abolition of border controls along all internal Schengen borders) began only in April 1998, after a positive evaluation decision at the end of 1997. Thus, stricter controls at the external borders and the role of the above-mentioned compensatory measures were gaining importance parallel to the abolition of controls at internal borders.

More and more, Austria has also engaged in cross-border cooperation with police and law enforcement officials in neighbouring countries

and beyond. For example, the aforementioned special command SOKO Grenze, which was active until 2002, brought together officials from Austria, Hungary and Slovakia in a joint effort to break up human smuggling rings in the area. Other special commands focusing on anti-smuggling operations have included the Czech Republic, Romania and Germany, among others. Another increasingly important element of international cooperation in the control of illegal migration is concluding and subsequently implementing readmission agreements for the return of unauthorised migrants. By 2005, Austria had already concluded 21 bilateral readmission agreements, to which the growing number of EU-wide readmission agreements can also be added (NCPA 2005).

Another crucial step in international collaboration with regard to external controls came in January 2003. This was when EURODAC went into operation, thereby systematising a means for collecting and exchanging fingerprint data of asylum seekers and apprehended illegal migrants across most EU countries. While reports on the efficiency of the system during its first year of operation indicated only limited effectiveness,⁸ the expectation all along was that EURODAC would improve implementation of the Dublin regime – readmission to the first country of asylum within the enlarged EU – and consequently have a major impact the migration strategies of illegal and smuggled migrants. This became evident in May 2004, when four of Austria's neighbours simultaneously acceded to the EU and to the Dublin regime, which included the EURODAC system. Within the first few months of the accessions, there was a noticeable drop in asylum applications at Austria's borders, and there have been continued decreases in the periods since then.

3. External controls

Austria's main instruments for controlling unwanted migration are put into effect before it can even reach the country's borders. These include visa requirements and regulations, administered in combination with carrier sanctions that prevent unauthorised migrants from boarding planes, ships or buses without necessary documentation. Visa policies as an instrument for migration control became ever more important for Austria during the 1990s. As of November 1989, following the first wave of migrants and asylum seekers from the former Eastern Bloc countries, Austria had introduced visa requirements for citizens of Bulgaria, Romania and Turkey. Many more countries would follow suit in the years thereafter.

However, in formulating its own visa policy, Austria was also highly dependent on the policies implemented in other European countries;

the introduction of visa requirements in one country are a classic setup for 'spill-over' effects into other countries. A good example is seen in the wave of Bosnian war refugees who came to Western Europe from 1992 onwards. Initially, many Bosnian refugees were only passing through Austria on their way to be with relatives in Germany. When Germany introduced visa requirements for persons with a Yugoslavian passport in April 1992, Austria was faced with the prospect of a massive inflow of war refugees. Entry requirements for persons from the former Yugoslavia were thus quickly tightened. On 30 April 1992, the BMI (Ministry of the Interior) issued a directive demanding individuals from the former Yugoslavia who lacked valid documents to identify a personal reference living in Austria who could guarantee board and lodging. But because this did not stop the large influx of immigrants, in July 1992, the Austrian government issued a visa requirement for persons from that region. As a result, the number of asylum applicants from the former Yugoslavia dropped dramatically from July 2002 onwards (Jandl 1998).⁹

Since Austria's 1995 entry into the EU, its visa policy had kept in accordance with the visa regimes of the EU and the Schengen countries. This includes adherence to the common list of countries that need visas to enter the Schengen area and those that are exempted from such a requirement.¹⁰ The latter also meant that, from 2002 onwards, nationals of Romania and Bulgaria (for whom visas had been introduced in 1989; see above) were exempted from the visa requirement once again. This proved a rare example of entry liberalisation for third country nationals.

Visa requirements, however, could not be fully effective at preventing irregular migrants from reaching Austrian borders without the execution of other legal and practical tools. This was where the introduction of so-called carrier liabilities became an effective instrument of pre-entry control. Carrier liabilities and the subsequent carrier sanctions in effect shifted the burden of control checks from the state to the transportation company. Whether travellers had their required documents before boarding a plane, a ship or a bus thus came to be the responsibility of a transport service provider, i.e. the airlines, the bus line or the shipping company. By 1991, Austria had introduced such liabilities and sanctions requiring carriers to foot the bill for returning persons who were rejected at the border and/or to pay substantial fines for not fulfilling this obligation. During the 1990s, most European countries introduced carrier liabilities and sanctions and, by 2001, the issue was regulated at the European level by Council Directive 2001/51/EC.¹¹ The directive specifies a minimum amount of 3,000 euro and a maximum amount of 5,000 euro in fines for each person illegally carried.¹²

To further effect the system of externalised controls, Austria, like many other European states, has sent liaison officers abroad. Beyond Austrian borders, these officials provide training and instruction at embassies, consulates and carriers on how to process visas and travellers. Even before the full establishment of the EU network of Immigration Liaison Officers (ILOs) in important countries of origin and transit,¹³ Austria had sent several ILOs abroad on the basis of the Amsterdam and Schengen treaties and bilateral agreements. These ILOs were part of an 'early warning' campaign conducted in consultation with authorities in other countries to prevent irregular migration and to implement readmission agreements. As emissaries from the Ministry of Interior, Austrian ILOs were deployed to Belgium, Italy, Slovakia, Hungary, Yugoslavia, Romania, Turkey and Jordan in 2001. In 2002, they were deployed to Poland, the Czech Republic, Slovenia, Ukraine and Russia; to Morocco in 2003; and to Spain, Croatia, Bosnia and Bulgaria in 2005.¹⁴

In addition, Austria has on standby a smaller group of so-called document advisors. On short notice, these specially trained advisors can be deployed on week-long missions for bringing local know-how to airports and Austrian embassies. Most commonly, the officials provide consultation on document forgeries and fraud. Since November 2003, missions have been carried out in Cairo, Bangkok, Damascus, Beirut, Belgrade, Ankara, Kiev, Lagos, Tirana and Amman, sometimes on more than one occasion.¹⁵ Moreover, in May 2005, Austria was one of the signatories of the so-called Schengen III agreement. This also aimed to establish a network of document advisors in particular countries of origin and transit to work with consular missions, transport companies and foreign authorities, helping them to identify forged documents and the fraudulent use of documents for illegal migration. (Schengen III also has provisions on the facilitation of repatriation, joint expulsion flights, intensified police cooperation, the exchange of fingerprint data and DNA profiles and vehicle licensing data).

Border police, moreover, can carry out specifically targeted entry controls to prevent irregular migrants from transgressing Austrian borders. For example, in response to a 2003 surge in illegal entries via Vienna-bound flights from the Ukrainian city of Kharkov, specially trained police officers began accompanying Austrian Airline flights to and from Kharkov four times a week. The intention was to prevent unauthorised passengers from boarding the plane or hinder them from deplaning once landed in Austria. In 2004, apprehensions at Vienna International Airport, when compared to rates in 2003, decreased by 77 per cent. This was allegedly 'due to the effective tight control measures in place, in particular ramp controls' (Republik Österreich 2005: 59).

4. Internal controls

Aliens with legal residence in Austria – whether short-term or long-term migrants, seasonal workers or asylum seekers – are subject to the country's strict regime of internal control measures for as long as they are non-naturalised citizens endeavouring to stay within the purview of the law. Thus, laws and ordinances regulate their entry and residence status, their access to work, social security, welfare benefits and much more. Asylum seekers are subject to even stricter control measures, for example, requisite fingerprinting (to provide cross-checks via the EURODAC database) and mobility restrictions on first-time asylum procedures. All this has been well documented in numerous publications on the Austrian aliens legislation. The more interesting question, however, is whether internal control measures can also have a bearing on unauthorised, unofficially present residents who are unknown to the authorities. And if so, how?

Internal control instruments for detecting illegal residents – and, presumably, subsequently removing them – take on a variety of forms. For one, random police checks on the street attempt to spot individuals without valid papers. This practice occurs despite the fact that bearing an identity card is not mandatory in Austria and identity checks are relevant primarily in connection with suspected criminal activities. Another mechanism for control is performed through targeted sweeps of run-down housing projects where illegal resident aliens are suspected of living. (There are generally no 'immigration sweeps' in which police search a house they suspect is inhabited by illegal immigrants; this would only happen in very rare cases whereby police have an indication that illegal residents are also involved in criminal activities such as human smuggling or drug dealing.) Targeted or random checks at the workplace are another method employed to detect illegal residents; this will be further discussed later. Another control method is the use of various databases that serve to filter out individuals not authorised to stay in Austria. This strategy is presumably most effective at certain points of contact with authorities, whereby illegal immigrants might claim some public or private service and, in order to receive it, are required to present documented proof of their legal residence. Synching key databases to allow for the 'automatic' detection of illegal residents is simultaneously a dream-come-true for control pundits and a nightmare for data protectionists. The reality, however, is more prosaic, as will be shown in the following section.

The population register is a basic instrument through which public authorities obtain the demographic information of Austrian residents (including both nationals and foreigners). Replacing what was once a decentralised national register, the Central Population Register (CPR)

is a centralised computerised system that became operational in 2002. Except for tourists, foreign diplomats, daily cross-border commuters and seasonal workers, all persons with legal residence in Austria are obligated to register any alteration in their residence within three days of the change. Upon registering the new residence, the individual must present a signature from the dwelling's owner or another authorised individual also living in the dwelling. At present, there are no systematic links between the CPR and other registers – in particular, the Central Alien Information File, which only records information on administration filed according to the Aliens Law (Kraler & Bilger 2005).¹⁶

The CPR cannot be used for the internal control of unauthorised residents because an individual's illegal (or potentially illegal) residence status is not checked upon registration, nor are there links between the CPR and other databases.¹⁷ Furthermore, there is no formal exchange of information between the residence registration system and the Aliens Police. In fact, it is likely that there are a number of unauthorised aliens registered in the population register, seeing as the *Meldebestätigung*, or the 'confirmation of residence document' issued upon registration, can be used to register for certain other administrative procedures. Moreover, since 2002, mandatory residence registration has been carried out at municipal offices, rather than police offices as before. There is anecdotal evidence that this change in procedures increased the likelihood that illegal residents would register so as to secure the *Meldebestätigung*, which is highly useful for a number of administrative procedures in daily life. Such procedures include signing up for gas and electricity services, registering motor vehicles and parking-fee exemptions, securing mobile phones, bank accounts and other services such as rentals from libraries and video stores.¹⁸

Whether as the result of intentional or accidental circumstances, there are also other areas where no direct links between different datasets work to detect illegal residents. A prime illustration here is when it comes to enrolling children in kindergarten or school. The legality of the parents' residence is deliberately left unchecked so as to guarantee all children free access to education. One source has estimated that there are some 5,000 to 7,000 illegally resident children in the public school system (Biffl 2001). Nevertheless, there is a broad – even if tacit – consensus to uphold this open admissions system.

By contrast, it is almost impossible to get access to public welfare benefits and the public health care system without a legal residence status. In emergencies, however, health care providers must make decisions based on medical needs and are not obligated to turn over unauthorised migrants to public authorities. There are also a few Austrian NGOs that provide free health care services to anyone in need without checking any documents.

5. Controls at the workplace

Given that none of the above-mentioned internal instruments is widely or systematically used for the control of illegal immigration, the question remains: where does the state control illegal residence once the Austrian border has been crossed? More and more, the answer seems to be at the workplace. Still, this answer needs to be qualified. Controlling for illegal employment is rarely undertaken with the intention of detecting illegal foreign residence or even illegal foreign employment. More frequently, it is meant for detecting and preventing all forms of *irregular* employment. 'Irregular' refers to all employment undertaken in contravention to labour, tax and social security regulations by natives and foreigners, as well as employment in contravention to foreign employment regulations.

To control the seemingly growing illegal employment of foreigners, Austria established a special unit within the Ministry of Economy and Labour (MEL) in the early 1990s. In July 2002, the Control Unit for Illegal Foreign Employment (KIAB), came under the supervision of the customs authorities in the Ministry of Finance (MoF) and, in 2004, the unit was renamed the Control Unit for Illegal Employment (although retaining its original German acronym). In recent times, the control unit has been expanding quickly, from a staff of 39 in 2000 to a staff of 93 in the middle of 2002, and to a staff of 186 in May 2004 (coinciding with the date of EU enlargement and an anticipated increase in irregular employment from new EU nationals). Beginning in 2006, the unit has been gradually supplemented by another 200 staff members.

Consistent with the increase in control staff, recent years have overseen an enormous growth in the number of workplace inspections (sometimes occurring at small sites, other times, at large construction sites involving dozens of inspectors along with tax authorities, aliens police and others). Meanwhile, after having fallen in the second half of the 1990s, the number of foreigners detected in illegal employment has also risen over the past five years. This growth has been in almost direct correlation to the number of workplace inspections (see Table 1).

Looking more closely at the raw data on foreigners apprehended for irregularities in their employment status, it must be noted that there is a growing disconnect between work irregularity and illegal residence. This should not be surprising: since May 2004, foreigners from the Central and Eastern European countries that joined the EU could not, by definition, be considered illegal residents of Austria. And yet, their access to legal employment remains restricted by the so-called transition periods imposed before obtaining access to the labour market. The majority of foreigners apprehended at the workplace are from Central,

Table 1 *Illegally employed foreigners apprehended in Austria*

<i>Year</i>	<i>Number of workplace inspections</i>	<i>Number of illegally employed foreigners apprehended</i>
1995	11,513	4,210
1996	14,363	4,083
1997	14,452	3,858
1998	15,537	2,999
1999	14,027	2,550
2000	13,211	2,881
2001	12,765	3,010
2002*	7,814	2,151
2003	20,943	5,422
2004	23,222	6,201
2005	18,579	7,641

* second half 2002 only

Source: Ministry of Economy and Labour 1995-2001, Ministry of Finance 2002-2005.

Eastern and South-Eastern European countries. The most vulnerable sectors are, much as in other European countries, construction, catering and agriculture. It should also be noted that private services in households (e.g. cleaning, baby-sitting and caretaking) are not controlled, as inspectors do not have general access to private homes. There is also a certain suspicion that in particular areas of the labour market there is a widespread, often politically motivated, consensus that controls should not be too strict because this would interfere with other social policy goals. One obvious illustration of this is in the domain of caregivers (both for children and the elderly) who mostly come from neighbouring countries and provide services far below Austrian wage levels.

6. Legal migration to Austria: has the migration regime become irrelevant?

Following a period of very high migration to Austria in the early 1990s, Austrian policymakers sought to regulate the total volume of migration to Austria with the use of annual migration quotas. The new 1992 Residence Act, which only entered into force in 2003, established a quota regime for different categories of migrants, thus limiting the number of residence permits to be issued each year. The annual quotas get fixed each year by the federal government, after consultations with the relevant parliamentary committee and the social partners. The country-wide quota is then divided into sub-quotas for the federal states, which are further divided into sub-categories according to the purpose of residence (family reunification, 'key personnel', private and

others). In addition, a special quota for seasonal workers and, since 2001, 'harvest helpers' has been introduced. The annual quotas for the period 1998-2005 are given in Table 2.

The new migration regime was intended to strictly regulate the number of new immigrants to Austria, in abidance with the new official maxim of 'integration before new immigration'. In the first few years of the new quota regime, the annual number of immigrants did decline, while the number of emigrants remained roughly stable. This resulted in a net migration balance of only 7,140 by the year 1997 (Fassmann & Stacher 2003: 31). To demonstrate the policy change in effect to an otherwise sceptical public, the annual pronouncement of the total quota available to migrants and employers is made a public event. This has become somewhat of a ritual, believed by the government to signal that migration is 'under control'. Under the current migration regime, it is implied, labour migration is restricted to key personnel – highly qualified workers earning a minimum income of 2,178 euro fourteen times a year (as of 2006) – and family reunification is capped by a tight quota.

The reality, however, has long been very different from official pronouncements. In fact, looking at the actual immigration figures from Statistics Austria, the official policy comes down to little more than symbolic policymaking. Table 3 summarises annual immigration, emigration and net migration for the period 1998-2005.

Comparing Table 2 with Table 3 reveals that the official quota system regulates only a small part of immigration to Austria (less than 10 per cent), while actual immigration is much higher. So what accounts for the difference? There are several clearly discernable factors, though it is still not entirely clear how this enormous and rapidly widening gap between the official quota and actual immigration can be explained.

Taking 2004 as the reference year, a first factor to consider is immigration by EU nationals who are not subject to the quota restriction. In

Table 2 *Annual migration quotas in Austria*

	Total quota	<i>Family reunification</i>	<i>Key personnel</i>	<i>Others*</i>
1998	8,540	4,550	1,860	4,500
1999	9,565	5,210	1,130	5,500
2000	7,860	5,000	1,010	5,500
2001	8,338	5,490	1,613	15,000
2002	8,280	5,490	1,905	15,000
2003	8,070	5,490	2,405	15,000
2004	8,050	5,490	2,200	15,000
2005	7,500	5,460	1,600	15,000

* refers to seasonal workers and harvesters

Source: Ministry of Interior.

Table 3 *Immigration and emigration of non-nationals to Austria*

	<i>Immigration</i>	<i>Emigration</i>	<i>Net migration</i>
1998	59,229	44,865	14,364
1999	72,379	47,279	25,100
2000	65,954	44,367	21,587
2001	74,786	51,010	45,372*
2002	92,567	38,777	53,790
2003	97,164	46,065	51,099
2004	108,947	48,326	60,621
2005	101,455	47,480	53,975

* statistical break in series (therefore not strictly comparable)

Source: Statistics Austria.

2004, this group also included nationals from the new EU member states and totalled 36,198 for the EU-24, including 16,310 from the ten new EU member states and 13,179 from Germany. Second, in 2004, statistical changes increased the likelihood that several thousand more asylum seekers were counted in the immigration figures.¹⁹ Third, there is the possibility that, since 2002 (with the shift of registration from the police to the municipal authorities; see Section 4), more irregular migrants registered themselves in the country and were thus counted as immigrants. The most important factor, however, could be attributed to the high rate of family reunification between Austrian and other EU citizens (EU rules specify that family members of Austrian and EU citizens are not subject to quota restrictions). In 2004, approximately 23,308 third country nationals received a residence permit as the family member of an Austrian citizen (559 received permits as the family member of EU and EEA nationals). While the statistics do not specify, it is highly likely that many individuals applying for resident permits for their family members are themselves naturalised citizens; between 1995 and 2004 alone, 266,650 people were naturalised. The conclusion is that naturalisation has *de facto* become a major mechanism of migration management (König & Perchinig 2005: 2).

This startling development has of course not gone unnoticed by migration policymakers in Austria. However, in reality, there is little that the government can do to close the gap between symbolic policymaking and the actual migration outcomes. This is why official rhetoric still clinches to the annual quota of approximately 8,000. Of the more than 100,000 immigrants registered in 2004, most fall outside any quota restrictions due to international commitments (e.g. EU nationals and their family members, asylum seekers, diplomats and their personnel) or have otherwise managed to evade restrictions (such as through illegal entry with subsequent registration). Nevertheless, in 2005, the government incorporated a series of provisions into a new aliens law

package that was expected to have an effect on actual migration volumes.²⁰ The provisions included strengthened measures against irregular migration and human smuggling and new rules against marriages of convenience (also known as sham marriages) and fraudulent adoptions. The new 2005 Settlement and Residence Act, which entered into force on 1 January 2006, obliges courts and registry offices to inform the Aliens Police if they have any doubts about a marriage or an adoption involving a third country national. For the first time in Austria, if there is proof of a marriage undertaken solely for immigration purposes, the Austrian partner is subject to penal sanctions (a fine or imprisonment of up to one year). Furthermore, an amendment to the Austrian Naturalization Law works to synchronise the waiting periods for the granting of citizenship between federal states. This law also limits prospects for the commonly granted 'early' naturalisation of spouses of Austrian nationals as well as recognised refugees.²¹ As of 1 January 2006, requirements for long-term residents to learn German under the so-called 'integration agreements' were extended from 100 to 300 hours of language courses, with a severe curtailing of exceptions. If this obligation is not fulfilled after five years of residence, an extension of the residence permit may be denied and subsequent naturalisation not granted.

7. Conclusions

To summarise, migration control in Austria, as far as the prevention and control of unwanted or irregular migration is concerned, is traditionally focused on external control measures. This is due both to the geopolitical position of Austria – as a small landlocked country in the centre of Europe – and to the historical development of its migration policies over the last few decades. External control measures range from the intensive control of Austria's national borders (since 1998, this mainly involved the country's external Schengen borders) to cooperation with neighbouring countries together combating illegal migration, human smuggling and trafficking, to measures aimed at preventing irregular migration to Austria in countries of transit or origin (mainly through increasingly strict visa regulations and visa issuing procedures). In contrast, internal control measures are not aimed at illegal migrants, *per se*. Instead, they aim to prevent undesired migrant activities, particularly concerning irregular work, criminal behaviour and the unjustified use of public welfare funds.²²

The question of whether the overall level of control brought to bear on potentially unauthorised migrants has increased over the past decade or not is more difficult to answer. As part of the Schengen com-

pensatory measures, there was certainly a shift of control measures from former external Schengen borders to inland controls within the boundary (e.g. on highways or in trains). There was also a greater exploitation of externalised control measures in countries of origin or transit through the use of visas, carrier liabilities, immigration liaison officers, document advisers, etc., all of which worked to prevent irregular migrants from even reaching Austria. By contrast, the EU and the Schengen frameworks brought about a move in the opposite direction by abolishing controls at internal borders and by lifting visa restrictions for nationals of accession countries (e.g. Romania and Bulgaria). Nevertheless, there is very little reliance on internal control measures apart from the labour market, where controls have been steadily stepped up over the past decade. The net effect thus remains difficult to measure. Still, it is fair to say that the overall level of control is certainly higher today than it was in the pre-1989 era – when Austria was not yet part of the EU and the entire population to the east of Austria was still locked up behind the Iron Curtain.

In contrast to the control of irregular migration, which can be assumed to have at least a modicum of success in the prevention of irregular migration to Austria, the regulation of legal migration to Austria seems to have lost much of its effect on the total volume of actual migration to the country. Much as in other ‘matured immigration countries’ today, actual migration processes seem to be determined more by family ties and network effects within developed migrant communities than by government *fiat*. In reaction, policymaking for the regulation of immigration (in the narrow sense) has expanded into new areas such as language proficiency tests, minimum income requirements for key personnel, naturalisation laws and the conclusion of binational marriages.

Key characteristics of Austrian controls

- Focus on external border controls
- Increasing emphasis on ‘externalised’ migration controls
- Low level of internal controls except on the labour market
- Centralised population and aliens register
- ‘Quota regime’ for annually approved immigration
- High number of naturalisations and subsequent family reunifications
- Expansion of control domain (integration, marriage, etc.)

Notes

- 1 Annual net immigration to Austria in the beginning of the 1990s was thus around 80,000; it was only around 20,000 during the second half of the 1990s. Between 20,000 and 40,000 foreigners were naturalised annually throughout the 1990s.
- 2 At the same time, the public's perception of migrants, asylum seekers and criminal foreigners flooding Austria found expression in the growing popularity of the rightwing anti-immigrant Freedom Party (FPÖ) led by Jörg Haider.
- 3 The convention implementing the Schengen Agreement (Schengen II) went into force in Austria on 1 December 1997. However, full implementation of the Schengen Agreement (and thus the abolition of internal borders to all neighbouring Schengen countries) did not go into effect until 1 April 1998. The Dublin Convention (on the first country of asylum), adopted by the European Commission in June 1990, did not go into effect until 1 September 1997 and even then showed only limited effectiveness, thus leading to adoption of an enhanced 'Dublin II' Regulation in 2003.
- 4 *Assistenzeinsatz zur Grenzüberwachung.*
- 5 Information provided by Colonel Werner Fasching, Austrian Ministry of Interior, 15 April 2005.
- 6 Austria has approximately 1,300 kilometres of external Schengen borders. Except for the 'surveillance troops', all controls of internal Schengen borders were abolished in 1998.
- 7 See e.g. the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA).
- 8 'First Annual Report to the Council and the European Parliament on the Activities of the EURODAC Central Unit', Commission of the European Communities, SEC, 5 May 2004, http://ec.europa.eu/justice_home/doc_centre/asylum/identification/doc/annual_report_eurodac_en.pdf.
- 9 After 20 November 1992, refugees from the former Yugoslavia began needing permission from the Security Directorate in order to enter Austria. Such permission had become difficult to obtain because all provinces have issued an 'admission stop'.
- 10 Council Regulation (EC) 539/2001 of 15 March 2001 specified those third countries nationals who had to possess visas when crossing the external borders and nationals exempt from the requirement.
- 11 This Directive of 28 June 2001 supplemented provisions listed in Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.
- 12 Austrian legislation specifies an exact fine of 3,000 euro for each individual who has been transported to Austria without necessary travel documents or visas.
- 13 This was done through Council Regulation (EC) 377/2004 of 19 February 2004.
- 14 Information provided by Colonel Werner Fasching, Austrian Ministry of Interior, 15 April 2005.
- 15 *ibid.*
- 16 Thus, the Aliens Register is not universal. It includes only foreign nationals subject to permit requirements, i.e. aliens who have been authorised to stay in Austria by registered administrative acts. It thus excludes unauthorised foreigners as well as EEA citizens, asylum seekers, recognised refugees, diplomats and Swiss citizens with legal residence in Austria.
- 17 Each register uses its own administrative pin codes, which have not yet been synched across different datasets. However, work is currently underway to link numbers from the social security database with the CPR.
- 18 All of these services could also be obtained through middlemen or other creative solutions, but having a document confirming residence facilitates matters.

- 19 At the end of 2004, federal care accounted for some 28,000 asylum seekers – despite the fact that some may have been already registered (and thus counted) in years prior.
- 20 In addition, the government announced its intention to extend the transitional period of free labour market access to nationals of the eight ‘new’ EU countries of the CEE for a minimum period of 2006-2009.
- 21 A general extension of the current ten-year waiting period to twelve or more years was rejected by both the government and its opposing parties.
- 22 To this, another more recent area of concern for public authorities should be added: namely, the prevention of terrorist activities among supposedly extremist elements of the immigrant population. However, unlike other European countries, in Austria the issue has not yet assumed major significance in general policy debates and no generalised measures are presently taken to control terrorist activities. Proposals to register all foreigners with fingerprints and biometric data, usually advanced by the Austrian far right, have not found approval in mainstream political parties. Instead, the issue of potential immigrant extremism is dealt with rather discreetly by the Federal Office for Constitutional Protection, which monitors a select number of individuals suspected of possible terrorist connections.

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Report from Belgium

Sonia Gsir

1. Introduction

Before giving a brief overview on the evolution of Belgian migration control policy, it is important to outline its institutional framework, particularly because Belgium has been a federal state since 1985. Migration control is located at all levels of government: the federal, the community (i.e. the French-speaking Community, the Flemish Community, the German-speaking Community) and the regional (Wallonia, Flanders and the Brussels-Capital Region).¹ The control of entry, stay and exit in the Belgian territory is to a large extent a federal competence. The Federal Public Service for Home Affairs, also known as the Ministry for the Interior, and, notably, its Aliens Office are responsible for immigration control. They work in collaboration with the Federal Public Service for Foreign Affairs on visa-related matters, with the Federal Public Service for Employment to oversee workplace controls and the Federal Agency for the Reception of Asylum Seekers (FEDASIL).

Belgium's communities are competent for person-linked matters such as education and therefore are also responsible for enacting integration policy. The regions are competent for territorial matters such as employment (e.g. issues regarding labour permit delivery). In 1994, the Walloon Region and the French Community Committee of the Brussels Capital Region received new competencies from the French Community. The responsibilities included reception and integration policies for immigrants and youth of foreign origin, which would be assisted by state-funded organisations to develop integration activities as well as moral and religious assistance for immigrants. Today it is precisely the Walloon Region that is competent for integration policy in Wallonia. However, the region has not yet developed a full-fledged integration policy despite having already set up regional integration centres for the purpose of promoting migrant integration. In Wallonia, migrant integration emphasises, albeit indirectly, policies that fight social exclusion. By contrast, the Flemish Community, through its Interdepartmental Ethnic-Cultural Minorities Committee, has had its own policy on minorities since 1998 and recently began developing one on diversity in Flanders and Brussels. In 2003, the Flemish government

also introduced a compulsory integration programme for newcomers in Flanders. During the negotiations that took place after federal elections in June 2007, the Flemish government would come to claim more responsibilities over immigration control, which would mean increased efforts to promote migrant integration in Flanders and to fight its challenges along the way. Provided immigration control remains a federal competence in the first chapter of the new governmental agreement, there will remain a provision for opening Belgium to economic immigration. Discussions with the regions about rules on economic migration are expected to ensue by October 2008.

The first modes of migration regulation were outlined in the 1930s. They targeted foreign workers who had to get both work and residence authorisations from the Ministry of Justice if they already had a work contract. After the Second World War, Belgium signed ten bilateral agreements² to organise the recruitment of migrant workers, first in its coal-mining sector and later in other sectors such as industry and construction. From that time onwards, the residence permit was clearly subjected to the granting of a labour permit. During the 1960s, this principle was applied less strictly and overstayers could easily regularise their situation once they got a job. After 1967, however, new legislation on labour permits again led to an increase in migrant controls.

Following other European countries, the Belgian government decided to put an end to new immigration in the mid-1970s. Simultaneously, internal control measures were taken by placing sanctions employers hiring new migrants. However, data on immigration during the following decades show that, despite the official stop, immigrants still arrived in Belgium. These flows reveal six main patterns of migration: mobility of EU citizens, asylum applications, mobility of foreign students, migration of highly skilled workers, irregular migration and, not least, family reunification (Gsir, Martiniello & Wets 2003: 62-63). Before 1974, the Belgian government tightened migration control on foreigners, staying in keeping with the country's economical situation. These measures targeted all categories of foreign workers, though low-skilled workers were especially susceptible.

By the mid-1970s, the phase of 'differentiated' external control had begun with specific control measures being assigned to various categories migrants. On the one hand, there was high control over low-skilled migrant workers and, on the other hand, there was weak control over highly qualified workers and immigrants in specialised categories, such as football and basketball players. This differentiated control carried on throughout the 1990s. The highest number of asylum claims came in 1993. And ever since, Belgium's government policy has endeavoured to reduce asylum claims, notably by targeting asylum seekers whom the government considered 'bogus'. Although there was still a

rise in asylum claims in 2000, numbered at 42,691, the number has constantly declined since.

Since the beginning of the 21st century, the Belgian government's chief concern has been limiting unwanted immigration. To this day, the most undesired migrants remain asylum seekers, though followed by those involved in so-called 'pseudo-legal migration', i.e. migrants' spouses and family members and students. The government has therefore introduced the principle of LIFO (Last In, First Out) to the processing of asylum claims (see Section 5.6), and the financial aid once provided to asylum seekers has been replaced by material support. Other provisions have been laid down to guard against marriages of convenience. The prevention of visa shopping has also become a notable government preoccupation.

2. External controls

Belgium has long participated in regional agreements that impact its border control and, generally speaking, its migration regulation. Briefly, one can mention the following touchstones: as of 1957, membership in the European Economic Community; in 1960, signature of the BENELUX agreements (thus ceasing internal border controls among the three parties and creating common positions in the Justice and Home Affairs field); early commitment to the Schengen agreements and their enforcement since 1995; and finally, Belgium's partaking in the Dublin Convention,³ applied since 1997, to determine the responsible state for examining asylum applications (1990).

2.1. Border control

Since all of Belgium's neighbouring countries are parties to the Schengen agreements, the country's border control focuses mainly on the nation's harbours and airports. (As of April 2004, controls at the Eurostar terminal at the Brussels Midi railway station were removed.⁴) Belgian border checks rely on at least three levels of control: technological, human and administrative. The Belgian harbours have increased their checks and there has been a visible improvement of control instruments that include various types of detectors (e.g. x-ray, heartbeat and passive millimetric wave detectors). The airports have shifted some of their control to air carriers, while checking by Aliens Office immigration officers has increased at gates of access, particularly for flights come from airports considered 'at risk'. Moreover, since 1 January 2005, following the Council Regulation of 13 December 2004, Belgian authorities have been obligated to systematically stamp the travel docu-

ments of third country nationals who cross external borders. This administration is undertaken for the sake of recording an individual's precise length of stay in the territory vis-à-vis his or her visa duration.

When it comes to border control, the Belgian strategy is twofold. At one side of the spectrum, the state has worked to develop various means of preventing irregular entry into its territory. According to the Aliens Office, the most frequently cited grounds for removing foreigners at the border are false or forged travel documents, as reported through the Schengen Information System (SIS), or the lack of a clear travel motive.⁵ On the flipside, the state also relies on its restrictive border control to prevent migration of vulnerable groups such as unaccompanied minors. As of 1 May 2004 with the Guardianship Law entering into force, foreign unaccompanied minors lacking necessary documents at border control must be reported to the national guardianship service, which, among other things, endeavours to determine the age of the child. The Guardianship Law thus offers new protective services, specifically concerning the rights of minors.

2.2. *Visa policy*

Another key concern is 'visa shopping'. The Belgian government aims to tackle this phenomenon through a visa policy enacted via agreements at the European level, the BENELUX level and the national level. Modern technology also plays an important role. Firstly, the Belgian visa policy is conducted in accordance with the EU visa regime. According to the Schengen agreements, each member state can issue a visa on behalf of others, though bearing in mind the right that some countries maintain to be consulted through the Schengen Consultation Network regarding particular applications. For instance, Belgium requests such consultation for visa applications from Rwandan, Burundian and Congolese nationals. Unlike other European countries, Belgium never endeavoured to attract migrants from its former colonies through a specific immigration policy. Nevertheless, Belgian governments have been aware that historic as well as socio-economic ties with the Democratic Republic of the Congo, Rwanda and Burundi may attract migrants from these countries. Secondly, the BENELUX framework promotes cooperation on regulating aspects of visa policy that are not part of the Schengen acquis, such as visa policy for diplomats and recognition of travel documents, as well as readmission agreements. Furthermore, the Belgian government has actively collaborated in the organisation of the European Visa Information System in hopes of stamping out visa shopping. Thirdly, another condition to enter Belgium, in addition to a valid passport or identifying document and any required visas, is proof of sufficient financial resources for the individual's stay in Bel-

gium and a subsequent return journey. This proof, however, can be pre-empted by a guarantee. In such cases, a guarantor is held responsible for the foreigner for a period of two years after his or her entry into the Schengen territory. The guarantee method represents a clear shift of accountability from the state to the individual. Provided the foreigner does not leave the territory after three months, the guarantor must take care of all possible costs involved in his or her residence, such as medical care, stay and removal. Fourthly, when it comes to visas for stays of over three months, various provisions have been established to constrict prospective migrants. As of September 2003, a protective DNA procedure came into play for ascertaining family reunification visas. In cases where family ties are dubious because a birth certificate is lacking or unreliable, DNA tests can be conducted. These tests are administered at one of twelve Belgian diplomatic and consular posts.⁶ This measure is an example of Belgium's attempt to curtail abuse of the system in instances where the absence of civil state documents fails to verify blood relations. Following the transposition of the council directive on the right to family reunification into Belgian law, a spouse's minimum age has been upped by three years to 21. Moreover, as of June 2007, the applicant must prove that the Belgian resident, if he or she is not an EU national, has housing deemed appropriate for family reunification.

3. Externalised controls

Besides external border controls, Belgium has also developed preventive and proactive measures to impede entry by irregular migrants into its territory. Belgian Aliens Office immigration officers sometimes work in certain countries of origin to better grasp how migration processes work from the start. In 2004, for example, the Aliens Office dismantled a network in Angola that provided business visas through the use of false or forged invitations.

Moreover, Belgium has assigned Immigration Liaison Officers (ILOs) to countries of origin. This task undertaken by the federal police is meant to extend the country's regulation network into other countries. More or less since the turn of the millennium, the Aliens Office began to regularly send immigration officers to source countries. Their duties have been to evaluate the potential for irregular migration, to launch communication campaigns meant to deter potential irregular migrants and to derive a better understanding of sudden irregular migration processes. In this way, Belgium has recently targeted two particular countries that are considered a significant source of irregular migration. As such, immigration officers have gone to the Republic De-

mocratic of Congo on several instances. More recently, they have made trips to China in view of the new flow of irregular migrants direct flights between Beijing and Brussels have brought into Belgium (Aliens Office 2007).

4. Internal controls

Irregular migrants are the main target group of internal controls, yet it is important to underscore a trend in past years to enhance controls on regular migrants as well as, most notably, in Flanders. After political and social debate, the Flemish government agreed on a civic integration decree (28 February 2003) that ushered in not only the right to integration for newcomers, but also an obligation to undergo its process. As of April 2004, all (non-EU) adult newcomers who register themselves in a Flemish municipality must participate in an integration programme that involves taking Dutch courses as well as receiving social training and career guidance. A foreigner's knowledge of the national language has, more and more, become a tool with which to exercise control. That is, the lack of linguistic skills or failure to demonstrate efforts to learn the local language tend to be used to sanction migrants (i.e. in their access to social housing).

4.1. *Population registration, foreign identity cards and identity checks*

Population registers are administrative tools for the control of population flows.⁷ They indicate the precise dates of entrance and exit of each individual in a municipality and thereby have the potential to reflect accurate information on migration movements. In Belgium, foreigners are accounted for in three different registers. The Population Register records foreigners who have an unlimited right of stay and are authorised to settle in Belgium.⁸ Those with limited as well as unlimited right of stay are recorded in the Aliens Register. Created in 1995, the Waiting Register records asylum seekers for as long as their asylum claims are still pending.

Belgium makes it mandatory for all residents to carry an identity card. Foreigners permitted to reside in Belgium must carry their foreign identity cards, which differ according to varying immigrant statuses. Whereas most of these cards are still produced in a hard copy cardboard form, beginning in 2003, identity cards among Belgian citizens began being replaced with electronic chip-embedded cards. In 2006, the Belgian government also began issuing electronic identity cards for foreigners. The introduction began in three municipalities and is expected to extend throughout the whole country over the next

five years. This new project aims, first and foremost, at curbing document falsification, while also working to effect necessary administration to set up an e-government.⁹ Finally, the modernisation project also seeks to improve control in a broader European context through the standardisation of identification documents.

Checks conducted in the public sphere are another means of control.¹⁰ Although identification checks are regulated by law,¹¹ it is very common for individuals to be targeted according to common cultural stereotypes. In principle, the police are meant to inform the Aliens Office once they have checked undocumented migrants; in practice, this is not always the case.

4.2. Residence checks

As already discussed, instruments of controls may exist though implementation and/or actual utilisation can vary from case to case. There is also record of instances in which authorities act overzealously, as the European Court of Human Rights judgment of *Čonka v. Belgium* well illustrates. In this case, police misrepresented their intentions to a Slovakian family of Tzigane origin who were residing as asylum seekers in the Belgian city of Ghent. In October 1999, along with other Slovaks, the Čonka parents and their two daughters were sent a letter (written in both Dutch and Slovakian) inviting them to complete their asylum applications by coming to the local police station. Once they arrived at the station, however, they were arrested and sent to a retention centre near the national airport in order to be deported to Slovakia four days later. Since 2002, municipalities have refrained from further employing such 'tricks' to apprehend irregular migrants.

5. Special issues

5.1. Use of penal law

More and more, the Belgium government has shifted immigration control away from itself. Instead, it has turned attention inwards to individuals, being Belgian citizens or migrants themselves, and outwards, for example, through imposing fines on carriers that transport irregular migrants. In this regard, two elements are worth highlighting: first, Belgium's tendency to penalise those allowing or facilitating irregular entry or stay; second, the development of regulations to protect irregular migrants if their precarious situations make them susceptible as victims of abuse.

In 1995, the Aliens Law was modified to introduce penalties for carriers transporting aliens who travel without requisite documentation.

Belgium has actively endeavoured to enlist cooperation from carriers by arriving at mutual agreements through various memoranda of understanding. Since 15 October 1995, over 50 memoranda were signed. The Aliens Office is responsible for informing air carriers of the precise documentation that is necessary for individuals to enter Belgium. Since 1999, the Aliens Office website has provided complete information on Schengen access conditions, including the requisite travel documents. Air carriers, moreover, can still benefit from a system of reduced fines even if they have failed in some aspects or instances of control.¹² Although the system was initially plagued by problems, according to the Border Inspection Division of the Aliens Office, cooperation has improved since 2000. Nevertheless, the same unit also acknowledges that without memoranda it would be difficult to get carriers to pay due fines. In keeping with European regulation, the Aliens Law awards a penalty in the amount of 3,000 euro per person.

