EU and US approaches to the management of immigration

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The Migration Policy Group (MPG) is an independent organisation committed to policy development on mobility, migration, diversity, equality and anti-discrimination by facilitating the exchange between stakeholders from all sectors of society, with the aim of contributing to innovative and effective responses to the challenges posed by migration and diversity.

This report is part of a series of 18 country reports prepared in the framework of the project EU and US approaches to the management of immigration, which was carried out by MPG with the support of the German Marshall Fund of the United States and in co-operation with partners in the European Migration Policy Dialogue. Countries included in the project are Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Spain, Switzerland, and the UK.

Reports on these countries are available from MPG's website individually or jointly, together with EU-US comparative perspectives and European comparative perspectives. See Jan Niessen and Yongmi Schibel, EU and US approaches to the management of immigration – comparative perspectives, MPG/Brussels, May 2003.

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Preface

The European Union and the United States are areas of immigration, and both are entities of multi-level governance facing the task of managing international migration. However, unlike the United States most European states do not consider immigration as a matter of national interest.

In the US a regulated immigration system aims to enhance the benefits and minimise the drawbacks of immigration. The country's bi-partisan immigration policy receives strong support from a wide variety of stakeholders.

In Europe the emphasis is on immigration restriction and prevention, reflecting the position of most stakeholders that the costs of immigration outweigh its benefits. Immigration is a sensitive and sometimes controversial issue, as is demonstrated in recent elections in a number of European countries.

On both sides of the Atlantic migration ranked high on the agenda throughout the nineties. Changes in the size and direction of migratory movements as a result of global developments, EU enlargement and NAFTA received a great deal of attention. The ways in which migration policies are designed and implemented were reviewed and underwent some important changes.

In 1997, the US Commission on Immigration Reform presented its final report to Congress, proposing important changes in US immigration policies and management.

In Europe the 1997 Amsterdam Treaty empowered the European Union's institutions to act on migration, changing intergovernmental co-operation among member states into the development of joint policies on immigration and immigrant integration. A new debate emerged on the role of immigration to address economic and demographic imbalances.

The events of September 11 did not in themselves have an impact on the foundations of immigration policies' governance structures, or lead to changes in them, other than those already proposed. The events added, however, a range of other issues to the overall policy agenda (issues related to the fight against terrorism became a top priority) and the immigration agenda (where security issues became a priority). This resulted in a stagnation of the further development of immigration policies (the best example probably being the US- Mexico migration agreement) and in a refocusing of attention on countering the victimisation of immigrants and the straining of community relations.

It is against this backdrop that MPG launched the project EU and US approaches to the management of immigration in an attempt to identify the main drivers of immigration management in EU and US systems of multi-level governance. Building on an understanding of how migration needs are assessed and translated into policy on the national or state level, the project focused on the way in which national or state governments promote their immigration related interests within the federation (in the case of the United States) and the Union (in the case of the European Union). How successful are the different entities in shaping common policies according to their needs? Do they consider centralisation (which the extension of EU powers suggests), or decentralisation (as the campaigns of some states for a greater say in immigration matters suggest) more useful for realising their immigration-related goals?

The reports on fourteen EU Member States, three candidate countries and one associated state each have four chapters:

The first chapter reviews the (emerging) debates on migration and pays particular attention to the terms of the debate. It examines whether migration is debated in terms of control, security and restriction, or rather in terms of migration management and the assessment of migration needs. It asks whether the terms of the debate are different for different types of migrants, for instance irregular migrants vs. highly qualified migrants. The chapter analyses whether immigration has been linked with and embedded in larger discussions about social and economic policies for the future. In particular, it looks at the debates around the labour market and demography and considers whether and how immigration has been considered as an option for meeting emerging challenges in these areas.

The second chapter provides an inventory of stakeholders and an analysis of their activities. It gives a detailed account of who is responsible for which area of migration management in the different government departments. It also covers the activities of the various non-governmental organisations active in this field. The central question is which groups (within government, employers, trade unions, NGOs, academics and other experts) assess national migration needs, which instruments and mechanisms they use to make these assessments, and how they assert influence in the political decision-making process to translate these assessments into policies.

The third chapter provides an analysis of migration management in the areas covered by three of the most important Directives proposed by the European Commission (on admission for employment, family reunification[1], and long-term residents). Rapporteurs compare the national legal framework with the proposed European measures, and assess the degree of convergence between the two. The chapter addresses each of the substantive points dealt with in the Commission's proposals and sets out the corresponding national provisions, if such provisions exist under the current system. Recent and impending changes of national law are also examined, with a view to assessing whether immigration management rules are moving closer to or further away from the proposed European legislation.

The fourth chapter offers concluding remarks and evaluations by the rapporteurs. It addresses the Commission proposal for an Open Method of Co-ordination and considers whether such a mechanism would fit well with existing policy-making structures. Where appropriate, the chapter looks more closely at the proposed Guidelines and evaluates the degree to which they are already tackled in national policy. The impact of the European Employment Strategy on immigration management is also assessed. The fourth chapter also gives the rapporteurs an opportunity to make recommendations and to suggest alternative benchmarks for future debates and policy developments.

[1] Reports were drafted before the definition of a common approach to family reunification, which Member States agreed to at the Justice and Home Affairs Council of 27/28 February 2003. Rapporteurs base their comments on the text of draft Directive COM (2002) 225, published on 2 May 2002.

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Chapter 1: The terms of the policy debates

1.1. The terms of the policy debate and key words of the debate

Immigration to Germany and the short-term employment of third country nationals have a long and complex history[2]. Public discussion on immigration issues used to revolve around opposing key words: German versus foreign, temporary versus permanent, labour versus welfare migration. At least since the eighties, anti-immigration feelings have been activated to win elections. The long history of predominant anti-immigration rhetoric has prevented general reforms and deepened mental obstacles against migration. At the same time many changes in legal and administrative regulations have influenced the volume and composition of immigration substantially. Even though the competent Federal authorities followed a consistent strategic approach (to prevent immigration) all in all the institutional structure for the implementation of migration policy did not grow according to this plan, but in ad hoc responses to particular problems.

The first about-turn was the announcement of the recruitment stop in response to an economic recession and the oil crisis. Consequently, immigration came to be dominated by the influx of ethnic Germans and refugees. The second shift in immigration policy responded to the political situation of 1989. The German government tried to cope with the increasing immigration from Central and Eastern Europe with the expansion of inter-governmental agreements for the temporary employment of workers from Central and Eastern Europe[3], and with the tightening of the asylum law and the law on the admission of ethnic Germans. Debates in this period were characterised by the efforts to regulate temporary recruitment of CEE-workers and the admission of refugees and asylum seekers. The third and still ongoing about-turn was initiated by the increasing global competition for highly qualified workers, which led to the introduction of a "Green-Card" for computer experts (as the forerunner of an entirely rearranged immigration law) and the appointment of an independent expert commission which examined the need for immigration and proposed features of immigration management on behalf of the government[4].

The immigration debate of the nineties was characterised by a persistent struggle between anti-immigration and pro-immigration protagonists in particular fields like naturalisation law; labour immigration; family reunion; the asylum procedure; protection of refugees; integration measures in areas like language training, education, segregation, family reunion; immigration of unaccompanied minor refugees; treatment of civil war refugees and their access to the labour market; and the treatment of traumatised refugees. The granting of an independent residence right to maltreated spouses and gender as a ground for granting asylum were also contested issues. As awareness of a stable resident foreign population grew, the public authorities increasingly developed an intercultural approach.

A new subject that gained in attention and importance from the early nineties onwards was illegal immigration. With the dissolution of the Berlin Wall came the fear of massive uncontrolled immigration. The border patrol received more resources and the capacities for interior enforcement were strengthened. Unwanted immigration was presented as a security issue and a threat to public order, while NGOs pointed to the violation of human rights linked to exclusively restrictive measures. Some left wing NGOs initiated campaigns against expul-

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[2] Bade (1992 and 2000), Meier-Brauns (2002), Marshall (2000), Castles and Miller (1993), Herbert (1986), Dohse (1982)

[3] Faist et al. (1999) argue that the introduction of inter-governmental agreements on the temporary employment of workers from CEE countries was initially economically motivated, but that the expansion of these agreements followed foreign policy considerations. The German government argued that the temporary employment programmes should offer legal opportunities and reduce illegal labour immigration.

[4] See Independent Commission on Migration to Germany (2001).

sion. The events of 11 September 2001 reinforced the restrictive framing and have considerably influenced the debate on the new immigration law until now.

When power shifted to the red-green government in 1998, it launched a new naturalisation act with a provision for dual citizenship[5]. After fierce protests initiated by the Christian Democratic Party on the eve of a state election, the opportunity for dual citizenship was reduced to a temporary status for second-generation immigrants with the obligation to choose one citizenship at majority.

Only when an initiative to introduce a work permit scheme for computer experts[6] in 2000 – introduced on the demand of IT companies - was largely accepted, the government launched an initiative for a complete reform of the foreigners law. In order to overcome the resistance of the Christian democratic parties, the federal ministry set up an independent commission on immigration[7]. This Commission did not exclusively gather migration experts but consisted of representatives of relevant interest groups: apart from academic migration experts, it included representatives of churches, welfare organisations, trade unions, employers association and parties represented in the federal parliament[8]. The Commission invited and heard about one hundred experts[9] and finally presented proposals for a re-arrangement of immigration management in Germany. These proposals influenced the draft for the new Immigration Act to a considerable extent[10]. By using this procedure, the federal ministry gained the support of most relevant protagonists, although the Christian Democratic Party blocked the coming into force of the scheduled Immigration Act for tactical reasons.