The law of 10 August 2005 aims to reinforce provisions against smuggling, trafficking and slum landlordism. This law also condemns the exploitation of begging and distinguishes smuggling from trafficking, an offence which was extended to apply to Belgian nationals (not only foreigners). The law transposed the Council Directive 2002/90/EC of 28 November 2002, which defined the facilitation of unauthorised entry, transit and residence. According to Belgian law, in general, assisting irregular migrants for entry, transit or stay even without financial gain is punishable, meriting eight days to one year of imprisonment. Nevertheless, the law of 13 April 1995 made assistance of irregular migrants for humanitarian purposes non-punishable; the law of 10 August 2005 specified that humanitarian reasons encompass all non-profit and non-criminal purposes. However, the debate remains open and, in January 2006, Minister of the Interior Patrick Dewael expressed his positive stance on criminalising any help given to undocumented persons. His declaration sparked off debate in the media and notable reactions, particularly from NGOs. The Minister reminded the public that while helping undocumented individuals for humanitarian reasons may not be punishable by Belgian law, the measure contradicts Belgium's overall immigration policy that compels irregular migrants to leave the country (Caritas International 2006).

This new law of 10 August 2005 also sets up sanctions against slum landlords and so-called 'sleep merchants'. In other words, someone exploiting a precarious situation by renting a residence or some domestic element (a bed, for example) without regard for legal norms vis-à-vis security and habitability could be condemned to penalties and/or prison. Renting decent residence to an irregular migrant is not, however, punishable.

5.2. *Regularisations*

Belgium has seldom used regularisation as a mechanism of control. Regularisation is generally a discretionary power of the state enacted by the Aliens Law (Article 9.3). This article states that under exceptional circumstances, the Minister can grant a residence permit to a foreigner already present on Belgian territory. However, in 2000, a regularisation campaign was launched and about 60,000 undocumented migrants came forward with applications.¹³ As explained by Brochmann (1999), the regularisation mechanism is self-contradictory. From one perspective, it is a proactive control inviting irregular migrants to come out of the shadows. Yet viewed from another angle, it is 'a defensive symbol of a failed external control' (Brochmann 1999: 20) that may work to attract more unwanted migrants. This explains why the Belgian government more than once insisted on the exceptional character of the regularisation. Today, despite NGO mobilisation, hunger strikes and church occupations by undocumented migrants, the government is completely reluctant to pursue a new regularisation campaign. Nonetheless, at the end of 2004, buckling under pressure by the Forum Asylum and Migration (FAM), Minister of the Interior Dewael did agree to expedite asylum applications that had been awaiting a reply for over three years. This arrangement might be considered a kind of undercover regularisation. However, the government refused to make this arrangement collective in nature: each undocumented migrant had to apply individually under Article 9.3 of the Aliens Law. Even though such mobilisation efforts have pushed the government to clarify just what Article 9.3's criteria are, regularisation is still viewed as a discretionary power in the hands of the Belgian state. It is by no means a migrant right.

In October 2007, the core parties of the potential new federal governments (the orange-blue parties, i.e. the Christian Democrats and the liberal right) have agreed upon certain clear-cut criteria for regularisation.¹⁴ For example, families with children whose asylum claims have been pending for three years may apply for regularisation; the same applies to other asylum seekers whose claims have been pending for four years. Undocumented persons who entered Belgium before January 2006 and have recently been offered a job may also apply for regularised status. Nevertheless due to the present uncertainty of the next federal government, the mandatory application of these criteria via law is still uncertain. In February 2008, reacting to the 50-day hunger strike of around 150 undocumented migrants, Minister Dewael finally acceded to the issuance of a three-month residence permit that would allow the migrants to reintroduce their requests for regularisation. He also announced that the waiting period's duration would also include

the length of time appeals took. According to the Coordination and Initiative for Foreigners and Refugees (CIREF), this decision may well set a precedent for the future.

5.3. *Workplace checks*

In 2001, in an effort to combat irregular work, the government began a programme to strengthen workplace checks. Such checks are operated each month in every judicial district, particularly in sectors with a considerably higher likelihood of employing people involved in human trafficking (e.g. restaurants, cleaning and prostitution). In general, Belgium has strengthened its regulations to combat work in the informal economy. Hiring migrants without a labour permit is now punishable by law. In 2003, the government created a federal council established to combat illegal work and social fraud¹⁵ so as to improve the coordination between various structures and levels of governments. Besides these reactionary instruments, the government also launched a 2001 campaign to combat irregular work in the domestic sector through a proactive system that provides a fiscal incentive to individuals and companies who hire workers legally.

Belgium, much like other European countries, has used transitional arrangements to employ citizens from the new EU member states. All workers from these countries (except Malta and Cyprus) need a labour permit to work legally in Belgium, at least until 1 May 2009. Following the Federal Public Service for Employment, requests for labour permits remain low because migrant workers have found alternatives, such as by working freelance, being employed by a firm as a posted worker¹⁶ or working without any permit whatsoever.

5.4. *Control of sham marriages*

In Belgium, it is possible to get married even if one member of the couple is irregular as long as the undocumented spouse can produce the requisite documents, e.g. a birth certificate. Nevertheless, the Belgian government has observed how sham marriages have drastically risen in recent years and has therefore decided to combat what it calls 'pseudo-legal migration'. This terminology refers to abuse of immigration procedures such as that of family reunification that follows a marriage. The government has explicitly aimed to stop all forms of bogus matrimonial unions. To this end, two instruments have been developed. Firstly, the ministry bill of 13 September 2005 obliges civil servants from all registry offices to report to the Aliens Office any prospective marriage between an undocumented migrant and a European citizen. Secondly, since the law of 12 January 2006, sham marriages or

attempts to terminate such marriages have become punishable. Fines and prison sentences are commensurate to the kind of marriage¹⁷ that has taken place.

5.5. *Detention and return*

Detention was employed throughout the 1990s as an instrument to keep irregular migrants on hand before their removal as well as to deter future ones from coming. The first detention centre was officially set up in 1988. Five years later a law would be passed to regulate the creation of detention centres for asylum seekers and irregular migrants. There are now six detention centres in Belgium, with a total capacity of approximately 600 individual spots (i.e. beds) for detainees. In 2004, the average number of daily detainees was 513. An average period of detention varies between fifteen and 40 days, though detentions may be extended up to eight months. As of early 2008, there is no plan for creating new detention centres even if, according to the Aliens Office, more room is needed to meet the goals of Belgium's removal policy.

When it comes to irregular migration control, the Belgian government has traditionally pursued an operational removal policy and developed it accordingly. Over the years, the number of people being expelled from Belgium has risen. From 2000 to 2003, the number of expulsions almost doubled.¹⁸ Belgium manages its return policy in complementary steps and at different levels of governance (i.e. local, national and international). First, detention centres are a crucial element of the removal policy, as it is easier to return a migrant whose whereabouts are already under control. According to the Aliens Office, in 2006, the number of migrants removed directly from detention centres increased by nearly 14 per cent. Second, removal is administered through the conclusion of readmission agreements, as aided by administrative arrangements with embassies or consular representations. Around a dozen readmission agreements were signed in the framework of the BENELUX.¹⁹ Third, the implementation phase – if not the repatriation itself – is carried out in collaboration with other European countries. Besides its own civil and military flights to remove foreigners, the Belgian government also charters planes in cooperation with neighbouring countries (Germany, France and the Netherlands) to oversee the repatriation of irregular migrants. Belgium, the Netherlands and Luxembourg signed an agreement on 6 July 2004 to better their collaboration when it comes to joint flight controls. In the same year an agreement was also signed with the United Kingdom Immigration Service to cooperate on the identification and removal of irregular migrants. As such, return policy has become an issue falling under Belgium's broader migration policy. To this end, cooperation with other

states is pursued through a policy that first and foremost concerns itself with state relations. In other words, very little consideration is given to the migrants themselves.

The detention of irregular migrants and, moreover, their safe removal became subject to public debate when, in September 1998, a young Nigerian woman was killed on a plane by her police escort. Semira Adamu died of suffocation on what was the Aliens Office's sixth attempt to forcibly send her back to Nigeria. The Vermeersch Committee was consequently established to examine foreigner removal issues and present subsequent recommendations for Belgium's removal policy. Some of the Committee's recommendations included giving juridical protection to various categories of aliens such as unaccompanied minors and pregnant women, avoiding the use of violence and fostering conditions for voluntary return. Other recommendations also indexed elements of external and internal control such as improved visa policy (i.e. more effective data exchange among EU member states regarding persons granted or refused a visa and the reason for refusal), the role of ILOs in source countries and, in general, intensifying Belgium's battle against work in the informal economy.

Finally, when it comes to migration policy, particularly at the implementation phase, Belgium more and more turns to the local level. This is a deviation from past tendencies in which migration policy was mainly a federal competence. In 2003, a pilot project was launched with the intention of increasing cooperation between the Aliens Office and several municipalities. The project aims to improve implementation of federal policies relating to foreigners and, specifically, their removal. To this end, civil servants from both local and federal levels meet to discuss topics such as removal, human trafficking, sham marriages and the use of biometric data.

5.6. *Asylum*

The asylum system in Belgium is considered an especially effective instrument of control because it has a double-filtering mechanism (Pieret 2004). To begin with, the Aliens Office examines an application for asylum. Officials there determine whether Belgium is indeed the responsible nation for the application, according to Dublin II provisions. Multiple asylum claims by one person can be detected by the Aliens Office's very own Automated Fingerprint Identification System (AFIS), which was installed to cope with Belgium's growing number of asylum claims during the 1990s. Linked with the EURODAC database since 2003, Belgium's AFIS also works to prevent asylum shopping – that is, when an asylum seeker strategically chooses to claim asylum in the country he or she believes will offer the best provisions.²⁰ Provided Bel-

gium is the country responsible for the application, the Aliens Office then determines whether the claim corresponds to the formal conditions of the Geneva Convention. The admissibility phase of asylum application is an important opportunity for control because it permits refusal of a number of applications on the straightforward basis of an administrative file and a simple interview. Although the applicant has the right to lodge an appeal to the Council of State, his or her stay in Belgium is not necessarily guaranteed. With a view to repatriation, a failed applicant may be retained in a detention centre. Secondly, an application that is deemed well founded is examined by the General Commission for Refugees and Stateless Persons (CGRS). During this phase the applicant is received in an open reception centre.

Since 2001, asylum seekers have only received in-kind assistance, rather than financial aid, during the first phase in which their claim is being processed. This is one of the reasons applicants have had to live in open reception centres. In such centres, asylum seekers are generally free to come and go in their quotidian affairs so long as they return to the centre at night. The asylum procedure thus is a 'soft' way to exert control, while still keeping individuals on hand should a decision be made for removal. Recent research has shown how some reception centres work to reduce asylum seekers' exit opportunities by optimising their range of in-house activities (Gsir et al. 2004). Along with this major change in the reception policy, however, the Ministry for the Interior began applying the principle of LIFO (Last In, First Out) to asylum. In other words, the more recent an asylum claim, the more quickly it is processed – the idea being to first answer newcomers' requests and, in instances of rejection, to deport them just as rapidly.

In 2006, the Aliens Act was altered to simplify and expedite the asylum procedure. The limit on the duration of procedures was reduced to one year, unlike the previous period of three or more years. Asylum applications are now directly examined by the CGRS and, in June 2007, the new jurisdiction of the Aliens Litigation Council²¹ was created to deal with appeals made against CGRS decisions. Despite the reform, formal aspects of the claim are privileged at the expense of more substantive elements, and detention of asylum seekers during the procedure is still allowed. Another important change in the new asylum law is that an asylum seeker must live in a reception centre throughout the claim's entire processing and thus may not receive any financial aid before a refugee status has been granted.

6. Conclusions

Different patterns of migration prevail in Belgium. When it comes to mobility among EU citizens, however, a sense of *laissez-faire* and, in some cases, actual encouragement have predominated. Although this point was not a chief concern in this report, it is worth noting that Belgium has taken measures to facilitate the work of highly skilled migrants in the country (i.e. simplified laws for the labour permit). At present, it seems that a future Belgian immigration policy will oversee the development of a kind of 'green card'. By contrast, Belgium's trend has been to increase control on irregular migrants, family reunification migrants and asylum seekers.

Control of unwanted migration is pursued with a two-pronged approach. On the one hand, stricter, sometimes seemingly dehumanising, control gets manifested in a sense of administrative efficiency. High-tech instruments and well-linked databases are used in a technical effort to reduce irregular migration rates. On the other hand, a humanitarian-based control has come to evolve from the mobilised efforts of civil society, among other movements. In 2004 and 2005, provisions were made to limit state control over two migrant categories: unaccompanied minors and victims of trafficking.

Three other key elements of Belgian control merit highlight. First, there is an increasing trend to link various levels of governments, as well as to shift responsibilities to the international level. The policy is thus not only federally administered, but extended inwards – within Belgium (at regional, community and municipality levels) – as well as outwards – to the EU as a whole, particularly when it comes to visa policy. Second, Belgian migration control policy relies more and more on partnerships with private bodies such as transportation carriers. The intention is to create a public-private policy in which almost everyone – citizens included – will play a greater role in control. This mode of migration regulation is based on denunciation and suspicion, not solidarity among nationals and foreigners. Finally, Belgium has witnessed the increased and improved use of modern equipment to better control migrants. Such technology includes biometric data, electronic identity cards for foreigners, electronic visa processing and more sophisticated border-control detectors.

Key characteristics of Belgian controls

- Increasing control on irregular migrants and family reunification
- Fight against shame marriages

- Use of new technology to improve control
- Control under control for vulnerable migrants

Notes

- 1 As in Flanders, regional and community bodies have been merged; there are a total of six governments in Belgium (the federal government, Flanders and the Flemish Community, the French Community, the German-speaking Community, Wallonia and the Brussels-Capital Region).
- 2 Belgium signed agreements with the following countries: Italy (20 June 1946), Spain (28 November 1956), Greece (12 July 1957), Morocco (17 February 1964), Turkey (16 July 1964), Italy (11 July 1966), Tunisia (7 August 1969) Algeria (8 January 1970), Yugoslavia (23 July 1970) and Portugal (29 November 1978).
- 3 The Dublin Convention was replaced by the Dublin II Regulation.
- 4 This is the logical consequence of the tripartite agreements signed with the UK and France in 1993 and the added protocol agreements of 2002 and 2004, which regulate the advanced frontier check. British Immigration Service officers control the travellers departing to the UK at the Eurostar terminal in Brussels-Midi and French border police officers control entrance into the Schengen territory at the Eurostar terminal in London.
- 5 For the following years 2004 and 2005 (Aliens Office).
- 6 These posts include: Abidjan, Addis Abeba, Dakar, Kigali, Kinshasa, Lubumbashi, Lagos, Nairobi, Islamabad, New Delhi, Peking and Shanghai.
- 7 In Belgium, population registers have existed since 1847. The Aliens Register has specified registration rules since 1921.
- 8 Among others, the authorisation to settle in Belgium is granted to foreigners who have legally resided in Belgium for a minimum of five uninterrupted years.
- 9 Between 1995 and 2006, some 45,000 blank documents (mostly consisting of foreign identity cards) were stolen across 190 municipal administrations (Federal Public Service for Home Affairs).
- 10 Between 1996 and 1999, a research project carried out by the Catholic University of Louvain's criminology department observed how police patrols check for identification in the public sphere (see also Francis 2001).
- 11 This is stipulated by the law on police function of 5 August 1992, Articles 28 and 34.
- 12 See www.dofi.fgov.be.
- 13 The prior launched campaign came as a result of 1974's end to the active recruitment of foreign workers through bilateral agreements. Beneficiaries of the 2000 campaign were divided into four categories: asylum seekers whose applications were pending for an abnormally long period, migrants suffering serious illnesses, migrants without objective possibility to return and others with substantive ties in Belgium.
- 14 This agreement is still in the works, however, because – as of February 2008, after more than a half-year of negotiations – the federal government of Belgium formally remains inchoate. Since mid-December 2007, the country has only had a temporary federal government and, as of end January 2008, the temporary government has not yet concluded an agreement.
- 15 Conseil Fédéral de Lutte contre le Travail Illégal et la Fraude Sociale.
- 16 This refers to someone who normally works in a country other than Belgium, though is 'posted' to Belgium by an employer for a fixed time within the framework of the transnational provision of services.

- 17 The various categories include: marriage of convenience in which the purpose of the marriage is to gain access to Belgium or to ascertain a legal status within the country; forced marriages in which a union is arranged with a Belgian national, generally of foreign background, in order to give a non-national access to the country (this usually means one spouse is exploited); and marriages against payment, in which both parties are aware of the union's sole migration pretence and one spouse receives money for entering into the marriage.
- 18 In the wake of the Adamu trial, in 2004, the number of expulsions fell from previous years. The decrease may be explained by the police unions who refused to serve as escorts in removals, as well as the consequences of EU enlargement; in practise, nationals of new member states could not be expelled (Aliens Office Annual Report 2004: 71).
- 19 Readmission agreements were actually negotiated for Mali, Macedonia, Czech Republic, Armenia, Azerbaijan, Georgia, Nigeria, France, Algeria, Moldavia and Cyprus (*Benelux Annual Report* 2004).
- 20 Belgium was the first European country to use the high-tech fingerprint identification equipment supplied by Printrak International. The Aliens Office AFIS is now also frequently used by the police to deal with cases of informal work, prostitution and illegal stay.
- 21 The backlog of the Council of State is transferred to this new body.

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Report from France

Frédéric Coste

1. Introduction

Each change of government in France tends to entail a modification of the preceding immigration legislation. Contrary to what they usually claim, however, governments rarely abrogate all the former legislation. From the onset of the 1990s to the middle of the decade, France found itself in a series of harsh positions regarding the control of immigration. This led to the Right's enactment of two controversial regulations, which were subject to considerable public debate: the Pasqua Law and the Debré Laws. The next leftwing government tried to be more open regarding entry conditions for immigrants, particularly when it came to constitutionally protected categories such as asylum seekers and refugees and the pursuit of 'the right to a normal life'. At the same time, the government aimed to devise more effective controls on illegal immigration by means of the 1998 RESEDA¹ Law, also known as the Chevènement Law, which, like previous legislations, was named after the Minister of Interior at the time. However, to 'depoliticise' the stake of illegal immigration by making the phenomenon less visible, this law introduced case-by-case legalisation. With these measures, the government did not yet obtain unanimity from either the Right or its own Left side. The subsequent rightwing political power tried to curb the perceived failures of this law, which had not anticipated a surge in asylum seekers, and thus sought to emphasise more controls over illegal immigration.

What would come then – three laws in only four years enacted by the same political party² – must be seen as a rationalisation process in migration control. There is a real coherence within the three laws, as has been underscored by opponents (UCIJ 2007a). Their principal aim is to diminish streams of asylum seekers and family reunification, and to recover a high rate of economic migration, namely, 50 per cent by 2012 (Mariani 2007; Hortefeux 2007). Some say that the main reason is to take advantage of migrant workers depending on what – or who – the economic situation calls for. However, whereas its European counterparts see populations declining, France – with a not inimical fertility rate of 1.9 children per woman – should not face big demographic distortions in the labour market. This is evidenced by the high unemploy-

ment rate and the fact that migration flows remain considerable (Court of Auditors 2004; Centre of Strategic Analysis 2006). These factors are reflected in some government discourses and in reports of fellow-party politicians who are in charge of migration policies.³ We may thus consider how this stance corresponds with another characteristic President Sarkozy feature, with his proclaimed *realpolitik* to restore state power. By holding back constitutionally protected entries and increasing economic migration, something that can be controlled, Sarkozy might be seen as trying to improve the state's regulation of migration flows.

The main characteristics of each of the three 2003 laws can be described as follows. First, the Law of 26 November 2003,⁴ which was enforced by Sarkozy, then as Minister of Interior, emphasises tackling of illegal migration. Key measures include issuing mayors control over housing certificates in order to obtain a short-term visa, use of biometric visas and the extension of a retention period to allow enough time for authorities to deport illegal migrants. Second, the Law of 24 July 2006 came to reflect Sarkozy's famous 'chosen immigration', a term used instead of 'immigration quota' because the latter is considered taboo in France. (The new legislative text of 2006 thus refers to the introduction of 'annual goals to reach'.) It was the first time that a political leader in France used a selective migration policy approach in his discourse, encouraging highly skilled migrants⁵ and restraining access for others. If Sarkozy was keen on being friendlier to the former group by facilitating their residence and enabling graduate students to work in France after their studies there, the tightest of rules were enforced for all those migrants who were not highly skilled, e.g. in cases of family reunification. Notably, a time limit was instated for requesting such a procedure and welfare resources were no longer considered for the minimum financial resources required to let the family enter in France.

The introduction of integration as a means of control was the other major feature. An 'integration contract'⁶ tested in the previous law⁷ had become compulsory in 2006's law. The granting of long-term residence cards, in ten-year instalments, then became subject to an integration condition. In this sense, the Law of 23 October 2007 continued in trying to externalise integration requirements for candidates of family reunification.⁸ Furthermore, financial resources for family reunification were raised to 1.2 times the official minimum wage.

The legislative status of the entry and stay of foreigners in France is still enshrined in the regulation of 2 November 1945 (albeit modified several times). Up until the present, France has resorted to three mass-scale legalisations: 1981/1982, 1991 (solely for rejected asylum seekers) and 1997/1998.⁹ Case-by-case legalisation was abolished in the new

Law of Immigration in 2006. Prior to that, some 20,000 people were legalised annually.

Although most European countries no longer face great waves of asylum seekers, France's numbers had not ceased to climb until recent restrictions came into effect: from 31,000 in 1999 to 50,000 annually between 2001 and 2004, with the majority of applicants since 1999 coming from Africa. Some hypothesise that this increase is the outcome of France's two-pronged application system whereby an application can be filed either with the asylum agency OFPRA¹⁰ or with the French Home Office. If an application is turned down, the applicant may subsequently reapply with the other entity (Tandonnet 2004). The Law of 2003¹¹ aimed to curtail the flow of applicants by reintroducing a single application procedure. The later incorporation of the European list of 'safe countries' into French law¹² also contributed to the diminution of asylum seekers. Less prevalent factors that may explain the decline in numbers include the use of biometrics on asylum applicants in airports of departure and the introduction of airport transit visas. Also, a discretionary first filter of administration takes place upon arrival at the French border, whereby assent must be given to even seek asylum. While the first filter has deemed a huge number of border applications non-receivable – 76 per cent in 2006 – more and more, the trend seems to be swinging in the opposite direction to grant refugee status at the border.¹³ The overall number of asylum seekers in 2006 was approximately 40,000.

One significantly evolved element of migration control in France is the discourse of the political elite itself. In the 1990s, 'zero immigration' was its leitmotif, a goal that obviously failed. A salient measure proposed by the Debré Law in 1997 was that the police should be notified whenever a French citizen might receive a non-European foreigner into his or her home. Although such draconian attitudes seem to have been rejected by the general population, no political party could afford to neglect the new theme of migration control if their goal was to reach a position to govern. Stressing the significance of this issue, a fundamental change was thus made through creation of a Ministry of Immigration following the presidential election of 2007. Leftwing party member Dominique Strauss-Kahn, who is today head of the IMF, launched the idea during the presidential campaign of 2006-2007.¹⁴

Even if his role wasn't named as such, Sarkozy had acted as Minister of Immigration well before. It was his wish to lead a ministry controlling all aspects of migration. He secured an unusual compromise as the head of the Ministry of State.¹⁵ That is to say he took on the role of an abstract minister under whose auspices different administrations of separate ministers fell. Sarkozy created an Interministerial Committee for Immigration Control on 26 May 2005 that connected eight min-

istries: those of the Interior, Social Affairs, Justice, Defence, External Relations, Education, Finances and Overseas.¹⁶ The Interministerial Committee for Immigration Control thus evaluates France's migration policy and has notable attributes to prepare an annual report for Parliament with recommendations for guideline adjustments and quantitative objectives in conformance with the 2006 Law.

Two comments on models proposed in the seminal works of Brochmann (1999) and Guiraudon (2000)¹⁷ are useful here. First, these scholars underscore the fact that authorities disseminate their capacity for control by delegating it to actors who are better positioned, i.e. mayors, carriers, etc. By highlighting *diffuse* control, these models coherently analyse the process of extending control. But one thing implicit in this modular understanding is a consideration of the fact that all mechanisms of control are on the same level. How illegal immigrant employment is combated is entirely disproportionate vis-à-vis the instruments of external control that are symbolised by police cooperation under the Schengen Agreement. There are only 1,400 employment inspectors in France, each having to deal with 32,000 employees. By contrast, the European average is 25,000 employees per single labour inspector (Bessière 2005). Moreover, these models hint that, through such *security* and *control* measures, policies may run counter to *integration* measures. On the condition that it does not adversely affect the migrants themselves, curbing illegal employment, however, conforms to the wishes of most pro-migrant associations. Tough-ruling governments now officially use integration levels among certain migrants as a measuring device to decide whether to prolong or terminate residence. This has been made apparent in the recent laws.

2. External controls

2.1. Visa requirements

The Schengen visa has homogenised entrance requirements for periods of stay no more than three months among all Schengen countries. To enter France for an expected duration longer than three months, a long-term visa must be obtained before arrival. Once in France, a residence permit with a one-year validity must be obtained. Over time, the prerequisite long-term visa has become a means of control, in accordance with the Law of 2006, as no residence permit can be granted without a long-term visa. This control thus tends to be externalised 'at the source' – meaning by consulates in countries of origin.

Sufficient means of subsistence and a mayor-granted housing certificate, which specifies whether the migrant's prospective host environment has suitable living conditions, are requisites for entering the

French Territory for any duration. As will be discussed, this point tends to be more and more actuarially enforced. In spite of the 2.5 to three million short-term visas issued each year, the refusal rate of short-term visas is at an all-time high of 20 per cent. This may have something to do with the fact that rejected applicants can appeal a negative decision. Appeals are first filed at the consulates concerned and then, if necessary, are followed by addressing a commission in the French city of Nantes (the total waiting time is about ten months). Over 750 officials work in consulates whose sole task is to issue visas. It is easy to imagine, thus, how consulates are overwhelmed by the not insignificant number of cases they must process. Moreover, it is worth noting that most of the officials who work at such consulates are fellow natives of the common third countries lacking proper documentation. The responsibility these employees assume is therefore important.

As of 2003, the introduction of pre-processing visa fees have functioned as another means of control. Before this, payment had only been required once the visa was issued. Because fees are now too high for some individuals to even consider applying, the overall applicant number is lower. Pre-processing fees thus resulted in an estimated 15 per cent decrease in the visa refusal rate.

2.2. *Mayors: the link between internal and external controls*

Instituted by a decree in May 1982, the housing certificate was instated to ensure that France welcomed people into decent living conditions. Nonetheless, the housing certificate has become an indisputable means of migration control. A decree from August 1991 gives city mayors the capacity to refuse issuance of a certificate if certain housing standards are not met. For instance, the surface area of a house may be deemed too small for a prospective tenant to share with its current residents, thus leading to refusal of a certificate. When a ruling as such is made, moreover, neither a short- nor a long-term visa will be issued. The Law of 2003 permits mayors to deny this reception attestation, thus also constricting the acquisition of short-term visas if there are suspicions that a prospective immigrant's papers are not in order or if many attestations have been requested by a single individual.

2.3. *The recent use of biometrics*

The use of biometrics in visa applications was a key measure in the Law of 26 November 2003 that made fingerprinting requisite. This provision was mandated by the government and the Council of Ministers of Justice and Home Affairs on 5 and 6 June 2003. In March 2005, biometric technology was tested at a number of consulates

through BIODÉV (Biometrics Data Experimented in Visa), a France-led experiment in cooperation with the European Commission and other EU member states. BIODÉV was preceded by a decree in November 2004 that permitted seven consulates to maintain databases of fingerprints and numerically identified photographs of visa applicants for over two years. BIODÉV was principally funded by the European Commission. All French consulates are expected to be equipped with a biometrics system by the end of 2008. Since 1 June 2005, Air France has been experimenting with PEGASE, an automatic system of border control jointly run with France's Ministry of Interior and the border police.

The Council Directive 2004/82/CE of 29 April 2004 requires airline carriers to release passenger data to border control police. The French Lower House readily added this directive to its legislative core, though not without controversy: the government had claimed it was fighting irregular migration but inserted the directive in a bill on terrorism.¹⁸

2.4. *Irregular migrants, deportation, waiting zones and retention centres*

Tackling irregular migration has always been subject to special attention from governments of both political sides. This tendency was only furthered by 2003's three laws that set forth various attention-worthy provisions, including an extension of the detention period required to be able to deport a migrant, a capacity increase among retention centres and a limit on the number of asylum seekers by instating distinct measures (such as the introduction of the 'safe countries list'). France, moreover, took an official position to use quantitative goals vis-à-vis deportation. Thus, in 2002, the government's aim was to expel 10,000 migrants. By 2006, it had hoped to up this figure to 25,000.

In 1999, the prevention of irregular migration was delegated to the Central Office of Border Police.¹⁹ A processing attempt to rationalise police control of migration took effect on 23 August 2005 through the establishment of an immigration police.²⁰ The aim was to coordinate the efforts of all administrations working on illegal migration issues both at the border and inside the territory. Under the direction of the Central Office of Border Police, UCOLII²¹ was thus founded. In addition, the number of border-control agents increased from 7,458 in 2001 to 8,558 in 2006.

It is important to distinguish between categories of deportation. Some account for instances in which migrants are intercepted at the border, primarily at Paris Charles de Gaulle International Airport, while in other cases migrants are placed in so-called waiting zones before being expelled from the country. The latter scenario usually involves irregular migrants who have overstayed their time in the terri-

tory and are thus considered illegal. Prior to their deportation, they are subject to stay in a retention centre.²²

2.5. *Control at the border and waiting zones*

Controls at the border tend to be more sophisticated than they were in the past. Random controls have been systematised at 'hot destinations' vulnerable to potential illegal entries. In 2005, a check of 14,924 flights resulted in the identification of 8,154 illegal migrants (General Secretary of Interministerial Committee for Immigration 2007). However, even individuals with visas may be refused entrance into the French Territory. Various reasons may be invoked, for instance, not having a housing certificate, sufficient funds or a hotel reservation to accommodate their stay. A migrant needs to show that he or she has 53.27 euro *per diem* in spending money or, if in possession of a housing certificate, 26 euro (UCIJ: 2007b). Migrants sent to so-called waiting zones will not all be deported, for some of these asylum seekers will obtain refugee status. Conversely, it should be noted that the aforementioned total number of refusals of entry does not account for deportation.

Table 1 *Overall number of refusals of entry*

1999	2000	2001	2002	2003	2004	2005
47,002	44,815	38,563	42,943	32,223	33,232	35,921

Source: General Secretary of Interministerial Committee for Immigration Control 2005.

Table 2 *Number of persons in waiting zones*

2003	2004	2005
17,073	17,098	16,157

Source: Prime Minister 2005.

2.6. *Deportation once inside the territory*

In the data provided by government departments, we can observe two types of 'deportations' once inside the territory, though not at the border.²³ They include those that are actually effective and those more commonplace ones that are 'pronounced' though have actually failed. In the latter case, the chief commissioner of the police sends a letter ordering a foreigner to leave France. As shown in Table 3 and Table 4, this order rarely has an actual effect.

Moreover, we have to make another distinction: that between removals from France itself and removals from French overseas departments and territories – the French Antilles, Guyana and the Réunion

Table 3 *Indicator of the number of police chief commissioner enforcements*

	<i>Pronounced deportations</i>	<i>Effective deportations</i>	<i>Ineffective deportations</i>
1996	29,633	7,304	22,329
1997	21,918	5,653	16,265
1998	37,361	4,501	32,860
1999	33,855	5,144	28,711
2000	36,614	6,592	30,022
2001	37,301	6,161	31,140
2002	42,485	7,611	34,874
2003	49,017	9,352	39,665
2004	64,221	13,069	51,152
2005	61,595	14,897	46,698

Source: General Secretary of Interministerial Committee for Immigration Control 2007.

Table 4 *Overall outcome of pronounced and effective deportations*

<i>Enforcement</i>	<i>2004</i>		<i>2003</i>		<i>2002</i>	
	<i>Pronounced</i>	<i>Effective</i>	<i>Pronounced</i>	<i>Effective</i>	<i>Pronounced</i>	<i>Effective</i>
Territory bans	5,089	2,360	6,536	2,098	6,198	2,071
Chief commissioner enforcement	64,221	13,069	49,017	9,352	42,485	7,611
Other expulsion enforcements	292	231	385	242	441	385
Total	69,602	15,560	55,938	11,692	49,124	10,067

Source: Prime Minister 2005.

Table 5 *Effective deportations, 2002-2006*

<i>2002</i>	<i>2003</i>	<i>2004</i>	<i>2005</i>	<i>2006</i>
10,067	11,692	15,660	19,849	23,831

Source: Mariani 2007.

and Mayotte Islands in the Indian Ocean. In recent years, there has been a major surge in illegal entries from the latter category. Mayotte is a veritable tinderbox with 45,000 illegal immigrants, plus 15,000 legal ones, which corresponds to one-fourth of the island's total population (Investigation Commission on Illegal Immigration 2006). Guyana's estimate for 2006 is approximately 25,000 to 30,000 illegal residents. In overseas departments and territories, the number of effective deportations has doubled from 7,640 in 2001 to 15,588 in 2005. Mainland France took a similar turn, with its deportations doubling from 9,227 in 2001 to 19,849 in 2005. As already mentioned, this reflected the government's politically designed quantitative objectives for deportations.

2.7. *Retention centres*

Retention centres – as facilities holding migrants who are awaiting their expulsion are called – were set up first in 1984. On 19 March 2001, the conditions of retention were ‘officialised’ by decree.²⁴ A convention legally binds the state and the national association, known as Cimade, in their responsibility for the defence of detainee rights. Today there are 23 retention centres – nineteen in mainland France and four in the overseas departments. In addition, there are more than 100 dwellings used on an *ad hoc* basis as retention centres. These are not allowed for long-term use.

In the past, many deportation orders have not been executed. In part, this has something to do with the fact that periods of retention may be considered too short to obtain a consular pass from authorities of the country of origin that will allow them to expel the migrant. For this reason, the Law of 2003 extended the maximum duration of retention²⁵ in these centres from seven to seventeen days. However, this has created another problem: the overcrowding of these centres – meant, in principle, as temporary housing. During the July 2005 meeting of the Interministerial Committee of Immigration Control, the government thus scheduled a triennial programme for increasing the retention capacity. The overall capacity available among retention centres in June 2002 was approximately 959 places. By June 2005, the number had risen to 1,300 places, and a cap of 2,700 has been envisaged for June 2008. This policy of increasing retention centre capacity is part of a framework in which annual scheduled goals were set by the French Ministry of Interior to augment the number of escorts back over the border. In particular, the chief commissioner of police has been given a specific deportation quota to enforce.

Table 6 *Number of persons in retention centres per year*

2002	2003	2004
25,131	28,155	30,043

Source: Prime Minister 2005.

2.8. *Consular pass: the limit to unilateral government action*

For an immigrant in France to be deported to a third country, a consular pass from his or her country of origin must be obtained. Otherwise, on the basis of not having the administrative back-up for expulsion, the migrant may remain in France. Extending the retention duration as such is done for the sake of biding time to obtain the consular pass. Seeing as many consulates are not in favour of cooperation, however,

the compliance rate is quite low. Only about 20 to 30 per cent of the cases forwarded by the French authorities produced consular passes. Some consulates explicitly demand money in exchange for cooperation.

In 2005, France signed 37 bilateral readmission agreements. Ever since July of that year, once the government announced harsher measures against countries refusing to corroborate with readmission of their nationals, the compliance rate of issuing consular passes has increased. It rose from 35 per cent in 2004 to 46 per cent in 2005 (Investigation Commission on Illegal Immigration 2006).

2.9. *Document fraud*

Several measures have also been taken to prevent the forging of documents. For instance, in September 2005, the police visited a number of French consulates to help check the authenticity of documents. In 2003, the French border police detected 11,603 people in possession of false documents.

2.10. *Carrier sanctions*

Under Council Directive 2001/51/CE, French legislation has come to increase carrier sanctions. This European harmonisation was initiated by the French authorities. With the 2003 Law in effect, the sanction for permitting an illegal migrant to enter the territory is now 5,000 euro per person. Former pecuniary sanctions were about 1,500 euro per person.²⁶ However, carriers may earn partial exonerations by helping authorities transmit documents or establishing certain infrastructure such as a scanning system.

3. **Internal controls**

3.1. *Workplace controls*

In France today, a range of government departments is responsible for the investigation of illegal migrant workers. The three main institutions involved are:

- 1) The Office Central de Lutte contre le Travail Illegal (OCLTI), which was established by decree on 12 May 2005. This office falls under the direction of the gendarmerie, which is a division within the police department operating with a separate administrative status.
- 2) The Délégation Interministérielle à la Lutte Contre le Travail Illegal (DILTI), which was created by decree on 11 March 1997. Functioning under the Prime Ministry, this delegation works at the national

level and, in so doing, provides assistance to government agencies, facilitates coordination and initiates studies.

- 3) The Office Central pour la Repression de l'Immigration et l'Emploi d'Étrangers sans Titre (OCRIEST), which is in charge of dismantling illegal migrants networks and organised crime.

Illegal employment of migrant workers constitutes about 10 per cent of all illegal employment in France (Weil 1997; OECD 2000; Investigation Commission on Illegal Immigration 2006). The MISEFEN Law of 2003 has imposed more severe sentences – five years in prison and fines of up to 15,000 euro – for those who employ illegal immigrants. Convictions, however, are unusual; there were only 572 in 2000 and 818 in 2004. Scarcely are there any prison sentences, with only three accounted for in 2005; the sectors most frequently charged are construction and catering. Nonetheless, it should be noted that France has experienced a significant change concerning the employment of workers from abroad. Contrary to a country like Germany, where there has always been a huge and predominantly agricultural foreign labour force, coming primarily from Central and Eastern European countries, Europe's largest agricultural producer – France – does not rely on migrant labour in this sector. In effect, France no longer depends on large-scale labour migration whatsoever. Whereas in 1980, the agriculture sector accounted for 120,000 entries into the country and remained stable over the next decade, since the beginning of the 1990s, the number has totalled only 10,000 labour migrants each year (Martin et al. 2005).

3.2. *Random street checks*

Up until 2003, it was rare for people to be randomly stopped on the street for checks on the legal status of their residence. These checks now seem to have become common everywhere (Cimade 2005). Moreover, every person in France is required to carry at all times a document that verifies his or her identity. Illegal residence is considered a crime – this in itself is ground for expulsion. One ministerial rule even gives directive to apprehend illegal migrants in different areas – e.g. at home, in the office of migration administration, on the street – by pointing out how to avoid inefficiencies in the procedure. In this sense, the government's priorities in the matter are clear.²⁷ Nevertheless, governments have sometimes had to resort to opt-outs for certain illegal migrants who can be expelled for juridical reasons. Instead, the migrants get regularised in accordance with labour market legislation and rules pertaining to work permits that allow illegal migrants to claim

their salary if gone unpaid by an employer (Article L-341-6 du Code du Travail).

Among the array of indicators that exist to evaluate the size of the illegally residing population, Aide Médicale d'Etat is a noteworthy one. This state service provides medical care to illegal residents in accordance with the Law of 25 July 1999. Among those who benefited from medical assistance (Prime Minister 2005), there was a sharp rise from 139,000 individuals in 2001 to 170,000 in 2003. Using such numbers, the Prime Minister's office estimates that the population of illegal residents in France lies between 200,000 and 400,000 people.

3.3. *Transport checks*

Controls to detect illegal migrants in passenger trains are a new phenomenon in France, arising precisely from pressure by the UK. The UK's Immigration and Asylum Act of 1999 proclaims that every person who helps someone illegally enter into the territory is declared responsible for the entrance. Extending this regulation beyond its borders, the British Home Office began demanding that France's national train company SNCF pay penalties for each illegal migrant found in Le Shuttle upon crossing the British Channel. SNCF pleaded leniency, requesting greater understanding for the challenge to control migrants who arrive through Italy. Since a decree of 24 November 2000, however, train officials have been allowed to check the identity of riders not holding valid tickets.²⁸ While officials themselves cannot force passengers to exit the train, they can call on the police to escort away passengers of questionable identity (National Council of Transports 2001). Today, France has two police brigades supervising train lines along the British border in Lille and the Italian border in Nice.

3.4. *Prevention of sham marriages*

Sham marriages – that is, marriages undertaken for the sake of gaining residency – are a new focus of migration control in France. In this regard, the state has transferred migration control to city mayors. The Law of 2003 adds two conditions for the spouse of a French citizen to obtain permanent residency: the couple has to have been married for at least two years and they must be living together. Since the Law of 2006 went into effect, however, a compulsory three-year period for the marriage was instated. The state may thus withdraw an authorisation either if the engagement is broken or if it authorities determine that the marriage was only undertaken for the sake of a residence permit. Since the Decree of 23 February 2005, all affairs related to marriages contracted abroad are dealt with by the Court of Nantes. A Constitu-

tional Court decision of 20 November 2003²⁹ forbids mayors from suspending a marriage if one of the parties is an illegal migrant. However, since the Immigration Law of 2006, a migrant must be married in France to obtain a long-term residence permit.