Due to a broad consensus among the members of the Independent Commission that in a globalised world immigration is necessary for demographic and economic reasons, the debate shifted from the conflict between immigration vs. non-immigration to the contrast between immigration labelled as wanted vs. that labelled as unwanted. Following the reasoning of the Independent Commission, political and societal elites in all fields recognised that immigration is an inevitable aspect of globalisation and should not be prevented in general but managed properly – at least for some categories.

The Commission called for a new approach to immigration. What such a migration management could look like is, however, still controversial. The red-green coalition pushed a draft for a new Immigration Act, which was to address the problems raised by the various interest groups. Legislation should become less complicated, labour immigration should be opened up; integration should be fostered and unwanted immigration prevented. After 11 September 2001, security issues were emphasised in the debate on immigration with the result that the aspect of policing immigration gained relevance.

For tactical reasons the Christian Democratic Party, which had promoted very similar provisions in its own commission on immigration, suddenly perceived the provisions of the Immigration Act as too liberal: More restrictive features were demanded[11] in order to gain votes.[12]

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[5] Coalition Agreement concluded between the Sozialdemokratische Partei Deutschlands and BÜNDNIS 90/DIE GRÜNEN, Bonn, 20 October 1998, excerpt in Federal Ministry of the Interior (2000: 166-167).

[6] The Federal Republic of Germany's IT-Specialists Temporary Relief Program, see: www.bma.bund.de.

[7] Independent Commission on Migration to Germany (2000).

[8] For the members of the Commission and their affiliation see Report of the Independent Commission on Migration (2001: 2f).

[9] For an enumeration of the experts heard and their affiliations see Report of the Independent Commission on Migration (2001: 290ff).

[10] Davy (2001).

[11] Bosbach and Marschewski (2002).

After a contradictory vote in the second chamber of Parliament, the new law was first enacted, partly came into force in July 2002 and was finally stopped in December 2002 after the Christian Democratic Party mounted a procedural challenge before the constitutional court. Currently it is again being introduced into the legislation procedure with little prospects of success. However, a look at the empirical development reveals that the more prosperous states governed by Christian-democratic premiers, such as Bavaria or Baden-Württemberg, permit the immigration and employment of those third country nationals who fit into the regional labour markets while at the same time fiercely campaigning against the unwanted immigration of refugees and asylum seekers.

It is hard to predict further developments in German immigration policy given the stalemate between the first chamber (red-green-dominated) and the second chamber of Parliament (conservatively-dominated). Elite discussions in all parties and societal groups indicate that time is ripe for a substantial immigration reform, while the Christian democrats still appeal to anti-immigrant feelings in the population in order to win elections. This situation may lead to a success of the law in a second effort (if the liberals neutralise conservative votes in the second chamber), or to a rather restrictive but substantial reform in the 'window' between state elections after May 2003, or to a continuation along the old line of opening limited roads for temporary labour immigration and passing additional laws for pressing problems (e.g. integration) while sticking to an anti-immigration rhetoric and framework.

1.2. Different terms for different types of immigrants

The legal provisions on immigration provide numerous neatly defined categories for the distinction of migrants. To a particular extent, legal definitions differ from the public perception. In order to make sense of the categories used in general public discourse we refer to three dimensions:

(1) The first dimension concerns the dimension of national belonging, i.e. German vs. foreign. The terms 'immigrant' or 'migrant' have only recently become more prominent in public debates, migration questions having been framed as 'foreigners' questions for years. This distinction seems clear but turns out to be fuzzy[13]. Due to this basic distinction, a considerable share of new arrivals labelled 'ethnic Germans returning to the motherland' are perceived as a particular category separate from foreign immigrants and granted privileges[14]. Likewise the ascription of foreigner status lost relevance with regard to immigrants who are citizens of a member state of the European Union. In legal terms Union citizens are put on an equal footing with citizens in many areas. However, in the common understanding EU-citizens and also ethnic Germans often continue to be foreigners. While the employment of EU-workers in German companies under German conditions is unproblematic, the competition by EU-companies with low-cost posted workers has raised strong resentments, above all in sectors with high unemployment rates such as the construction industry[15]. A basic feature of German immigration policy is the constant emphasis that the three mentioned categories of immigrants (ethnic Germans, EU-citizens, third country nationals) are separate and have to be treated separately.