4. Family reunification and ‘integration contract’: an unintended means of control?

There are three main methods of controlling family reunification. First, sufficient financial means are needed in order to secure the right to family reunification. Since the 2006 Law came into effect, social assistance and child benefits are no longer considered viable financial resources. The following law in 2007 has modified this provision by requiring an applicant to earn 1.2 times the minimum wage. Second, the Law of 2006 has extended the required period of French residence from twelve to eighteen months, before the resident can become eligible for family reunification. Nevertheless, family reunification may be refused to people whom the state finds disrespectful of fundamental rights such as equality between men and women. Third, since the 2006 Law, a migrant can obtain a long-term residence card – through the family reunification procedure or not – only if he or she is deemed sufficiently integrated. This integration contract applies to all migrants seeking a residence title.

The 2007 Law seems to have ushered in a new mode of migration control. The integration clause also tends to be externalised – that is, used as a means of control directly in the country of origin. In cases where the migrant’s family is thought to lack sufficient knowledge of French Republican values and language, a two-month training course funded by French authorities in the country of origin is made available to the applicants. This preparation, however, is on a voluntary basis, and does not by any means constitute a condition for entry into France. Mere participation in the educational programme is usually considered sufficient, even without any end assessment.

However, two observations should be made vis-à-vis the evolution of French legislation. First of all, its varying bills have been reflective of differing experiments more than its final drafts may indicate. Thus, ensuing laws have required adjustments along the way for controlling immigration. Although the integration contract was first experimented with on a voluntary basis, it was eventually extended for general application and with real compulsory effects. It would not be unreasonable, then, to assume that even if under the 2007 Law an externalised integration contract for family reunification was not a condition for entry, it might be in the future. Secondly, these three last laws have not really

touched upon questions regarding naturalisation. As prospective sham marriages and family reunification are no longer invulnerable categories, access to nationality may well be the next candidate at stake for modifications.

5. Conclusions

France's migration system, much like that of other Western states, seems to be evolving into selective immigration. To illustrate, France, like other countries, wishes to enter into the competitive ranks of international universities by accepting more and more foreign students. In practice, however, French universities cannot truly compete with other European institutes because France does not charge the tuition fees with which they could improve quality of education and thereby gain prestige. This is the practice of most influential universities elsewhere. As it stands today, French universities – despite being poorly equipped – accept 2.5 times more foreign students in proportion to its overall student population than does the United States.³⁰ This situation highlights the fact that governments may follow a trend without examining the internal situation of the institution at hand – in this case, universities. As such, governments may interfere simply to promote their own selective immigration lines.

In this sense, one new feature of government policies during this last period, from 2002 onwards, has been its quantitative approach. At the core of irregular migration policy has been the desire to set higher and higher annual goals for expulsion. By contrast, the so-called quota policy was set in order to privilege economic migration over family reunification and asylum migration.

A stringent process of migration control has thus taken place to target all possible entries (prospective sham marriages, family reunification, etc.) that were not subject to regulation before – they were underpinned by constitutional rights. Furthermore, migration concerns are now managed with a more holistic overview of the issue rather than as isolated, decontextualised incidents. This new approach was underscored by the Interministerial Committee of Immigration Control in 2005, which simultaneously involved all concerned administrations, the launch of an immigration police and, later, the foundation of the Ministry of Immigration.

Of course, these reforms did not occur without contestation. In the summer of 2006, there were some troubles for the government concerning the expulsion of children of irregular migrants. The situation involved some only 7,000 regularisations from a pool of nearly 30,000 demands. More recently, the government was criticised for policy invol-

ving use of a DNA test for family reunification, which was seen as being overly utilitarian. But the opponents were not part of the political opposition of the Parliament, i.e. the Socialist Party. Since the Law of 2003, this party has only shyly criticised immigration policy. On the contrary, the French government's real opposition has come from mostly far-left organisations within the Uni(e)s Contre une Immigration Jetable³¹ (UCIJ). Although the Socialist Party had finally signed a collective petition by organisations in fierce disagreement with the government's policy, it was notable that none of its leaders had attended their meetings (Annexes UCIJ 2007B). One reason seems to be that while the Socialist Party is ideologically divided, most members publicly agree on the idea of regulating migration. Some have even spoken out about 'shared migration', in contradistinction to Sarkozy's 'chosen migration'. In fact, the government's opposition did not seem to correspond with the general outlook of French citizens whatsoever. A recent poll demonstrated that more than 60 per cent of French citizens, including 53 per cent of left voters, support the key ideas of the government policy³² (*Le Figaro* 10 May 2006). Surprisingly, 73 per cent of left voters support binding the long stay to a condition of integration. Resorting to integration as a mode of migration control thus constitutes a new feature that is highly consensual.

Thus, the opposition movement in favour of totally open borders did not achieve any effective political success. More than this, it was the first time in three decades that a political majority from the previous mandate had been elected again for the next presidency. And in fact, migration control was one of the main characteristics of Sarkozy's programme. Opponents claiming that the government took a utilitarian stance – by linking entry and stay to an economic interest while fighting against family reunification and asylum seekers – did criticise this well before Sarkozy adopted this position. Some of their claims go against the European selective immigration view, which was born less than a decade ago.³³ Opposition did thus exist before the government policy that officially appeared during the period 2005-2006. Indeed, it also highlights how a significant part of Sarkozy's policy has stemmed from the European level indeed.

Key characteristics of French controls

- Residence permits card along with a visa needed
- Mandatory carrying of ID at all times
- Mayors housing certificate to enter in France
- Entry in France subject to financial resources for family reunification

- A new approach using quantitative targets: this applies to targets in the deportation of illegal migrants as well as to a new quota policy targeting the highly skilled
- A trend towards the externalisation of control: long-term visas required to obtain a residence title and sufficient language skills are increasingly sought (if not compulsory) before giving leave to enter France

Notes

- 1 *Relatif à l'Entrée et au Séjour des Étrangers en France et au Droit d'Asile.*
- 2 Sarkozy was the main author of all three laws, having been minister at the time of their creation and then being elected President in spring 2007.
- 3 Concerning this matter, one influential politician responsible for writing all the parliamentary reports was MP Thierry Mariani.
- 4 This is known as the MISEFEN Law (*Maîtrise de l'Immigration, du Séjour des Étrangers en France et de la Naturalisation*).
- 5 Article 12 of the Law of 24 July 2006 accounts for migrants with skills in intellectual, sports and artistic fields. Article 9 is merely the result of the Council Directive of 12 October 2005 concerning scientists.
- 6 Officially, this is called a '*contrat d'accueil et d'intégration*'.
- 7 After being tested in some areas, this voluntary contract was extended to the whole territory by the Law of 18 January 2005 on social cohesion.
- 8 As will be discussed vis-à-vis family reunification, integration is not actually a condition to obtain the right of such a reunification
- 9 From a pool of 30,000 applications, 6,924 persons were legalised under the ministerial regulation of 13 June 2006.
- 10 Office Français de Protection des Réfugiés et Apatrides.
- 11 It is important to underscore the fact many implementing decrees took effect later.
- 12 This refers to Council Directive 2005/85/CE, which is as yet unpublished.
- 13 Although there was a decrease in the number of asylum seekers who were granted asylum despite this filter at the border – from 2,548 in 2004 to 2,278 in 2005 – a reverse trend occurred the following year, resulting in 2,866 grants for asylum seekers at the border.
- 14 During the Socialist Party's internal presidential campaign, Strauss-Kahn used the words 'Ministry of Migrations'.
- 15 Sarkozy was Minister of the Interior from May 2002 until April 2004, when he became Minister of State with prerogatives of the Prime Minister to organise interministerial meetings. For a short period, he was also Minister of Economy and Finances. After the unsuccessful European Constitution referendum of May 2005, Sarkozy maintained the title Minister of State while heading the Ministry of Interior
- 16 Instituted by decree on 26 May 2005, this committee has so far convened five times: 10 June 2005, 27 July 2005, 29 November 2005, 9 February 2006, 5 December 2006.
- 17 We can place these works in the context of Michel Foucault's vision of the diffusion of power. Contrary to many philosophers, Foucault stressed that over a long period political power does not disappear but, instead, tends to penetrate the life of individuals and thus control it.
- 18 In Article 7 of the Law of 23 January 2006.

- 19 Direction Centrale de la Police aux Frontières.
- 20 Ministerial rule of 23 August 2005.
- 21 Unité de Coordination Opérationnelle de la Lutte contre l'Immigration Irrégulière.
- 22 Retention centres differ from waiting zones in that the former are used once a migrant is already in France and the latter are reserved for interceptions at the border.
- 23 As already noted, 'deportation' does not account for cases in which someone has failed to pass the border after having been issued a refusal of entry or placed in a waiting zone prior to expulsion.
- 24 Regulation of November 1945, Article 35bis.
- 25 This was also part of the recommendations for the former government addressed by Patrick Weil in his 1997 'Mission d'étude des législations de la nationalité et de l'immigration', Report for the Prime Minister; <<http://lesrapports.ladocumentationfrancaise.fr/BRP/99400104/0000.pdf>>.
- 26 Article 27 of the MISEFEN Law, modifying Article 20bis of the Regulation of 1945.
- 27 Ministerial rule of 21 February 2006.
- 28 SNCF is also given this right, though not mandated to exercise it.
- 29 Decision number 2003-484 DC.
- 30 Foreign students represent 4 per cent of the overall student population in the United States, as compared to 10 per cent in France.
- 31 This translates to 'united against disposable immigration'.
- 32 The poll did not ask people if they were for or against the government policy, but rather, if they were in favour of some tougher measures that were those of the policy.
- 33 For more on the European selective immigration policy, see Frédéric Coste (2006), 'Les quotas dans la Politique d'Immigration Européenne: Du Sommet de Tampere au Programme de La Haye', *Migrations Société* 18 (103): 55-73.

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Report from Germany

*Birgit Glorius*¹

1. Introduction

By the end of 2006, Germany had a resident population of 7.3 million people with foreign citizenship and a total 15.1 million of 'migration background'. This latter figure represents almost one-fifth of the country's population (StBa 2008). Over the last decades, both the volumes and the geographical origins of migration flows have rapidly changed, and so too have political actions taken towards regulating immigration as well as the public's subsequent awareness of it. A net inflow of 788,000 in 1992 made Germany the second largest immigration country in the world that year (Angenendt 1999: 166). This historic record also led to a re-evaluation of migration regulation and to greater civic consciousness of the state's efforts to regain control on migration flows into the self-proclaimed 'non-immigration country' that was Germany. However, the state soon began to face the first effects of demographic ageing – made especially visible in the form of highly skilled labour shortages – and it became more and more aware of integration problems that the former so-called 'guest workers' and their offspring were experiencing. As such, the public and political debate on migration and integration shifted: rather than just controlling migration, discourse began to emphasise the aspect of *shaping* migration.² One of the results of this debate was a clear statement by the state that it would promote better integration opportunities for foreigners in German society. Nevertheless, the subsequent policies on immigration and their surrounding discourse are still dominated by the issue of control. This is also clearly expressed by the title of the new Immigration Act 2004: Law for the *Control* and *Limitation* of Immigration and for the Residence and Integration Regulation of EU Citizens and Foreigners³ (my emphasis). Germany's Immigration Act 2004⁴ as well as various pertinent EU-level policies form the legal basis of the country's activities in the field of migration control.

This report describes the present regulation of immigration into Germany, following the leitmotif of control. It will elaborate on central immigration paths into the country, corresponding regulations, external control and defence measures, as well as the system of internal con-

trols that reaches out to the major aspects of daily life, such as work, accommodation, education and health. To better understand the evolution of German immigration control and its legal basis, the report will start with a brief review of the country's immigration history, from after the Second World War up until today. The report will then turn to the current structure of external and internal immigration control.

2. Brief history of immigration and its regulation

From both historical and geographical perspectives, it becomes clear that a large share of the German population was either born outside the state's present-day territory or stems from parents who were born abroad. In the wake of the Second World War, many refugees from the former German territories in Central Eastern Europe settled in Germany. The first provisional population census in the Federal Republic of Germany (FRG) of 1950 counted 9.43 million of these refugees known as *Heimatvertriebene*, including refugees from the Soviet-controlled zone that would later become the German Democratic Republic (GDR) (Lederer 1997: 227). The establishment of new frontiers in Central Eastern Europe left behind a large number of displaced ethnic Germans. A remigration system was subsequently established for them that was characterised by an easy regularisation procedure and a very generous integration programme. Between 1950 and 1990, around 2.4 million so-called *Aussiedler* arrived, coming mainly from Poland, the Soviet Union, Yugoslavia, Romania and Czechoslovakia (Lederer 1997: 231f). The prospering economy of the 1950s and 1960s raised the demand of industrial workers. This compelled the state administration to implement a programme of temporary labour migration – the so-called 'guest worker programmes', the *Gastarbeiterprogramm* – for the recruitment of manual labourers from the less prosperous countries of Southern and South-Eastern Europe, such as Italy, Spain, Portugal, Yugoslavia, Turkey and Greece.

Between 1955 and 1973, guest worker programmes constituted the most important immigration channel to Germany. Immigration controls during this period were clearly subordinate to economic interests: external controls were not very restrictive and legal stay was not directly dependent on legal entry. Immigrants could apply *de facto* for a residence permit even after having crossed the border irregularly and having found an employer (Vogel 2003: 168). After the 'oil crisis' of 1973, several European states adopted stop-policies for foreign workers, thus making legal stay contingent upon legal entry and thereby putting an end to the aforementioned *ex-post* regularisation channels. In Germany's case, this policy change was institutionalised through the *Anwer-*

bestopp of 1973. It subsequently marked the official end of the recruitment of labour migrants. However, the unexpected consequence of this policy was an actual increase of migrants from the guest worker countries. Many of the temporary migrant workers opted for permanent stay in Germany, rather than returning to their countries of origin, and a large number of family members subsequently moved to Germany on the basis of family reunification.

Another important entry channel was the immigration of asylum seekers. In the wake of the Nazi regime, both German states deemed it a historically momentous, humanitarian obligation to guarantee shelter to political refugees. A very generous asylum law was thus developed. West Germany assumed an especially important ideological function in the polarised world of the Cold War: the presence of refugees from Eastern European countries was seen as proof of the 'superiority' and attractiveness of Western countries, while in the GDR, communist and anti-fascist refugees from Spain, Greece and Chile served the same function (Sachverständigenrat 2004: 113f).

Particularly by the end of the 1980s and the years ensuing, Germany faced a situation in which immigration was occurring less as a response to internal factors (e.g. economic needs and migration policy) and more as a response to external factors (Angenendt 1999: 166). The country experienced increased inflows of civil war refugees, *Aussiedler* and asylum seekers, mainly from the economically and politically collapsing Central Eastern European countries. As a reaction to these unexpected – and unwanted – migration flows, German governments operated a progressive 'externalisation' of immigration control. Through several changes in the law, legal stay became dependent on legal entry. Meanwhile, access to other legal channels such as asylum and *Aussiedler* immigration becomes more and more difficult and visa requirements, more stringent.

The latest and perhaps most significant constitutional change was the implementation of the new Immigration Act 2004 on 1 January 2005. The Immigration Act restructured the legislative activities towards immigration and its regulation, summarising into one single act several laws and subsequent regulations concerning immigration, residence and work.⁵ This constitutional change also had a strong symbolic effect, showing that Germany accepted playing the role of an immigration country. However, as already mentioned above, the Immigration Act 2004's thrust is on the limitation and control of immigration. It has opened up but a few new paths for the desired immigration of highly skilled migrants. Most political parties in Germany see the Immigration Act 2004 as not far-reaching enough, from either the perspective of control and limitation or liberalisation and integration. As a matter of fact, the Immigration Act 2004 was implemented only after

a long and harsh political dispute, in many ways giving off the impression that it was the result of compromise.

3. External controls

External controls are measures that affect the external borders of a country. They include the regulation of regular migration flows as well as the rejection, expulsion and deportation of irregular migrants. The following section will give an overview of modes of legal immigration and then explain how the Federal Republic of Germany deals with irregular migration flows.

3.1. *Visa requirements*

Regular entry into Germany is linked to the possession of a valid visa. Today visa requirements for all Schengen countries are defined by European Council Regulation No. 539/2001 of 15 March 2001, last modified through Regulation 851/2005/EC, which foresees visa requirements for 131 non-European countries. Nevertheless, Germany introduced visa requirements as early as 1980, due to a large increase in asylum seekers at the beginning of the decade. At present, foreigners can apply for tourist, familial,⁶ work and business visas. Should a visa for visiting or business purposes be requested, German authorities require a 'responsibility declaration' that holds the prospective host financially accountable for the migrant. Business visas require a similar declaration in the form of an official invitation from the company of employment. On a case-by-case basis, authorities evaluate the likelihood that a person will overstay by considering his or her background and the opportunities he or she will have for repatriation. In the case of a work or study visa, both of which must be applied for from an applicant's home country,⁷ the applicant must be able to show various certifications. Besides proof of being able to self-finance stay in the country, the applicant must present a work contract or a letter of acceptance from an academic institution. A visa can cost either 30 euro (for a national German visa) or 60 euro (for a hybrid or a Schengen visa); a visa application is cost-free, but the applicant must purchase European travel insurance to cover possible health expenses. German authorities may refuse issuance of a visa if, for example, they have doubts about the applicant's inclination to return. In 2006, German authorities issued 1,827,684 Schengen visas for short-term stays, 169,884 national visas for longer stays (e.g. for work, study or family reunification purposes). Of this total number, 233,561 applications were rejected (AA 2007). At national and supranational levels, visa policy is considered a

control instrument *par excellence*. However, Germany's 2005 visa scandal⁸ revealed that German visa policy is not as restrictive as expected.

3.2. *Entry for work purposes*

Despite the recruitment stop of 1973, the possibility to enter and work in Germany was still feasible under certain exceptions listed in the Regulation of Exceptions of the Recruitment Stop.⁹ In the beginning of the 1990s, furthermore, German state administration had developed recruitment schemes based on bilateral agreements entered into with several Central Eastern European states. The declared objective was to support their economic transformation process. Such agreements concerned contracted work (mainly in the construction industry), agriculture-based seasonal work and vocational training). They also established regulations for cross-border workers from Poland and the Czech Republic, who are permitted to work within a 50-kilometre radius of the German border, though while maintaining official residence in their home country and either returning there daily or limiting their stay in Germany to two days a week.¹⁰ Seasonal workers have been the largest group of foreign workers by far: in 2005, they numbered at 320,389, the majority being Polish citizens. Meanwhile over the last decade, the allocated number of treaties issued for contract workers – as Germany's second largest group of immigrants – was usually around 40,000 (after having reached its maximum of 94,902 in 1992) (BAMF 2005: 152ff). Seasonal labourers can work in Germany for a maximum of three months each year. Contract workers are recruited for a limited period of time, usually two years. Once a contract expires, they must return to their home country and are only eligible for a new contract after a specified waiting period.

The regulatory frames for temporary recruitment schemes have been subject to various changes since coming into existence. The quota of the different recruitment schemes, in particular, have been adjusted to the needs of the German labour market (see BAMF 2005: 71). One of the most recent innovations was the introduction of an additional recruitment programme for Central Eastern European domestic workers who are to be employed as caretakers of the elderly and the disabled. This action may be interpreted as an attempt to regularise the large number of domestic care workers who are believed to be living in Germany, as several qualitative studies suggest (see Alt 2003; Friese 1995). However, due to the restrictive regulations of this recruitment scheme both for the employer and for the employed, this programme was not very successful.¹¹ The job market for highly skilled migrants was opened in 2000 through the so-called Green Card Regulation for IT specialists, although their recruitment had been already possible

through internal personal transfers before its enforcement (Kolb 2004). However, the number of highly skilled immigrants remained quite low when compared to other immigration channels (see Table 1). All in all, the Green Card Regulation represented a process of opening up towards labour immigration before the approval of the new Immigration Act 2004.

The new regulations cater to the needs of the German economy and the national labour market, mainly focusing on highly skilled workers (§ 18(1) Residence Act 2004). In general, residence permits for work purposes can only be issued by the Federal Work Agency, the *Bundesagentur für Arbeit*, after a priority check has been conducted, thus allowing foreign recruitment if and only if no German citizen or a 'privileged' foreigner¹² is available for the same job (§ 39 Residence Act 2004). Highly skilled immigrants can enter the country only if they have a concrete job offer, favourably in a science field, as an academic instructor or in any other position with an annual remuneration of at least 85,500 euro (§§ 18 and 19 Residence Act 2004). Self-starting entrepreneurs can obtain a residence permit if they invest a minimum of 500,000 euro and offer employment opportunities for at least five persons (§ 21 Residence Act 2004, changed through the *Richtlinien-Umsetzungsgesetz* of 19 August 2007, BGBl I 2007, No. 42).

Summarising these regulations and their effects on migration schemes and numbers (see Table 1), it becomes clear that while Germany has stressed the need for highly qualified migrants, the majority of labour migrants is actually recruited for low-qualified jobs, albeit under much more restrictive conditions. This inconsistency between labour needs, both pronounced and provided for, and actual migration practice may be attributed to the various exceptions that have interrupted the recruitment stop (contract workers, seasonal workers, et al.).

Table 1 *Main groups of labour migrants in 2006*

Seasonal workers	294,450
Contract workers	20,001
Guest workers	1,415
Cross-border workers	1,514
Domestic workers in care households	2,241
Highly qualified non-EU citizens*	80

* no data available on the circulation of highly qualified employees within the EU

Source: BAMF 2006b.

3.3. *Students*

In general, foreign students wishing to apply for a visa must hold a letter of admittance to a German university and valid health insurance. If they have not already been admitted into a German university, they may also apply for an applicant visa known as a *Studienbewerbervisum*, which is valid for three months. A three-month *Sprachvisum* may also be issued for those wishing to study German. Non-European students are only permitted an annual total of 90 full days or 180 half-days of work. In 2006, 53,554¹³ students from abroad¹⁴ undertook university education in Germany. Since the implementation of the New Immigration Act 2004, foreign students can extend their stay after graduation from a German university up to one year in order to look for a job in Germany. In 2006, 1,954 persons held a residence title under this condition (BAMF 2006b).

3.4. *Ethnic immigration: Aussiedler and Spätaussiedler*

The immigration of *Spätaussiedler* (referred to as ‘*Aussiedler*’ until the 1990s)¹⁵ is regulated by the Federal Law for Displaced Persons¹⁶ of 1993, which is modified by the new Immigration Act 2004 (§ 6). This immigration channel focuses on persons of German origin who had been displaced over the course of frontier changes after the Second World War. Such individuals are said to define themselves as German and to demonstrate such self-perception through their use of the German language and their practice of German culture (BBMFI 2003: 27). Once a migrant’s *Spätaussiedler* status is approved, he or she gets access to the social system, the German labour market and financial aid (Pallaske 2001: 128). Criteria for approving such status has become far more exigent since the end of the 1980s, when Germany experienced a huge increase of *Spätaussiedler* immigration due to the political and economic crises in Central Eastern Europe. Among other measures, applications must now be submitted before entering the Federal Republic, the applicants must pass a German language exam¹⁷ and they must provide evidence that they have experienced ethnic discrimination in their current country of residence (BAMF 2005: 39; Lederer 1997: 228).¹⁸ As a result, *Spätaussiedler* immigration has declined dramatically – from more than 200,000 per year in the 1990s to less than 100,000 yearly since the year 2000. Meanwhile, the share of spouses and offspring of such applicants had grown from 45 per cent in 1995 to 81 per cent in 2004 (BAMF 2006b: 246). Regulations for the immigration of applicants’ non-German spouses and offspring were thus modified in the Immigration Act 2004 (§ 6), when – among other measures – German language tests were extended to all migrating fa-

mily members of the *Spätaussiedler* applicant. In 2007, only 7,747 persons migrated to Germany under the *Spätaussiedler* scheme, with the share of spouses and offspring thus dropping to 62.4 per cent.

3.5. *Jews from the former Soviet Union*

In 1990, the last administration of the GDR began opening up an immigration channel for Jews from the former Soviet Union. This practice was carried on by the unified German state after its reunification. The country applied the Quota Refugee Law,¹⁹ which had originally been established in 1980 for refugees from South-East Asia (e.g. the so-called 'boat-people'²⁰). Individuals of Jewish descent from the former Soviet Union could thus apply for a residence permit at the German embassy in their country of origin. Applications were checked case by case; admission was contingent on accommodation and support capacities that the FRG and the German federal states, the *Bundesländer*, could offer. The state's motive for establishing this immigration programme was reported as being the desire to strengthen Jewish communities in Germany. Between 1991 and 2004, nearly 200,000 people of Jewish descent and their offspring migrated to Germany from the former Soviet Union, mainly from the Ukraine and the Russian Federation (BAMF 2005: 48f; Lederer, Rau & Rühl 1999: 23). With the implementation of the new Immigration Act 2004, the Quota Refugee Law was abolished. Now Jewish migrants must apply for a residence title under the regulations of the new Residence Act (§ 23 AufenthG). In a subsequent decision, the German *Bundesländer* Ministry of Interior further specified admittance criteria concerning Jewish immigration. Among other requirements, applicants now need a favourable prognosis of their capacity to secure family income through their own means as well as a German language certificate. As a result, the number of admissions dropped from approximately 15,000-20,000 per year between 1995 and 2003 to 11,208 in 2004 and 1,079 in 2006 (BAMF 2006b).²¹

3.6. *Right of asylum and subsidiary protection*

Another possible way to secure legal stay in Germany is by applying for asylum. Every asylum applicant obtains a residence permit that is valid until the final ruling on his or her application. After the huge increase of asylum seekers in the years before and after the collapse of the communist regimes in Central Eastern Europe (with a peak in the year 1992, when 438,191 applications were counted), the national asylum law was revamped so Germany could regain control on its inflow of refugees. The redesign was expected to expedite the application pro-

cedure and to develop instruments for the detection of persons who were clearly ineligible for asylum. One of those new instruments took the form of mandatory fingerprinting of all applicants in order to detect duplicate registrations. This has proven to be quite a successful measure: in 1993 double registration was detected in 12.4 per cent of applications, whereas in 2003, the number fell to 2.3 per cent (Sachverständigenrat 2004: 137).

The reform of the constitutional right of asylum (§16a (2) Basic Law)²² excludes the individual right of asylum to people who enter Germany from an EU member state or from another safe third country (as per the 'safe third country' rule). German Basic Law therefore excludes asylum seekers who enter the country by land from the constitutional right of asylum. For asylum seekers who have applied for asylum in an international airport, the law foresees a special airport procedure²³ regulated in § 18 of the Asylum Procedure Act.²⁴ No doubt the German asylum channel's attractiveness was tarnished by 1993's new Law of Social Benefits for Asylum Seekers,²⁵ which cut state provisions for asylum seekers.

Germany's constitutional regulations concerning the handling of asylum applications extend to the EU level.²⁶ A case in point, the Dublin Agreement 1997 was instated to prevent the secondary migration of refugees within the EU territory and their consecutive application for asylum.²⁷ This new regulation became necessary after the cessation of boarder controls in the course of the Schengen Agreement. According to the Dublin Agreement, every asylum application of a third country national is first checked vis-à-vis the state in charge. If another EU member state is found responsible for the refugee, a 'readmittance request'²⁸ is issued to the respective member state. Within a certain period of time, the member state must then accept or refuse readmittance of the refugee. In order to facilitate this measure, an automated computer system for crosschecking refugees' fingerprints was introduced in 2003 in all EU member states. EURODAC, as the system is known, steadily upped Germany's share of 'readmittance requests' from what was a standard 4-6 per cent of all asylum applications. In 2006, the number rose to 23.8 per cent – that is, 4,996 of 21,029 applications. From those 4,996 cases, a readmittance request was issued for 3,290 cases, of which 1,940 persons were actually readmitted to another EU member state. By contrast, in 2006, Germany received 5,103 requests for readmittance by EU member states and actually readmitted 2,795 people (BAMF 2006: 36).

Despite restrictions on the constitutional right of asylum, German law takes additional forms of subsidiary and temporary protection into consideration. People facing danger of political persecution may refer to § 60 of the Residence Act 2004 regarding protection for humanitar-

ian reasons. This paragraph regulates the Convention refugee status and the prohibition of deportation, as derived from the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the U.N. Convention relating to the Status of Refugees of 28 July 1951. Specifically, it prohibits the deportation of refugees in cases where a country of origin poses serious risks to an individual's life, personal integrity, freedom or the danger of torture. Persons who fit the Convention's definition of refugee or who fall under prohibition of deportation obtain a temporary residence title and a work permit. After three years of legal residence in Germany, they can apply for a permanent residence title. Individuals who cannot be deported for factual or legal reasons²⁹ receive a 'toleration permit'³⁰ (§ 60 (1) Residence Act 2004). This allows an individual provisional stay in Germany, though without possibility to obtain a regular residence title or work permit. The individual is then enforced by the state to leave the country as soon as the legal or factual reasons for non-deportation are abrogated.

In the last decade, Germany has refused the majority of asylum applications (see Table 2). In 2006, out of a total of 30,759 decisions, only 251 asylum grants (0.8 per cent) were issued and 17,781 applications (57.8 per cent) were refused. Additionally, the Convention refugee status was granted to 3.6 per cent of asylum seekers (1,097 admissions out of 30,759 decisions), prohibition of deportation applied to 2.0 per

Table 2 *Applications and decisions on asylum in Germany, 1996-2006*

	Total asylum applications*	Total decisions** on asylum applications	Of which are...				
			Granted asylum	Granted Convention refugee	Prohibition of deportation	Refused	Other***
1996	116,367	194,451	7.4%	4.9%	1.1%	65.1%	22.5%
1997	104,353	170,801	4.9%	5.7%	1.6%	59.7%	29.7%
1998	98,644	147,391	4.0%	3.7%	1.7%	62.2%	30.1%
1999	95,113	135,504	3.0%	4.5%	1.5%	59.2%	31.7%
2000	78,564	105,502	3.0%	7.9%	1.5%	58.6%	29.0%
2001	88,287	107,193	5.3%	15.9%	3.2%	51.7%	24.0%
2002	71,127	130,128	1.8%	3.2%	1.2%	60.6%	33.2%
2003	50,563	93,885	1.6%	1.7%	1.7%	67.1%	27.9%
2004	35,607	61,961	1.5%	1.8%	1.6%	62.3%	32.8%
2005	28,914	48,102	0.9%	4.3%	1.4%	57.1%	36.4%
2006	21,029	30,759	0.8%	3.6%	2.0%	57.8%	35.8%

* number refers to initial applications

** Number of decisions does not refer to number of applications in the same year³¹

*** e.g. withdrawal of application

Source: BAMF 2005: 57, 2006a: 39.

cent of asylum seekers (603 admissions out of 30,759 decisions) (BAMF 2006a: 39).

4. Irregular immigration and irregular stay

Not having the necessary visa or residence title is considered a crime in Germany. Border guards (*Bundespolizei*), police officers and local and national authorities work hand in hand to prosecute those who are regarded criminals as such. Besides control at the German borders and within border zones,³² the *Bundespolizei* competence includes control in public places such as in train stations or aboard trains. Furthermore, the police, in their function as an 'internal authority', are obligated to check for identity cards *and* residence titles on routine controls. Persons who have committed crimes against Residence Act 2004 or against the Asylum Procedure Code of 1993³³ are included in the regular criminal statistics of the police. Criminal statistics registered for 2004 comprised 81,040 such cases, 18,215 of which were recorded as occurring at the external borders (see Table 3) (BAMF 2005: 16off). As is the case with asylum seekers, detected irregular migrants must register their fingerprints in a national police's Automated Fingerprint Identification System (AFIS) so as to keep verified proof of their identity on record (Sinn, Kreienbrink & Von Loeffelholz 2006: 75).

The German government has tried to improve external controls by increasing border police employees; their number soared from 25,187 in 1990 to 40,000 in 2002.³⁴ Germany's eastern border with Poland and the Czech Republic was well outfitted to handle the increase of irregular migrants expected to arrive after the fall of the Iron Curtain. Between 1992 and 1997, the number of employees at the eastern border thus grew from 2,678 to 6,200 persons (Alt 1999: 338).³⁵ Within recent years, formal and informal networks comprising boarder guards, customs authorities, police and national authorities have become more and more dense. These forces have concentrated, in particular, on issues of human smuggling and control of the borders with new EU members Poland and the Czech Republic. Integration of these new members into the Schengen Agreement and the subsequent cessation of border controls on 21 December 2007 prompted new discussions for control measures, for example, the computerised registration of cars crossing the border. A car identification system that the Bavarian border police have already installed serves as a template for what the country hopes to implement along all its borders. Other measures for securing Germany's borders are data exchange among police, border police and the local and national administrative authorities, the synchronisation of databases at the national and the EU levels, as well as

Table 3 Prosecution of irregular stay and instruments of departure enforcement, 1995-2004

	1998	1999	2000	2001	2002	2003	2004
Prosecution of irregular stay of which concerned...	140,779	128,320	124,262	122,583	122,573	96,197	81,040
External borders*	40,201	37,789	31,485	28,560	22,638	19,974	18,215
Persons smuggled into the FRG	12,533	11,101	10,320	9,194	5,713	4,903	4,751
Human smugglers	3,162	3,410	2,740	2,463	1,844	1,485	1,534
Repulsions	31,510	23,610	20,369	16,048	11,138	9,729	8,455
Deportations	38,479	32,929	35,444	27,902	29,036	26,487	23,334

* excluding airports

Source: BAMF 2005.

the externalisation of control vis-à-vis International Liaison Officers (ILOs) in significant irregular migration source countries such as Ukraine (Sinn et al. 2006: 75ff).

A gap in the control system becomes visible when it comes to third country nationals who have entered the country on the basis of a valid visa, yet extend their stay beyond their visa's expiration. Seeing as there are no exit controls in Germany, there is no system that detects so-called overstayers. In 2002, to step up the fight against post-9/11 international terrorism, the Law on Defence of International Terrorism was altered to integrate measures for detecting overstayers, such as the collection of biometric data (Sinn et al. 2006: 68). Since 2003, all German visas have been issued with an integrated photo of the applicant. However, these control methods fail in the cases of those third country nationals who can enter Germany without a visa; because the border-crossing date is rarely stamped into the passport, keeping checks on duration of stay is practically impossible (Cyrus 2004: 8; Vogel 2000: 40).

4.1. Enforcement of departure

Individuals who have illegally entered the state territory or who lack a valid residence permit must leave the country. Germany made readmission agreements with a number of source and transit countries to ensure that irregular migrants found in this scenario return to their home countries. At present, 28 bilateral agreements and two EU-based readmission agreements exist (Sinn et al. 2006: 94f). The departure of migrants who lack a residence title may be enforced through four principal means: *refusal of entry and repulsion*, *deportation*, *detention* and the use of *departure centres*.

4.2. *Refusal of entry and repulsion*

Refusal of Entry is regulated by § 15 of the Residence Act 2004 and is issued as non-admission to the German territory. It is applied for in instances when, for example, a migrant without a visa or some other form of entry permission arrives at a German airport. Repulsion (known as *Zurückschiebung*) is regulated by § 57 Residence Act 2004; it can be undertaken only within the first six months subsequent to an irregular entry. In this case, the irregular migrant is escorted to the border by the local authority. Compared to deportation processes, the administrative procedure for repulsion is faster, as local authorities do not need to serve the immigrant with a written notification of the deportation (known as *Abschiebungsandrohung*). In 2002, the border police documented 47,286 cases of refusal of entry and 11,138 repulsions. After 2002, the repulsion numbers decreased, a pattern paralleling decrease of irregular migrants detected at the German borders (see Table 3). This development is partly related to the abolishment of visa obligations for Romanian and Bulgarian citizens, both of whom constitute a considerable portion of the irregular migrants who were detected before 2002 (Finotelli & Sciortino 2006).

4.3. *Deportation*

Deportation (known as *Abschiebung*) is regulated by § 58 of the Residence Act 2004. Immigrants and refugees who do not hold, or have since lost, a residence permit or their residential status otherwise are considered irregular immigrants. They must leave the German territory. These immigrants receive a written notification that they must leave the country either immediately or within six months. If immigrants are reluctant to leave the country voluntarily, expulsion is enforced through deportation. The *Ausländerbehörde*, the aliens office with competency for the case at hand, judges whether the individual in question will leave the federal territory voluntarily or not. In 2004, the border police carried out 23,334 deportations, most of them by plane.³⁶

4.4. *Detention*

Foreigners are detained if an aliens office suspects they will not leave the country after being requested to do so. In this case, the law foresees two kinds of detention (known as *Abschiebehaft*): custody for up to six weeks if the aliens office has decided to expel an alien, but has not decided yet how to manage the expulsion; or custody for up to six months, which can then be prolonged up to eighteen months (§ 62(3) Residence Act 2004) if there are convincing reasons to suspect the for-

eigner will not leave the country on his or her own accord, or if deportation is seen to be actually enforceable. The migrants are detained either in ordinary prisons or in police prisons. In 2005, several of the German *Bundesländer* opened special prisons, referred to as *Abschiebegefängnisse*, for the remand pending deportation. Among them is the Justizvollzugsanstalt (JVA) Büren, the biggest in Europe with its 560-person capacity (Flüchtlingsrat NRW).

4.5. *Departure centres*

On the basis of the Immigration Act 2004, a new instrument for the purpose of expulsion was introduced. So-called ‘departure centres’ known as *Ausreisezentren* (§ 61(2) Residence Act 2004) are meant to encourage voluntary departure. They accommodate irregular migrants who have been formally expelled, though cannot be deported because the available information meant to prove the migrant’s national identity is ambiguous. Departure centres are intended to bide time for clarifying an individual’s national identity, something seen as prerequisite for their departure. In this context, migrants also receive advice and are offered financial aid so as to encourage their voluntary departure. Even though the migrants are not detained, they are obligated to live in the departure centres, where their mobility is restricted and their presence is regularly controlled by the authorities. By the end of 2005, nine departure centres had been established by the regional authorities of the German *Bundesländer*. Through the Initiative gegen Abschiebung, however, the government is encouraging the creation of more such centres to provide an alternative to detention (BBMFI 2005: 386f).

4.6. *Encouragement of voluntary departure*

Experiencing a surge in refugees as early as the 1970s, by 1979, German state administration had established a programme to encourage voluntary return and/or continued migration. The Reintegration and Emigration Programme for Asylum Seekers in Germany (REAG) offers financial aid to asylum seekers and irregular migrants who pledge to permanently leave Germany and to repatriate within the ensuing three months. From 1979 to 2003, 546,000 persons left the country via REAG assistance, thus making it one of the most successful return programmes in Europe (Sinn et al. 2006: 92f). In 1989, the Government Assisted Repatriation Programme was established to target asylum seekers and refugees from what were considered – in terms of immigration numbers – ‘very important source countries’. German state administration decides on the eligible countries according to their current political situation and the German state budget (ibid.). The pro-

gramme provides between 600 and 1,500 euro in return aid per family, though irregular migrants are not eligible to this programme.

5. Possibilities for regularisation

An irregular migrant in Germany only has a few possible ways to regularise his or her stay. Apart from temporary regularisation through an asylum application, there is the option to start a family with a German or a fellow foreigner who has a valid residence title, or to qualify for a regularisation campaign.

5.1. *Marriage*

According to the new Residence Act 2004 (§§ 28, 30), a foreigner may obtain a temporary residence title by marrying a German resident or a foreign resident with a long-term residence title. A number of requirements concerning family life must be met, such as the provision of evidence that either the migrant or the migrant's fiancée has appropriate accommodations and a sufficient income (§§ 5 (1, 2), 29 Residence Act). However, for an irregular migrant it would seem nearly impossible to produce the requisite documents for a marriage, as the lack of a residence status would be revealed in data crosschecks between the German registry office and the Aliens Office. Even after a migrant has married a native or a regular resident, the Aliens Office may refuse to issue a residence permit on the basis of deeming the union a sham marriage. If there are suspicions that a sham marriage is on the line, the Aliens Office can run a profile check on the fiancés, either once they have applied for a marriage certificate or even after the marriage has taken place (Sinn et al. 2006: 38f).

5.2. *Parenthood*

The legalisation of a residence title is also made possible through parenthood. If a child is born to a parent without a residence title, yet a German resident formally acknowledges being the child's other parent, the migrant parent is eligible to obtain a residence title. This is the case even if he or she was once in Germany illegally (§ 28 (1) Residence Act & § 4 (1) Nationality Law).

5.3. *Regularisation*

Germany is considered to be the 'last fortress against regularisations' (Pastore 2004). The national reluctance to enact regularisation pro-

cesses for irregular migrants is not only a matter of political culture. It is also embedded in the welfare-state structure, as such measures involve high budgetary costs (Finotelli 2006). Nevertheless, the German government has periodically carried out special amnesties called ‘old-cases-regulations’. *Altfallregelungen*, as they are known, are extended to rejected asylum seekers and irregular migrants who have been living in Germany with a ‘toleration’ permit. As a consequence, about 60,000 residence permits were issued between 1996 and 2002 according to the *Altfallregelungen* that were approved by the German Conference of the Ministries of Interior. Finally, in March 2007, the Conference of the Ministries of Interiors decided to issue a long-debated Regulation for the Right of Stay³⁷ for ‘tolerated’ refugees, mostly from Kosovo, who had been living in Germany for over six years and were deemed socially and economically integrated.

6. Internal controls

The system of internal controls in Germany can be subcategorised according to direct and indirect controls. Direct controls explicitly focus on the detection of irregular migrants, for example, through the control of residence and work permits and identity checks, as discussed above. Indirect controls occur on the basis of checks concerning the already instated mandatory carrying of an identity card at all times and the obligatory registration of one’s address. These checks transpire when a migrant seeks to enter the labour market or obtain public services such as social aid, health care or education. As such, an irregular residence status is likely to be detected in the course of routine data exchange between public authorities. Furthermore, should the Aliens Office detect a case of irregular stay, local institutions such as schools, hospitals, *inter alia*, must collaborate with authorities. Other instances in which identity and address registration are checked include opening a bank account, obtaining a driver’s license, signing up for a telephone or mobile phone contract, enrolling as a member in a sport club, etc. Although an irregular migrant might be able to avoid relying on these kinds of consumption-oriented services, his or her vulnerability seems almost inevitable when it comes to the healthcare and education systems.

6.1. Accommodation

German citizens and all residents of Germany for three months or longer must register in their local registration office, known as an *Einwohnermeldeamt*. In turn, the local population register, the *Melderegister*,

keeps track of every address change, in accordance with the *Meldspflicht*. The *Melderegister* then transmits all foreign data to the corresponding aliens office where the local aliens register is kept. Data from the local aliens registers are then transferred to the central aliens register, the *Ausländerzentralregister*. Landlords will ask tenants to show a certificate of registration, for they are responsible for ensuring that their tenants are registered in the local registration office. This system is particularly risky when it comes to overstaying. To illustrate, aliens offices usually monitor the address of a rejected asylum applicant if they suspect he or she may not leave the country. This is why most rejected asylum seekers and ‘tolerated’ foreigners who decide to overstay switch their accommodations (Stobbe 2004).

6.2. *Workplace controls*

Workplace controls take place at several levels on the common basis of authority data exchange. Generally, when hiring a new worker, an employer must request the prospective employee’s social security number, health insurance and wage tax card. A forged social security card would thus be detected during routine data crosschecks with the migrant’s health insurance data, which would lead to informing the local work authorities. Applying for a wage tax card, which is done at the local registration offices, could also jeopardise an irregular migrant. Before issuing a wage tax card to a foreigner, the local registry will query the Aliens Office on the prospective employee’s residence status. This means that regular employment of a person with irregular residence status is next to impossible (Sinn et al. 2006: 80).

Another instrument for control at the workplace focuses on the detection of illicit work. Up until the end of 2003, workplace controls in Germany were carried out by 118 work offices (known as *Arbeitsämter*) and customs offices. Since 2004, responsibility for detecting irregular employees has come to lie within the customs offices (known as *Zollämter*). These offices exercise the same rights and responsibilities as police officers should they suspect someone of a criminal offence (e.g. against the Residence Act) upon conducting a workplace control (Bundesregierung 2000: 40). An employee’s residence status is checked by means of direct document control at the workplace and, additionally, through data exchange with the national aliens register. Foreign workers with a valid work permit undergo additional examination in the form of crosschecks between their company payroll and social security data files. Should an irregularly working asylum seeker be suspected, his or her fingerprints are crosschecked with the national police’s AFIS. Data exchanges and various authorities’ duty to collaborate with each other are thus the main elements of the German control system

against irregular work (Sinn et al. 2006: 82). Between 1995 and 2002, the work and customs offices checked up on about 3 per cent of the 30 million workers in Germany. They discovered between 91,000 and 142,000 irregularities each year (see Table 4).

Table 4 Prosecution of irregular employment (concerning both employees and employers), 1995-2002

Total cases*	1995	1996	1997	1998	1999	2000	2001	2002
	79,554	86,792	78,551	75,390	76,500	64,351	50,743	60,417

* including all legal proceedings taken against employees and employers

Source: BBMF 2003: 138.

6.3. Health system controls

Migrants in Germany need a valid residence permit to gain access to the health insurance system. The public offices competent for the social insurance of both German and foreign workers can always check on a migrant's status by comparing their data with that held by the Aliens Office, which is immediately informed in cases of irregularity. If irregular migrants are unable to pay their treatment in a hospital, the social office (known as the *Sozialamt*) takes over the fee and must then transmit the patient's data to the Aliens Office (§ 87 Residence Act 2004). This is why the majority of irregular migrants avoid hospital treatment. Recent investigations have shown how irregular migrants requiring ambulatory assistance often make illegal use of a relative's or a friend's insurance card. In this way they obtain professional treatment without being persecuted (Anderson 2003; Alt 2003).

6.4. School

According to the UN Convention on the Rights of the Child, every child has the right to receive education (§ 28 KRK). Even though Germany signed this convention in 1990, it added another paragraph upon its approval stressing the state administration's right to differentiate between nationals and foreigners and between regular foreigners and irregular foreigners. With this addendum, the German state secured implementation of a paragraph in the Immigration Act that foresees the collaboration of institutions such as schools in cases involving irregularity.³⁸ As the education system in Germany is organised in the federal system of the sixteen *Bundesländer*, the daily practice of dealing with the children of irregular migrants varies from *Bundesland* to *Bundesland*, sometimes from town to town. Some *Bundesländer*, like Bavaria, make education mandatory for the children of irregular migrants,

whereas other *Bundesländer* have excluded them in their education law and leave the decision of enrolment up to the individual schools. However, should an irregular migrant's child be enrolled in public school, the control mechanism according to § 87 (2) Residence Act applies. This means that the school or the educational authority overseeing it must inform the Aliens Office that they are dealing with *irregular migrants*. In some *Bundesländer*, this only applies during the enrolment procedure,³⁹ whereas in others, like Hessen, schools are expressly informed of their duty to report *irregular migrants* upon each case of detection, even if after enrolment (for example, upon administering emergency medical aid after an accident at school or upon organising a field trip to another country) (Sinn et al. 2006: 89). Also influencing the decision of the individual school is the fact that – under certain conditions – failure to collaborate with authorities may be considered an offence that is charged through penal law (§96 Residence Act). A common perception is that the majority of German schools refuse *irregular migrants'* children in order to avoid potential residence status-related problems (see Rausch 2005; Stobbe 2004).

7. Conclusions

This report has shown that Germany has endeavoured to increase the effectiveness of migration control over the last decades. Quite often this was done by following a reactive policy, such as in the case of the 'asylum compromise' that came after a huge increase of refugees in the 1980s. The implementation of the new Immigration Act 2004 seemed to begin a new chapter in the country's migration history, as Germany bade farewell to its image as a non-immigration country and recognised the need for labour immigration. However, whereas the regulations seemed to work well for the low-skilled sector, Germany was less successful at attracting highly skilled migrants. This could well be due to the restrictive attitude still held towards immigration, which is clearly expressed in the title of the new Immigration Act 2004 – Law for the Control and Limitation of Immigration and for the Residence and Integration Regulation of EU Citizens and Foreigners – as well as in highly formalised legislation and a complicated recruitment procedure.

It has become more and more difficult, however, for Germany to battle illegal migration only through national policies in a globalising world. Moreover, Germany has had to open up its borders ever since becoming a member of the EU, a community that encourages the international exchange of goods, services and capital. Two major tendencies have been observable in the German control system: 1) the shifting

up of migration control to the EU level through a series of cooperation agreements and supranational migration policies; and 2) a downshift of migration control to the local level, relying on a deeply interconnected public administration that is embedded in the organisational structure of the German welfare state and affects almost every sector of daily life. Quite unsurprisingly, indirect controls in the course of public administration activities are seen as the truly characteristic – and most effective – aspect of the German migration control system (Vogel 2000: 39). Germany's internal and external control mechanisms are constantly improved through the implementation of technological innovations (e.g. the collection of biometric data) as well as through the increased exchange of information via computerised networks among different local, national and supranational authorities.

Key characteristics of German controls

- Restrictions to the 'humanitarian' channel
- External controls enforced through technical cooperation (e.g. data exchange) at the national and supranational levels
- The *Ausländerzentralregister* local and centralised aliens register
- Local and centralised population register
- Highly interconnected public administration
- Mandatory carrying of identity card at all times
- Social security number related to all labour relations and social insurances
- All access to public resources depending directly or indirectly on residence status

Notes

- 1 An earlier version of this work was prepared by Claudia Finotelli, to whom I express gratitude for helping inform this chapter.
- 2 This is expressed in the very title of the 2001 report of the independent commission on migration suggests: 'Shaping Immigration – Encourage Integration' ['Zuwanderung Gestalten – Integration Fördern'] (Unabhängige Kommission 'Zuwanderung' 2001).
- 3 Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern.
- 4 The most important are: the 1985 and the 1990 Schengen Agreements on border controls along the EU's internal and external frontiers; the Dublin Agreement of 1997, which regulates the EU member states' responsibilities in handling specific refugee cases; the Maastricht Treaty of 1993; the Amsterdam Treaty of 1997.

- 5 The core part of the new Immigration Act 2004 is the Residence Act 2004 (*Aufenthaltsgesetz*), which regulates all issues concerning immigration and residence of foreigners in Germany.
- 6 Such visas are issued for purpose of family reunification or visits with resident relatives.
- 7 Exceptions are made for citizens from Australia, Israel, Japan, Canada, New Zealand, South Korea and the US, all of whom can also apply for visa upon or after arrival.
- 8 The year 2000 introduced liberalisations of visa regulations. In combination with the circulation of forged travel insurances in the Ukraine, the number of visa issued by the German Consulate in Kiev rose from 150,000 in 1999 to 300,000 in 2001 (*Tageschau* 7 July 2005).
- 9 *Anwerbestoppausnahmereordnung*.
- 10 For further information on implementation of these types of migrant work, see Becker and Heller (2002), Glorius (2004), Höhner (1997), Marburger and Kienast (1995); the implications of this policy in a European context are discussed in Faist (1995).
- 11 In 2002, 1,104 permits were issued for domestic workers in households of disabled people. After 2002, this recruitment scheme was suspended, though it came to be known as the ‘Exception of the Recruitment Stop’ in the Immigration Act 2004 (§ 4 (9a) ASAV; see BAMF 2005: 76).
- 12 These are either EU citizens (with exception of the new member states) or foreigners who already live in Germany with a regular residence permit.
- 13 This number sums up the academic terms of summer 2006 and of winter 2006/2007.
- 14 This group is also referred to as ‘educational foreigners’ (*Bildungsausländer*) so as to distinguish them from the huge number of students of foreign nationality who hold permanent residence permits and have received their primary and secondary education in Germany (*Bildungsinländer*).
- 15 Bade (2002: 415) considers the term ‘*Aussiedler*’ or ‘*Spätaussiedler*’ an ‘ethnonational euphemism’: legally speaking, *Spätaussiedler* are Germans, even though socially, culturally and psychologically, they may be considered immigrants.
- 16 *Bundesvertriebenengesetz*.
- 17 They must either obtain a StartDeutsch certificate, issued by the Goethe-Institut, that attests to their basic German language skills, or they are examined at the German embassy in their country of residence.
- 18 The legal base for these measures is the Law for the Admittance of *Aussiedler* (AAG) of 1 July 1990 that was integrated into the Law on Displaced Persons and Refugees (§ 27 (3) BVFG) in 1993 (Lederer 1997: 228).
- 19 *Kontingentflüchtlingengesetz*.
- 20 This term was coined in the 1970s, when over 500,000 Vietnamese in small overloaded boats tried to flee their politically oppressed country facing severe economic decline. Some 10,500 ‘boat people’ were received by the Federal Republic of Germany as refugees (www.aufenthaltstitel.de).
- 21 For further information on the immigration of Jewish migrants in Germany, see Doornik (1998) and Harris (2001).
- 22 *Grundgesetz für die Bundesrepublik Deutschland*.
- 23 *Flughafenregelung*.
- 24 *Asylverfahrensgesetz*.
- 25 *Asylbewerberleistungsgesetz*.
- 26 Further elaborations on the EU regulations concerning asylum can be found in Niesen (2004).
- 27 This pattern has been referred to as ‘refugees in orbit’ (see BAMF 2006a: 31).
- 28 *Übernahmeersuchen*.

- 29 This may happen in instances when, for example, national identity cannot be determined or a country of origin refuses to receive a refugee.
- 30 *Duldung*.
- 31 Decisions transpiring in 2006 had an average procedural duration of 21.7 months, beginning the day of asylum application. However, almost half of the decisions were concluded within one year (BAMF 2006a: 48).
- 32 This zone includes a 30-kilometre range within the country.
- 33 *Asylverfahrensgesetz*.
- 34 This data is provided by the German border police's website (www.bundespolizei.de).
- 35 In border regions, the public is encouraged to report suspects to the police via anonymous telephone hotline. Newspaper ads and local notices try to instil a sense of security among the residents, arguing that denunciations are an instrument of crime prevention. Another form of incorporating the public in the border regime is through the implementation of carrier sanctions against taxi drivers who are caught servicing illegal immigrants. In fact, ever since one border-region taxi-driver was prosecuted by law in 1995, drivers now convey feeling obligated to check their passengers' identity documents (Alt 1999: 338f).
- 36 The circumstances surrounding some deportations have been strongly criticised by human rights organisations. In 1999, a deportee came to his death when suffocated by a police officer while aboard a plane. This occurred because the police officer was pressing down the head of the migrant so forcefully that the helmet he had to wear obstructed his breathing (Amnesty International Deutschland 2000).
- 37 *Bleiberechtregelung*.
- 38 *Übermittlungspflicht*, according to § 87 (2) Residence Act.
- 39 The enrolment procedure in public schools usually foresees presentation of the child's birth certificate and identity and residence checks of the parents.

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Report from Italy

Ferruccio Pastore

1. Introduction

Although Spain overtook its top ranking at the turn of the millennium, Italy remains one of Europe's largest immigration countries in terms of net migration (see Table 1). When it comes to yearly growth rate of the foreign-born population, Italy ranks even higher: third among the developed countries reporting migration statistics to the OECD, after Spain and South Korea (OECD 2007: 59).

Despite such impressive figures, established trends and the fact that the country's migration rate became positive some 30 years ago,¹ Italy still perceives itself to be largely a 'new immigration country'. Legal, institutional and administrative infrastructures for the management of migration and for the promotion of integration processes are still underdeveloped (minus a few exceptions, as will be illustrated). With a chronic statistical deficiency and a systematic shortage of funding for empirical research, this kind of infrastructural 'backwardness' affects the cognitive foundations of migration policymaking.

As the focus of this volume is modes of migration regulation, it should be noted that the fundamental normative and institutional features of the Italian regulation system were only defined relatively late, during the 1990s. Until Law 39/1990, for instance, Italy thoroughly

Table 1 *Top five EU countries of legal immigration (net migration), 2000-2006*

2000	2001	2002	2003	2004	2005	2006
Spain: 378,500	Spain: 427,800	Spain: 649,900	Spain: 738,500	Spain: 610,100	Spain: 652,300	Spain: 636,000
UK: 168,500	Germany: 274,800	Italy: 349,300	Italy: 600,600	Italy: 558,200	Italy: 338,100	Italy: 222,400
Germany: 167,800	UK: 184,300	Germany: 218,800	UK: 260,500	UK: 203,600	UK: 196,300	UK: 159,500
Netherlands: 57,000	Portugal: 64,900	UK: 126,400	Germany: 142,200	France: 105,000	France: 102,900	France: 160,500
Italy: 55,200	France: 60,400	Portugal: 70,100	Portugal: 63,500	Germany: 81,800	Germany: 98,500	Ireland: 80,000

Source: CeSPI based on Eurostat (2005, 2006, 2007) and ISTAT (2007).

lacked any national legislation on asylum (apart from a single, albeit quite advanced, article in the 1948 Constitution),² as well as on the criteria for the granting, renewing and withdrawing of a stay permit (*permesso di soggiorno*).³ It was only Law 40/1998 that introduced the possibility to keep undocumented foreigners in custody prior to expulsion (in facilities known as *centri di permanenza temporanea e assistenza*; see Section 2.3), and that a stable, long-term resident status was created on paper (based on the granting of the *carta di soggiorno*; see Section 5.2). The Law of 1998 was also at the root of the current admission system, which is based on yearly entry ceilings set through *ad hoc* governmental provisions (so-called *decreti-flussi*; see Section 3).⁴

2. The control side

2.1. *Prevention of clandestine entry: the 'Schengenisation' of external borders*

Law 39/1990 and Law 40/1998, both key in setting the essential features of the Italian migration regulation system, were drafted under severe pressure by international political constraints generated in the Schengen intergovernmental environment. The succession of dates is telling: Law 39/1990 was adopted in February 1990, just a few months before Italy signed the acts of accession to the Schengen agreements in November; Law 40/1998 of 6 March 1998 (its first draft presented in Parliament in February 1997) was crucial for convincing the original members of the Schengen club that Italy was finally ready for the full application of the *acquis*. This eventually took place in two stages, between October 1997 and March 1998.⁵

Somewhat similar to what would happen a few years later with Central and Eastern European countries, Italian migration legislation and policy was profoundly shaped by Schengen conditionality. This factor, coupled with a strong politicisation of the 'clandestine immigration' issue, explains the centrality of border controls in Italian migration policymaking during the 1990s. The responsibility for a particularly 'vulnerable' stretch of the Schengen/EU external border and the ensuing emphasis on migration controls is also clearly reflected in the increasing financial imbalance between the amount of public resources allocated for law enforcement purposes and those for more broadly defined integration aims (see Table 2).⁶

The second Berlusconi government's strong anti-immigrant stance (2001-2006) contributed to a particularly restrictive implementation of the Schengen/EU *acquis*. A striking illustration of this is the fact that in 2003, Italy alone was responsible for almost half of the 1990 Schengen Implementation Convention's Article 96 concerning alerts in the

Table 2 *Financial resources allocated by Italian state for migration policy aims, 2002-2004*⁷

	2002	2003	2004
For law enforcement purposes	65,469,100	164,794,066	115,467,102
For integration purposes	63,404,004	38,617,768	29,078,933
Total	128,873,104	203,411,834	144,546,035

Source: Corte dei Conti 2005: 7-8.

Schengen Information System (SIS) (Statewatch 2005).⁸ Italian authorities' restrictive interpretation of Schengen rules is also concretised in the relatively low number of Schengen visas Italian consulates granted, as compared to more generous visa providers such as France and Germany. As Table 3 shows, the production of Schengen visas by Italian consular authorities has resumed growth since a sharp decrease between 2000 and 2003.

2.2. *Repression of unauthorised stay: the upgrade of the removal system*

Between the late 1990s and the early 2000s, a blend of external, Schengen-generated constraints and internal political choices thus turned Italy – once known as Europe's 'soft belly' – into a particularly restrictive country for migrants.⁹ Comparative statistics on removals and repatriations are extremely difficult to gather and to interpret at the European level, due to both political reasons and methodological constraints. However, according to one of the few existing sources, in the early 2000s, Italy's expulsion rate ranked very high, being responsible for almost 10 per cent (131,609) of the total number of expulsions from the EU-25 (1,339,545).¹⁰

Looking more closely at Italian statistics (Table 4), though, a paradox becomes apparent. On the one hand, it is striking how the number of undocumented foreigners apprehended within Italian borders has grown steadily over the last decade. (The only unsurprising exception is the two years immediately following the massive 2002 regularisation)

Table 3 *Number of Schengen visas issued every year in select EU countries, 2000-2006*¹¹

Country	2000	2001	2002	2003	2004	2005	2006
Italy	1,008,999	947,322	853,466	874,874	983,499	1,076,680	1,198,167
France	2,113,632	2,117,056	2,025,624	2,008,802	2,053,019	2,047,388	2,038,888
Germany	2,607,012	2,676,297	2,580,353	2,495,544	2,395,376	1,960,660	1,997,000
Spain	670,949	737,845	620,353	694,475	750,883	848,527	954,685

Source: Ministero degli Affari Esteri 2006a, 2006b, 2007.

Table 4 Migration law enforcement activities by Italian police forces according to different indicators, 1999-2007

Year	1999	2000	2001	2002	2003	2004	2005	2006	2007 thru March
Number foreigners rejected at border controls	36,397 (down from 1995 peak of 62,443)	30,871	30,625	37,656	24,202	24,528	19,646	20,547	2,566
Number undocumented foreigners apprehended at 'blue borders' upon landing	49,999	26,817	20,143	23,719	14,331	13,635	22,939	22,016	1,652
Number undocumented foreigners apprehended on national territory of which...	64,444	88,570	92,561	105,988	77,583	77,517	96,045	101,704	NA
...are expelled (including formal readmission procedures)	23,955	23,806	34,390	42,245	29,630	25,196	26,985	21,690	NA
Effectiveness rate of the expulsion system (expelled/apprehended)	37.2	26.9	37.2	39.9	38.2	32.5	28.0	21.3	NA

Source: Ministero dell'Interno 2007.

tion, which, as expected, reduced the overall pool of undocumented migrants). On the other hand, the number of actual expulsions (thus excluding non-enforced orders to leave the country) dropped by half in the following four years, after a substantial growth until 2002. What makes the figures even more remarkable is that the rather dramatic fall in the Italian expulsion system's overall rate of effect occurred just when the centre-right political majority led by Silvio Berlusconi was investing numerous resources (Table 2) into migration law enforcement.¹² Likely at the root of this paradox are several concurring causes: more than the vast 2002 regularisation scheme, also at stake is an important decision by the Italian Constitutional Court (Sentence 222/2004) that has significantly heightened legal guarantees for foreigners awaiting removal. The single most important explanatory factor, however, is probably a crisis in the effectiveness of bilateral cooperation agreements with some key sending and transit countries. This has expressed itself in a strong reduction in the number of readmissions (Ministero dell'Interno 2007: 352).

2.3. *Detention of foreigners and the trend to criminalise unauthorised stay*

Besides traditional means of migration regulation (e.g. prevention of unauthorised migration and its repression through removals, as discussed in Section 2.1 and Section 2.2), during the last few years, Italian authorities have increasingly resorted to detention and penal regulations as a tool for migration management.

The 2002 Bossi-Fini Law allocated resources for expansion of the network of *centri di permanenza temporanea e assistenza*. Often designated with the acronym CPTA, these facilities hold foreigners in pre-removal custody for the duration of time it takes to check identity, ensure readmission and organise deportation. The capacity of the CPTA system overall was raised from 1,228 to 1,940 individual places between 2002 and 2007 (figures updated through end-January; Ministero dell'Interno 2007a).¹³ The number of foreigners in custody, however, grows more than proportionally (see Table 5) because the 2002 law also raised the maximum length of detention (doubling it, from 30 to 60 days). In the period 2002-2004, the average length of detention thus

Table 5 *Annual number of undocumented foreigners kept in CPTA custody for variable periods (up to 30 days 2000-2002; up to 60 days 2003-2006), 2000-2006*

2000	2001	2002	2003	2004	2005 and 2006
9,768	14,993	18,625	13,863	15,647	approximately 25,000

Source: Ministero dell'Interno 2005, 2007a.

grew from twenty to 26 days, with a large majority of actual removals (72 per cent) being carried out within the first 30 days of detention. The overall 'effectiveness' of the CPTA system (measured as a ratio between the number of foreigners kept in custody and those actually removed before the end of the detention period) grew from 34.2 per cent in 2002 to 48.1 per cent in the first nine months of 2004. At the beginning of 2007, this rate was reported to float around 60 per cent (Ministero dell'Interno 2007a: 13), though the figure was based on monitoring only six CPTAs out of the fourteen then functioning.

Besides CPTAs, judiciary detention in ordinary prisons has more and more also been used as a tool for migration management. Being in breach of an order to leave the country had been treated as a minor criminal offence in the Italian legal system since 1998. However, Law 189/2002 – to then be followed by emergency decree (*'decreto legge'*) 241/2004 (converted into Law 271/2004) – introduced a heavier penalty for such an offence. The offence is now sanctioned with a one-year minimum and four-year maximum term of imprisonment. In practice, these new norms become a kind of 'criminalising device' in a number of cases of undocumented foreigners. As a matter of fact, when an illegally resident foreigner to be deported cannot be kept in CPTA custody (e.g. for lack of available space, which is frequently the case) or cannot be removed (e.g. for lack of financial resources, or for practical reasons associated with identification or readmission procedures), he or she will be ordered by the local police authority, the Questore, to leave the country at his or her own expense within five days (Article 13, Law 189/2002). It is easy to imagine how such an order often goes unattended and, as a result, how such non-compliance can now be sanctioned with detention for up to four years. This perverse law enforcement mechanism contributes to the high presence of (mostly undocumented) foreigners in the Italian jail system.¹⁴

2.4. *The external dimension: readmission agreements and international police cooperation*

The importance of the external dimension of migration control policies has increasingly come to the fore of the European debate and policy-making, especially since the Tampere Summit of October 1999. As an external border country, Italy was relatively early in realising the key role of exit controls (by neighbouring non-EU countries) and readmission agreements for dealing effectively with irregular migration flows. As a matter of fact, the first readmission agreement signed by Italian authorities (besides the multilateral Schengen-Poland agreement that entered into force in 1994) dates back to 1997. Since then, diplomatic efforts to expand the network of agreements with ever-new sending

and transit countries went through ups and downs, though they never really ceased. Even the opening of official negotiations at the EU level with certain countries did not discourage Italian authorities to continue bilateral negotiations (despite having to occasionally deal with more or less hidden tensions with the European Commission).

It is well known that a formal agreement is neither a necessary nor a sufficient condition to obtain systematic readmission of deportees by a specific sending or transit country.¹⁵ Because readmission is unpopular (when it comes to one's own nationals) and costly (when it comes to third country nationals), it obviously needs adequate incentives in order to be actually carried out. Assessing the nature and amount of *quid pro quo* and negotiative *contrepartie* in bilateral migration relations is often difficult. From this point of view, Italy is a rather special case. Since 1998, in addition to general exchanges based on development aid or debt reduction – where the exact *quid pro quo* is usually proves very hard to document anyway – Italian governments have experimented with a peculiar approach based on opening privileged admission channels and on granting fixed 'entry quotas' to countries willing to cooperate on the control side. Table 6 illustrates the evolution of the system of 'privileged quotas' over ten years (1998-2007). Section 3.2 will further elaborate on the pros and cons of such a system. At this point, it is sufficient to say that, from the official point of view of the Italian authorities, country quotas are not binding under international law (in fact, no written international treaty openly contemplates such quotas). They are understood as being unilaterally determined by Italy in the exercise of its national sovereignty on immigrant admission.

3. The admission side

3.1. Admission for working purposes and other forms of admission

Even though upgrading control mechanisms has been the main driving force of recent¹⁶ Italian migration policies (in terms of public spending as well as in the public discourse), unlike most EU countries, Italy has had an official policy for legal economic immigration in place since 1998.¹⁷ The next two sections briefly explain how such admission policy for working purposes functions, focusing first on its general regulatory infrastructure (namely, the rules and procedures by which the overall volume of legal flows is regulated) and then describing its procedural mechanisms aimed at matching specific job supplies and demands (Section 3.2).

Legal admission for working purposes is not the main admission channel in the Italian system. Section 4 shows how irregular entry or

overstaying followed by regularisation were historically the most quantitatively important ways of obtaining legal immigrant status in the country. Nevertheless, volumes of legal economic immigration are not negligible, for they make a significant contribution to an overall population of legal residents more than half of whom consistently comprises workers. On 1 January 2006, for instance, 62.1 per cent of Italy's legally residing foreigners were holders of a stay permit for working purposes (ISTAT 2007: 3).¹⁸

At both the national and the European levels¹⁹ there is debate about whether legal and illegal economic immigration flows really do interplay and, if so, how. In the Italian experience, governments (especially, though not only, those that are centre-left) often used the argument that widening the legal admission channel would reduce the demand for illegal entry and therefore ease the pressure of clandestine immigration and a propensity to overstay. But the pool of candidates for legal immigration, on the one end, and illegal immigration, on the other, is so wide and heterogeneous that it is by no means certain – nor demonstrable or particularly probable, except in very limited contexts – that such a direct relationship between authorised and unauthorised flows exists indeed.

3.2. *The regulatory infrastructure of the planning system: annual ceilings and privileged quotas*

The overall volume of legal economic immigration from non-EU countries is regulated by decrees adopted annually by the President of the Council of Ministers, on the basis of a wide and complex consultation process (including the competent parliamentary commissions and the Conferenza Unificata, which gathers together the regions, provinces and municipalities).²⁰

In setting an overall 'ceiling' for the following year's new legal entries, each annual decree (unofficially called a '*decreto-flussi*', i.e. a decree dealing with 'flows') should follow the guidelines that are set by the triennial document for migration policy planning. Although adopted by the President of the Council and published as a decree of the President of the Republic,²¹ such guidelines are usually vague and lack a substantial binding effect on annual decrees.

Each yearly decree establishes a general 'ceiling', though it may still be lifted by a further decree in cases of extraordinary labour market needs.²² The decree is then administered in category-wise quotas (seasonal/non-seasonal workers, employed/self-employed workers, special quotas for IT workers, etc.) and nationality quotas. As discussed in Section 2.4, country quotas are exclusively assigned to nationals of those

'privileged' countries with which Italy has bilateral agreements on readmission and migration law enforcement.²³

As shown in Table 6 and Table 7, the number of entries allocated through national quotas has started to grow again, after 2003's low point. In the meantime, though, the number of 'privileged countries' has also kept growing far beyond the original belt of Italy's neighbouring countries with a strategic position in the geography of irregular flows to Italy. The result is that most privileged states are granted relatively small quotas, which for large countries, in particular, are not sufficiently substantial incentives for cooperation.

3.3. *The admission mechanisms: seasonals, nominative calls and visas for job-searching*

The procedural mechanisms aimed at matching the internal labour demand and the external supply are complex, and their description go far beyond the scope of this report. In order to understand the basic functioning of the Italian migration regulation system, however, some essential information must be taken note of.

For one, admission mechanisms are fundamentally different for seasonal workers versus all other types of workers. The entry and stay of seasonal workers is managed by a sort of parallel admission system organised on a territorial basis, whereby employer associations play a major role in collecting and vouching for job offers.

As for non-seasonal workers, the fundamental principle has traditionally been that of a 'nominative call' in which an individual foreign worker still residing abroad is solicited by an individual employer willing to hire him or her. The rigidity of the supply-and-demand matching mechanism, however, was eased during the prior period of the centre-left government (1996-2001). During this period, a specific provision of Law 40/1998 broadened the annual decree with a limited number of entries for the purpose of job-searching (with a twelve-month staying permit as per Article 21). This special visa for job-searching could be granted either on the basis of an individual sponsorship (i.e. a personal guarantee that could be supplied either by private individuals and associations or local governments) or, in very limited numbers, by means of 'self-sponsorship' (in this case, it was the migrant himself or herself who had to provide a financial guarantee as a precondition for admission).

Most experts consider admission for job-searching purposes integral to facilitating the matching of supply and demand in what is a very fragmented labour market. (Some such markets are that of homecare and personal care services and low- or medium-skilled jobs in small enterprises, all of which are very important in the Italian case.) Here, in-

Table 6 National beneficiaries of privileged quotas in Italian admission policy, 1998-2007

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Albania	3,000	3,000	6,000	6,000	3,000	1,000	3,000	3,000	4,500	4,500
Algeria	/	/	/	/	/	/	/	/	/	1,000
Morocco	1,500	1,500	3,000	3,000	2,000	500	2,500	2,500	4,000	4,500
Tunisia	1,500	1,500	3,000	3,000	2,000	600	3,000	3,000	3,500	4,000
Somalia	/	/	/	500	/	/	/	100	100	100
Egypt	/	/	/	/	1,000	300	1,500	2,000	7,000	8,000
Moldova	/	/	/	/	500	200	1,500	2,000	5,000	6,500
Nigeria	/	/	/	/	500	200	2,000	2,000	1,500	1,500
Sri Lanka	/	/	/	/	1,000	500	1,500	1,500	3,000	3,500
Bangladesh	/	/	/	/	/	300	1,500	1,500	3,000	3,000
Pakistan	/	/	/	/	/	/	1,000	1,000	1,000	1,000
Argentina*	/	/	/	/	4,000	200	/	/	/	/
Argentina+	/	/	/	/	/	/	/	/	/	/
Uruguay+	/	/	/	/	/	/	/	/	/	/
Venezuela*	/	/	/	4,000	/	/	400	200	500	500
Reserves***	/	/	6,000	/	/	/	2,500	700	1,400	2,500
The Philippines	/	/	/	/	/	/	/	1,500	3,000	5,000
Ghana	/	/	/	/	/	/	/	/	1,000	1,000
Senegal	/	/	/	/	/	/	/	/	/	1,000

* foreign nationals of proved Italian descent

*** nationals of countries with which *ad hoc* cooperation agreements are signed during the planning year

Source: Presidency of the Council of Ministers.

Table 7 Annual ceilings and privileged quotas in Italian admission policy, 1998-2006

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Ceiling of planned entries according to total numbers...	58,000	58,000	83,000	89,400	79,500	79,500	79,500	159,000		
... Of which 50% are from new EU member states (EU-8)	690,000									
... Of which 170,000 are from new EU member states (EU-8)	250,000									
... Of which are non-EU seasonal workers	/	/	/	39,400	56,000	68,500	50,000	25,000	50,000	80,000
Privileged quotas of planned entries for nationals of specific countries according to total numbers	6,000	6,000	18,000	16,500	14,000	3,800	20,400	21,000	38,500	47,100
Number of countries benefiting from privileged quotas	3	3	3	4	8	9	12	14	15	17
Percentage of privileged quotas vis-à-vis ceiling	10.3%	10.3%	21.6%	18.4%	12.5%	4.5%	25.6%	13.2%	5.5%	18.8%
Percentage of non-EU seasonals vis-à-vis non-EU ceiling	/	/	/	44%	70.4%	86.1%	62.8%	31.4%	9.6%	32%

Source: Presidency of the Council of Ministers.

dividual characteristics, best observed in person, are crucial for guiding employers' choices. Nevertheless, the 2002 Bossi-Fini Law abolished the visa for job-searching on the ground that it allowed abuses of the system.²⁴ The principle of nominative call again became the sole mechanism for matching supply and demand on the Italian foreign labour market. The rigidity of this mechanism was even increased with the introduction of the '*contratto di soggiorno*' ('stay contract'), a special type of labour permit very unusually endowed with some effects in the field of administrative law. As a matter of fact, a *contratto di soggiorno* is to be signed prior to admission, while the worker – at least, in theory – is still abroad. Upon signature of the *contratto di soggiorno*, the employer must guarantee not just the financial costs of repatriation (at the end of the contract or in the absence of a renewal, with the same or with another employer), but also the housing of the worker.

The extreme rigidity of this admission mechanism makes it unfit to meet the basic needs of an atomised and rather unstable labour market. This leads to a series of perverse effects, including a further boost to irregular immigration and the fact that nominative calls from abroad often hide already existing, albeit unregistered, labour relations.

4. Regularisations

The overall economy of the Italian migration regulation system has been marked by a strict (and often arbitrarily harsh), yet far from 100-per-cent-effective, control side (see Section 2), as well as by an increasingly clumsy and unfit admission side (see Section 3). Nevertheless, periodical regularisations have generally been perceived and dealt with as a structural – and, admittedly, uncomfortable – necessity (Barbagli, Colombo & Sciortino 2004).

It is indeed striking that in most European states – although not Italy and some other mostly Southern European countries – large numbers of undocumented foreigners have not traditionally represented reason enough for the granting of mass amnesties. This fundamental intra-European cleavage (see Table 8) is not easy to explain. Included among the relevant factors, however, should be the following: a) the deep cultural differences in the conception of the rule of law; b) the different attitudes of national trade unions towards undocumented foreign labour and; c) the different roles played by non-governmental actors (including churches) in migration policymaking in each country.

This intra-European cleavage is clearly reflected in the existing (however patchy) statistics: more than 90 per cent of the roughly four million foreigners who were regularised in Western Europe during the last three decades obtained their entitlement to stay in one of four Mediter-

Table 8 Main regularisation schemes in selected EU states, according to a) applications and b) permits granted, 1973-2007²⁵

Country	Belgium	France	Germany	Greece	Italy	The Netherlands	Portugal	Spain	UK
Permits granted according to scheme	1974: b) 7,400	1973: b) 40,000	2007: a) 180	1997-1998: a) 598,000 b) 590,000	1982: b) 5,000	1975: b) 15,000	1992-1993: a) 80,000 b) 39,200	1985-1986: a) 44,000 b) 23,000	1974: b) 1,800
	1995-1999: b) 6,100	1981-1982: b) 121,000		2001: a) 368,000 b) 228,000	1986: b) 105,000	1978: b) 1,800	1996: a) 35,000 b) 31,000	1991: a) 135,400 b) 109,100	1977: b) 400
	2000: b) 52,000	1991: b) 15,000		2005: a) 142,000	1990: b) 217,600	2004: b) 2,300*			
		1997-1998: b) 77,800		2007: ongoing	1995: b) 244,400	2007: b) between 24,000 and 30,000	2001: b) 179,200	1996: a) 25,000 b) 21,300	
		2006: a) 30,000 b) 7,000			1998: b) 217,100		2004-2005: NA	2000: a) 247,600 b) 153,500	
					2002: a) 700,000 b) 644,000			2001: a) 350,000 b) 234,600	
Total permits granted per country	65,500	260,800	/	818,000	1,433,100	19,100	249,400	1,111,500	2,200
Total permits granted					3,959,600				

* provisional data

Source: De Bruycker 2000: 51; Levinson 2005; SOPEMI 2004: 71; SOPEMI 2007; for Italy: Ministry of the Interior, Ministry of Labour and Social Affairs; for Spain: Ministerio de Trabajo y Asuntos Sociales 2005.²⁶

Table 9 *Ten largest groups of Italian regularisation applications by nationality, 2002*

Romania	142,963
Ukraine	106,633
Albania	54,075
Morocco	53,746
Ecuador	36,591
China	35,647
Poland	34,270
Moldova	31,102
Peru	17,390
Egypt	15,946
Total	700,033

Source: Zucchetti 2004: 28-29.

Table 10 *Ten largest groups of Spanish regularisation applications by nationality, 2005*

Ecuador	139,714
Romania	118,298
Morocco	85,969
Colombia	56,652
Bolivia	47,202
Bulgaria	25,549
Argentina	23,848
Ukraine	22,209
Pakistan	15,069
China	13,120
Total	690,679

Source: Ministerio de Trabajo y Asuntos Sociales.

ranean countries (Greece, Italy, Portugal, Spain). The two large amnesties recently granted by Italy (2002) and Spain (2005) have represented historical turns in each of their national migration histories as well as in the geography of international labour mobility in Europe as a whole. Namely, they have highlighted a boom in irregular inflows from Latin America and Eastern Europe (see Table 9 and Table 10).

5. Internal controls

5.1. *The traditional weakness of workplace controls in Italy*

Section 2.2 and Section 2.3 dealt with the 'control side' of the Italian migration regulation system, while also dwelling upon the internal dimension of police controls and different forms of migrant detention and custody. This section will briefly sketch the effects of other mechanisms of internal control on the immigrant population.

In a country like Italy, where off-the-books work is particularly widespread (ISTAT 2005b) and represents a major pull factor for irregular immigration, one would expect a strong investment of public resources in workplace controls, both for fiscal and migration law enforcement purposes.²⁷ Such a naive expectation would not take into account the powerful economic interests that are behind such a wide informal economic sector. As a matter of fact, the Labour Inspectorates (operating under the political control of the Minister of Labour and Social Affairs) are traditionally a very underdeveloped law enforcement tool, with a particularly uneven distribution (and degree of effectiveness) on the national territory. Figures such as those diffused by the Bundesanstalt für Arbeit in Germany, with 3 per cent of the workforce controlled over ten years (as pointed out by Birgit Glorius' chapter on Germany in this volume) are unthinkable in Italy.

It should be pointed out, however, that a targeted enhancement of workplace controls recently did take place. In a first phase, the endeavour was specifically directed through *ad hoc* operations against Chinese-owned businesses in several Italian regions (such as the so-called Marco Polo I and II operations, performed in July 2005 and September 2005, respectively).²⁸ More recently (from 2006 to 2008), reinforcing workplace controls came to take place on a larger scale. What was once an established downward trend in the number of inspectors (from 2,083 in 2003 to 1,356 in 2007) has since reversed. Figures provided by the Ministry of Labour in January 2008 show a 58.8 per cent increase in labour inspectors under the Ministry of Labour and a 13.5 per cent increase in the Carabinieri specialised branch, as compared to the situation on 30 April 2006 (Ministero del Lavoro 2008). Furthermore, Law 123/2007 has allocated 4,250,000 euro for hiring extra staff and the same amount of money to reinforce inspection activities.

5.2. *Bureaucratic controls and the precariousness of the status of legal immigrants*

There is, however, an area where internal controls on the immigrant population are particularly strong (besides the area of direct police controls targeted at the undocumented population, as touched upon in Section 2.2 and Section 2.3). This pertains to what could be considered bureaucratic controls on the legally resident foreign population.