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[12] For a substantiation of the thesis that the conservative parties have exploited and continue to exploit the immigration issue in a populist manner in order to gain advantages in elections see Meier-Brauns (2002), Thränhardt (2000).

[13] For the fuzzy character of "Germanness" see Forsythe (1989).

[14] The public treatment of ethnic Germans is quite inconsistent. In legal terms ethnic Germans and the accompanying family members of non-German origin are not subject to the Foreigners Law but to a special law on the admission of Ethnic Germans. On the other hand people who are admitted as ethnic Germans are de-facto treated as privileged immigrants: Particular publicly funded programmes such as language training and vocational training are provided to overcome integration problems. It is revealing that the established programmes for ethnic Germans are currently reviewed with regard to the integration of foreign immigrants.

[15] See Cyrus (2003).

(2) According to international understanding and national law the distinction between temporary and permanent immigration is important. Ever since the 'guest worker' programmes in the fifties and sixties, temporary stays have been considered acceptable and safe while permanent immigration has been considered to be potentially threatening so that it should be prevented. Nonetheless, permanent immigration took place above all as a side effect of other policies such as EU-integration, family reunion or post-war compensation[16]. As there is now a considerable foreign population resulting from entries during the times of the 'guest worker programme', there is a perception that the rotation principle failed because temporary migrants were too much integrated in the general employment system. Thus, there is a tendency to construct new temporary programmes in a less inclusive way.

As there is no explicit immigration policy, there are no precise immigration statistics giving information on foreign-born German citizens or on the purpose of entry and the status trajectories of immigrants. Newcomers are subject to the relatively strict German residence registration duties – some states require registration for any stays exceeding two weeks. In public discourse anti-immigration actors have used the figure of about 600 000 annual entries (including tourists and seasonal workers) in a misleading way by concealing that a comparable number leaves the country each year. All in all the data of registration authorities overstates the number of resident immigrants because some do not give notice when leaving the country.

(3) Thirdly, migrants are categorised according to their perceived usefulness in relation to the labour market and the welfare state, i.e. needed labour migration versus burdensome welfare migration. This categorisation is often phrased as wanted versus unwanted migration[17] or as "those who be of use for us and those who exploit us". In this categorisation, asylum migration and ethnic German migration are a burden, while computer experts and care workers are perceived to be potentially beneficial if they do not reduce the labour market chances of the German unemployed.

These major lines of the public debate tend to frame discussions on the distinct legal categories for migrants: as asylum and humanitarian migration is generally perceived as foreign, potentially long-term and burdensome, it is largely discussed in pejorative terms. Ethnic German migration is long-term and at least initially burdensome, but German. This constellation leads to increasingly restrictive regulations, often on consensus but without much public debate and pejorative terminology. Temporary labour migration is tentatively welcomed and sceptically scrutinised for its economic usefulness. A characteristic feature of the Germany discussion is that this development has always taken place in interaction with civic groups who oppose the purely instrumental dealing with immigration in favour of human rights considerations.

1.3. Links of the migration debate with other issues of the future

The debate on migration issues used to be attached to areas of broader interest. Until the eighties, the linkage between immigration and labour market development predominated. In the eighties, the negative impact of immigration on the social welfare systems was stressed[18]. Only in the late nineties some economists started to argue that immigration has positive impacts on economic performance[19].

On the demand of employers' associations, opportunities for the employment of foreign workers from abroad were opened up from 1991 onwards in order to address labour scarcity

[16] For the opinion that immigration to Germany was a side effect of other policies see Federal Ministry for Family (2000: XV); Federal Commissioner (2002: 29); Cyrus and Vogel (2000).
[17] Federal Commissioner (2000: 29).
[18] Vogel (1996)
[19] Loeffelholz (2001)

in particular branches such as agriculture or construction on a strictly temporary basis.[20] The subject of labour shortages has remained on the agenda since. In the mid-nineties, immigration debates changed slightly. In order to substantiate the need for a new Immigration Act, advocates referred to growing trends: the decline and aging of the population (see below), globalisation, Europeanisation, transnationalisation of labour markets, and a global competition for qualified labour.

The authoritative reasoning was set out by the Independent Commission, which argued that the new legislation would not only correspond to international humanitarian standards of immigration policy but also serve the self-interest of German society, which has to cope with future demographic gaps and contemporary labour market shortages. The new reasoning maintains that Germany is now in global competition for highly qualified workers who are urgently needed[21]. The opponents of a substantial immigration reform use one core labour market argument: With high numbers of unemployed, newcomers will either drive residents into unemployment or become a burden for the welfare systems themselves[22]. Thus, the general need for immigration is only seen for the future, but denied for the present.

1.4. Demographic studies and their use in the debate

As early as the mid-seventies demographers had began to point to the negative demographic trend in developed societies and its effects for society. However, the demographic argument pointing to a remote future was not salient while the present was still characterised by strong cohorts in the employment ages. Moreover, the increase in the foreign population due to the admission of family members and refugees made considerations to fill a future demographic gap superfluous. In the nineties several demographic studies claimed that immigration could fill the future demographic gap.[23] While demographic arguments were initially mainly used in debates on the reform of the pension system, over time demographic reasoning became a standard argument in favour of immigration.[24]

The protagonists of the German immigration debate noticed the relevance of the demographic argument early on. Already in 1988 the Minister of the Interior pointed to the fact that the German population will shrink and become older[25]. Since then the demographic argument has been put forward by immigration advocates, first by scholars, then by representatives of employers' association[26]. The German parliament ran an expert commission on demographic trends that underlined the need for immigration[27]. NGO actors concerned with humanitarian aspects of immigration initially avoided the demographic argument because of its utilitarian undertone. However, when the argument revealed its powers of persuasion, more pro-immigration activists began to refer to it. The importance of demographic reasoning is obvious from the report of the Independent Commission on Migration. The Commission ordered demographic studies[28] and made extensive use of them – without, however, considering the intricate interaction of general demographic trends and without linking them to the particularities of local labour markets or particular sectors with very high unemployment. The Federal Ministry of the Interior adopted the reasoning and made the studies available on the

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[20] Ordinance on Exemptions Relating to the Issue of Work Permits to Foreign Workers Entering the Federal Territory for the First Time 1990 (Federal Law Gazette I, 3012 ff), ASAV.
[21] See the Report of the Independent Commission on Migration (2001).
[22] Bosbach and Marschewski (2002).
[23] Recktenwald (1989), Klauder (1992), Hof (1993 and 1995), Münz and Ulrich (2000), Loeffelholz (2001).
[24] See for instance the reasoning by Bade 1992, Tichy (1990), Meier-Brauns and Oberndörfer (2000), Meier-Brauns (2002), Münz and Bade (2000 and 2002).
[25] Schäuble (1988).
[26] Tichy (1990).
[27] Deutscher Bundestag Referat Öffentlichkeitsarbeit (1998 and 2002).
[28] Eridion (2002), Seifert (2000).

ministry's own homepage[29]. Further studies conducted on behalf of the Independent Commission dealt with labour demand despite simultaneous high unemployment rates[30].

[29] See Modellrechnung zur Bevölkerungsentwicklung in der Bundesrepublik Deutschland bis zum Jahr 2050 (www.bund-bmi.de).
[30] These studies, conducted by Institut der deutschen Wirtschaft (IW-Consult GmbH); IFO – Institut für Wirtschaftsforschung; Institut Zukunft der Arbeit gGmbH; Hamburgisches Welt-Wirtschafts-Archiv (HWWA), are also available on the website of the Ministry of the Interior.

Chapter 2: The stakeholders

The broad overview reveals that the debate on immigration issues is characterised by a juxtaposition of often contradicting subjects and objectives changing over time. As a rule it can be said that public policy has been dominated by an anti-immigration restrictionist attitude perceiving immigration to be detrimental for Germany. On the other hand, the dominant rhetoric of restriction hides that the actually implemented policies on immigration and integration have often been more pragmatic[31]. The particular German political culture with its strong alignment to individuals' rights as guaranteed in transnational and national law, the strong interference of court case law, and the important role played by local implementation and pressures, has resulted in a practice much less restrictive than suggested by the rhetoric. Therefore, only naming national stakeholders would not provide an adequate portrayal of the situation.

2.1. Which ministries and which NGO actors contribute?

The formation and implementation of German immigration policy is characterised by its vast institutional diversity[32]. Due to the federal constitution with its decentralised competencies and the subsidiarity principle, the implementation of measures in the field of immigration is similarly fragmented and dispersed. This situation results from general features of German federalism and from the fact that immigration has always been treated as a side effect of other policies. Looking at their function in the making and implementation of laws, we distinguish broadly between public organisations active in the legislation, interpretation, administration and enforcement of immigration laws.

Legislation: The most significant agency in field of immigration law (i.e. the regulation of the admission or refusal of entry and the sojourn of foreigners) is the federal government and the responsible Federal Ministry of Interior. The government uses its ministerial staff capacities in the Ministry of the Interior to prepare and initiate laws and to issue ordinances. The Bundestag parties can also present juridical proposals and ask the Bundestag for approval. Generally, the German Parliament is needed to approve federal immigration legislation.