In every developed country, documented immigrants of foreign nationality are submitted to periodic checks prior to renewal of residence/stay or labour permits (that is, in such countries where the labour permit is separate from the stay permit, which is not the case in Italy). These checks follow up on employment status and housing conditions, as well as on an individual's police record or lack thereof. In

the Italian case, however, the nature of such controls is particularly heavy, given several factors. They include: the limited length of stay permits, which was cut in half by the 2002 law, thus no longer allowing for a maximum of four years; the Questure's huge backlog, thus delaying an average renewal waiting period for up to twelve months in some large cities; and the serious lack of cross-cultural training and sensitivity among police forces assigned to administrative tasks in the field of immigration regulation.

This state of affairs, suffered and denounced by immigrant communities and some (rather isolated) media, induced the Ministry of the Interior to sign a convention with the National Association of Italian Municipalities²⁹ in February 2006.³⁰ This agreement sees to the establishment of pilot experiments in institutional cooperation among municipal administrations and the Ministry of the Interior; it is intended to oversee the administrative management of a very quickly expanding legal immigrant population.

The weight of the bureaucratic controls generated *de facto* by the reduced length for stay permits and by the constant dependence of legal immigrants on police offices is exacerbated by another set of factors. These include the difficult and quantitatively very limited access to the status of long-term residency (embodied by the *carta di soggiorno*, introduced in the legislation by the 1998 law³¹) and the limited opportunities that exist, legally and practically speaking, to obtain Italian nationality both by first generations of non-EU immigrants and by second generations of immigrant origin (Pastore 2001). As illustrated in Table 11, the number of foreigners who are granted Italian nationality each year is low in comparison to other large European countries. Furthermore, the large majority of those granted Italian nationality were for marriage reasons (i.e. foreigners marrying an Italian national), rather than naturalisation resulting from long-term residence (Zincone 2006).³²

6. Conclusions

The Italian migration regulation system is no doubt at a turning point. The need for a structural reform is generated by at least three major factors of unsustainability in the current system. First of all, Italy lacks capacity for the proper administrative management of a quickly growing legal immigrant population. An increase in the share of the foreign population as strong as that recently experienced by the country calls for a deep restructuring of the administrative machinery for implementation of immigration policy. Until now, the Italian administrative machinery has had its centre of gravity in the Ministry of the Interior and

Table 11 Acquisitions of nationality in six largest EU member states according to absolute numbers and percentage of foreign population, 1996-2005

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
France	NA	NA	NA	147,522	150,026	127,548	128,092	144,640	168,826	154,827	NA
Germany	86,356	82,913	106,790	142,670	186,688	178,098	154,547	140,731	127,153	117,241	NA
	1.2%	1.1%	1.4%	2.0%	2.5%	2.4%	2.1%	1.9%	1.9%	1.6%	NA
Italy	8,823	9,789	12,016	11,335	9,563	10,382	12,267	17,205	19,140	28,659	35,266
	1.2%	1.0%	1.2%	1.0%	0.7%	0.8%	0.9%	1.1%	1.0%	1.2%	1.3%
Poland	NA	NA	871	1,000	975	766	1,186	1,634	1,937	2,866	NA
	NA	NA	NA	NA	NA	NA	NA	3.3%	NA	NA	NA
Spain	8,433	10,311	13,177	16,394	11,999	16,743	21,810	26,556	38,335	42,830	NA
	1.7%	1.9%	2.2%	2.3%	1.5%	1.9%	2.0%	2.0%	2.3%	2.2%	NA
UK	43,069	37,010	53,525	54,902	82,210	90,295	120,125	125,535	140,705	161,780	NA
	2.2%	1.9%	2.6%	2.5%	3.7%	3.9%	4.6%	4.9%	5.1%	5.7%	NA

Source: SOPEMI 2007; for Italy (2002-2006): ISTAT 2007a.

in police offices, not just for law enforcement, but also for management of the legal foreign population. Particularly since the large-scale 2002 regularisation, this balance of institutional competences and the related distribution of administrative tasks have become unsustainable. This is the case at least in the absence of an – unlikely – massive investment in police personnel.

Secondly, Italy's current rules and procedures for the admission of economic immigrants is inadequate. There is a widening gap between the intensity of migration pressures (due to a particularly strong combination of pull, connecting and – for certain sending areas – push factors) and the very rigid rules and procedures currently regulating admission for economic purposes (see Section 3).

And finally, in a third factor of unsustainability, Italy's investments in measures aimed at supporting integration are insufficient. It would seem that a dramatic increase in the country's foreign resident population would call for massive investments in measures and programmes to support integration and promote dialogue on different levels. To the contrary, the state's resources allocated to integration purposes are extremely scarce. Integration policies at regional and local levels are a substantial reality in some of the most developed parts of the country. They are, however, difficult to monitor, uncoordinated and face serious budgetary restrictions themselves.

The centre-left government, in power from May 2006 until April 2008, had endeavoured to tackle these structural problems through a wide-ranging series of legislative and political initiatives. In August 2006, the Council of Ministers approved a bill aimed at radically reforming Italian nationality law by broadening opportunities to acquire nationality for immigrants and their descendants. In November 2006, the government launched a bold proposal to counter illegal employment by granting special stay permits for harshly exploited undocumented workers willing to denounce their illegal employers. A few months later, with the budget law for 2007 in force, Parliament set up a new so-called Fund for the Social Inclusion of Immigrants, which was meant to enhance integration efforts with a fresh 50 million euro per year until 2009. Finally, in April 2007, the government led by Romano Prodi adopted a bill setting general principles for a deep and comprehensive reform of immigration law.³³ Among the key contents of the bill were: a) the granting of full electoral rights at the municipal level to long-term residents; b) more flexible admission procedures, including the reintroduction of job-searching visas; c) a radical reform of the CPTA system (paragraph 2.3) with a view to, at a minimum, reduce the number of cases of detention prior to expulsion.

This comprehensive reform of Italian immigration law and policy, however, was aborted, due to the legislature's premature termination

and the general election held in April 2008. The next centre-right government will once again face old dilemmas and ever more serious structural contradictions.

Key characteristics of Italian controls

- Focus on external border controls (initially imposed as Schengen conditionality)
- Early involvement in negotiated bilateral relations with sending states (privileged admission quotas in exchange for cooperation on readmission and exit controls)
- Increasing emphasis on ‘externalised’ migration controls (focus on Southern Mediterranean despite greater importance of overstayers’ migrating from Eastern Europe and Latin America)
- Traditionally low level of internal controls on the labour market, but tough repatriation policy
- Repeated recourse to large-scale extraordinary regularisations
- Strong and increasing emphasis on links between immigration and crime, with growing use of criminal law as tool for migration control

Notes

- 1 It should be pointed out that in as early as 1969, the Ministry of the Interior registered 164,000 foreigners who were regularly present on the Italian territory (Colombo & Sciortino 2004: 16-17; see also Einaudi 2007).
- 2 The laws and policies on asylum are not analysed in this report.
- 3 Before then, the fundamental aspects of migration policy were regulated by means of internal administrative rules (*‘circolari’*). On the structural developments of Italian migration law and policy during the 1990s, see Pastore (1998).
- 4 One of the best scientific tools for monitoring legal developments is the journal *Diritto, Immigrazione e Cittadinanza*, which has been published since 1999 by the Association for Legal Studies on Immigration (ASGI) (www.asgi.it).
- 5 International norms were also a fundamental constraint in the creation of Italian migration law in a prior phase: the first immigration bill ever adopted by a republican Italian Parliament (943/1986) was primarily justified by the need to implement an important convention of the International Labour Organization (ILO), namely no. 143 of 1975, ratified per Italian law no. 158 of 1981.
- 6 The large expenses connected with the role of Italy (and other countries, including new member states) as a Schengen/EU external border country raise issues of burden-sharing among member states. It was only since the turn of the millennium that the issue of burden-sharing in the field of border controls found its way onto the EU Justice and Home Affairs agenda. As a result, a wide-ranging, if not vague, ‘solidarity principle’ in the field of migration policy was gradually recognised (and even inserted in the draft constitutional treaty signed in October 2004). It slowly transmogrified into some marginal, though practical, arrangements and financial tools.

- 7 These figures must be analysed with explicit mention of a certain caveat. It is difficult to single out allocations and expenses that specifically go to migration policy activities, within the broader field of competences by ministries such as the Ministry of Foreign Affairs, the Ministry of the Interior or the Ministry of Social Affairs.
- 8 The imbalance between Italian alerts and all other participating states' alerts may also be partly explained by a technical reason: namely, the especially long period prohibiting foreigners from entering the country (even if all other requisites for legal admission are present). Because the ban period was raised to ten years by Law 189/2002 (the so-called Bossi-Fini Law, named after its main proponents), Italian authorities will keep firm alerts in the SIS by for a longer period than in most other participating states. Alerts, therefore, tend to accumulate in large numbers.
- 9 This assessment must be taken into consideration vis-à-vis the extreme openness of the Italian admission system, relative to the EU as a whole (see Section 3 and Section 4). The ambiguous nature of Italy as one of the 'most open' and simultaneously one of the 'toughest' European countries on immigration, can largely be explained in terms of a sort of post-modern *Gastarbeitermodell*. Such a model is shaped by the strong, widespread demand for cheap foreign labour, coupled with a minimally inclusive welfare and political system.
- 10 From CIREFI and Eurostat data cited in European Commission (2005).
- 11 It must be stressed, however, that the large difference between the number of visas granted by France and Germany, on one side, and Italy and Spain, on the other, does not depend only on the 'political' interpretation of Schengen rules. It also relies on the dimension of the immigrant (or immigrant-origin) communities already settled in a country, thus operating as a magnet and a subsequent precondition for short-term legal mobility.
- 12 If one looks, for instance, at the most spectacular of all means of collective enforcement of expulsions – charter flights – in the first four years of the Berlusconi government, there was a very significant increase: from 1,007 migrants deported via fourteen flights in 2001, up to 4,900 individuals expelled via 72 flights in 2004 (Ministero dell'Interno 2005).
- 13 Corte dei Conti (2005: 104).
- 14 As of 30 June 2007, out of a total of 43,957 inmates in Italian prisons, 15,658 were foreigners. (For a general overview, see Barbagli 2002; for updated figures, see Ministero della Giustizia 2007a,b).
- 15 As a matter of fact, in a growing number of cases, cooperative relations in the field of readmission and, more widely, of migration law enforcement are not formalised in written and/or public agreements (including 'exit controls', patrolling at high sea, exchange of personal data and detention facilities for migrants awaiting removal in non-EU countries). Keeping such relations as informal and confidential as possible clearly increases operational flexibility, though dangerously reduces transparency and accountability (Favilli 2005). A very serious case in point is represented by the current cooperation between Italy and Libya (Pastore 2008).
- 16 Since coming into power in 2006, the centre-left government had made efforts to reshuffle the Italian migration scheme, with its main focus being on legal immigration procedures. Endeavours were aborted, however, upon early termination of the legislature in April 2008.
- 17 Before then, some legal and institutional tools for an active admission policy were already in the law, though not seriously implemented (see Pastore 1998).
- 18 The ratio between legal foreign workers and the overall population of foreign residents is lower in most older immigration countries in Europe: for a comparison based on yearly inflows, see SOPEMI (2007: 37, Chart 15). So as to provide a comparative picture, it must be pointed out that in Italy, as elsewhere in the EU, family

members of legal foreign workers are themselves entitled to work. (In some states this right is only granted after a certain number of years spent in the country.) This aspect is often forgotten by policymakers and researchers; one reason is that it is not easy to ascertain the number of working individuals who hold stay permits on the basis of family reasons.

- 19 See European Commission (2004).
- 20 See Article 3(4) of the *Testo Unico* regarding legislation concerning immigration and the legal condition of foreigners, Legislative Decree 286/1998.
- 21 For the latest triennial planning document (referred to period 2004-2006), see Presidenza del Consiglio dei Ministri (2005); the next triennial planning document for the period 2007-2009 was approved by the Council of Ministers in October 2007, though has not yet been published at the time this report was being written in February 2008.
- 22 In the year 2006, for instance, the initial ceiling of 170,000 new entries (Table 7), fixed by decree of the President of the Council of Ministers on 15 February 2006, was subsequently raised to a total of 520,000 admissions by a supplementary decree issued in October and published in the *Gazzetta Ufficiale* no. 285 of 7 December 2006 (see www.stranieriinitalia.it/news/DPCM25ottobre2006Registrato.pdf).
- 23 The only exception are the small quotas allocated to nationals of certain Latin American countries with populations largely of Italian descent (see Table 13).
- 24 No clear evidence of such abuses, however, can be found in the scarce data on the implementation of the sponsorship mechanism.
- 25 This table covers collective regularisation schemes, namely administrative procedures aimed at granting legal status to pre-defined categories of irregular foreigners. Individual, case-by-case regularisations are not included in the table. Nevertheless, in most European states, authorities (usually the Ministry of the Interior) have a discretionary power to 'legalise' a foreigner's status by granting a residence permit on an extraordinary basis, generally for humanitarian reasons. This practice is infrequent and, understandably, little advertised by authorities, though in some countries it concerns several thousands of foreigners every year. For instance, in 2002, France granted over 20,000 stay permits to undocumented foreigners on different grounds (e.g. those having spent more than ten years irregularly in the country, those with French children or other family ties and those with serious illness, *inter alia*; see P. Weil's *La République et sa Diversité: Immigration, Intégration, Discriminations* (Paris: La République des Idées-Seuil 2005: 39, note 39). In 2004, the UK granted residence permit 'on a discretionary basis' to over 8,000 persons (more than 16,000 in 2003) (see Table 2.4, 'Grants of settlement by category of grant, excluding EEA nationals, 2000 to 2004', in Home Office's *Control of Immigration: Statistics United Kingdom* (2004: 23): www.homeoffice.gov.uk/rds/pdfs05/hosb1405.pdf). I thank Franck Düvell for pointing out this figure to me.
- 26 When faced with discrepancies between sources, the most recent source's figure was generally counted. This method is justified by the fact that states often present successive corrections of figures on regularisations.
- 27 An important indirect indicator of the concentration of foreigners in the 'black' and 'grey' sectors of the labour market is represented by the disproportionately high number of foreign workers who are victims of labour accidents; see INAIL (2004).
- 28 It can be argued that these operations had specific political motivations, in a context where the large sector of Italian small and medium enterprises (SMEs) is deeply concerned by the allegedly unfair competition by Chinese firms, including those transnational ones based in Italy.
- 29 Associazione Nazionale Comuni Italiani (ANCI).

- 30 See the Ministry of the Interior's press release and the text of the convention; available at www.interno.it/news/articolo.php?idarticolo=21955.
- 31 Obtaining a long-term resident status and the *carta di soggiorno* is contingent on (besides certain economic prerequisites) a period of uninterrupted legal residence, which was raised from five to six years by the 2002 law. The EU directive on long-term residence later required Italy to again modify the provision and bring the required length of residence back to five years.
- 32 Ten years of uninterrupted legal residence are required in the very restrictive 1992 Italian legislation.
- 33 Camera dei Deputati, Progetto di legge, 'Delega al Governo per la modifica della disciplina dell'immigrazione e delle norme sulla condizione dello' (Atto Camera 2976); see http://legxv.camera.it/cartellecomuni/leg15/documenti/progettodilegge/trovaschedacamera_wai.asp?PDL=2976.

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Report from the Netherlands

Jeroen Doomernik

1. Introduction

Dutch migration control mechanisms are not limited to the nation's borders and gates of physical entry. Instead, the Netherlands has had a history of administrative measures by which to regulate entry and residence of foreign nationals. Indeed, with progressing integration into the European Community – and, subsequently, the European Union – the significance of national borders and their controls has been modified to the extent that it is now Schengen partners who control territory borders, including ones on behalf of the Dutch government. What is left in terms of old-fashioned border control is now concentrated at the Netherlands' seaports (notably, Rotterdam) and international airport (Amsterdam Airport Schiphol), both of which are gates of entry to the Dutch territory as well as the Schengen area at large. Administrative controls within the Dutch state have, in the meantime, been intensified.

After providing a brief historical overview, this chapter will look at Dutch – and, consequently, Schengen – interventions in migration processes aimed at the Netherlands. This analysis will examine physical controls at borders and gates of entry, internal controls and the measures used to address the failings of these controls (e.g. regularisations of irregular residents and the application of penal law).

2. Overview

2.1. *Labour migration*

Until the mid-1970s, labour migration to the Netherlands was only minimally regulated.¹ Even though both a residence permit and a labour permit were required for a foreign worker to be regularly present and active in the Netherlands, the enforcement of these provisions was limited and *post factum* regularisation was common (Penninx et al. 1994). Once such regularisation had taken place, access to rights and entitlements on equal footing with Dutch nationals followed. Moreover, the 'guest worker' policy pursued at the time contained little to actually enforce the temporary nature of this labour migration. In other words,

there was no government desire to curtail or, for that matter, restrict labour migration and the 'regulation' amounted to the absorption capacity of the economy.

From 1975 onwards, it was no longer the employee who needed to secure permission to (come and) work in the Netherlands. Rather, it became the employer's responsibility to demonstrate a need for foreign workers. Aiming to protect the interests of the labour force already legally present in the country (gradually extending towards inclusion of labour migrants from other EU member states), this was the first step towards control. The principle has remained in place to the present day.

Even though further labour immigration was restricted, migration on other grounds continued and even increased. At first, family reunification with former guest workers – many of whom had prolonged their presence in the country – was a significant source of further immigration. Few hurdles to this secondary migration were constructed, and no policies were developed to actively stimulate unemployed or employed guest workers' return home, as was done in Germany, for example. Throughout the 1980s, the increased labour migration took place according to the rules, for the most part, though undocumented and/or irregular cases, when they did occur, did not elicit great concern (Engbersen & Van der Leun 2001: 54).

The fact that the Dutch government deemed it necessary to restrict labour immigration beginning in the mid-1970s does not mean – as it did in Germany – that all such migration was made impossible. Instead, a system was put in place that aimed to guarantee privileged access to vacancies set aside for the national labour reserve. Currently known as the *Wet Arbeid Vreemdelingen* (WAV), a law was drafted to stipulate the conditions an employer had to meet before being able to employ a third country national. Simply put, to the employer must actively look for privileged workers (which these days means legal residents of all EU member states except Romania and Bulgaria) and must demonstrate having done so with sufficient determination. The duration of employment is usually restricted to one or two years and the worker needs to remain abroad until all paperwork has been processed, a procedure that can take up to five weeks. The period during which the employer needs to advertise the vacancy up until the time it is filled can last for a number of months. For this reason, employers of seasonal work are often compelled to hire irregularly. All workers fall under the WAV unless there are good political – read: 'economical' – reasons to be more generous. This is also currently the case concerning so-called 'knowledge workers'.

The admission of skilled workers to the Netherlands is undertaken via two mechanisms. The first one is an *ad hoc*, liberal use of the WAV. Relaxed conditions apply for certain sectors and for particularly longer

or shorter periods of employment. In these cases, an employer need not go to great lengths to prove the demand for a singular type of employee. In recent years, it was thus relatively easy to attract ICT workers and health care workers. The second mechanism for admitting skilled workers is one of almost complete openness. If an employer is willing to pay a substantial salary, or if the migrant is a scientist, admission is unconditional.²

2.2. *Unsolicited migration*

The fundamental change in Dutch policy approach came during the 1990s, probably not accidentally coinciding with an unprecedented influx of asylum seekers and refugees throughout most EU member states. Though the flow was most notable in Germany, relatively large numbers also appeared in the Netherlands. Three broad types characterise the measures that were taken in response: physical interventions, tightening of administrative law and practices and changes in penal law. First and foremost, these measures sought to address asylum seekers and other irregular labour migrants. To this end, a new aliens law was introduced in 2001. But also imposed in the domain of family-related migration were more restrictions, including among them the requirement to obtain a visa before being permitted to, as a spouse, apply for a residence permit; previously, this kind of application could follow from an *in situ* change in residence permit.³ Visa fees have been increased, integration testing is imposed as another obstacle and such testing, furthermore, must also be paid for by the migrant.

3. **Physical external interventions**

An eventual result of the Schengen Agreement's ratification, the Netherlands' border controls with Belgium and Germany were abolished in 1994. This was not the case, however, for the Amsterdam or Rotterdam harbours, nor Amsterdam's international airport, all of which comprise outer borders of the Schengen Area. Furthermore, the formal abolishment of border controls has not meant that land borders go unguarded. Spot checks on incoming traffic regularly take place directly 'behind' the border. Referred to as the *Mobiel Toezicht Vreemdelingen* (MTV), the Mobile Supervision of Aliens programme is undertaken by the military police; guarding national borders traditionally falls as one of their tasks. If a vehicle has crossed the border before being inspected and there are missing, incomplete or invalid travel documents, officials may take quick action to authorise the removal of the

vehicle's alien passenger(s) from the territory or to take the passenger (s) into custody.

The implementation of the Schengen Agreement includes the development of a common visa policy, whereby each member state can issue a visa on behalf of the others. Even if the criteria for issuing a visa may be uniform, the administrative practice can differ. Dutch administrative law, for instance, is informed by the principle that the state must demonstrate why it refuses to grant a certain privilege or service. The burden of proof lies with the state, not the applicant. This means that if a visa application refusal is appealed, chances are considerably high that it will be granted by default. A new visa law that addresses this issue, among others, has been in the making for a number of years, but Parliament has not as of yet passed it.

3.1. *Detention*

In recent years, detention of irregular migrants has become a commonly used instrument in instances where expulsion could not immediately be effectuated, yet was expected to become feasible within a given number of days, or in cases where detention was believed to be an appropriate instrument to establish an alien's identity and nationality. Even though detention can be for prolonged periods of time (in some cases for up to a year or even longer), if expulsion cannot be effectuated, the alien will be put out on the street. In this case the assumption is that he or she will leave the territory or else face attrition. According to the Minister of Aliens Affairs and Integration,⁴ the average period in 2006 for which an alien was detained was 50 days. Of all aliens who are detained, about 40 per cent are ultimately deported. In almost all cases, deportation occurs within the first three months of detention. Of those who leave the country, approximately 10 per cent come back to the Netherlands at some point (Van Kalmthout et al. 2004).

Prolonged detention thus apparently fails to increase readiness or willingness among inmates to cooperate on their own return. Overall, each expulsion costs an average of 40,000 euro. Those who cannot be expelled must, sooner or later, be put out on the street, with a summons to forthwith leave the country (*ibid.*). In spite of these findings, during the past few years, detention capacities have steadily increased. In 2002, the Netherlands had room for less than one thousand detainees; today the capacity has more than tripled. In view of an average detention time, this capacity suffices to hold approximately 16,000 aliens per year. According to the Ministry of Justice's budget, the number of places is to grow further and should reach a total comprising 3,600 individual spots by the year 2010 (see Table 1). This number

Table 1 *Alien detention capacity required, 2005-2010*

	2005	2006	2007	2008	2009	2010
Detention capacity required	3,100	3,356	3,442	3,423	3,516	3,609

Note: Increase in holding capacity (in persons) is according to proposed budget of the Ministry of Justice for 2006.

Source: Tweede Kamer Vergaderjaar 2005-2006, 30300 (2): 22.

comes close to comprising 20 per cent of the overall capacity of the Dutch detention system.

The Netherlands generally concedes that a considerable number of illegal aliens – a substantial percentage of which results from failed asylum requests – are residing in the country. Estimates made by Engbersen et al. (2002) put the number somewhere between 120,000 and 160,000, while the Ministry of Aliens Affairs and Integration recently invoked as much as 200,000. There is also recognition of the fact that many ‘removals’ are actually just administrative removals (see following page), i.e. the record of a migrant simply no longer residing at his or her last known address. If still present at the address, however, and the migrant also happens to be a rejected asylum seeker, he or she is encouraged to move to a removal centre (known as a *vertrekcentrum*), where four weeks of accommodation and support are available to help prepare for ‘voluntary’ return. The 2008 budget of the Ministry of Justice has allocated 53,821,000 euro for *vertrekcentra*. If an alien is not a prior asylum seeker, however, it is likely that he or she will immediately be taken into custody.

In late October 2005, a fire swept through the *vertrekcentrum* at Schiphol Airport, killing eleven aliens awaiting expulsion. In the drama’s aftermath, the Minister of Justice and the Minister for Housing, both of whom are responsible for prison buildings, resigned from their offices. It also compelled a journalist of the weekly *Vrij Nederland* to go undercover as a guard at one of the detention centres on a ship docked at the Rotterdam harbour. The journalist’s reports revealed the detention centre’s overall poor living conditions, including a lack in fire safety, meagre medical facilities and insufficient social care. The picture painted was one of quick fixes and low-budget improvisation (Van de Griend 2006).

Since January 2007, the Ministry of Justice has had a task force solely focussed on the return of irregular and undesirable aliens. The Dienst Terugkeer & Vertrek (DT&V) draws from previously disparate resources, bringing together expertise from the authority responsible for asylum seekers, the aliens police, the military police, the Immigration and Naturalisation Services (IND), the detention services (DJI), the

International Organization for Migration (IOM) and the Ministry of Justice's policymakers. With its more holistic approach, this new service hopes to improve overall information exchange so that at any given moment it is clear where an individual awaiting deportation is located, and that he or she has a manager who is familiar with the case particulars. No evaluations of this new task force's effectiveness are yet available.

What is available are the repatriation figures provided by the IND. It is striking that close to three-quarters of rejected asylum seekers depart 'administratively' (a figure that has hovered at this level for the past decade). This means that the police have been able to establish that an alien is no longer residing at his last known address. Whether this also means that the individual has actually left the territory of the Dutch state obviously remains unknown. This fraction is considerably lower among those who have not applied for asylum, yet have been apprehended for irregular residence in the country. In their case approximately forty percent are removed administratively and 60 per cent are known to have left (Table 2).

3.2. *Shifting down*

Notably, in cases of rejected asylum seekers it is often the local authorities who must evict people from their homes. This frequently gives rise to policy dilemmas, not least because local authorities are also responsible for maintaining public order. As a result, considerable discussions demanding full compliance with government policies have taken place in recent years. This has occurred on two levels, between the larger Dutch cities and the Association of Netherlands Municipalities⁵ (VNG), and between the cities and the government. Of especially great concern

Table 2 *Departure of asylum seekers and irregular foreign nationals*

	2005	2006
Departure of asylum seekers		
Forced departure	1,400	900
Voluntary departure	2,000	1,550
Administrative departure	9,100	7,750
Total	12,500	10,200
Departure of irregular foreign nationals		
Forced departure	14,400	12,400
Voluntary departure	4,600	4,000
Administrative departure	13,400	13,700
Total	32,400	30,100

Source: IND 2006: 12

has been the growing number of homeless aliens, including approximately 4,000 unaccompanied minors (Letter of the VNG to Parliament, 5 December 2005). In effect, many local governments openly refused to implement the strict rules set by the central government, for instance, by choosing to subsidise additional accommodation for the homeless. Despite the occasional rebuke by subsequent ministers, the general trend has been to tolerate such inconsistencies.

A compromise was reached between the municipalities and the present government that provided for three principle agreements. First of all, a substantial number of former asylum seekers whose return had become virtually impossible would be pardoned (see Section 4.3 and Section 4.3). Secondly, the government would take full responsibility for those who should be returned to their country of origin (through the DT&V), thus alleviating the municipalities of this burden. And finally, the municipalities would in return be expected to discontinue their assistance to irregular residents.

3.3. *Shifting to the individual*

Another simple measure that, though strictly speaking, is not of a physical nature, aims⁶ to reduce the Netherlands' immigrants, in general, and those with low skill levels, in particular. This measure comes in the form of high costs that are imposed on unsolicited migrants seeking regular entrance. Mandatory transactions include high visa and residence permit fees, as well as costly language tests for migrants seeking to reunite with a spouse already legally residing in the Netherlands. The charge for first admissions of a spouse or a child is 830 euro. Other permits also tend to be expensive.⁷ The argument for imposing these fees, which are relatively high in a cross-European comparison, is that they reflect the real costs of application processing.

Language tests⁸ have been mandatory for some immigrants to the Netherlands since mid-2006. In general, these exams are not considered very difficult to pass. On 19 October 2006, the Dutch newspaper *Trouw* reported that out of 1,500 aliens who had taken the test, 1,384 passed. Taking the test, however, is not free of charge: each attempt to pass the exam costs 350 euro. Moreover, in order to be granted permanent residence status, a second test must be passed at a later stage (within five years of residence), which requires a good command of the Dutch language. Failing to pass this exam implies that the migrant will remain a 'temporary resident', who needs to renew his or her permit on an annual basis. Until recently, the language courses necessary to prepare for the test were funded by the authorities. New rules have made course fees the responsibility of the migrants concerned.

In November 2004, the minimum age for bringing in a spouse was raised from eighteen to 21. The partner resident in the Netherlands must have an income that is equivalent to 120 per cent of the Dutch minimum wage (approximately € 1,400 net per month). According to the Minister for Aliens Affairs and Integration, this has substantially reduced the number of applications for marriage and family reunification (from 42,000 per year to 30,000 in 2005) (*Trouw* 19 October 2006). This development, however, is in keeping with the general reduction of newcomers to the Netherlands. Since 2002, net migration has been negative for migrants from Western countries and, from 2005, the same has held true for migrants of non-Western background (Statistics Netherlands, StatLine 25 October 2007). The period 2004-2006 witnessed an especially significant decrease in the percentage of marriages contracted with partners from Turkey (61 per cent down to 59 per cent) and from Morocco (36 per cent down to 29 per cent) (*Trouw* 22 November 2007)

3.4. *Shifting out*

The Netherlands has also invested in a measure for control taking the form of return agreements with a number of countries of origin. In those instances whereby aliens refuse to reveal their nationality or do not cooperate with authorities otherwise (e.g. upon being detained), this instrument no doubt proves rather blunt. This point is reflected in the low percentage of aliens who can be coaxed into cooperating on their return while held in a detention centre and the high percentage who are eventually put out on the street (Van Kalmthout et al. 2004).

As is common in other EU countries, carrier sanctions (not a physical measure in and of themselves though their effects are) are also pursued by the Dutch government. At the same time, such sanctions have become part of EU community actions, including the alternative for increased fines. On past occasions, Netherlands-bound migrants were known to flush their documents down an aircraft's toilet or pass them on to a third person before disembarking at Schiphol Airport, thus making it impossible for the authorities to return the person on a following flight. As a remedy, the Dutch Aliens Law (Article 4) makes it possible to oblige a carrier to copy travel documents before their passengers board so-called 'risky flights'.

Dutch fines are presently at a minimum of 3,000 euro for a first offender and a maximum of 16,750 euro per inadmissible passenger. The national public prosecutor, known as the Openbaar Ministerie (OM), usually offers to drop charges in return for a financial 'transaction'. In 2004, a total of 760,000 euro in such transactions was offered by the OM to 58 airlines. This concerned 1,112 rejected aliens (*Tweede*

Kamer, 2005-2006, 30300 (69): 1-2). In 2006, 50 airlines were fined, concerning 665 charges.⁹ As have many European countries, the Netherlands dispatches International Liaison Officers (ILOs) to 'problematic' countries and airports to advise airlines and local authorities on appropriate travel documentation.

4. Internal controls

Internal controls are supported considerably by the existence of a comprehensive population and aliens register, as well as a Social Fiscal (SoFi) number for those who are regularly employed or self-employed.¹⁰ However, it should be noted that these registers are aimed at identifying those who have rights – not those who do not. In effect, aliens who are irregularly present in the country are not accounted for. As for internal controls, a number of significant measures have been taken since the early 1990s.

As of 1991, only aliens in possession of a residence permit were permitted to be economically active, thereby being given a SoFi number. This number is listed on all pertinent documents belonging to an individual and is included in his or her employer's administration records. SoFi numbers could once also be obtained by irregular migrants; this led to a situation in which aliens worked and paid taxes and premiums, though they were actually not supposed to in the eyes of the government because it would fuel the illusion of legality among the migrants concerned.

The Compulsory Identification Act of 1994/2005 requires employers to be able to identify all their employees. To this end, photocopies of passports and/or other identification documents are to be kept on file with the employer's administration. This act also obliges persons under certain conditions to be able to identify themselves in public places and in transit. As of 1 January 2005, it became obligatory for all persons over age thirteen to carry a form of identification at all times. Officials cannot demand this documentation at random, but only under specific circumstances – what such circumstances entail is only broadly sketched and will over time be concretised through jurisprudence.

In 1994, the Marriage of Convenience Act outlawed marriages contracted for the sole purpose of gaining access to a residence title. The registrar presiding over the marriage is obligated to assess the intentions of prospective spouses, particularly if there is a reason to suspect 'bogus' motives. In cases of manifestly fraudulent intentions, the marriage should not be concluded. As Jessurun d'Oliveira (1998) notes, this law is not unproblematic in nature; marriages of convenience – from all of time and across all societies – have long withstood the scru-

tiny of judges who have invariably concluded that people's nuptial motives are of no concern to the state. This law has a corresponding article in the Aliens Law, whereby a residence permit can be withheld should authorities doubt the 'authenticity' of a relationship (bound by marriage or otherwise). The number of cases in which restrictions on either ground have been imposed, however, is small. Nevertheless, there is a common perception that the 'abuse' of marriage for the sake of securing legal residence is widespread (De Hart 2003).

The Linkage Act of 1998 aims to exclude access to all benefits for those without a residence permit, while limiting access of some rights for some categories of regularly present aliens. Simply put, this is achieved by synchronising the population and aliens registers so that all service providers may cross-check whether the claimant is entitled to such benefits (e.g. social security, child benefits, rent subsidy, health care). Emergency medical care and education for those of school age (which is mandatory) are exempt. A special fund has been created from which doctors and hospitals can get a refund for their expenses. A first evaluation completed one year after the law's implementation revealed that the number of aliens unjustifiably benefiting from such services was rather small – or, at any rate, much smaller than Parliament had supposed.

In 2004, a new division of labour between the police and the IND came into being. Whereas most residence permit applications had previously been processed by the local aliens police – the main exception being applications for asylum – all applications are presently processed by the IND. An important argument for this restructuring was to free up the police force's capacity for the detection, detention and expulsion of irregular aliens. Approximately 1,300 police officials are thus available for internal migration controls.

4.1. *Asylum*

In 2001, a new aliens law came into force, considerably speeding up the adjudication of asylum requests. Asylum had been the main political concern throughout much of the previous decade (Doomernik et al. 1997). Yet, several attempts to curtail the influx of new applicants within the framework of the erstwhile law had failed to elicit the expected results. In the government's view, this was mainly due to lengthy and considerable appeal procedures before the courts. The new law allowed authorities to reject many applications on a first instance, thus leaving asylum seekers little opportunity to appeal the decision. The rate of first such rejections reached 70 per cent, thus leaving lawyers to question the accuracy of these new procedures (Doomernik 2004). The new law did have the desired effect insofar as the number of asylum

requests dropped dramatically in subsequent years. In 2004, the number fell below 10,000, which was the same in 1988. In 2000, there had still been 44,000 requests for asylum.¹¹ Incidentally, it is hard to indicate to what extent this means that migrants who may have first requested asylum now opt to remain anonymous.

What is known, however, is that the costs related to asylum requests have decreased together with the falling numbers. To a large extent, this is a consequence of the Dutch reception system. All aliens awaiting a first decision on their asylum request are taken care of by the authorities: i.e. they are accommodated (as opposed to interned) in hostels, where they are given food, medical care and pocket money. At the same time, however, such aliens are kept from integrating into Dutch society until they are granted refugee status. This means they are not supposed to be economically active.

The Dutch government has shown confidence in the effectiveness of present asylum policies, as illustrated by the 2008 budget of the Ministry of Justice. The budget reflects the anticipation of a general reduction in aliens-related expenditure, notably for the reception of asylum seekers. In 2007, the Central Agency for the Reception of Asylum Seekers, the *Centraal Organ Opvang Asielzoekers* (COA), had estimated 412.9 million euro per annum, whereas the estimated expenses for the year 2012 are down to 151.1 million euro.

4.2. *Regularisations*

After the 1970s, the Dutch government became very reluctant to offer amnesties to irregular labour migrants. The main exception to this rule was formulated in 1995, when it was deemed appropriate to regularise those migrants who had already been at work – before, SoFi numbers were only given to regular migrants – and who for six years since had been continuously employed, all the while paying taxes and premiums. These migrants were referred to as ‘white illegals’ because every aspect of their employment had been above board, apart from the missing residence permit. Judging from discussions in Parliament, the number of people who qualified under this amnesty could not have been large. From the start of the amnesty until August 1997, a total of 1,225 cases were dealt with, which led to 1,119 rejections (*Tweede Kamer, Vergaderjaar 1996-1997, 25453 (2): 2*). Still, not all of the individuals granted amnesty were qualified according to the criteria. In some cases, ‘exceptional hardship’ experienced by migrants gave the State Secretary of Justice reason enough to deviate from the chosen line. The Secretary’s discretionary powers to grant a pardon subsequently gave way to protest: it seemed an unfair arrangement for those irregular migrants who failed to meet all the criteria, but still felt they were fully integrated in

Dutch society. During the winter of 1998-1999, a number of migrants went on a hunger strike to call attention to their plight. They tended to find a sympathetic ear in the Netherlands' four largest cities. The mayors of Amsterdam, Rotterdam, The Hague and Utrecht seemed to recognise the incident's potential threat to public order and – as far as media coverage at the time suggested – they showed compassion for these migrants' claims of truly belonging in their cities, living among their fellow inhabitants. The situation forced the government to devolve some of its discretionary powers to the local level. To this end, the government further specified a set of criteria that migrants should meet, while, at the same time, a mayoral committee was given the opportunity to advise on which aliens should be allowed to stay in the Netherlands because – besides meeting the general criteria – they were notably well integrated into society (Tweede Kamer, Vergaderjaar 1999-2000, 19637 (482))

4.3. *Regularising old asylum cases*

Under the previous law, a long backlog of applications and appeals, especially, had developed. This led some individuals in Parliament, as well as interest groups like the Dutch Refugee Council, to argue in favour of a one-time pardon. It would apply to all those who had applied under the old regime and, for a considerable number of years, were still awaiting their ultimate rulings. In many instances, this concerned people whose grounds for applying for asylum were not honoured and whose removal to their country of origin was not feasible, either because such a removal would mean a violation of the European Convention on Human Rights (notably, Article 3),¹² or due to a number of major practical impediments.

The subsequent Balkenende governments (2002-2006) categorically refused to consider such a general gesture.¹³ The main arguments were that it might attract both new and previously rejected asylum seekers, and that it would be unfair to those who had left upon being first turned down and neither appealed nor awaited the ruling of an appeal. Moreover, the pardon would be rewarding those asylum seekers who had been using all legal means possible to postpone departure. At the same time, the Minister for Alien Affairs and Integration promised Parliament it would reconsider all cases, with a particular sharp eye for the aforementioned cases of extraordinary hardship. Among those old cases, 43 per cent were identified as refugee cases or involved granting some kind of residence status otherwise.¹⁴ The Dutch elections of 2006 produced a parliamentary majority in favour of a more generous solution. Even before the new government was formed, Parliament had already demanded the regularisation of all those who had applied for

asylum before 1 April 2001, and were since residing in the country. The precise number of persons eligible for this regularisation remains unknown, though it is estimated to come close to 30,000.

4.4. *Use of penal law*

It is somewhat ironic that, with the outlawing of human smuggling in late 1993, there was a fundamental change in people's perception of the act of assisting a migrant across a border against the will of a state. Only a few years earlier, human smuggling rather had the ring of heroism to it than that of a criminal act, at least from the Dutch viewpoint.

According to Article 197a of the Dutch penal code, human smuggling – provided its goal was to make a profit – became punishable, with a maximum imprisonment of two years or a fine (of the fifth category). Only a few years later, in 1996, the maximum sentence was raised to four years, or eight years in aggravated instances of organised or habitual crime. Apart from the targeted deterring effect, criminalisation was expected to encourage more efficient detection because the graver the offence, the more invasive the police's methods for investigation (telephone taps, house searches, surveillance and infiltrations) (Peters 2005). Since 1 January 2005, human smuggling has been made a crime, regardless of the motive – pecuniary or otherwise.

From this date up until August 2005, a total of 114 cases was brought to the attention of the authorities. In 92 instances, individuals were thereby summoned to appear before the courts. Since August 2005, fifteen cases have led to convictions and three, to acquittals (Tweede Kamer, Vergaderjaar 2005-2006, 29537 (28): 14).

To dissuade employers from hiring irregular migrants, fines for such offences that have also been raised. Before January 2005, fines averaged 1,000 euro per employee; at present, they are 8,000 euro per employee. In the past, problems arose if during workplace checks employees refused to produce their documents for the labour inspectors (only police officials can demand them to be shown). Under the current rules, the employers are held responsible for the proper documentation of their workers. Failing this, fines are levied as though the employees were indeed working illegally (see Table 3 for an overview of the workplace checks for the first eight months of 2005, grossing close to 8 million euro in total fines collected).

Irregular employment in a private household is sanctioned with a fine of 4,000 euro. In practice, it appears difficult for a private individual to establish whether an alien can be legally employed or not, especially not in the case of workers from the new EU member states whose residence – but not always their employment – is legal.