The states (Bundeslaender) have a decisive influence on federal legislative acts through the second chamber of the parliament (Bundesrat). The Bundesrat consists of representatives of the sixteen *Laender* (and often has a different political majority than the Bundestag) and has to approve the federal law. A further agent increasingly gaining in importance is the European Commission, which releases directives that have binding force for the national frame setting institutions.

While European directives and Federal laws set the legal framework for immigration, a large share of responsibility still rests with the state level. Within their area of responsibility, federal states (*Laender*) enjoy some discretion in the interpretation and implementation of Federal provisions and in the issuing of legal provisions relevant for the admission and integration of immigrants.

Interpretation: The main power of the *Laender* in immigration matters lies in the interpretation and implementation of laws. The German model of federalism implies that nearly all public functions are implemented exclusively by the *Laender* and, within the *Laender*, by the local communities (Gemeinden). The federal level exercises its power mainly by legislatively restricting the discretion of lower levels of government. The interpretation of laws through rules and ordinances rests at the *Laender* level, often leading to different practices in different states.

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[31] See Bade and Bommes (2000).
[32] The Independent Commission spoke of "shattered competencies" (Independent Commission 2001: 204).

German legislation provides considerable rights for established immigrants, most of all in the areas of employment and social benefits. Foreign workers, once they have gained access to the labour market, enjoy equal treatment and participate actively and passively in the works councils. Third country nationals with lawful residence may enjoy access to some social benefits when particular conditions are met[33]. All laws and administrative interpretations of laws may be subject to court control. In Germany, it is mainly the administrative jurisdiction which is in charge of immigration related matters. Administrative courts have frequently corrected administrative decisions on immigration cases, sometimes resulting in a need to amend general ordinances. In some cases the administrative courts had appealed to the European court and afterwards set the standard of European law.

Administration: There is no central agency dealing with the implementation of immigration management, neither on the federal nor on the state or local level. Competencies are spread across several agencies dealing only with some particular aspects. To give some examples: the main administrative bodies competent for the granting of residence permits are the 660 aliens offices at the municipal level. They are increasingly bound by rules and ordinances of the *Laender* and closely cooperate with other community offices as residence registration offices or welfare offices. Nonetheless, they influence the effects of laws by exercising their remaining discretion and independently allocating personnel to tasks, thus setting implicit priorities. On the other hand, the granting of work permits lies within the competence of the local labour offices, which are part of a federal agency.

The administration of federal integration funds and measures is mainly carried out by four federal ministries: The Federal Ministry for Labour and Economy grants financial support for measures aimed at the professional and social integration of foreign workers and their families[34]. The Federal Ministry for Family, Elderly Persons, Women and Youth grants financial support for programmes aimed at the support of education and the social stabilisation of youth and elderly persons with a migrant background[35]. The Federal Ministry for Education and Research provides some financial means for the training of ethnic Germans, quota refugees and accepted asylum seekers[36]. The Federal Ministry for Interior disposes of small funds for integration schemes and recently received responsibility for the language training of foreigners from the Federal Ministry for Labour and Economy. At the moment, the authority in charge of language issues is the Federal Office for the Recognition of Foreign Refugees.

The main level for the financial support of integration measures lies, however, with state (*Laender*) and local agencies. On these levels the dispersal of competencies and funding repeats.

In accordance with the subsidiarity principle most of the public programmes are not implemented by public authorities but by NGOs. Some of these organisations additionally spend own funds for the social work with third country nationals. The biggest welfare organisations have united on the federal and state level in a league of welfare organisations[37] in order to coordinate activities and to negotiate with public authorities. The welfare organisations have some modest influence on the implementation level and advocate on behalf of their clients. Beyond this operational co-operation with the interpretive level of public authorities, the league and its members try to accompany and influence the decision making process by issuing statements. This is also done by a multitude of other NGOs, among them the Intercul-

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[33] See section 3.3 of this report, more extensivly Davy (2001: 320 ff).
[34] See Federal Ministry of the Interior (2000: 26 f), Federal Commissioner (2002: 42 f).
[35] Federal Commissioner (2002: 44).
[36] Federal Commissioner (2002: 44 f).
[37] AWO, Caritas, DPWV, DRK, Diakonie.

tural Council.[38] Among immigrant organisations, in particular associations with Turkish background have gained some influence and run integration measures.

Enforcement of all laws including laws concerning immigration questions is generally the task of the *Laender* (state) police. Police are subject to state legislation and state government with little influence from the central government. Thus, the state police forces are also responsible for all immigration related crimes and for arresting foreigners without residence permit.[39] In the last decades however, federal agencies such as customs and border patrol increasingly engage in the field of enforcement and contribute considerably to the apprehension of third country nationals disrespecting legal provisions.