Table 3 *Results of workplace controls, January-September 2005*

	<i>Results of workplace controls January-September 2005</i>
Number of checks	6,200
Number of instances where fines were in order	1,600
Percentage of instances where fines were in order	25%
Detected nationals of Central and Eastern European countries	1,400
Detected aliens with a non-Central or Eastern European nationality	2,100
Total amount of fines collected	€ 7,750,000

Source: Tweede Kamer, Vergaderjaar 2005-2006, 29537 (28): 12.

Keeping in line with international developments, exploiting the precarious situation of illegal aliens has also become a crime under Dutch law, even more so if this happens under force or threat thereof. In fact, such a case is considered trafficking. Traffickers can be convicted for up to six years of imprisonment. For the year 2006, the Dutch newspaper *de Volkskrant* (28 February 2007) reported, however, that the average trafficking conviction amounted to one year and seven months. At the same time, there is reason to believe that labour exploitation is generally 'voluntary' in nature: migrants who face the prospect of attrition simply have no alternative left but to work for whatever remuneration is offered to them (Garcés-Mascreñas & Doornik 2007).

Several proposals have been launched in Parliament to also outlaw illegal residence, *per se*. The Dutch Cabinet never embraced such suggestions, one reason being that this would put considerable strain on the Public Prosecutor and the penitentiary system (Tweede Kamer, Vergaderjaar 2004-2005, 29537 (23): 3-4). This would appear to be paradoxical in view of the country's ever-increasing capacity for detention, as discussed above. It is less contradictory, however, when one realises that detention centres for aliens are run on the basis of a light, dormitory-like regime, whereas ordinary prisons know a higher level of security and detainees are locked in single cells (increasingly, in double cells). In other words, incarcerating criminals is a much more costly affair.

5. Conclusions

Over the past three decades a clear trend in Dutch migration controls has become visible. From a situation in which migration was regulated by the absorption capacities of the labour market and government actions hardly went beyond formalising a *de facto* situation, the Nether-

lands entered a prolonged process in which subsequent governments have attempted to gain control over migration processes. Each attempt has led to spill-over effects: labour migration gave way to family-based migration and, with growing global integration, asylum and refugee migration. Failed previous attempts have also tempted governments to adopt policy measures in adjacent areas: from pure administrative measures, through labour market sanctions, to the formal exclusion of all irregular aliens, and, finally, into the domain of penal law. Pecuniary hurdles are also being tested as a possibly suitable means to dissuade unsolicited migrants from choosing the Netherlands as a destination for resettlement.

Lastly, what has become evident from this short excursion through Dutch restrictive migration measures is that the hardest element of a control lies at the exit. Migrants who end up working in the country, and even more so those who have sought asylum, are difficult to expel if they fail to cooperate. Detention, a costly instrument, has some effectiveness in this respect, but a majority of detainees sooner or later are put out on the street.

Key characteristics of Dutch controls

- Gemeentelijke Basisadministratie (GBA), the centralised network of local population registers
- Vreemdelingen Administratiesysteem (VAS), the local aliens police register connected to a central aliens register
- Social Fiscal (SoFi) number for all documents dealing with labour relations and direct taxation
- Residence permit cards
- Mandatory carrying of identification document at all times
- Access to public resources contingent on residence status
- Governmental reluctance to use regularisations
- Tendency to grant discretionary powers and implementation to local governments

Notes

- 1 This overview excludes migration and its regulation as far as colonial and post-colonial flows are concerned. Even though one could argue that encouraging Surinamese independence in 1975 aimed to reduce migration from Surinam to the Netherlands (Schuster 1999) – until then, all Surinamese individuals were Dutch nationals – the extent to which migration controls were exerted on colonial migrants has been modest.

- 2 The definition of 'knowledge worker' specifies the following criteria:
- if the migrant is under age 30 and will earn an annual salary of at least 32,600 euro gross;
 - if the migrant is over age 30 and will earn an annual salary of at least 45,000 euro gross;
 - if the migrant is a scientist, regardless of the annual gross salary he or she will earn (i.e. even if this falls below the 32,600/45,000 euro limit).
- The spouse of a knowledge worker has free access to the labour market, and knowledge workers qualify for a generous tax reduction (30 per cent of the gross wage is not taxed during the first ten years) (De Lange et al. 2003).
- 3 For example, someone in an irregular position or any asylum seeker already in the Netherlands could, without leaving the country, apply for permission to stay with a spouse. Current regulations specify that such an alien must return to his or her country of origin and there apply for temporary leave in order to reside in the Netherlands. This permit is known as a *Machtiging tot Voorlopig Verblijf* (MVV).
- 4 Until 2002, the policy fields of integration and admission were the respective domains of the Ministry of Home Affairs and the Ministry of Justice. Between 2002 and 2007, both policy fields were the responsibility of Minister for Aliens Affairs and Integration Rita Verdonk, whose department was part of the Ministry of Justice. The present government has once again separated these responsibilities, now with a Minister for Housing, Communities and Integration and a State Secretary for Justice responsible for asylum and immigration.
- 5 Vereniging van Nederlandse Gemeenten.
- 6 The Dutch government has always maintained that imposing these measures is not meant to minimise immigrants, but rather, to serve to enhance the (prospect of) integration among newcomers in Dutch society.
- 7 For an overview of fees imposed by the IND, see www.ind.nl/nl/Images/Leges06_ENG_tcm5-76140.pdf.
- 8 Strictly speaking, the tests are not only on language, but also aim to examine some basic knowledge of Dutch society. A DVD is now available to instruct prospective migrants on all the do's and don'ts of living in the Netherlands. This DVD, which is accompanied by a booklet containing all the exam questions, costs 64.50 euro.
- 9 Thanks are due to Sophie Scholten for providing this information.
- 10 SoFi numbers are also administered to regularly residing children once they become of school-going age. Schools are required to register all their pupils' SoFi numbers, though they may not turn away children who lack them so long as they are of school-going age (up to sixteen years old).
- 11 'Asielverzoeken in EU met Eenvijfde Gedaald', CBS Webmagazine, 18 April 2005.
- 12 Together with the Refugee Convention, Article 3 forms the basis of Dutch refugee law. An alien qualifying for protection or non-removal under either instrument is granted refugee status. This status remains open for review during the first five years, after which it becomes irrevocable.
- 13 Minister Verdonk stated in a press release that, upon being appointed to office, she pardoned over 2,300 cases of asylum seekers who had filed applications over five years before and were still waiting for a first judgement by the IND.
- 14 Press release from the Minister of Aliens Affairs and Integration; available at: www.justitie.nl/actueel/nieuwsberichten/archief-2006/60620Verdonk-voldoet-aan-motie-dittrich.aspx.

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Report from Spain

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1. Introduction

The Spanish Constitution of 1978 contains only one precept on migration movements concerning Spanish emigrants.¹ That is, Article 13, which specifies the basic constitutional regulation on aliens. The precept formulates a principle of restricted equivalence between nationals and aliens vis-à-vis the entitlement to, and exercise of, fundamental rights and public liberties.² The article also constitutes the basis for Spanish legislation on aliens and immigration. The Spanish Constitution does not, however, take immigration into account. At the time of its creation, immigration was veritably non-existent, and Spain had traditionally been a country of emigrants. As the data in Tables 1 through 4 show, there has been substantial change in Spain's migratory flows during the last 30 years.

Spain's emigration-to-immigration metamorphosis provides rich fodder for describing the evolution of the country's legal regime. While the country's legislation has been adapted to European Union legislation and policies, and it must therefore be understood in the greater European context, this chapter's analysis takes a stricter national perspective. The chapter underscores the vacillation that Spain experienced in the legislative and political process during years of intense change. Revealed here are the difficulties that were involved in the creation and execution of the *new* policy on immigration.

2. Organic Law 7/1985 on the rights and liberties of aliens in Spain

Organic Law 7/1985 develops Article 13³ for the first time. Its content can be classified as 'net aliens': it stressed the control of aliens – their entry, stay and work – and the restrictive regulation of rights was based on the distinction between legal and illegal aliens and, within the legal group, aliens on temporary stays and residents. This law did not provide for aspects of immigration. For example, it did not take into account residence or work permits for an indefinite period of time, nor

Table 1 *Foreign resident population, 1953-2006*

<i>Year</i>	<i>Foreign resident population</i>	<i>Annual increase in percentage</i>
1953	59,483	–
1960	64,660	1.2%
1970	148,400	12.9%
1980	182,045	2.3%
1990	276,796	5.2%
1991	360,655	30.0%
1992	402,350	22.6%
1993	430,422	7.0%
1994	361,364	7.3%
1995	499,773	8.3%
1996	538,984	7.8%
1997	609,813	13.1%
1998	719,647	18.0%
1999	801,332	11.3%
2000	895,720	11.8%
2001	1,109,060	23.8%
2002	1,324,001	19.3%
2003	1,647,011	24.4%
2004	1,977,291	20.1%
2005	2,738,932	38.5%
2006	3,021,808	10.3%

Source: Anuarios Estadísticos de Extranjería 1953-2003, Ministry of the Interior, Permanent Observatory on Immigration, Ministry of Labour and Social Affairs (2003-2006).

Table 2 *Population growth according to municipal register, 1998-2005*

	<i>1998</i>	<i>2000</i>	<i>2002</i>	<i>2004</i>	<i>2005</i>
Total population	39,852,651	40,499,791	41,837,894	43,197,684	44,395,286
Spanish population ⁴	39,215,516	39,453,206	39,859,948	40,052,896	40,163,358
Foreign population	637,085	923,879	1,977,946	3,034,326	3,730,610
Percentage of foreigners in relation to total population	1.6%	2.28%	4.73%	7%	8.4%

Source: National Institute for Statistics.

did it regulate family reunification. The Spanish legislator was thus short-sighted, being well aware of the immediate reality of Spain's incorporation into the European Community, while nevertheless being unable to foresee Spain's transformation from a country of emigrants to a country of immigrants.

During the years following Organic Law 7/1985, the situation was characterised by a constant increase in migratory flows, which gave rise to a growing number of irregular immigrants. Immigration became a subject of public debate. Thus, an immigration policy was formulated through the Proposal of 9 April 1991.⁶ The proposed active policy on

Table 3 Comparison of foreigner totals in municipal register with foreigner totals in register of foreigners with resident permits,⁵ 1998-2005

Register	1998	1999	2000	2001	2002	2003	2004	2005
Number in municipal register	637,085	748,954	923,879	1,370,657	1,977,946	2,664,168	3,034,326	3,730,610
Number in register of foreigners with resident permit	719,647	801,332	895,720	1,109,060	1,324,001	1,647,011	1,977,291	2,738,932
Difference between municipal register and register of foreigners with resident permit	- 82,562	-52,378	28,159	261,597	653,945	1,017,157	1,057,035	991,678

Source: National Institute for Statistics and Permanent Observatory on Immigration, Ministry of Labour and Social Affairs.

Table 4 *Number of Spanish residents in foreign countries by continent, 1991-2001*

		1999	2000	2001
Europe	EU	519,571	509,501	499,937
	Rest of Europe	152,820	131,283	138,482
	Total	672,391	640,764	638,419
Africa		12,937	12,515	13,244
Asia		8,940	8,316	9,713
Americas	North America	131,339	121,411	12,731
	Central America	41,880	43,249	51,149
	South America	690,466	586,973	581,041
	Total	863,465	751,633	734,921
Oceania		14,208	14,269	17,056
Total		1,571,941	1,427,497	1,413,353

Source: *Anuario de Migraciones*, Ministry of Labour and Social Affairs.

immigration was to be realised in three main points: control or systematisation of migratory flows, social integration of immigrants and development cooperation with emigration countries. During the application of this policy, an extraordinary regularisation (i.e. an amnesty process) took place in 1991 and the Social Integration Plan for Immigrants was developed, although the latter was only slowly and partially implemented. In addition, Organic Law 7/1985's new implementation rules, as approved by Royal Decree 155/1996, involved a large number of participants, and its approach did take immigration into consideration. Royal Decree 155/1996 approved another extraordinary regularisation (i.e. an amnesty process).

Nevertheless, a number of factors highlighted the need to change the Organic Law. For one thing, the organic law and its implementation rules were characterised by a technical-legal disconnect. While, in fact, this organic law is a pure law on aliens, Royal Decree 155/1996 took into account aspects of immigration, which was paradoxically strange to the law it implemented. For instance, the implementation rules foresaw a permanent work permit (Article 75.IV), yet the organic law only considered a five-year maximum work permit (Article 15). The unstable legal framework and a lack of sufficient resources for its management have also had an impact on the migratory flow system. Such administrative deficiencies have given rise to recurring groups of irregular immigrants, thereby calling into question the efficacy of the law. The same held true for the lack of legal cover of measures for the social integration of immigrants. Finally, political reasons came into play. This could be seen, for example, in the opposition's accusations that the Popular Party's first government was insensitive to immigration, if not altogether neglectful of the topic.

3. Organic Law 4/2000 and its revision by Organic Law 8/2000

Organic Law 4/2000 on the rights and liberties of aliens in Spain and their social integration arose from several bills that were submitted to Parliament in 1998. At first, the parliamentary process was a tranquil one. In the end, however, it was forced to go through the urgency procedure. It was approved, although the Popular Party, who was in power at the time, voted against it. This led to the break-up of political consensus and the inclusion of immigration policy in electoral manifestoes.

Organic Law 4/2000 included the following legislative policies: First, as the basic instrument of social integration, it laid down the principle of maximum equivalence between nationals and aliens and acknowledged a wide range of social rights to aliens, including even irregular immigrants who were on the municipal population register. Second, with regard to the legal system for residence and work permits, Organic Law 4/2000 increased guarantees and endeavoured to reduce the administrative authority's scope of discretion (e.g. regarding visas). It regulated a process for ordinary, permanent and singular regularisations (i.e. a legal way to obtain a resident permit without the correspondent visa, cf. Article 29.3) and excluded deportation in cases of irregularity; it also included an extraordinary regularisation process (i.e. another amnesty process). Thus, Organic Law 4/2000 stressed removal of legal obstacles that would hinder the social integration of immigrants who were in an irregular situation and – that being said – the law also worked on the assumption that the system for organising the flows was ineffective.

Since the Popular Party's March 2000 victory (winning with an absolute majority), Organic Law 8/2000 of 22 December was passed through the urgency procedure. Organic Law 8/2000 completely revised the articles of Organic Law 4/2000 and shifted its underlying orientation by stressing the system of administrative authorisations required by aliens. The new law's most salient points included a weakening of the general principle that equated Spaniards and aliens and led to an overall reduction in the state's recognition of migrant rights. The latter point was driven expressly by reinforcing regularisation as a presupposition for recognition in general.⁷ When it came to the legal system of control, the administrative authority's increased discretion regarding visas was recognised once again. Meanwhile, ordinary permanent regularisation was restricted and deportation in case of irregularity was reintroduced.⁸

Table 5 *Main extraordinary regularisation processes, 1985-2005*

<i>Year</i>	<i>Number of applicants</i>	<i>Number of permits granted</i>	<i>Percentage of applications granted</i>
1985-1986		38,100	
1991	110,100	108,321	98.4%
1996	25,128	21,300	84.8%
2000	247,598	163,913	66.2%
2001	361,289	243,790	67.5%
2005	691,655	575,827	83.1%

Source: Ministry of the Interior, Ministry of Labour and Social Affairs.

4. The new legal reforms of 2003: Implementation Rules of 2004

From 2001 onwards, there was a substantial growth in the number of regular and irregular immigrants in Spain due to the country's economic boom. The large number of irregular immigrants punctuated the system for managing immigration flows with a huge question mark. In addition, human trafficking and smuggling networks grew, and there was an increase in aliens-related crime rates. The situation led the second government of the Popular Party to consider another process for reforming legislation. This was brought about by the Supreme Court decision of 23 March 2003,⁹ which annulled eleven articles of the implementation rules on aliens, as approved by Royal Decree 864/2001. These articles were written off because they contained stipulations lacking due legal cover (for example, the possibility of internment of aliens subject to removal). The reform was specified in the approval of Organic Law 11/2003 of September 2003 and Organic Law 14/2003 of November 2003, the latter of which, especially, introduced many modifications to the organic law.

The final text of Organic Law 14/2003 was agreed upon by both the Popular Party and the Socialist Party. Improved management was its main objective, something expected to be attainable by simplifying administrative steps and the legal regime applicable to aliens, as well as by strengthening the sanctioning instruments for illegal immigration and human trafficking and smuggling. Thus, as in the case of Organic Law 8/2000, the reform was basically oriented towards ordering and controlling migratory flows; it neither affects nor addresses the social integration of immigrants.¹⁰

The approval of Organic Law 14/2003 required new implementation rules. The vicissitudes of the policy – the change of government after Spain's general elections on 14 March 2004 – had delayed creation of the implementation rules for over a year. The Socialist Party's new gov-

ernment finally approved the rules by Royal Decree 2393/2004 on 30 December 2004.¹¹ They entered into force on 7 February 2005. The pillars of the new regulations are as follows:

1. Managing migratory flows through the mechanism of the general regime (i.e. individual evaluation of each authorisation and job) and the quota system. With regard to the former, the domestic employment situation is evaluated through creation of a catalogue of so-called 'difficult-to-fill' occupations;
2. Combating irregular immigration and the underground economy by linking the work permit to the social security system's otherwise effective registration and by regulating residence and work permits ascertainment on the basis of job-determined residence;
3. Facilitating family reunification and obtaining residence and work permits via social embedding;
4. Encouraging participation of all social actors through creation of the Three Party Immigration Employment Commission;
5. Implementing a computerised registration system that is common to all competent departments in order to expedite application processing.¹²

Although the preamble of the implementation rules declares that the implementation rules are the fruit of a wide consensus of the politicians and economic and social actors, the Popular Party voiced its dissent with the so-called 'normalisation' process (which was, in fact, another extraordinary regularisation, i.e. another amnesty). This one was of a strongly employment-oriented nature, made in the first half of 2005. It was in this way that Spain's present legal framework for immigration was completed.

5. External controls

Starting from the fact that aliens have restricted freedom of movement and residence, immigrants are subjected to a system of control through administrative authorisations. Entering, staying and working are guaranteed by an *ad hoc* administrative sanctioning system. The most salient sanction is deportation, in its several modalities, complemented by a number of penal provisions for the repression of more serious illegal conducts. As the legal system operates both upon entry to the Spanish territory and during the stay on the territory, a distinction is to be made between external and internal controls. Because an immigrant's residence status is normally conditioned by his or her form of entry, however, the external-internal delineation does not complicate an under-

standing of the process as a whole. (For this reason, the penal legislation in force will be addressed in Section 8 on special issues.)

It should be noted, furthermore, that because Spain belongs to the EU, details about the entry, residence and work of aliens in the country do not apply to nationals of EU member states or those aliens assimilated to them.¹³ This also involves the application of the EU law concerning the free movement of persons, external border control, asylum and immigration and, because Spain belongs to the Schengen Area, all the legislation entailed by this.

The entry of immigrants to Spanish territory requires compliance with a number of legal requirements. They are as follows:

1. entering at an authorised border post;
2. being in possession of a passport or an in force document that certifies an individual's identity and is valid for entry purposes (e.g. a travel pass);
3. being in possession of a valid visa, if required;
4. not being subject to express prohibitions regarding entry;
5. providing documentary justification for the stay's purpose and conditions;
6. being able to verify sufficient life resources or being in condition to legally obtain them;
7. fulfilling requisite health criteria.¹⁴

Should these requirements not be complied with, entry will be refused with a reasoned resolution and due judicial guarantees.¹⁵ Such consequences are meant to prevent aliens from accessing Spanish territory and to decree their return; in addition, any involved transporters will be obligated to transfer the immigrants as well as cover any expenses that may arise. Return is the administrative measure at the border that is intended to repatriate persons who have been refused entry; it has made room for rejections at ports and airports. In cases where return is delayed for more than 72 hours, aliens may be held at a so-called alien internment centre.¹⁶ In terms of processing and application of the legal system, control of entry at border posts is the competence of the national police force, while border surveillance is carried out by the civil guard.

Furthermore, designation of the Schengen Area has meant elimination of internal borders between the states it comprises. Aside from exceptional cases, entry into Spain from a fellow Schengen state does not involve border control. In such cases, aliens are obligated to declare entry in terms of Article 12 RLOE; this obligation constitutes a deferred control, not an external one. Although in recent years, police practice has been extended to identity checks along certain routes lying in proximity to internal borders, conceptually speaking, this is an internal,

rather than an external, control. Nevertheless, available data show that the greater number of irregular immigrants enters with stay type visas via Spanish border posts or uncontrolled internal borders (see Table 6 and Table 7).

Finally, we refer to illegal entry; that is, access to Spanish territory without passing through posts that are authorised for this purpose. Such a transgression leads to removal of the alien. This is regulated in Article 58.2-6 LOE and Article 157 RLOE, which constitutes an administrative measure at the border that is directly intended to remove presence of an alien on Spanish territory when he or she has attempted to enter the country via border-post evasion.¹⁷ The removal is classified as an administrative measure because it does not require deportation proceedings, for it is applied to aliens intercepted at the border or within immediate proximity. The removal results in prohibition to enter Spanish territory for a period of up to three years. In such cases, an alien is given the right to legal assistance, which is cost-free if the alien lacks financial resources, as well as the assistance of an interpreter.

If a removal cannot be executed within a period of 72 hours, a request will be made to the legal authorities for the individual to be sent to an alien internment centre. A removal will not be executed – and will, in fact, remain suspended – if it involves a pregnant woman

Table 6 *Law enforcement activity by Spanish police forces, 2000-2005*

	2000	2001	2003	2004	2005
Number of <i>retornos</i> : foreigners rejected at the borders	6,181	8,881	14,750	11,280	15,258
Number of <i>devoluciones</i> : undocumented foreigners apprehended and removed at 'blue' or other unofficial borders/ tried illegal re-entry after expulsion	22,716	22,984	13,684	13,136	14,466
Number of <i>readmisiones</i> : foreigners readmitted at land borders (e.g. France)	–	–	50,407	83,431	52,017
Number of <i>expulsions</i> : foreigners with orders of expulsion	6,579	12,976	14,104	13,296	11,002
Total number foreigners rejected, returned, readmitted or with orders of expulsion	35,476	44,841	92,945	121,143	92,743
Number of disarticulated networks of traffickers	317	362	–	44	67
Number of persons detained for trafficking	1,010	1,223	–	145	269

Source: *Anuarios Estadísticos 2000-2005*, Ministry of the Interior.

Table 7 *Irregular immigration by boat, 2000-2005*

	2000			2003			2004			2005		
	Total	Strait of Gibraltar	Canary Islands	Total	Strait of Gibraltar	Canary Islands	Total	Strait of Gibraltar	Canary Islands	Total	Strait of Gibraltar	Canary Islands
Number of boats detected	807	628	179	942	-	-	740	445	294	567	348	219
Detained occupants	15,195	12,785	2,410	19,176	9,788	9,388	15,675	7,245	8,426	11,781	7,066	4,715
Detained persons responsible for boat	-	-	-	283	-	-	283	159	124	140	113	27
Shipwrecks	-	-	-	13	-	-	14	-	-	2	-	-
Deaths	-	-	-	101	-	-	81	-	-	24	-	-
Rescued persons	-	-	-	406	-	-	339	-	-	329	-	-
Disappeared persons	-	-	-	109	-	-	60	-	-	36	-	-

Source: *Anuarios Estadísticos 2000-2005*, Ministry of the Interior.

whose health or unborn child's gestation may be at risk. In cases where an application for asylum is formalised, a removal will not be executed until its admission or rejection is resolved. There is also a special regime for the protection of unaccompanied minors, who must remain in the custody of the Protection Services for Minors until they can be returned to their families of origin (cf. Article 35 LOE).

Mainland Spain's southern sea borders in Andalusia and Murcia and the Canary Islands pose many irregular migration problems. Proximity to the African coast exposes these regions to networks of illegal immigrants using small boats to navigate the Strait of Gibraltar and even slightly larger ones to the Canary Islands (see Table 7). The Strait of Gibraltar's surveillance system is technologically advanced, and provisions – in terms of both human and navigational resources – along with Morocco's present-day cooperation have permitted detection and interception of boats before they arrive on the Spanish coast. However, as recently as in 2006, the Canary Islands were highly vulnerable to boatloads of immigrants from the west coast of sub-Saharan Africa. Moreover, the cities of Ceuta and Melilla, which have land borders with Morocco, are surrounded by walls and metal fences with surveillance towers and human detectors. As time goes on, the walls grow higher and the fences, wider. In 2005 and 2006, there were massive entry attempts by immigrants and subsequent fatal casualties. The Spanish army has sometimes been called on to help the civil guard's forces in surveilling these land borders.

In practical terms, alien internment centres from the above-mentioned areas are challenged to provide enough space to hold the number of immigrants who have entered illegally and are awaiting removal. What's more, if the removal is not done within 40 days, aliens are freed onto national territory even though they do not have legal cover to stay.

6. Externalised controls

Outstanding among the above-mentioned prerequisites for entry is the visa. Because a visa generally must be obtained in the country of origin, it is considered an external control of migration. The visa constitutes the main instrument for regulating migratory flows; its regime for concession depends on the type of visa being accorded, which is based on the alien's reasons for entering Spain. A visa may fall under one of the following categories: transit, stay, residence, work residence and study-stay (cf. Article 25bis LOE). As already stated, Spain's legal and political regime for visas has been adapted to the EU and to the Schengen Area. For present control purposes, the legal criteria for a visa's

concession or refusal are formulated in such wide terms that the government is left with its own ample discretion.¹⁸ Although the refusal of a visa may be legally appealed, this judicial control is limited; the consular authority need only give reason for refusing a visa in applications concerning residence visas for family reunification, work visas to be issued to prospective employees or visas applied for within the regime of community citizens. If, by chance, refusal is based on the fact that the applicant is on the Schengen list of inadmissible persons, he or she will be notified.¹⁹ All in all, what may thus be deduced is that Spain has two basic criteria on regular immigration, concerning family reunification and work as a prospective employee.²⁰

With regard to the regulation of family reunification, Spanish legislation (cf. Articles 16-19 LOE and Articles 39-44 RLOE) complies with the general guidelines of EU Directive 2003/86. This gives rise to key questions regarding verification of family ties and whether the reunifying person has adequate accommodation and sufficient resources to attend to the needs of a family once regrouped. For this reason, the administrative processing in Spain as well as at Spanish consulates abroad is usually a slow one.

The key factor in issuing employee visas is an initial concession by the administrative authorisation that verifies the individual may work and, furthermore, that a foreign employee is entering the domestic job market. The concession also presupposes prior assessment of the domestic employment situation to confirm that there are no locally based employees whom the job would benefit. The Spanish legal system currently uses several methods to evaluate the domestic employment situation vis-à-vis the processing of initial work permit applications. In the first place, reference should be made to a processing method by individual determination, which involves the analysis of each application. This is conducted by checking whether the domestic employment situation even permits contracting an alien worker. The check can be carried out in one of two techniques (cf. Article 50 RLOE): a) drafting a catalogue of so-called 'difficult-to-fill occupations' (Catalogue DCO) by the state public employment service (work permits will be issued to fill these jobs); b) a so-called direct processing system in which the employer submits the work offer to the public employment service for processing. If, within fifteen days, the position goes by unfilled, the public employment service issues a certificate verifying the lack of adequate available applicants for the job. A second method of processing applications, a so-called general numerical determination,²¹ hinges on Spain's determination of an annual quota. Bilateral agreements on the regulation of migratory flows that have been concluded with certain countries constitute a third way to access the domestic job market.²² Usually, nationals from such places enjoy visa-granting preference. In

the last few years, the Catalogues DCO, published quarterly for certain provinces (e.g. Madrid, Barcelona), demonstrated that Spain's domestic employment situation has not worked to prevent concession of initial work permits and consequent visas.²³

Finally, mention should also be made of the role the current Spanish legislation on aliens plays vis-à-vis community legislation on transporters. As already stated, transporters are obligated to return aliens who are not admitted at the border.²⁴ The responsibilities imposed on transporters turns their employees, *de facto*, into the first immigration control agents. This measure is thus considered an additional external control. It is important to remember, however, that the data available show that the majority of irregular immigrants enter with stay type visas through Spanish border posts or uncontrolled internal borders (see Table 6 and Table 7).

7. Internal controls

Residence of aliens on Spanish territory is subject to administrative authorisation. The modalities of residence are: stay, temporary residence (as a non-earner or an earner) and permanent residence.²⁵ Permanent residence notwithstanding, access to stay and temporary residence requires the following: a correctly corresponding visa, sufficient resources (or, in the case of an earner's residence, a work permit) and being free of criminal record. In fact, failure to have these authorisations – or, if applicable, lacking the relevant visa – constitutes a serious offence that is punishable by preferential expulsion.²⁶ Apart from return and removal, which has already been discussed, the Organic Law of Aliens distinguishes between preferential expulsion and ordinary expulsion. Preferential expulsion is defined through the procedure established to decree it; fundamental characteristics are its immediacy (once deportation is decreed, it is executed right away, with no appeals for deferral) and the summary nature of the processing, which involves only the briefest of stages.²⁷ These characteristics call into question the effective right of the alien to judicial protection, as they drastically reduce his or her guarantees. However, ordinary expulsion takes place through a completely different procedure.²⁸ In order to guarantee expulsion, one of several precautionary measures is stipulated. One of the most notable is the precautionary confinement of the alien in an internment centres for a maximum period of 40 days²⁹ (see Table 6).

Following this overview of the legal regime concerning aliens is an explanation of the resources the Spanish legal system has implemented to evaluate its control of migratory flows.

7.1. *Control in the area of employment*

Compliance with alien employment legislation is controlled by the Inspectorate of Employment and Social Security (IESS) (cf. Article 3.1.4 Law 42/1997 on the Inspectorate of Employment and Social Security), whose functions include the competence to initiate sanctioning proceedings. The human resources and techniques currently available to the IESS have so far proven insufficient, for it has been unable to comply with tasks involving vigilance of the job market and the social security system. Furthermore, the IESS comes up against special difficulties when faced with overseeing those sectors in which immigrants tend to find jobs, such as domestic service (as home helpers and caregivers of the ill or the elderly). Such work is not easily accessed by the IESS, for as the worksite is the private home of the employer. Also proving difficult to control are the agrarian sector, due to its geographic dispersion, and the catering sector, which has a large number of small family-run establishments. Despite efforts by the IESS in recent years, irregular economic activity has grown proportionally higher than general economic growth. Moreover, there remain sectors whose activity is essentially partly regular and partly irregular (Pajares 2004: *passim*).

7.2. *Control in the area of public security*

Immigrants who have the authorisation to remain in Spain for a period of longer than six months are obligated to obtain an alien identity card. Otherwise, they must have documentation that verifies their identity and their status in Spain (cf. Article 4.1 and Article 2 LOE). Exercising the duties entrusted to them, Spanish security forces can request identification of an immigrant. If he or she is not forthcoming with information, the immigrant may be requested to accompany the officer to the nearest police station (cf. Article 20 of Law 1/1992 on the Protection of Public Security).

7.3. *Control through population registration*³⁰

All persons who live in Spain, including aliens, are obligated to register at their local branch of the municipal population register. The very advantages that registration offers are the best guarantee for compliance with it; registration provides proof of continued residence in a municipality, which is usually a prerequisite for being awarded rights of a local nature. In short, local authorities lack effective resources to verify whether an entry on the register accurately indicates someone's residence. Furthermore, it is advantageous for municipalities to have a re-

Table 8 Labour inspection authority activities pertaining to foreign workers, 2003-2006

	2000	2001	2003	2004	2005	2006	Percentage variation 2003-2004	Percentage variation 2004-2005	Percentage variation 2005-2006
Number of inspections	11,818	19,486	30,409	34,301	79,481	71,631	12.80%	131.72%	-9.88%
Number of infractions*/ workers affected	4,229	6,813	10,152	13,800	9,535	10,981	35.93%	-30.91%	15.16%
Amount of sanctions (euro)	14,213,936	36,781,940	60,532,871	84,983,000	59,307,711	69,816,421	40.39%	-30.21%	17.72%

* concerning infractions in the hiring of irregular workers

Source: Dirección General de la Inspección de Trabajo y Seguridad Social.

gistered count because the number of inhabitants within a territory is used for calculating certain state grants.

The regime presently in force for the registration of aliens was the fruit of successive legislative efforts, though it remains a rather incoherent one. The legal reform of 1996 separated registration and the control of aliens. Moreover, the law now holds that the registration of aliens in the municipal population register does not prove their legal residence in Spain, nor will it attribute any rights other than those of the legislation in force. However, Organic Law 4/2000 recognised certain rights for registered aliens, even if in an irregular situation, while Organic Law 8/2000 suppressed all the aforementioned references, except for participation in municipal public life (cf. Article 6 LOE) and the right to health care (cf. Article 12 LOE). Finally, Organic Law 14/2003 introduced the stipulation that the police may access data contained in the municipal population register in order to control the stay of aliens in Spain. Unsurprisingly, this stipulation discourages registration by irregular immigrants and prevents them from attaining subsequent rights.

Public education and health services, which are the competence of the Autonomous Communities, do not concern themselves with administrative matters regarding the regularity of an alien. Indeed, immigrants have explicit legal coverage for the right to education (cf. Article 9 LOE), though dubious legal coverage for the right to health care (cf. Article 12 LOE) and basic social services (cf. Article 14.3 LOE). Municipal registration cannot therefore be deemed a totally effective means for controlling immigrants.

Paradoxical though it may be, facilitating an immigrant in an irregular situation to gain access to legal residence is considered an internal control measure. Such measures, to be described in the next section, are referred to as ordinary, permanent and individual regularisations.

8. Special issues

8.1. Ordinary regularisation

From a judicial standpoint, ordinary regularisation means the recognition of an individual right to regular residence arising from *de facto* (*extra* or *contra legem*) residence as an alternative to the visa. The current regulation includes temporary residence in exceptional cases, which include length of residence, reasons involving international protection, humanitarian reasons and reasons involving collaboration with the authorities.³¹ Length of residence or settlement (*'arraigo'* in Spanish) is divided into three modalities. They are as follows:

1. *Employed length of residence* or settlement. Prerequisites are continued residence in Spain for a minimum period of two years, on the condition that the person does not have a criminal record in Spain or in country of origin, and the verifiable existence of employment relationships that have lasted at least one year. Such work relations must be accredited by a judicial resolution or a sanctioning administrative resolution (cf. Article 45.2.a and Article 46.2.b RLOE).
2. *Social length of residence* or settlement. Prerequisites include continued residence in Spain for a minimum period of three years, on the condition that the person does not have a criminal record in Spain or in country of origin. A minimum one-year work contract signed by both employee and employer must be produced at the time of the application, or the applicant must be able to verify family ties to other alien residents (i.e. a spouse, immediate relatives in the ascending line or descendents), or the applicant must have a report issued by the town hall of his or her daily domicile that verifies the individual's quality of social integration (cf. Article 45.2.b and Article 46.2.c RLOE).
3. *Family length of residence* or settlement. Prerequisites are having a father or mother of Spanish origin and being free of a criminal record (cf. Article 45.2.c RLOE).

8.2. *Use of penal law*

Finally, attention must be given to the penal legislation. This is a far more intense instrument of control that is applied to more serious infringements of Spanish judicial order. Under this system, the following conducts are classified: illegal traffic of labour (Article 312 and Article 313 Criminal Code), illegal traffic and clandestine immigration of persons from, in transit or to Spain or another EU member state (Article 318bis Criminal Code).

A number of reasons for expulsion are also stipulated. They include measures to punish an offence with *mens rea* (Article 57.2 LOE); to substitute criminal proceedings (Article 57.7.a LOE); to substitute compliance with a sentence imposed on an alien who is not legally resident on Spanish territory (Article 89 Criminal Code); to substitute compliance with the security measures imposed on an alien who is not legally resident on Spanish territory during criminal proceedings (Article 108 Criminal Code).

Table 9 Spanish and foreign inmates in Spanish prisons, 1996-2004

Year	Total	Spanish inmates		Foreign inmates ³²	
		Frequency	Percentage	Frequency	Percentage
1996	41,903	34,640	82.7%	7,263	17.3%
1997	42,756	35,220	82.4%	7,536	17.6%
1998	44,370	36,520	82.3%	7,850	17.7%
1999	44,197	36,297	82.1%	7,900	17.9%
2000	45,104	36,114	80.1%	8,990	19.9%
2001	47,571	36,476	76.7%	11,095	23.3%
2002	51,882	38,469	74.1%	13,413	25.9%
2003	56,096	40,891	72.9%	15,205	27.1%
2004	59,375	42,073	58.9%	17,302	41.1%

Source: National Statistical Institute.

Table 10 Motives for detaining foreigners, 1998 and 2005

Nationalities	1998				2005			
	Crimes/ offences*	Faults	Infractions**	Total	Crimes/ offences*	Faults	Infractions**	Total
Romania	923	204	1,422	2,625	10,819	2,308	12,884	27,302
Portugal	1,301	111	153	1,885	1,791	88	18	2,276
France	1,125	191	94	1,602	1,571	165	44	2,015
Morocco	7,026	539	24,384	32,964	17,649	1,016	20,993	43,113
Algeria	5,245	1,529	7,268	15,617	3,168	632	2,193	6,901
Colombia	1,064	39	2,764	3,965	4,226	115	1,403	6,225
Brazil	112	3	1,054	1,194	911	27	3,439	4,458
Ecuador	530	38	1,035	1,631	8,062	348	3,081	12,313
China	200	5	719	941	2,442	29	865	3,409
Others	11,056	1,435	10,391	24,491	32,125	2,984	35,603	64,337
TOTAL	28,582	4,094	49,284	86,915	82,764	7,712	69,523	172,349

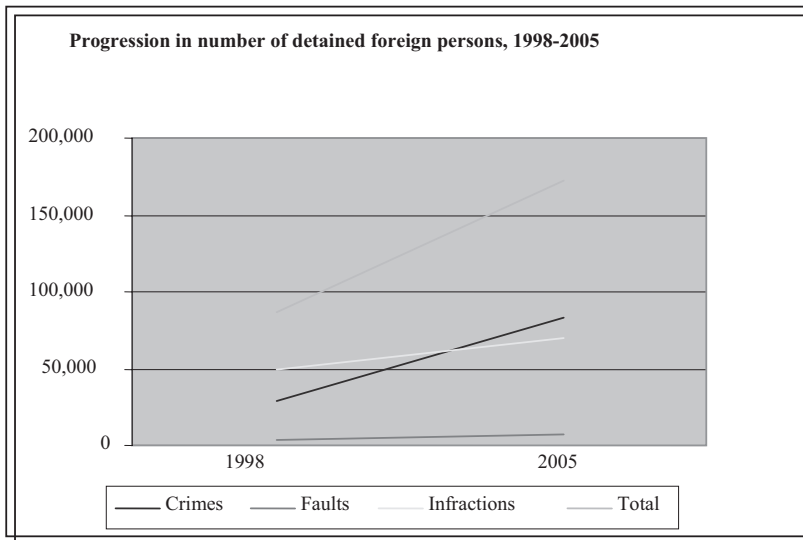
* includes those against people or property, including violations of sexual freedom, drug trafficking and personal misrepresentation and fraud

** primarily referring to detentions for irregular entrance or stay in the country

Source: *Anuarios Estadísticos* 1998, 2008, Ministry of the Interior.

9. Conclusions

To date, Spanish immigration policy has been a matter of responding to problems as they arise. This *ad hoc* approach has thus entailed occasions of improvisation or haste, something no doubt reflected by the urgency procedures through which four organic laws have been processed. The legislative vacillation that characterised the period 1999-2000 is an example of what ought to be avoided in national policy. Neither has Spain yet allocated the resources required to manage immigration. In general, the legal control system has been ineffective when it comes to the organisation of migratory flows. This has given



Source: *Own elaboration with data from Anuarios Estadísticos 1998, 2005, Ministry of the Interior.*

rise to the repeated appearance of pockets of irregular immigrants even on occasions when regularisation channels have been implemented. There are several reasons for this situation.

First of all, controlling Spanish borders has proven extraordinarily challenging. Africa's proximity to mainland Spain (e.g. the Canary Islands and Ceuta and Melilla) means that the country's borders are vulnerable to the illegal entry of certain migrant groups. Spain is increasingly opening up its economy to the exterior – in particular, its very significant tourist sector – which makes the control of its borders even more difficult. Furthermore, the creation of the Schengen Area transfers control of migratory flows from Eastern Europe to other EU countries. To this end, it appears that countries such as Germany and Austria are sometimes less cautious when it comes to granting stay type visas.

Another issue at stake is the deficient administration of the legal framework by competent authorities. Although systemic organisation and coordination have improved, the insufficient allocation of human and financial resources hinders the flexibility and speed required for the concession required by the relevant authorisations. Moreover, a lack of social awareness regarding compliance with the legal control framework is a veritable invitation for immigrants to travel without papers. Many such individuals think they will be able to obtain their documents once in Spain. The lack of social awareness may be attributed to

a number of concurring factors such as: a) legislative instability, as evidenced by four organic laws and four implementation rules over twenty years; b) five extraordinary regularisation processes; c) the inefficiency of the sanction system, which is clear from the low execution rate of decreed expulsions and; d) the legal provision of ordinary, permanent and singular regularisation channels, the regulation of which has not always been in balance with the overall legal regime.

Substantial questioning of the legitimacy of the legal framework for the control of migratory flows has also hindered its capacities. The legal framework has been challenged from various angles. The human rights point of view has proposed a 'papers for everyone' attitude that guarantees the freedom of movement for all persons. A Christian humanism perspective has called for people and groups to take action to help immigrants out of compassion for the more unfortunate. Finally, a more flexible legal framework has been advocated for economic reasons such as to increase the availability of employee diversification.

The considerable and lasting economic growth experienced by Spain in recent years has attracted – and absorbed – a large number of immigrant workers. In fact, the Spanish economic growth model has been partly based on the intensive use of immigrant labour that is not specially qualified, is mobile and is flexible when it comes to work conditions. Moreover, the period of economic expansion has entailed a relatively greater growth of the underground economy according to the studies available (Pajares 2004: *passim*), which acts as a powerful magnet to irregular immigrants.

Last but not least, the intense pressure to immigrate has arisen in a unilateral globalisation context that reflects substantial inequalities of income from one country to another. We understand immigration pressure to be the difference between the number of immigrants wishing to come to Spain in order to improve their living conditions versus the number who can be integrated into standard conditions. All of these factors also depend on the socio-economic prospects Spain has, at specific times, been able to offer.

It should be noted that the degree of influence Spanish public authorities have differs case by case. Some circumstances are completely beyond their control. This means that modern migratory flows pose a very arduous challenge and the system of controlling migratory flows constitutes only one aspect of the problem. A global immigration policy must not forget the social integration of immigrants nor the value of international cooperation in the development of emigration countries, as set out in the Proposal of 9 April 1991 (see Section 2).

Key characteristics of Spanish controls

- Intense substantive changes of migratory flows during the last 30 years
- Legislative instability
- Ineffectiveness of the legal control system
- Recurring regularisations

Notes

- 1 According to Article 42's title I, chapter III, 'On the Principles Governing Economic and Social Life': 'The State will take special care to protect the economic and social rights of Spanish workers abroad and will orientate its policy towards their return'.
- 2 Article 13.1: '1. Aliens in Spain will enjoy the public liberties which are guaranteed by this Title in the terms established by the treaties and the law'. It should be taken into account that, although aliens are subject to certain restrictions or exclusions, they must be compatible with the complete constitutional text and the evolution of constitutional case law has brought a restriction of the admissibility of a differentiated treatment for aliens. See the following decisions: Decision of the Constitutional Court (DCC) 107/1984 of 23 November, which settled the first and basic interpretation of Article 13; DCC 99/1985 of 30 September, on the right to effective judicial protection; DCC 115/1987 of 7 July, which resolved the appeal on unconstitutionality regarding the Organic Law 7/1985; DCC 94/1993 of 22 March, on the right to free movement of aliens; DCC 95/2000 of 10 April, on the right to public assistance; DCC 13/2001 of 29 January, on the principle of equality in Law; DCC 236/2007 of 7 November declares the unconstitutionality of certain articles of Organic Law 8/2000 that restrict the opportunity for aliens to enjoy some fundamental civil rights and public liberties.
- 3 The 'organic' nature of the law means that it would affect fundamental civil rights and public liberties.
- 4 Growth of the Spanish population may be attributed in part to the naturalisation of foreigners.
- 5 As mentioned before, Spanish law allows foreigners – whatever their legal status – to be included in the municipal register so long as they can prove their residence in a municipality. Irregular migrants, particularly since 2001, have been encouraged to register themselves in order to obtain health benefits and to secure a proof of residence that may be used for regularisation. The difference between the figures in the municipal register and those of the register of foreigners with residence permits is used to indicate how many irregular foreigners are in Spain. The municipal register, however, is known to have many flaws, which prevents us from taking its figures at face value.
- 6 The law was processed through Parliament by what was then an urgency procedure, which was approved by practically all votes. The law's subsequent implementation rules were approved by Royal Decree 1119/1986.
- 7 Approved by the Congress of Deputies, this proposal was the result of a consensus by all political forces. Only Izquierda Unida, a minority leftist coalition around the Communist Party, abstained. This consensus lasted throughout the 1990s despite the leftist and rightist nuances that coloured parliamentary debates and subsequent votes.

- 8 The above-mentioned DCC 236/2007 of 7 November, declared the unconstitutionality of certain articles of Organic Law 8/2000 on this ground.
- 9 As will be further explained, Spanish law accounts for three modalities of deportation: return, removal and expulsion.
- 10 Spanish Official State Gazette (BOE) 16 May 2003.
- 11 Among the reform's innovations are:
1. the mandate to have an alien identity card (cf. Article 4.2 LOE);
 2. extension of a visa's function, which may or may not serve as an initial residence permit for work purposes (cf. Article 27.2.b Organic Law 14/2003);
 3. less specific terms in the new regulation of the ordinary permanent regularisation (cf. Article 31.3 Organic Law 14/2003);
 4. new peculiarities of the administrative procedures concerning these matters, which convert them into almost authentic exceptional procedures (cf. Additional Provision 3 and Additional Provision 4).
- 12 BOE 7 January 2005.
- 13 See the report by the Ministry of Employment and Social Affairs for the Council of Ministers held on 19 November 2004, whereby the Project for the Implementation Rules Regarding Aliens was approved, as well as the Statement of Reasons for the Rules).
- 14 According to BOE 28 February 2007: 'The internal implementation rule of Community Law is Royal Decree 240/2007 of 16 February on entry, permanence and residence in Spain of nationals from the Member States of the European Union and other States included in the Agreement on the European Economic Area'.
- 15 Cf. Article 25 LOE, Article 1, Article 4 and Article 9 RLOE.
- 16 Cf. Article 26.2 LOE and Article 13 RLOE.
- 17 This is regulated in Article 60 LOE and Article 156 RLOE. Regarding transporters, cf. Article 66 LOE and Article 16 RLOE.
- 18 An alien found in contravention of a prohibition to enter Spanish territory may also be removed, though in such a case, the removal is not classified as a border measure.
- 19 For example, the concession of visas is subject to the international commitments in force regarding this matter in compliance with the objectives of the foreign policy of the Kingdom of Spain and of other Spanish or EU public policies, such as immigration policy, economic policy and public security (cf. Articles 27.4 and 5 LOE, Additional Provision 5 RLOE).
- 20 Cf. Articles 27.6 LOE, Additional Provision 6. 6 RLOE and 4.3 Royal Decree 1178/2003.
- 21 The current legislation on asylum and refugees, which follows the pattern of EU community legislation, has restrictions on obtaining protection. These restrictions are based on previous application processings, which makes it possible to refuse admission to claims that are clearly unfounded (Law 5/1984 of 26 March regulating the Right of Asylum and the Conditions of Refugees, modified by Law 9/1994 of 19 May and its implementation rules).
- 22 It is regulated in Article 30 LOE and Articles 77-83 RLOE.
- 23 Up until now, such agreements have been concluded with Ecuador, Colombia, Morocco, the Dominican Republic, Romania, Poland and Bulgaria.
- 24 The Catalogue DCO for the present quarter is available via the State Public Service website (www.inem.es).
- 25 Transporter obligations are provided for in Article 66 LOE. Failure to comply with them constitutes a serious infringement that is punishable with high fines and other types of measures such as the suspension of activity and provision of guarantees, as well as immobilisation of the means of transport (cf. Article 54.2, Article 55.1.c and Article 61.2 LOE).

- 26 Cf. Articles 29-32 LOE and Articles 25-76 RLOE. The LOE specifically regulates the situation of students, the residence of stateless persons (cf. RD 865/2001), those without documents (cf. Articles 107-108 RLOE), refugees and unaccompanied minors (cf. Articles 33-35 LOE and Articles 85-94 RLOE).
- 27 The regime of sanctioning aliens is based on a classification of infringements (minor, serious, very serious) and the commensurate stipulation of types of sanctions (fines, seizure of resources used in human trafficking, closure of an establishment or premise and *ad hoc* decisions on expulsion).
- 28 Cf. Article 63 LOE, Articles 130-134, Articles 138-142 RLOE.
- 29 Cf. Article 63 LOE, Articles 122-129, Article 138-142 RLOE.
- 30 Cf. Articles 61-62 LOE and Articles 153-155 RLOE.
- 31 The municipal population register is regulated in Articles 15-18 and the Seventh Additional Provision of Law 7/1985 regulating the bases of the local regime.
- 32 Cf. Article 31.3 LOE and Articles 45-47 RLOE.
- 33 So-called 'offences against public health' account for a large number of foreigners in prison, many of them accused of being 'mules' who are caught at frontiers carrying drugs. Another reason for the high proportion of incarcerated foreigners is that they, unlike many of their Spanish counterparts, lack families who can vouch for them as well as a known national residence, both of which are general requirements to be granted release on probation.

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Report from Switzerland

Paolo Ruspini

1. Introduction

Less than a decade ago, writing about the dynamics of inclusion and exclusion in a wider Europe, Jörg Monar argued that ‘Switzerland has remained a “blank spot” right in the middle of the emerging EU internal security zone’ (Monar 2000: 15). The renowned professor of European studies then went on to describe the growing concern amongst European Union practitioners regarding the country’s exclusion from common EU and Schengen cooperation and data exchange, ‘although’, as he pointed out, Switzerland’s ‘border control and policing systems are of very high standard’ (ibid.).

At a later date, when discussing the package of seven agreements that the Swiss government signed with the EU on several matters – from free movement to road and air transport, to public procurement and research – Monar came to the conclusion that, because of the imposition of the EU principles and requirements, the Swiss case could be named another case of ‘unequal inclusion’ (Monar 2000). The extent to which the situation has changed from the time of Monar’s publication is the topic of this chapter. Along with this investigation comes a preliminary assessment of Switzerland’s current immigration system.

2. The system of admission policy

Before becoming a country with net immigration, Switzerland had long been a country with net emigration. The transformation of Switzerland into an immigration country occurred at the same time as the industrial take-off during the second part of the 19th century. It was the construction of the railway network that brought about a first wave of immigrants from the neighbouring countries. The proportion of foreigners in the total population increased from 3 per cent in 1850 to 14.7 per cent in 1910 (Mahnig & Wimmer 2003; see Table 1 and Table 2). It was not until 1888 that Switzerland’s net migration became positive.

In 1931, the *Bundesgesetz über Aufenthalt und Niederlassung der Ausländer* (ANAG) was enacted. This Federal Law of Residence and Settle-

Table 1 *Proportion of foreigners in relation to overall permanently resident population from end December 1900*

<i>Year</i>	<i>Percentage foreigners</i>
1900	11.6%
1910	14.7%
1920	10.4%
1930	8.6%
1941	5.1%
1950	5.9%
1960	9.3%
1970	15.9%
1980	14.1%
1990	16.4%
2000	19.3%
2006	20.4%

Table 2 *Composition of foreign population, 1900 and 2006*

<i>Year</i>	<i>Neighbouring countries</i>	<i>Other</i>
1900	96.1%	3.9%
2006	37.4%	62.6%

Source: Federal Office for Migration, Berne-Wabern.

ment of Foreigners can be regarded as a ‘police law’ that was aimed at border control and the defence of the national territory. It was profoundly inspired by the international political context of the time, the economic crisis and a widespread xenophobia directed against a so-called *Überfremdung*, an ‘over-foreignisation’¹ of Swiss society (Mahnig & Wimmer 2003).

Since the Second World War, Swiss migration policy has been dictated by the need for unskilled labour. This led to the introduction of a system of ‘quotas’ (officially known as ‘contingents’ or ‘maximum numbers of authorisations’) that would depend on the demands of the labour market. Rotation of the labour force – also known as the ‘guest-worker system’ – would insure that immigration be temporary and prevent immigrant groups from durable settlement in the country. In 1970, the federal government set up the Central Register of Foreigners (RCE) for monitoring and recording the influx of foreign workers. Up until recently, Switzerland had been reluctant to acknowledge the long-term settlement of foreigners, which had in fact already started in the 1970s (Wanner, Fibbi & Efonyi 2005).

The need to comply with the European integration process necessitated the adaptation of Swiss immigration legislation, as reflected in the ‘three circles model’ designed in 1991. Accordingly, immigration

was no longer permitted from outside the EU and the European Free Trade Association (EFTA) – the first circle – and the United States, Canada and Central and Eastern Europe – the second circle.² Since November 1998, Switzerland has followed a ‘dual entry scheme’, which basically prohibits the recruitment of workers from outside the EU and the EFTA, unless it involves highly qualified persons whose recruitment is justified for special reasons (Federal Decree AS 1998 2726). The quota system does not, however, fully reflect Swiss immigration in actual practice. Changing migration patterns, family reunification and the growing number of asylum seekers have transformed the structure of the foreign population (Gil-Robles 2005; see Table 3 and Table 4).

The agreement between Switzerland and the fifteen old EU member states on freedom of movement (RS 0.142.112.681.1) provided for the abolition of all quotas for workers from EU-15, Malta and Cyprus on 31 May 2007, i.e. five years after its entry into force (1 June 2002).³ The initial transitional period, during which the principle of national priority and the control of pay and working conditions remained valid, had expired on 31 May 2004. The agreement resulted in a 46 per cent increase in the number of EU nationals: from 34,000 in 1997 to 49,800 in 2003. Most of them came from Germany and Portugal, with EU labour migrants most active in finance, trade-related and service industries. A growth in EU commuters from neighbouring countries has also been reported (Wanner et al. 2005).

Accompanying measures were introduced at this point to protect Swiss workers against wage and social welfare ‘dumping’. These measures apply to the whole working population, including workers who come from the new EU member states. As a result of the above dispositions, the short- and long-term residence quotas remained valid until June 2007. In the event of a large-scale immigration, the ‘safeguard clause’ allows the possibility to reintroduce such quotas up until 2014. Up until 31 May 2009, a federal decision that is subject to an optional referendum (IO 2005a) may rule on whether this agreement should continue.

For the ten new member states that joined the EU on 1 May 2004, Switzerland and the EU have agreed upon a separate transitional system, which is the subject of a supplementary protocol for agreement on the freedom of movement. This protocol defines a transitional period, which enables Switzerland to maintain restrictions of access to its labour market (albeit with priority for indigenous workers and wage control) until 30 April 2011. During this period, Switzerland will apply for gradually increasing quotas on an annual basis for short- and long-term residence permits (IO 2005a).

In the popular vote on 25 September 2005, a 56 per cent majority of the Swiss electorate accepted the bill on the ‘Extension of the Agree-

Table 3 *Total permanently resident population in Switzerland, end April 2007*

	<i>Swiss and foreign nationals together</i>	<i>Foreign nationals in absolute numbers</i>	<i>Percentage foreign nationals</i>
Total	7,628, 393	1,674,683	22.0%
Permanent resident population	7,479,804	1,526,094	20.4%
Short-term residents ≥ 12 months (L permit)		43,568	
Resident (B permit)		406,515	
Settled foreign nationals (C permit)		1,076,011	
Short-term residents >4 to <12 months (including seasonal workers (L permit))		63,200	
Service providers ≤ 4 months (L permit)		4,058	
Short-term residents ≤ 4 months (L permit)		7,555	
Musicians and artists ≤ 8 months (L permit)		914	
Dancers ≤ 8 months (L permit)		1,538	
International civil servants and their families (FDFA permit)		27,300	
Asylum seekers (N and F permits)		44,024	0.6%

Source: Federal Office for Migration, Statistical Services, Berne-Wabern.

Table 4 *Total immigration according to motive, May 2006-April 2007*

Total	106,352	100.0%
Subsequent immigration of the family	38,456	36.2%
Foreign nationals in gainful employment subject to quotas	39,983	37.6%
Foreign nationals in gainful employment without quotas	2,686	2.6%
Foreign nationals without gainful employment	4,626	4.3%
Re-immigration	97	0.1%
Basic and advancing training	14,084	13.2%
Recognised refugees	1,323	1.2%
Cases of hardship	3,376	3.2%
Others	1,721	1.6%

Source: Federal Office for Migration, Statistical Services, Berne-Wabern.

ment on the Free Movement of Persons of the new EU States and the Revision of Accompanying Measures' (FOM 2005). Although remaining bilateral agreements were automatically extended to include both Bulgaria and Romania, which joined the EU in 2007, insofar as freedom of movement is concerned, particular negotiations are still being held to decide on quota levels and the transitional period of labour

market restrictions. For example, national priority, prior control of employment and wage conditions and quotas all remain up for discussion. The internal EU transitional regulation on Bulgaria and Romania constitutes a point of reference for such negotiations: the EU states may sustain national immigration restrictions for both the newest member states until no later than 2014 (IO 2007b).

On 16 December 2005, the Swiss Senate approved a new Law on Foreign Nationals, which replaced the extant Federal Law of Residence and Settlement of Foreigners dating back to 1931. The new law was ratified with a 67 per cent majority of Swiss voters on 24 September 2006. It is intended to regulate, in particular, the admission and residence of non-EU and non-EFTA nationals who are not asylum seekers.⁴ The law reaffirms current two-tier immigration practices and changes some residency rules. Only a few thousand highly skilled workers from outside the EU and the EFTA are allowed to come and work in Switzerland each year.⁵ Foreign nationals will no longer be granted permanent resident status automatically after ten years and the cantons are now asked to review each request for permanent status. Family reunification has become more restricted, seeing as the children of a Swiss national's foreign spouse will no longer be granted long-term residency if they are over age twelve (previously, age fourteen). Crime involving foreign nationals and their abuse of legislation are also to be punished more severely. Illegal immigrants and rejected asylum seekers can be jailed for up to two years pending deportation, a doubling of the previous length (Swiss Info 2006). Particular measures are to be stipulated, for instance, against human smugglers, illicit labour and marriages of convenience (UFM 2005). The new law provides sanctions such as detention or fines of up to 20,000 Swiss francs for either perpetrators or facilitators of marriages of convenience (Article 113).

3. The immigration control policy

Participating in the development of a common EU asylum and immigration control policy has been a stated aim of the Swiss government since the 1980s. In order to reach this goal, several avenues have been explored (Brochmann & Lavenex 2002). Only in October 1990, the then Federal Councillor for Justice and Police, Christian Democrat Arnold Koller thus established the Expertenkommission Grenzpolizeiliche Personenkontrollen (EGPK). This Expert Commission on Border Controls was led by François Leuba, a rightwing Liberal Member of the National Council.⁶

In its 1991 intermediate report, the Leuba Commission argued that without accession to Schengen, Switzerland would have degenerated into an 'island of insecurity' and become the 'country of last asylum' for those whose applications were refused in EC/EU countries (Glättli & Busch 2005). The Commission's final report, dating back to 1993, became a blueprint for the core elements of Switzerland's police and justice politics after the Fichen scandal.⁷ Internally, the Federal Justice and Police Department (EJPD) recommended 'extended state security'. Meanwhile, with sights set externally, the EJPD reiterated its commitment to Schengen.

During the 1990s, accession to Schengen had failed for two reasons: firstly, because Switzerland was not a member of the EU, which was long imperative for being accepted into the club; secondly, because Switzerland's own strict border controls, at least on paper, contradicted the Schengen principles. This latter point is evidenced by Article 2 of the Schengen Implementation Agreement (SIA) demanding the abolition of internal controls (Glättli & Busch 2005).

As a subsidiary strategy to Schengen, Switzerland has sought to conclude readmission agreements with its EU neighbours. The first agreements on various aspects of border cooperation, police cooperation and readmission were made with Germany in 1994 and with France, Italy, Austria and Liechtenstein in 2000 (Brochmann & Lavenex 2002). Thus, Switzerland had signed readmission agreements with all neighbouring Schengen States and had negotiated common methods of police cooperation that essentially mirror those contained in the Schengen Agreement.

At the beginning of 2001, EJPD Chair Ruth Metzler surprised the public with the announcement that the Federal Council intended to make accession to Schengen and Dublin the subject of the second series of bilateral negotiations with the EU. In order to achieve this, he was willing to abolish border controls between Switzerland and its neighbouring Schengen states (Glättli & Busch 2005).

On 5 June 2005, with 54.6 per cent of the people voting in favour of the Schengen and Dublin agreements, the Swiss finally agreed to join the EU's borderless area, thus implementing joint actions with the EU on asylum seekers. The turnout of the referendum was very high for the country, at 56 per cent⁸ (Vucheva 2005). Switzerland had had plans to eliminate border controls and implement Schengen's other provisions by 2008 (Gelatt 2005).

The Schengen agreements abolish systematic, random controls of persons at the internal frontiers between Schengen states. Because Switzerland is not a member of the EU Customs Union, it will be treated as a special case in Schengen: checks will still take place at the Swiss border. Little will change with regard to current security ar-

rangements following participation in the Schengen agreement. Efficient arrangements for individual checks may remain in place and, at the same time, these checks will be more effective thanks to access of the Schengen Information System (SIS).

The main provisions concerning the Swiss accession to Schengen are as follows:

- Border guards will continue to be present at Swiss borders. As already mentioned, since Switzerland is not a member of the EU Customs Union, control of goods will be conducted as before. Within the scope of these controls, checks can be performed on persons carrying undeclared or controlled goods. If the police have any suspicions, they can also conduct border checks upon persons within the Schengen area.⁹
- In addition to the static controls at the border,¹⁰ controls under Schengen are also mobile and can take place inside the country (e. g. in the area just behind the border, based on the strength of targeted location analyses). Switzerland already deploys 40 per cent of its border guards on a mobile basis in the area close to the border. One reason for this is that, owing to the element of surprise, these mobile controls are very efficient. Controls of persons at the border are now only performed sporadically due to the high volume of traffic: of the 700,000 people crossing the border into Switzerland every day, only 1 to 3 per cent are thoroughly checked.
- During particularly high-risk events (e.g. G8, WEF, UEFA), Schengen allows the systematic controls of persons to also be reintroduced in Switzerland.
- The constitutional division of labour between federal police and cantonal police remains unchanged (IO 2005b).

Participation in Schengen does in fact mean that Switzerland is no longer on the outer border of Schengen. As already mentioned, the country has not only gained access to the electronic investigation system (SIS), but also to the common visa policy and the common ‘Schengen visa’ for visits of up to three months.¹¹ As a result of a special arrangement, Swiss banking secrecy vis-à-vis direct taxes remains protected (IO 2005b). Since signing the Agreement of 26 October 2004, Switzerland adopted some 30 new legal provisions, including three important developments: the introduction of biometric data in passports and travel documents, the adoption of the Borders Code concerning control for persons travelling beyond the external border of Schengen and participation in Frontex. Each of these provisions requires amendments to laws and might eventually become the subject of an optional referendum.

Swiss experts can now participate in the Schengen mixed committees of the Council of the EU and take an active role in discussing the further developments of the Schengen rules. Switzerland has the *right of decision-shaping*, though not the *right of decision-making*. The right of co-determination is, however, important since decisions in all cases are based on consensus. Through further development of the Schengen/Dublin body of law, Switzerland has negotiated a transitional period of up to two years, thereby allowing sufficient time for the different federal levels to decide whether or not any new legal provisions should be adopted (IO 2007a).

4. Control measures to counter the irregular employment of foreigners and human trafficking

The term '*sans papiers*' is commonly used in Switzerland to designate seasonal or other immigrant workers who have lost their legal status, as well as members of their families. It also covers rejected asylum seekers who have not stayed in reception centres, but have merged into the population, often working more or less illegally (Gil-Robles 2005). A detailed governmental report on illegal migration in Switzerland estimated the total number of irregular-status migrants to be between 50,000 and 300,000, some of whom had been living in the country for ten years or more (IMES 2004; Annexes IV&V). A special investigation supported by the FOM and carried out by a Bern-based research establishment (with assistance from six institutions gathering data and conducting 60 expert interviews all over Switzerland), estimated that there are some 90,000 irregular-status foreigners (within a margin of error of +/-10,000 persons) (Gfs.bern 2005).

The situation of nationals from the former Yugoslavia, particularly concerning Kosovars, sparked off debate on Switzerland's *sans papiers* during the late 1990s. The federal authorities' attitude was to refuse any collective regularisation,¹² albeit with an expressed willingness to consider the possibility of issuing residence permits in cases of hardship. Bern authorities demanded to be allowed to exercise their discretion, while providing information about the practices they followed in the so-called 'Circulaire Metzler' (Gil-Robles 2005). This document was signed by Federal Councillor Ruth Metzler on 21 December 2001 to issue instructions for establishing criteria for the regularisation of the status of foreign residents in cases of hardship. It sought to reconcile a Federal Court decision specifying that the number of years spent illegally in Switzerland could not be taken into account for the purpose of obtaining certain advantages, with the need to bear in mind the implications of a long stay in Switzerland for a foreign national.

How decision-making powers and financial burdens are divided between the confederations and the cantons partly accounts for the problem of irregularly residing foreigners. Decisions on allowing aliens to reside in Switzerland are, in fact, made by the confederation. Meanwhile, the canton of residence deals with social issues and also executes deportation orders issued in Bern. As a result, different cantons adopt very different approaches by asking – or not asking – for the regularisation of all their aliens.

As described by Rohner (2000), the Swiss approach to countering employment of foreign workers in irregular situations provides for *sanctions* (enforcement and deterrent measures) and *controls* (measures aimed at combating and halting illegal employment). Switzerland as of yet lacks any *incentive measures*, although it is now clear that such methods are an essential component of any effective policy. Instruments currently in place include:

4.1 *Administrative provisions*

Foreigners must have identity papers showing their place of residence and, for those who are employed, where they work and who their employer is. The main identification data required are thus directly available to the relevant authorities, for example, at customs or roadside checkpoints. At the core of the system is the online Central Register of Foreigners. As previously mentioned, the responsibility for verifying the conditions that apply to residence and gainful employment are shared by a number of Swiss authorities. Once a work permit is issued, the main statutory provisions relating to employment contracts become subject to considerations of public policy. It is thus relatively easy for the employee to rely on legislation when it comes to employment contracts, particularly in the courts. Furthermore, the regional labour inspectorates check up on firms to ensure that they are complying with labour laws, accident insurance and unemployment insurance legislation. In cases of non-compliance, the Federal Law on work (RS 822.114) foresees different sanctions applied to either the employer or the employee (Rohner 2000).

4.2 *Administrative sanctions*

There are a number of sanctions either against employers (for serious or repeated legal offences towards foreigners) or against service providers (for serious and repeated offences related to the entry of foreigners). On the flipside, foreigners can be expelled from Switzerland (and may also be prohibited from re-entering the country for a period of up to three years) if convicted of a crime or offence, or if their behaviour or actions suggest that they are unwilling or unable to conform to the

established order. Finally, the competent authority can prohibit entry into Switzerland by undesirable aliens.

4.3 *Criminal provisions*

To dissuade individuals from facilitating or assisting illegal entry into Switzerland, illegal departure from the country or illegal stay within the state can sentence offenders to imprisonment for up to six months or a maximum fine of 10,000 Swiss francs. To counter the knowingly illegal employment of foreign workers, a fine of up to 5,000 Swiss francs is imposed upon an employer for each irregular worker. (In cases where illegal employment may have occurred unknowingly, the fine is lowered to a maximum of up to 3,000 Swiss francs). The Swiss authorities also provide for different sanctions, ranging from a fine of up to 100,000 Swiss francs for procuring work or hiring out services to foreigners, to imprisonment of up to six months or detention for subsequent offences in breach of the Law on Foreign Nationals.

Based on a number of one-time surveys, Rohner (2000) argues that the legal bases for criminal sanctions are adequate, though there are no data on their deterrent effects. Rohner's discussion goes on to say that the sanctions are not severe enough and therefore do not effectively function as a deterrent. There is, furthermore, a sort of consensus either that the authorities don't give enough priority to enforcement operations or that the resources available are inadequate (IMES 2004; Rohner 2000).

In 2002, the Federal Office of Police estimated that there were between 1,500 and 3,000 victims of trafficking in Switzerland, as compared with roughly 120,000 for Western Europe on the whole (Gil-Robles 2005). The section of the Swiss Criminal Code (Article 196) on human trafficking is currently under revision. The definition of the offence is being extended to include not only trafficking for the purpose of sexual exploitation, but also trafficking for the purpose of exploitation of labour (forced labour or services and slavery-like practices) as well as organ trafficking. Still on the normative side, Switzerland has begun contributing to the international effort to fight this problem by signing the relevant UN conventions, which have not as of yet been ratified.

On the domestic front, in September 2000, the EJPD established an Interdepartmental Working Group for the introduction of further measures to combat the phenomenon. In January 2003, the Swiss Coordination Unit against Trafficking in Human Beings (SCOTT) became effective. The SCOTT is responsible for coordinating action in the field of prevention, criminal prosecution and victim protection, although the operational tasks remain the responsibility of the competent departments of both the confederation and the cantons, which are themselves

SCOTT members. The unit is also responsible for ensuring cooperation between the authorities and relevant organisations, including NGOs. Finally, the new PMM Commissariat¹³ to combat paedophilia, human trafficking and the smuggling of migrants went into operation on 1 November 2003. Its task is to deal with current cases and to coordinate complex operations related to investigations conducted across several cantons or abroad (Gil-Robles 2005).

5. Conclusions

Switzerland has seen its foreign population increase and diversify within the last fifteen years. Contrary to its multicultural characteristics, Switzerland does not, however, recognise itself as an immigration country. Moreover, it still lacks an immigrant policy at the federal level (Hoffmann-Nowotny & Killias 1993; Mahnig & Wimmer 2003).

Hardly isolated from the rest of the Continent, Switzerland had no choice but to address the international pressure concerning the working conditions and social integration of its foreign residents. Thus, its migration policies underwent a major reorganisation, starting from the conclusion of the bilateral agreement on the free movement of persons within the EU. The seasonal worker status had to be abolished and the rights of legal immigrants had to be extended, allowing for family reunification, professional and geographical mobility and the transformation of temporary permits into permanent ones (Brochmann & Lavenex 2002).

Table 5 *Illegal entries 2003 according to main nationalities*

Bosnia-Herzegovina	285
Turkey	479
Serbia-Montenegro	848
Asia	1,285
Africa	1,901

Source: IMES 2004.

Table 6 *Apprehended 'human smugglers' 2003 according to main nationalities*

Africa	42
Turkey	42
Asia	56
Former Yugoslavia	96
Rest of Europe	170

Source: IMES 2004.

Switzerland's convergence with the process of European integration concerning asylum and immigration did not work against the strategic interests of the country. The country's knack for adaptation is reflected by the two-tier immigration that was instated. These practices attempt to satisfy the demand for foreign labour while simultaneously making it difficult for all but the most skilled third country nationals to enter. Because of domestic political pressure and the peculiar characteristics of Swiss democracy, it seems that the country will continue to emphasise control and cost-effectiveness as criteria for making immigration and asylum legislation and policy. This seems a more likely route for Switzerland, rather than abiding by any demographic or economic needs, now or in the future (Efonayi, Niederberger & Wanner 2005).

As of November 2007, the rightwing Swiss People's Party (SVP) under the leadership of the controversial billionaire and Swiss Justice Minister Christoph Blocher, had won the most votes (29 per cent) ever recorded for the party in a Swiss general election. This, furthermore, occurred after Blocher mounted a virulent anti-foreigner (and anti-EU) campaign, which was widely denounced as racist.¹⁴ The SVP called for a law that would give authorities the power to expel entire families of immigrants if one member were found guilty of committing a violent crime or an offence like drug dealing or benefit fraud. One of the key trends in the election was the spread of SVP support from the German-speaking cantons into the more Europe-friendly areas of French-speaking western Switzerland.

Lastly, polarisation on the topic of immigration is expected to once again dominate the Swiss political debate. It seems inevitable in Western Europe's black-and-white tendency to choose for either 'the embracement of an increasingly globalized, multicultural society or the retreat into social isolation in an effort to preserve eroding traditional identities' (Moore 2007).

Key characteristics of Swiss controls

- Pressures from and adaptation to the European integration processes through 'bilateral agreements'
- Two-tier immigration system based on 'three circles' policy, with limited quotas for selected highly skilled migrants from outside either the EU and the EFTA (the first circle) or the US, Canada and the CEE (the second circle)
- The *right of decision-shaping* – but not the *right of decision-making* – in the mixed Schengen/Dublin committees of the Council of the European Union

- The division of power and financial burdens between the confederation and the cantons, sometimes resulting in fragmentation on immigration matters and partly accounting for the problem of foreigners in irregular status
- No official recognition of Switzerland as an immigration country as well as the absence of an immigrant policy on the federal level

Notes

- 1 While establishing a casual link between the number of foreigners and the threat to Swiss identity, this concept refers to a situation in which the society had become 'foreign' to its own members because of immigration.
- 2 The third circle is defined by exclusion – specifically of so-called 'third country nationals' who are not from the EU, the US and Canada or the CEE region.
- 3 The quota system for EU citizens with a work contract, regardless of their skills and qualifications, accounted for 15,000 first-time long-term residence permits and 115,500 short-term residence permits per year.
- 4 At the same time, stricter new asylum rules have been approved. As of 1 January 2007, applications of asylum seekers failing to produce either a passport or an identity card without a credible explanation are automatically turned down. The loss of the right to social security benefits and a reduction of the amount of emergency aid came into effect on 1 January 2008. Only refugees who have received 'temporary asylum' may benefit from the law, which has been widely criticised for being the toughest in Europe and disapproved of by the United Nations High Commissioner for Refugees (UNHCR).
- 5 The number of first-time renewable year-round residence permits (which provide for the right to work) is limited to 4,000, and the number of non-renewable one-year residence permits, to 5,000.
- 6 The National Council is Swiss Parliament's lower chamber.
- 7 In November 1989, a parliamentary enquiry commission publicised the fact that the political police had records on 900,000 persons and organisations. The commission's report was the starting point of the *Fichenskandal* (literally meaning 'record cards scandal'), which did not lead to the abolishment of the political police, as the left had demanded, but to major reorganisation and modernization of the country's whole police system.
- 8 Although the majority of citizens endorsed the agreements, the yes camp failed to obtain a majority of cantons. Most of the French-speaking cantons voted in favour, but a majority of German- and Italian-speaking cantons voted against them.
- 9 Systematic random checks, however, are not permitted.
- 10 Since autumn 2002, Swiss border guards have been provided with an automatic identification system by means of digitally recorded fingerprints (AFIS).
- 11 Up until now, the centralised electronic visa-issuing system EVA has been at the core of visa control.
- 12 In 1998, the government turned down the National Council's majority motion for an amnesty. The main reason for its decision was that an amnesty would not be an effective or lasting answer to the problem of illegal foreign workers.
- 13 Commissariat Pédophilie, Traite des Êtres Humains et Trafic de Migrants.
- 14 The party had run an electoral poster showing a Swiss flag with three white sheep kicking off a black sheep from its perimeter with the caption 'For more security'.

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Report from the United Kingdom

Franck Düvell

1. Introduction

While the United Kingdom had long been a country as closed to new immigrants as any other European nation, a policy shift observable by the end of 1990s began to produce a liberal and open migration regime. Within ten years, the focus of immigration politics moved from restricting entry to Commonwealth immigrants to concentrating on reducing asylum migration and, most recently, to managing labour migration flows under conditions of globalisation. On the one hand, there are numerous legal migration channels in the UK as well as irregular and otherwise *de facto* immigrants such as asylum seekers, their families and Eastern European labour migrants who have been regularised to a certain extent. Indeed, in 2004 the country's borders were opened to unrestricted flows from the ten new EU member states. On the other hand, 9/11 and, even more so, the London terrorist attacks of July 2005 have reinforced British security concerns and efforts have been made to enhance the control aspect of migration policies. Notably, migration from the 2007 accession countries of Romania and Bulgaria has been subjected to a restrictive transition period. Also in 2007, the UK's institutional framework was reformed and, in the course of reorganising the Home Office, the Immigration and Nationality Directorate (IND) was replaced by the Border and Immigration Agency (BIA). By 2008, the complex legal categories for immigration would come to be replaced by a points system. So far, the migration regulation system has been characterised by constant changes and further major reforms lie ahead. No doubt this makes the evolution of British migration policy difficult to follow.

2. Transformations in migration policies

When the New Labour government came to power in May 1997, it identified itself as a radical reforming administration that aimed at national renewal and the transformation of government institutions. In a prototypical passage, erstwhile Prime Minister Tony Blair wrote: 'Re-

form is a vital part of rediscovering a true national purpose, part of a bigger picture in which our country is a model of the 21st century developed nation' (Blair 1998: iii).

At the heart of contemporary British politics is the desire to improve national economic performance, labour productivity and labour market participation, yet all the while reducing benefits dependency. New Labour was anxious to rebut the Old Labour image of being hostile to financial and commercial interests. Instead, it promoted British business, emphasising how the flexibility of UK labour markets gave the country an edge over competition with its European partners. Rooting out fraud of all kinds (tax evasion, black markets, shadow labour markets, social security fraud, etc.) was another issue, though of a secondary nature, as it tended to distort the dominating economic aims. Finally, 'modernising' public services was based upon strategic planning and constant reviews that were to be realised through enjoining public agencies and otherwise separate policies and approaches. Ultimately, the aim was to make public services more efficient instruments. This also involved some cultural shifts to rebalance the relationship between consumer-friendly services and enforcement requirements.

The limits to any such reforms are set by three major principles – civil liberties and individual freedom, entrepreneurial freedom and racial equality – and two major policies – promoting social inclusion and civic participation. Since the alienation of Black and Asian minorities during the 1970s and the subsequent trauma of the 1980s inner city riots, maintaining public peace and cohesion has been another overriding aspiration. To this end, Britain has taken care to prevent overly biased policy approaches that would once again alienate its ethnic minorities. Efforts to provide for a commonly shared identification with the country have insisted that policymakers pay attention to the very diverse cultures in the UK, instead of simply demanding adaptation to a dominant and homogeneous *leitkultur*. Any regulations, in whatever policy field, must be carefully balanced against these guiding principles.

Immigration policies provide a striking example of this process. On 8 September 2000, then Immigration Minister Barbara Roche made a crucial speech announcing this change at the conference 'UK Migration in the Global Economy', held at the Institute for Public Policy Research. Roche's emphasis was on how 'Britain has always been a nation of immigrants', adding that the immigrant contribution was crucial to the country's economic success and cultural richness. This speech, however, reflected the UK's split immigration politics when it comes to migration issues. On the one hand, the nation endeavours to balance the requirement of an open economy under conditions of global competition. Yet on the other hand, Britain aspires to be a society

embracing multiculturalism and racial equality, though all the while fearing over-crowding, competition for collective goods and an overload of pressure on public services. Migration was welcomed as a 'central feature' in a globalised environment, one in which 'there are potentially huge economic benefits for Britain if it is able to adapt to this new environment' (Roche 2000: 1). The notion that migration has a positive economic effect has since been repeated – frequently enough (e.g. Home Office 2005) that it has become like a mantra.

The government considers the UK 'one of the world's foremost trading nations' and a 'leading member of a European Union whose success and advantages are underpinned by the movement of people and goods' (Cabinet Office 2007: 5). The UK's general role in the global arena and, more specifically, its immigration policy is viewed from the perspective of competition with other developed countries, particularly in the argument that the UK is 'in competition for the brightest and best talents' (Roche 2000: 1). Another frequent argument is that the country needs to help its businesses and industries 'to compete internationally' (Hodge 2000). As such, it is felt that 'the integration of migrants into British life has been remarkably successful, particularly when compared with some of our European neighbours' (*ibid.*).

In addition, labour and skills shortages in several areas and industries, as well as an ageing population, have both added to the need for reform and change. Whilst the focus is on temporary migration – visitors, students, labour migrants – legal criteria for subsequent permanent immigration and settlement must still be considered comparably generous. Nevertheless, evoking such issues has worked to make language sufficiency and a basic knowledge of British history and culture compulsory for acquiring citizenship (Home Office 2005: 22). Other recent changes have been attributed to concerns caused by cases of immigrants' failing integration, occasional radicalisations and worries over some overcrowding related to large-scale immigration from A8 countries, notably Poland and Lithuania.

Finally, offering legal migration channels has been suggested as the best strategy to prevent irregular migration (Home Office 2002), though the United States experience suggests that this could well result in failure (Edwards 2006). Not only does this approach aim to close the gap between individual aspirations and institutional goals, but it also unites various forces. These forces are economic – the market's demand for labour – and political. The latter specifically refers to powers that once aimed to reduce migration and thereby gave rise to the inevitable tension leading to irregular migrations (for this argument, see Düvell 2005).

By contrast, the New Labour government is driven by the aim to win public confidence, to demonstrate that public concerns are taken ser-

iously and to prove that they are in control over migration issues. Namely, the Home Office is expected to 'protect the safety of the public', as was reinforced by Shadow Home Secretary David Davis (in *The Guardian* 29 April 2006). Accordingly, besides a liberal labour migration regime, equal emphasis has been placed on the importance of regulating entry 'in the interests of social stability and economic growth' (Roche 2000: 1). Meanwhile, one could observe that the global recruitment strategy for specific labour shortages is balanced with a tough line on asylum migration. It is open to interpretation whether refugees have been picked at and sacrificed in order to demonstrate – possibly as a counterweight to an otherwise liberal approach – that the government is prepared to do the utmost to combat illegitimate immigration. Also open to interpretation is whether a tough asylum policy serves to put on a false scent, masking otherwise increasing levels of immigration. Reports have consequently been published focusing on refused asylum applicants and the established target of up to 60,000 deportations (*The Guardian* 13 August 2001).