Within these policy arenas a crosscutting institution, the "Commissioner of Foreigners' Issues", exist on the federal, state and local levels respectively. As a rule the commissioners have no legislative or interpretive legal powers. As a cross-section agency the commissioners have to examine public activities and to inform about the rights of foreigners. The commissioners regularly prepare reports on foreigners' issues, make proposals in the field of immigration policy and politics and comment on ongoing developments. On the federal and state levels the institutions have a high reputation. However, their influence is rather modest and rests on diplomatic skills in a highly complex and difficult policy arena[40].

Without doubt immigration policy and implementation is highly fragmented.[41] The halted 2002 immigration law was scheduled to transfer some competencies to a new "Federal Office for Migration and Refugees", building on the Federal Office for the Recognition of Foreign Refugees.[42] With the failure of the immigration law the Office had to re-adopt the former designation.

2.2. Channels of lobbying and the importance of stakeholders

The complexity of the policy field is mirrored in the diversity of lobbying channels. The most important and most viable channel is the direct communication with legislators and interpreters in the context of already established corporatist relations. In the field of labour market policy the social partners make extensive use of this channel to influence legislation and implementation rules. In the field of humanitarian immigration the churches, welfare organisations, human rights organisations and the trade union umbrella organisation (DGB) have developed similar approaches in a somewhat less institutionalised consultation framework.

The second level of lobbying consists of public awareness campaigns. Due to the sensitivity of the subject, actors struggle hard to influence the public. Most actors publish frequent press releases on migration issues, organise conferences or workshops, prepare publications and sometimes launch expensive advertisement campaigns or even collections of signatures[43].

Much of the more pragmatic implementation of immigration policy is negotiated and designed through corporatist arrangements without a public audience[44]. This decision making structure leads to the perhaps dissatisfactory discovery that this corporatist network is the decisive

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[38] For instance the Catholic Bishops Congregation, the Synod of the Evangelic Churches, the trade unions, the employers association, immigrant organisations, and alliances of independent organisations active in the field of immigration policy such as the Intercultural Council.
[39] It should be noted that illegal residence is considered a crime under the German Aliens Law, while illegal work is considered to be a regulatory offence only. The *Laender* criminal police have specialised departments responsible for illegal work and foreigners without status.
[40] For tasks and responsibility on the federal level see Ministry of the Interior (2000: 59), and section 91 Foreigners Act.
[41] See also Independent Commission (2001: 273 f).
[42]According to section 75, sched. Immigration Act.
[43] Even the Christian Democratic Party in 1999 used the classical instrument of collection of signatures as a last resort to oppose to the scheduled new Naturalisation Act.
[44] Bade and Bommes (2000: 166f).

actor[45]. Immigration policy in Germany is characterised by the existence of a number of corporatist networks related to particular aspects of immigration (integration, labour market issues, education, humanitarian aspects etc.). As a rule it can be said that the networks concerned with economics and labour market issues have more weight than those concerned with the "soft" aspects of the humanitarian dimension. Accordingly the vested interests of the social partners seem to have more weight than the human rights concerns of NGOs and churches.

In this framework, it is easier to block changes than to succeed in getting changes done. Stakeholders can only succeed if they manage to form coalitions with other stakeholders. Germany's transformation into a country accepting immigration succeeded only when employers' association, trade unions and economic interest groups joined in supporting the call for immigration. Recent reform efforts are the best example. Interior Minister Schily skilfully used this political culture when he appointed the Independent Commission on Migration to Germany, which consisted of influential or popular representatives of the various corporatist networks that were known to favour some sort of reform. Through this particular architecture, the most influential groups were integrated into the recommendation process and finally agreed with the compromise achieved. A Christian democratic commission led to a paper that opened the discussion in this party as well[46]. When the Interior Ministry launched a legal initiative in the summer of 2001, it was close to both the Commissions' and the Christian-democratic party's proposals, so that a consensual compromise seemed tangible. But as September 11 gave a push in a more restrictive direction[47] and the national elections came closer, the conservative parties returned to a more populist anti-immigration rhetoric, blocked efforts to reach consensus and rejected the new law in the second chamber for tactical reasons[48].

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[45] The setting up of Commissions of experts and/ or stakeholders who are charged with working out reform proposals in particular contested policy fields is a very common approach in Germany. In the last years federal government appointed, for example, commissions on an examination of demographic change; globalisation; the reform of industrial relations; the reform of the social insurance system; and migration to Germany.

[46] See the Report of the Commission on Immigration and Integration of the Christian Democratic Party of Germany (2001).

[47] Angenendt (2002: 46f).

[48] Commission on Immigration and Integration of the Christian Democratic Party of Germany (2001) and Angenendt (2002: 48). The concessions regarded the reduction of the age of children entitled to subsequent immigration, the change of the title of the Immigration law into „Law on the reduction and management...".