In sum, immigration is identified as an engine of economic growth and global economic integration. It is, moreover, an acknowledged contribution to social dynamics and cultural enrichment. Immigration administrations are identified as being key instruments for improving the UK's performance in a global and competitive environment. Crime and security aspects have been emphasised only as of late, while the enforcement of internal control was primarily of a secondary nature, albeit with some exceptions. Meanwhile, in 2004, internal control did begin to exhibit some changes that were then accelerated by the London terrorist attacks of July 2005. Today, UK migration policy is, more than ever before, highly influenced by security concerns, even if not driven by them. This shift has been illustrated by sharply rising enforcement figures since 2003, the systematic fingerprinting of visa applicants, the forthcoming introduction of identity cards and possible departure controls (Home Office 2005). The latest policy change – restrictions to non-EU immigration and movements from Romania and Bulgaria – was triggered by controversial public and media responses to the unexpectedly high level of immigration from Poland and Lithuania. However, it is less the economic impact of this migration that has led to fresh concerns about immigration. What has instead led to the UK's most recent restrictions has been social consequences, as manifested by overburdened local authorities struggling to cope with increasing demands for housing, schooling and health services.

3. Immigration control

The challenge of immigration control lies in the balance between economic and security considerations, as well as between the service and the control aspects of immigration politics. Accordingly: ‘the [immigration] service faces two competing pressures ... the need to stop people entering the country who are not entitled to and the need to get passengers through the controls as quickly as possible’ (National Audit Office 1995: 1). Earlier views like these have since been replaced by statements that reflect acknowledgement of an increasingly complex environment: ‘objectives are clear – the facilitation of legitimate travel and trade; security from the threats and pressures of crime, whether illegal migration, terrorism, or attacks on the tax base; and protection of the border itself’ (Cabinet Office 2007: 5). Notably, the latter statement suggests that the UK is far accelerating in its moves towards a ‘borderless world’ (Kenichi 1999).

The UK’s approach to immigration control is determined by its geographic conditions: the fact that it is an island means there is an emphasis on border and entry controls, whilst internal controls remain less developed by comparison. This is underscored by the government’s policy not to join the Schengen Agreement, but instead to keep border controls with all of Britain’s EU neighbours. Up until the late 1990s, it was argued that:

The main focus of UK immigration controls has traditionally been at the point of entry ... These controls match both the geography and the traditions of the country and have ensured a high degree of personal freedom within the UK. This approach is different from practice in mainland Europe where, because of the difficulty of policing long land frontiers, there is much greater dependence on internal controls such as identity checks. (Home Office 1998: paragraph 2.9)

This unique approach was recently reinforced by the establishment of a new Border and Immigration Agency (BIA), whose website states that the ‘management of our borders is fundamental to the interests of the United Kingdom’ and that ‘our immigration system must allow us to manage properly who comes here’ (BIA 2007a). The importance of the external dimension of control is also reflected by an ever-increasing list of countries that require visas to enter the UK. The list amounted to over one hundred in 2004. Pre-entry controls will be further strengthened through ‘e-Borders and greater use of biometrics’, thus introducing automatic cross-checking of data and large-scale passenger screening (BIA 2007a: 16).

Whilst the numbers of international passenger arrivals and immigrants are constantly rising year by year, enforcement figures are also increasing. These statistics reflect the UK's broad approach to open up borders to those who are considered desirable, while still being tough on those deemed illegitimate, surplus or exploiting these new opportunities.

4. The organisational structure of immigration controls¹

In principle, immigration controls are distinguished by three dimensions: pre-entry control, on-entry control and internal controls. Accordingly, three major public institutions can be identified with each of these tasks.

- Pre-entry controls are dealt with by UK missions (UK embassies, consulates and high commissions). These deal with visa issues of all kinds, such as pre-entry clearances, checking applications, interviewing applicants, deciding on applications and issuing visas. UK missions were traditionally administered by the Foreign and Commonwealth Office (FCO). Recently, UK missions were merged into a new agency, UKvisas, which is a joint directorate of the Foreign and Commonwealth Office and the Home Office (UKvisas 2007).
- On-entry controls were dealt with by the Immigration and Nationality Directorate (IND) of the Home Office and the Operations Directorate, namely, its border-control unit. Meanwhile, the IND was renamed and reorganised and became the above-mentioned BIA.
- In-country and internal controls are dealt with by a range of agencies. First and foremost, control came under the IND's and now the BIA's authority. Internal controls are then followed up by the Operations Directorate, including its enforcement and removals unit, detention service and intelligence unit. Other major actors are the Benefits Agencies (BA) and the regional police forces.

The IND and, now, the BIA implements all issues concerning the following: the Nationality Act and passport regulations, the Treaty of Rome and other EU agreements and conventions, the Immigration Act of 1971 and the Asylum and Immigration Act. This agency also issues the 'Immigration Rules and Instructions', a detailed set of immigration categories and procedures. The IND/BIA's decision and/or veto takes priority over FCO decisions. As the institution considered least affected by reform and modernisation, the FCO is said to still reflect a traditional, imperial and even colonial culture.

The IND had undergone a period of major changes until finally being replaced by the BIA. First, Work Permits UK (WP UK), the body

administering permit applications for non-EU labour migrants, which was previously under the umbrella of the Department for Education and Employment (DfEE), was moved to the IND in late 1990s. Several ports and enforcement directorates were also merged into the single enforcement agency of the Operations Directorate. Staff levels were extended considerably, while computerised administration and casework was introduced. Meanwhile, in terms of organisation and location, immigration policy is very much centralised in the IND, the BIA and even more so with the future Border Agency, and their overlapping tasks were successively minimised. Only in visa affairs are there still instances of administrative overlaps between the IND/BIA and the FCO. In terms of location, some tasks such as enforcement matters, work permits or research are dealt with from campuses other than the main site in Corydon, South London. Nevertheless, the IND/BIA is distinguished by its numerous tasks, the various immigration categories it specifies and it is accordingly organised into many highly specialised units. The IND was divided into seven directorates: Policy, Operations, Asylum Support, Casework and Appeals, Managed Migration, Finance and Services, Human Resources, and Change and Reform. Each directorate was divided into units, which were further divided into teams.

With respect to enforcement matters, the IND has run a number of branches in London and other cities. Here, specific categories of immigrants – usually those who have exhausted all their asylum or residence applications and who are liable for removal – must regularly report themselves and can expect to be detained at certain points in their procedures. The IND/BIA has also come to run an increasing number of detention centres (fourteen at present). This came in response to the police's frequent unwillingness to have their jail cell capacities filled with immigration offenders or suspects thereof (see Jordan & Düvell 2002). Some of these control measures such as running detention centres and transferring detainees are outsourced to private firms.

As mentioned before, the organisational structure of immigration controls was just recently completely overhauled, leading to the establishment of the new Border and Immigration Agency (BIA). The BIA took over all responsibilities from the IND, though was given greater autonomy from the Home Office in developing politics, operations and management. It, too, is subdivided into six 'strategic' directorates: asylum, border control, enforcement, human resources and organisational development, managed migration, and resource management (BIA 2007b). The BIA, however, will soon be replaced again by the UK Border Agency, likely in 2008. This move is expected to 'incorporate all the work of the Border and Immigration Agency and UKvisas and the work of HM Revenue and Customs staff at the border' (BIA 2007a).

5. Penalising immigration offences

Illegal entry (Immigration Act 1971: section 24, paragraph a), overstaying (Immigration Act 1971: section 24, paragraph b) and working in breach of conditions (Asylum and Immigration Act 1996, section 8) are all considered criminal offences. Any individual in breach of an immigration law is liable to criminal penalties, while perpetrators are additionally liable to administrative powers of removal and deportation.

In 1999, the imprisonment sentence for human smuggling rose from ten to fourteen years. This change was catalysed when a new Immigration and Asylum Act came into force on facilitating illegal entry, which is the legal term for human smuggling (sentenced by Immigration Act 1971, section 25(1)). Meanwhile, carrier sanctions came into force as early as 1987, when the Immigration (Carriers' Liability) Act was introduced. According to section 8 of the Asylum and Immigration Act of 1996, the employment of illegal immigrants became an offence that same year. The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 also classified new criminal acts that pertain to: entering the UK without a passport, the addition of immigration documents (as distinct from passports) to the Forgery and Counterfeiting Act 1981 and a maximum two-year sentence of imprisonment for failing to cooperate with deportation or removal. Later, specific clauses on 'sham marriages' were also introduced.

6. Externalisation of controls

The UK is a driving force in external controls policies, both within the EU and vis-à-vis its neighbours and non-EU countries. British immigration officers are stationed in Northern France and Belgium to control ferry check-ins and train stations so as to prevent possible illegal immigrants from even turning up on British shores. Airline Liaison Officers (ALOs) are deployed at 31 airports for the same purpose. Collaborating with airlines to prevent illegitimate passengers from boarding planes and entering the UK, ALOs are commonly based in cities such as Moscow, Bangkok and Sarajevo. UK immigration staff is also deployed to non-EU immigration authorities for liaising with local authorities on a range of migration issues.

A few years ago, the British government's proposal for Transit Processing Centres (TPC) and Regional Protection Zones (RPZ) (see Home Office 2003) gained international attention and, finally, support. Pilot schemes were projected for the Great Lake region, Ukraine and/or Moldova as well as Northern Africa, possibly including Libya. So far, elements of the proposal have been put into practice in Ukraine. And

recently, the government has introduced a related programme for 'exporting the border' (Cabinet Office 2005: 7), which translates to:

moving a greater proportion of the UK border controls overseas. An important example of this approach is the introduction of juxtaposed immigration controls in France and Belgium to detect and deter clandestine illegal immigrants attempting to cross the Channel, which represented a step change in the management of immigration controls. (ibid.)

7. Pre-entry controls

Pre-entry controls are dealt with by the 162 UK embassies, high commissions and consulates all under the umbrella of UKvisas. Another exemplification of the overall modernisation process – and because of increasing levels of visa applications – some mostly routine aspects of the process have been outsourced to private businesses. As a consequence, embassy staff concentrates on specific and usually problematic cases. In the period 2002-2003, 2,115 million (entry clearance) visa applications were dealt with; the annual increase stands at around 7 per cent (House of Commons 2004a). In 2002-2003, of the 1.95 million visa applications submitted, about 13 per cent were refused (National Audit Office 2004: 1). Appeals, however, can be lodged with an immigration judge at the Asylum and Immigration Tribunal (AIT).

8. Internal controls²

Up until 2000, a mere 500 officers or so were deployed nationwide for internal operations. This number testifies to how low a priority British internal controls have long been. The situation, however, has since changed; in 2006, up to 2,000 officers were deployed in this field, thus reflecting the issue's new importance. Furthermore, in 2001, arrest squads were set up to specifically target refused asylum seekers. And with effect of the Immigration and Asylum (Commencement No. 2) Act 1999, sections 128 and 139, immigration officers have been given powers to search and arrest. These powers, moreover, were considerably extended by the Asylum and Immigration Act 2004, clauses 8 and 14. To this end, 'an immigration officer may now arrest a person without warrant on reasonable suspicion that an offence has been committed or attempted' (Morgan 2004: 1), illustrating the country's newly acquired 'extremely wide powers', as has been criticised by the British Refugee Council (2004: 7).

Regulations to extend internal controls have been successively introduced over the years. These controls include access to specific public services such as jobseekers allowance, housing benefits, child care and particular financial benefits, all of which are subject to immigration status checks, as regulated by 1985 Immigration Rules, Housing Act 1996, Immigration Rules 1996, sections 9, 10 and 11. Some frequently non-monetary services such as access to health care, neighbourhood services, primary and secondary education, however, are not yet subject to immigration status checks, though efforts are made to further restrict irregular immigrants' access to public services. As yet, public authorities refuse to participate in immigration control, arguing that the different tasks of a society's functional systems should be kept separate. Some say this stance may be attributed to the autonomous nature of various public authorities and the desire to uphold a professional identity, as well – and not least because of – the policy of public service workers' trade unions.

The police have also proved to be an unwilling partner in immigration enforcement measures. Reasons include a scarcity of resources, illegal immigration ranking low on their priority list or because of concerns over police-community relations. Since the inner city riots of the 1980s and the MacPherson report (1999), which associated the police with matters of institutional racism, any activities that could give rise to further immigrant alienation or to accusations of racism have been actively avoided. Whereas in the past, immigration enforcement staff had no enforcement powers and therefore required the police to execute search warrants or arrests, IND/BIA staff were given such authority in 2003 (see Section 4). By 2007, the UK Borders Act again extended existing powers of immigration officers to cover a wider range of police powers of detention. This meant that cooperation with the police would no longer be necessary, and for a while it seemed as though the police were even less involved in immigration control matters than before. Meanwhile, new police units and operations have been established and the police are beginning to play a greater role in immigration enforcement, particularly in special matters such as trafficking and document fraud. In 2007, Operation Swale was introduced to 'create a more joined-up approach to immigration issues' and to improve collaboration between the BIA and the Home Office – notably, the police and, namely, the London Metropolitan Police (Met) (*The Job* 2007). Operation MAXIM was also founded to create a cooperative partnership among the London Met, the UK Immigration Service (UKIS), the Identity & Passport Service (IPS) and the Crown Prosecution Service (CPS) (*ibid.*).

Workplace immigration raids have long been rare, and regulations on illegal employment were seldom enforced. For example, regulations

Table 1 *Enforcement figures in UK*

<i>Persons</i>	<i>Refusal at border and removed</i>	<i>Removal as result of enforcement action</i>	<i>Total removals</i>	<i>Illegal entry action initiated</i>	<i>Deportation orders</i>	<i>Total enforcement actions initiated</i>
1994	17,220	5,210	22,430	7,540	5,770	13,310
1995	19,150	5,080	24,230	10,820	5,640	16,460
1996	21,200	5,460	26,660	14,560	6,850	21,410
1997	24,535	6,610	31,140	14,390	5,600	20,000
1998	27,605	7,820	34,920	16,500	4,580	21,080
1999	31,295	6,440	37,780	21,165	1,785	22,950
2000	38,275	7,820	46,645	47,325	2,525	50,570
2001	37,865	10,290	50,625	69,875	625	76,110
2002	50,360	14,205	68,630	48,050	235	57,735
2003	38,110	19,630	64,390	N/A	N/A	N/A
2004	39,930	18,710	61,160	N/A	N/A	N/A
2005	32,840	21,720	58,215	N/A	N/A	N/A
2005	34,825	22,840	63,865	N/A	N/A	N/A

Source: IND 2005; due to data quality problems only limited statistics are available for 2003-2006.

on the employment of workers from the new EU member states remain unarticulated; there has been no word of having to register their employment or sense of having work conditions checked upon or enforced. As yet, no data is exchanged between the numerous workplace inspections. For example, violations in health and safety matters and, for that matter, irregular immigrants discovered by any other agency will not be reported to the Home Office. Frequently, besides the Home Office, other government agencies that identify undocumented immigrant workers in the course of an inspection come to find that the IND/BIA is either too or too slow to respond. As a result, the suspects are released anyway (House of Commons 2004b: chapter 2). Meanwhile, improving collaboration and data exchange between different labour market control agencies vis-à-vis undocumented migrant workers has become a stated goal (Home Office 2005).

Home raids, particularly when conducted on suspicion only, are very unpopular. They often trigger high levels of social unrest and protest from various actors and agencies. Raids only seem to be carried out upon detaining and deporting refused asylum seekers or instances in which the authorities, because of regulations in place (e.g. via a reporting system), know exactly where a person or family is residing. An increase in home raids has recently been observed in the UK.

Random immigration status checks on the street, in train stations or other places were basically unheard of until 2004. Irregular immigrants were therefore mostly detected inadvertently, such as in the

course of inquiries regarding other issues, or as a result of denunciations. In fact, telephone hotlines to which the public can call in suspects seem to be the most successful strategy in identifying irregular immigrants. While this picture has recently begun to change, it is not yet clear whether increasing numbers of raids are becoming a permanent feature or if this is only an incidental outburst of activity.

The limited, albeit increasingly successful, use of internal controls can be explained within the framework of the above-mentioned principles. Entrepreneurial freedom and the overall aim to create a business-friendly environment distract authorities from interfering too often or too much with a place of employment, even if it is suspected of employing irregular immigrants. Rather than undergoing a full-scale raid, employers would rather receive a formal or an informal warning, for example, a discrete call from the enforcement authorities. Anti-racism and equal opportunity legislation, moreover, prevent authorities from specifically targeting people of immigrant or ethnic origin background.

So far, data protection regulations are also often barriers to internal immigration controls. For example, Revenue and Customs (formerly known as Inland Revenue) was restricted from cooperation with the IND. Up until 2006, only the Benefits Agencies agreed on a specific policy providing for close cooperation and exchange of data with the IND. While National Insurance Numbers (NINs) can serve as a means of identification, there are a million more NINs in circulation than people of working age. NIN cards, which are cheaply available on the black market, can be easily used by impostors; they do not bear a photo nor is any relevant data stored on the magnetic strip.

Other aspects explaining the UK's limited capacity to enforce internal immigration controls are of a more technical nature. Nevertheless, there are direct consequences for a liberal state and its interpretation of civil liberties and individual freedom, which limits the state's right to interfere with the individual. So far, the UK has no population register, and there is no obligation to carry a passport or any other documentation of identity. Normally, if the police ask an individual for personal details, the information given is taken for granted, for it cannot be checked in any computerised system. In cases where a proof of address is required, telephone or gas bills are presented. According to government proclamations, from 2008 onwards, immigrants staying for three months or longer in the UK must have a residence permit that includes a photograph and fingerprints (Home Office 2005: 27).

9. Immigration enforcement

Immigration enforcement concentrates on removal (for overstaying, breach of employment restrictions and gaining leave to remain by deceiving an immigration officer) and deportation (after committing a criminal offence or because it is 'conducive for the public good'). Deportation is a more serious and also procedurally more complex measure with long-term effects because it precludes re-entry into the country. Typically, the stated aim is 'to detect and remove those entering or remaining ... without authority' (IND 1997: 31). That is, 'the removal of failed asylum-seekers is our main concern,' as one immigration official explained it (see Düvell & Jordan 2003: 309). A rationale given by the Home Office (2005) is that 'swift removal is central to the credibility of our immigration system'. More recently, some priority has also been given to the deportation of criminal immigrants.

As Table 1 shows, enforcement figures generally rose by 1999 and 2000, just after the New Labour government came into power. This reflects the greater efforts this government has put in both implementation and enforcement. It also shows an emphasis on actual removals and deportations. Raids are not covered in these figures.

Up until 2003, workplace raids were a rare feature and undocumented work generally ranked low on the enforcement agenda. Although section 8 of the Immigration Act 1996, which sanctions employers who illegally hire immigrants, had been introduced in 1998, it has rarely been enforced. There were indeed instances in which employers were giving warnings, yet very few were ultimately fined. Instead of widespread raids, enforcement agencies preferred to concentrate on few large-scale raids. This would no doubt be highly publicised and thereby demonstrate the Home Office's potency (see Düvell & Jordan 2003). For a long time, the only permanent taskforce was 'Operation Gangmaster', which targeted those subcontractors supplying workers to UK farmers who were suspected of hiring undocumented, mainly Eastern European workers (Ministry of Agriculture, Fisheries and Food 1998). However, in 2003-2004, only 34 raids had been carried out on farms and pack-houses (House of Commons 2004b: chapter 2). This low enforcement level changed only recently, and the Home Office claims that in 2004 '1,600 enforcement operations against illegal employment have been carried out, a 360 per cent increase on the previous year, and 3,300 people working illegally were picked up' (Home Office 2005: 26; syntax slightly changed). These numbers are not considerably high, nor is the ratio of two detected illegal immigrant workers per operation impressive; nevertheless these efforts do signal increased efforts to tackle irregular immigrant labour.

Increasing enforcement measures have also been recorded in others areas, such as raids in homes and public spaces. In 2003-2004, 700 immigration raids took place (Home Office, 10 November 2004), many occurring on private premises. This represents a 100 per cent increase since the previous year, no doubt illustrating a tougher line on this aspect. Furthermore, *The Guardian* (15 September 2004) reported that 235 immigration operations in train and tube stations, as well as on the street, were undertaken in 2004; the apprehensions were jointly carried out by police and immigration forces, and more than 1,000 arrests were made, in 'swoops ...that have become regular weekday events'.

10. Conclusions

For a long time, there has been a huge gap between declared policy goals and policy implementation. The figures presented in this chapter, illustrating increasing enforcement measures on all levels, suggest that the British government is going to change this. It seems to be aiming to close this gap – or is it not?

On the one hand, the government, businesses and some elements of the public are very positive about immigration. On the other, the media, the Conservative Party and other portions of the public are very critical. Even though some traditionally anti-immigration voices had praised new EU-8 immigrants for their work ethos, this hospitable attitude was not going to last and has meanwhile been replaced by a far more critical perspective. The government is acutely aware of these trends, and terrorist threats, furthermore, add another problematic dimension to this situation. Moreover, it should be taken into account that government papers and new legislations have always been part of discourse management. They intend to give the impression that the government acts in a responsible and reliable manner, safeguards the public from external threats and is tough where and when necessary. Nevertheless, for a complex set of reasons, implementation has not yet lived up to such declarations, and there are few reasons to believe this will change. First, the priority given to economic considerations limits the efficiency of any measures that have the potential for a negative impact on economic growth. Second, entrepreneurial and individual freedom, civil rights, racial equality and non-discrimination policies, as well as consideration for civil society activism, will balance enforcement politics and effectively limit its implementation. Organisational culture and professional ethics of staff in public services will stay intact as strong barriers to simple enforcement politics (Düvell & Jordan 2003). By and large, the UK is the perfect example of a country that struggles – and to some extent, fails – at reconciling a liberal approach to eco-

conomic migration and a humanitarian approach to forced migration and family reunification with the aim to maximally regulate migration. Complicit in the situation are security concerns and hostile responses towards immigration by some parts of the public and the media.

Key characteristics of British controls

- Present politics combines liberal approach on migration with increasing enforcement ethos
- Complex interaction between policy design and media attention
- Priority given to external over internal controls
- Increasing externalisation of controls
- Lack of central registrar and imposed obligation to carry identity documents
- Low level of internal enforcement operations, except for removal and deportation
- Constant legal and institutional reform

Notes

- 1 Because both the UK's legislation and organisational structure are constantly undergoing changes, the descriptions given here are only provisional and major revisions may have since been announced; see also Cabinet Office 2007.
- 2 For more on this section, see Düvell and Jordan (2001) and Jordan and Düvell (2002).

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Conclusions

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1. Ten conclusions towards a new framework for analysis

The chapters comprising this book have analysed mechanisms of migration regulation and control in Europe along the lines of Brochmann's benchmark 'The Mechanisms of Control' and Guiraudon's subsequent 'De-Nationalizing Control'.¹

As we have found, however, much has happened in the field of migration policy since these two influential studies were written. Migration flows – their volumes, forms, types and patterns – have all undergone dynamic changes. Responding to both new migration realities and external developments, policies have subsequently been adapted or, in some cases, undergone fundamental revisions. The dynamic environment of policy and migration interdependence has thus catalysed further changes in migration patterns and, consequently, further policy responses.

While Brochmann and Guiraudon were pathfinders to the starting point for our own analysis, this volume has extended and modified their concepts by examining the mechanisms currently at play in the countries under study. In this final chapter, we limit ourselves to ten general conclusions drawn from the nine reports contained herein. We then follow up our conclusions with a proposed new framework to conceptualise the progressive expansion of state migration controls.

First, we have seen that migration policies in Europe follow three main regulatory practices that are closely associated with three main groups of migrants. Focusing on the groups to begin with, the first category consists of 'unsolicited' or 'unwanted' migrants, e.g. those who are irregular, asylum-seeking or involved in family reunification. The underlying aim of states is to suppress, limit and control such types of movements. By contrast, the second main category of migrants is encouraged and often 'invited' to move. These individuals propel what have come to be desired migration flows, e.g. the migration of highly skilled workers, certain types of temporary and seasonal labourers as well as co-ethnic migration.² Finally, the third category of migrants comprises citizens of EU countries moving within the EU. This group's flows are mostly met with an attitude of *laissez-faire* or benign neglect,

albeit with two exceptions. On the negative side, migration from 'new' to 'old' EU member states is still constrained by restricted access to the labour market across many EU countries. And on the positive side, temporary student migration is actively promoted through EU academic exchange programmes.

The first category of migration policies is the control and suppression of unwanted migration. It is clear that this is the preoccupation of European states when the topic of migration comes up, either in the public discourse or in discussions among their political elites. It is also the main focus of the country reports of this volume and will be the subject of the remainder of this chapter. The third category pertaining to internal EU migration is, almost by definition, a non-issue in the regulation of migration (with the two exceptions mentioned above) and will not be further discussed here. Finally, we should say a few words about the second category, which is substantiated by policies to encourage certain types of migration flows. While labour migration, *per se*, has not been the subject of our study, we still find many examples in our country reports that illustrate state interests to attract 'needed migrants' to their economies, or at least to create the public impression of doing so. Thus, some states have instituted special programmes to attract highly skilled migrants, such as the UK's Highly Skilled Migrant Programme or Germany's (now defunct) Green Card for IT workers. Meanwhile, others like the Netherlands offer special tax incentives, like Austria, issue special quotas or, like Switzerland, have permit systems for key workers from non-EU countries. At the same time, it should not come as a surprise that many states, including the UK, Germany and Austria, have also created special entry slots for needed temporary workers, even if these programmes are less publicised presumably because they are politically less propitious. Finally, it should be noted that some nations like Italy and Spain have introduced preferential quotas for labour migrants from certain countries for reasons that are external (e.g. to promote foreign policy), internal (e.g. to improve the labour market) or both.

Second, returning now to Brochmann's division of control mechanisms into external and internal, we can add the increasingly important category of 'externalised' controls to the inventory. Even a quick look at our country reports suggests that this type of instrument for control has grown enormously in both its range and impact. Today externalised controls encompass a comprehensive EU-wide synchronisation of visa requirements, carrier liabilities and sanctions; a growing network of Immigration Liaison Officers (ILOs), Airline Liaison Officers (ALOs) and document advisors; as well as pre-departure checks and parallel pre-entry checks. Many of these instruments had been applied by individual states for years (e.g. the UK introduced carrier sanctions in

1987), even before becoming part of the EU and/or coming under Schengen-wide policy jurisdiction.

Third, we are convinced by ample evidence that external control measures at or around the EU's external borders have been further strengthened over the past decade. On the one hand, this is clearly the result of compensatory measures that were taken in return for dismantling internal EU borders through the introduction and expansion of the borderless area of Schengen's aspired-to area of 'freedom, security and justice'. On the other hand, increased border-control capacities – occasionally even enlisting the army, as do Austria and Spain – amounted to a doubling, if not more, of border guard staff in many cases (e.g. in Germany and Austria). A move like this goes well beyond a simple redirection of controls from internal to external. It can more accurately be linked to a widespread perception among the general public of 'losing control over one's borders', despite little concrete evidence for or against this populist battle cry. In a number of cases, an increase in resources devoted to external border control can also be linked to political pressure on states with extended external borderlines (e.g. Italy before joining Schengen), rather than mere internal political pressures. The focus of external control measures has more and more shifted to the EU's southern borders. Increased and improved police watercrafts and sophisticated surveillance equipment have been deployed to intercept boats carrying illegal migrants (as in Italy and Spain) and/or to fortify physical barriers (as in the case of the Spanish exclaves Ceuta and Melilla).

Fourth, as the individual country chapters here have shown, the level of internal control measures brought to bear on both authorised and unauthorised aliens varies widely. Nevertheless, there are signs of policy convergence even in an area so tied to the idiosyncratic traditions of states and their means of controlling their own populations' daily lives. Thus, the level of internal controls exercised on a country's residents varies between the extremes of the liberal tradition followed by the UK and the high degree of controls instituted in the German system. An illustration of how the general level of state control directly affects the level of control aimed at non-nationals is found in the differing stances that states take on carrying identification documents in public places. Thus, the mandatory carrying of an identity card at all times is prescribed in Belgium, France, Germany, Spain and the Netherlands, but not in Austria or the UK. Random checks of a person's legal status in the country are thus less consequential in Austria and the UK. Having said that, it should be noted that there are currently moves in both countries towards making it mandatory for non-nationals to carry identity cards with them at all times. Moreover, even in countries where, only a few years ago, random identity checks on the streets were vir-

tually non-existent (e.g. France and the UK), such forms of control seem to have become more frequent.

Fifth, we see how general control of the labour market has up until now experienced little policy convergence. As a result, there has also been scarce enforcement of immigration regulations at the workplace, through either systematic or random checks, and states have failed to unify a corresponding system of fines and sanctions. While relatively few workplace inspections occur in Italy, France, Spain and the UK – and migrants working in the informal economy in these countries may feel relatively safe from detection – the frequency of worksite controls seems especially high in Austria, Belgium, Germany and Switzerland. Moreover, there is a general tendency to both broaden and intensify the control of irregular work (e.g. in Austria, Belgium, Spain) and to significantly raise the fines levied on irregular employers (as in France in 2003, the Netherlands in 2005 and Austria in 2006).

Sixth, we have widely observed a tendency to extend the applicability of penal law to the misuse of immigration stipulations. This happens in two primary ways: first, through the steady rise in fines and potential prison sentences for already existing immigration offences; second, through the introduction of new legal offences previously unpunishable by law. An example of the former is seen in the last decade's progressive increase on the penalty scale for human smuggling activities in Austria, Belgium, Italy, the Netherlands and Spain. Human smuggling was introduced as a criminal offence in most European countries only in the early 1990s. Strictly speaking, criminalising human smuggling (and trafficking in human beings) and providing ever harsher legal penalties is not a 'real' case of independent policy convergence: these provisions were all partly mandatory under EU law.³ However, in many cases, the applicable national legal instruments go well beyond the minimum EU requirements. In fact, as much as national laws are driven by further development in EU standards, individual countries also drive the greater EU legislation.

Regulations expanding criminal sanctions to new forms of immigration offences are visible in checks against 'marriages of convenience' (also called 'sham' or 'bogus' marriages) that are concluded only for immigration purposes. Just a quick glance at the development of national migration laws indicates that the battle against bogus marriages has superseded the fight against bogus asylum applications. While the Netherlands had passed the Marriage of Convenience Act in 1994, France and the UK passed specific legislation in this area just within the past decade. It was only in 2006 that Austria, Belgium and Switzerland introduced specific penal sanctions against both perpetrators and facilitators. The new preoccupation with marriages of convenience is hardly coincidental; it reflects states' growing concern over family re-

unification and family formation, two legal gates to Europe that are rapidly becoming the main entry channels in mature immigration countries. Marriage also adds another dimension to the enforcement of immigration: the verification of 'bona fide' marriages in a migration context requires the cooperation of new actors (e.g. civil registrars, mayors, civil courts, church officials) and a more intrusive screening of personal affairs.⁴

Given this widely observed tendency towards the use of penal law in immigration matters, it may come as a surprise to learn that the simple act of illegal immigration – meaning illegal entry and/or illegal residence – is treated with widely differing measures in the countries under study. While illegal immigration is only an administrative offence in Austria, Belgium, France,⁵ Italy, Spain⁶ and Switzerland, it is considered a criminal offence in Germany and the UK. Limited administrative capabilities and detention capacities notwithstanding, states have unique reasons for refraining from criminalising illegal migration as such. Nevertheless, in practice the range of approaches seems to make little difference in how apprehended illegal aliens are ultimately treated.

Seventh, we see more emphasis being placed on the removal of aliens who are not (or who are no longer) authorised to reside in the territories of European states. In several states under our review, the number of effected returns – whether voluntary, forced or cases of 'assisted voluntary return'⁷ – has either grown considerably or remained at a high level (e.g. Belgium, France, Italy, UK). Again, efforts at the EU level to make returns an efficient and credible instrument of migration policy have played a role here. National concerns to demonstrate the integrity and credibility of the system, however, have usually predominated (as in the UK). This is also evidenced by the low number of readmission agreements that have been concluded at the EU level, compared to the vast number of bilateral readmission agreements European states have succeeded in making.

Eighth – and coupled with the redoubled concern over return and readmission – we see a wider use of detention as a means of ensuring the departure of unauthorised aliens. As of 2005, unauthorised aliens in Spain can be detained if return after refusal at the border is delayed for 72 hours. This often leads to detention capacities being stretched to their limit.⁸ In many countries (such as Austria, France, Italy), the maximum period of detention has increased and detention capacities have grown. France's detention capacity grew by +40 per cent between 2002 and 2005, while in the Netherlands, detention capacities tripled during the same period. In 2005, Germany newly introduced departure centres to facilitate the voluntary departure of failed asylum seekers (today the country has nine such centres). Management of the UK's grow-

ing number of detention centres (fourteen at present) is more and more being outsourced to private firms.

Ninth, over the past decade we have repeatedly witnessed how some states have resorted to official regularisation programmes due to prior failures in their control systems. These incidents have included situations in which external control measures could not, in the first place, prevent illegal migrants from entry, or internal control measures failed to detect them once they were in the country. Other scenarios that have made the removal of migrants non-viable have involved legal obstacles, economic and political considerations as well as the sheer numbers. This has been the case for some of the countries presently under review: France in 1998, Belgium in 2000, Italy in 2002 and Spain in 2005. Such programmes are usually criticised by other countries that consider official regularisation programmes non-effective or even counterproductive (e.g. Austria, Germany, Switzerland). However, it should be noted that even in countries that do not officially announce official regularisation programmes, there is usually some way to regularise long-staying irregular migrants on a case-by-case basis (e.g. France, Germany, the UK). Although the issue recurringly comes to the surface in many countries, massive regularisation schemes remain a contentious issue both within and between countries.¹⁰

Finally, in our tenth observation we note the rising tendency for immigration control responsibilities to be shifted to the lowest level possible: that is, to migrants and to the general public. An example of responsibility falling on the migrant is a measure requiring all aliens to at all times carry identification cards (which are more and more becoming biometrically equipped). This is presently required in Spain and now foreseen in Austria and the UK. An example of responsibility falling on the public is the creation of new legal immigration offences for nationals who facilitate illegal migration, e.g. by entering into marriages of convenience or providing housing to irregular migrants (e.g. Austria, Belgium). The general public is naturally also affected once carrying an identity card becomes mandatory for all residents in the country (as is now the case in Belgium, Germany and the Netherlands).¹¹ Finally, ordinary citizens are increasingly enlisted in migration control efforts in a number of instances. In France, they are called upon to notify the police of all (non-EU) foreign visitors. In Belgium, the public is expected to denunciate an illegal migrant through local police stations. In Germany and the UK, individuals are asked to report suspected irregularly residing migrants to specially created hotlines. This kind of civic involvement has potentially grave consequences for inter-community relations.

2. Conceptualising the dynamics of migration control

The country studies presented in this book provide us with rich material for understanding current realities and likely tendencies in the regulation of migration. While the conclusions drawn here are necessarily incomplete, they do provide a valuable starting point for theoretical analysis. In light of the above analysis, we wish to modify Brochmann (1999) and Guiraudon's (2001) arguments concerning internal and external controls. By taking into account the expansion of traditional migration regulation instruments into new domains, we would propose a revision to their views on shifting migration control upwards, downwards and outwards.

Based on the country case studies contained in this volume, we argue that, rather than a unilateral 'de-nationalisation of migration policy', we can observe today a progressive expansion of state control into other, new areas in which migration-relevant controls are exercised by state actors at various levels. This expansion takes place in three main directions. First, there is a *forward expansion* in which externalised control come outside a country's own borders. Second, there is a *backward expansion*, with more internal controls and checks in public and at the workplace. And third, there is an expansion of the requirements placed on migrants themselves, which is a 'personalisation' process that we may refer to as an *inward expansion*. Concomitant with these three directions of the expansion of state control are the expansions of the actors involved and the terms and conditions attached to migration control. A synopsis of these developments is provided in Table 9.1.

A final thought to conclude. In their monumental study on migration control, Cornelius et al. (2004) draw our attention to the frequent occurrence of the 'unintended consequence' of migration policies. The most famous example of such an unintended – and even perverse – consequence is the effect that the strengthening of immigration barriers in the United States had on the number of undocumented migrants living in the country. By making cross-border movements and returns more difficult, the measure actually increased the illegal residents' average length of stay and thus, by all estimates, the total stock of undocumented migrants in the US. In fact, such counter-intuitive side effects are very likely to arise from current modes of migration regulation as well. To give but one example, the contours of a new set of unintended consequences can already be discerned when viewing current efforts to counter marriages arranged for migration purposes. By progressively raising the barriers for several types of entry paths (labour migration, asylum, illegal entry), family formation and family reunification with resident foreigners and citizens (naturalised or native-born) has now become many countries' main entry channel. It should

Table 1 *The progressive expansion of state migration controls*

	Domain expansion	Actors expansion	Term expansion
Forward expansion	Externalised control: general measures outside national borders	Transport companies, ILOs, public authorities in transit and source countries, travel agencies, multilateral operators of new electronic/biometric datasets (VIS, ⁹ SIS II, EURODAC)	Eligibility rules for visa issuing, carrier liabilities, readmission agreements
Backward expansion	Internal control: limiting access to the labour market, linking administrative datasets	Labour market inspectors, social security services, local authorities, employers	Transitional periods for labour market access, enforcing employer fines, longer detention periods, more expulsions and returns
Inward expansion	Personalised control: checks on fulfilling integration requirements and conditions for marriages with non-EU citizens	Language course providers, civil courts, mayors, civil registrars, church officials	Introduction and enforcement of so-called 'integration contracts' (e.g. language tests and culture courses), minimum-income requirements for highly qualified migrants, naturalisation law, civil status law, marriage law

come as no surprise that, under these circumstances, the strategic use of marriage as a means to gain entry and residency rights has become an ever more viable option.¹² Again, states are reacting to their limited capabilities by fine-tuning their control apparatus on family formation, family reunification and naturalisation. This has potentially wide-ranging consequences on civil liberties and the integration of long-established immigrant communities. Judging from experience, we may assume that the next unintended consequences are just around the corner.

Notes

- 1 Brochmann (1999) categorised control measures as either *external* – pertaining to entry and border regulations – or *internal* – pertaining to what happens inside the receiving country – with a further distinction then made between explicit and implicit regulations. Guiraudon (2001) subsequently argued that competence levels and responsibility assignments in migration control are changing. A designation was thus made between a shifting *upwards*, from the national state to supranational institutions like the EU; a shifting *downwards*, from the national state to local authorities; and a shifting *outwards*, from the national state to private organisations.
- 2 Preferential treatment of migrants with ethnic or ancestor ties in the destination country occurs in many states. Two prominent examples of facilitated migration, which includes the automatic awarding of citizenship, are observed in the case of so-called ‘ethnic Germans’ (*Aussiedler*) from the successor states of the former USSR migrating to Germany and those of ‘ethnic Greeks’ (*Pontians*) migrating to Greece.
- 3 See e.g. the Council Framework Decision of 28 November 2002 on the strengthening of the penal system to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA).
- 4 Extended application of penal law to immigration offences is, however, not restricted to marriages of convenience alone. This can also be seen in the new sanctions that have been introduced against fraudulent adoptions (Austria), slum landlordism (Belgium), carrier sanctions against taxi drivers (Germany) or the use of forged or counterfeit documents (UK).
- 5 In France, illegal immigration is a ‘*délit*’, an offence that falls somewhere between an administrative and a criminal offence.
- 6 In Spain, illegal immigration is considered a ‘serious administrative offence’, while people smuggling and trafficking in human beings is considered a criminal offence.
- 7 Migrants required to leave a foreign country or who simply wish to return to their country of origin after having been displaced by conflict are often offered monetary or in-kind assistance to facilitate their return movement. Although return may thus be instigated by the state’s desire to induce the migrant to exit the country, the migrant agrees to return voluntarily in exchange for assistance.
- 8 If removal cannot be effected within 40 days, the aliens are free to move onto the national territory.
- 9 For example, France’s new 2006 immigration law abolished the case-by-case legalisations under which some 20,000 persons had already become regularised. However, only a few months after the law came into force, a renewed debate was opened on the regularisation of specific immigrant categories (e.g. children).
- 10 Before it was ultimately introduced, this measure was repeatedly rejected in the Netherlands for fear of the negative effect it would have on the general public.
- 11 The EU’s Visa Information System (VIS), expected to begin operating in 2009, will centrally store the biometric identification data of visa applicants for all Schengen countries .
- 12 This option becomes relevant the more ‘mature’ the migration system of a given destination country is and how closed it is to newcomers without family ties. Thus, family formation – and the frequently very expensive option of entering into a marriage of convenience – is not yet a concern in Southern European countries such as Italy and Spain, where irregular migration is otherwise relatively widespread.

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