Chapter 3: European legislative proposals

3.1. Linking the German and the European debate

Immigration policy has been perceived as one of the most important domains in which the German nation state can assure a distinct national identity and political sovereignty. The fact that European legislation initially had an impact on issues of immigrant integration[49] but not on admission policies contributed to the irrelevance of Europe in domestic immigration affairs[50].

The emphasis on national sovereignty, however, had already begun to erode with the increase in the unwanted immigration of refugees and illegal immigrants since the end of the eighties and with the Schengen agreement. The coordination of immigration issues in a European framework reluctantly but steadily gained acceptance. Reference to a prospective joint European immigration policy became a standard argument in the debate on immigration policy. In the beginning, allusions to a prospective European legislation served to reject calls for a national reform of immigration policy and politics. The argument: this would be an unwelcome anticipation of reforms that should be launched by the European Commission. But when first indications of the later Amsterdam agreement emerged on the political horizon, the reasoning changed. Now it was argued that it was useful to reform German legislation in anticipation of prospective European legislation because this would improve the chances to structure and influence European legislation according to the German example[51].

However in the debate on the Immigration Act, the prospective European standards did not play an outstanding role. While the legislator argued that the new immigration law as a whole would be more in accordance with the prospective European migration law, the debate about contested details was hardly affected by prospective European standards in this field. Some provisions were introduced in the knowledge that they would not fit with the proposed directives. All in all the European legislation process is accepted as a general framework, but the reference to European standards seems to be more a matter of tactical considerations than political belief.

This study provides the basis for an assessment of the accordance of national law with the proposed European directives in the field of family reunion, admission to the labour markets and the rights of long term residing third country nationals. As a general feature Germany, like other member states, is very reluctant to shift competencies in these three and other areas of immigration to the European Commission. Regarding refugee immigration and the sharing of the financial burdens of refugee reception, Germany has promoted the responsibility of the European Union since the early nineties, but it is not yet ready to accept that the European Commission will acquire competencies in the regulation of immigration. Throughout the negotiations on the mentioned directives, the German representatives spoke up for the retention of extensive competencies and discretion on the national level. Like other member states, Germany denied that immigration should become subject to the open method of coordination and insisted that the consensus principle should be the basis for any decision on European immigration policy. Thus the member states reserved the rights to prevent with a veto any regulation that would interfere into domestic immigration policy. Conse-

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[49] In this field European case law contributed considerably to the development of immigrants' rights in Germany

[50] In 1997 the Federal Commissioner in Foreigners' Issues still considered that: "Moreover, member states will even in the medium-term not totally renounce their competence to decide on the admission of immigrants from third-countries according to their own responsibility" (1997: 60).

[51] „The model submitted by the Independent Commission on the Migration to Germany for labour market-orientated immigration concurs with current European law. It could contribute towards legislation on immigration policy at European level. The new European law should at least be compatible with the recommendations made by the Independent Commission on Migration to Germany" (Independent Commission on Migration 2001: 64), see also Weller-Monteiro Ferreira (2002).

quently, under the pressure of the member states the more liberal and far-reaching draft directives proposed by the European commission turned during negotiations into a platform of minimum standards with exemptions for member states already below the required standards[52].

3.2. Comparing German legislation with European legislative proposals

The current situation is characterised by immense uncertainty about the further development of immigration law in Germany. The new Immigration Act 2002, which had already passed the legislation procedure, was stopped by the Federal Constitutional Court because of procedural shortcomings. At the moment it is most probable that only parts of the stopped Immigration Act will come into force but nobody can say which parts and with which changes. In order to meet this situation we have to describe the legal provisions of the Foreigners Act of 1990[53], which are currently valid, as well as the scheduled provisions of the new Immigration Act 2002[54]. This act has once more entered the adoption procedure and may well provide the legal framework in the future, particularly since in the fields under review not all changes scheduled with the refused Immigration Act are a matter of dissent. Thus we may suppose that at least these unchallenged provisions will sooner or later be introduced into the national law. We describe these provisions in comparison with the respective directives recently proposed by the European Commission in these fields[55]. The information given represents a broad overview rather than an exhaustive analysis of legal provisions, and it is important to note that German immigration and integration law is highly intricate, encompassing many exceptions, exemptions and detailed provisions.

For instance, it is necessary to mention here that the area within which the foreigners law is operative does not encompass all third country nationals in the same way. German immigration policy and law makes differences between the eligibility of citizens from EU-member states, Turkish nationals, citizens of countries associated with the European Union, citizens of accession states and finally all other third country nationals. For instance, due to the association between Turkey and the European Union special favourable regulations apply in the case of Turkish workers[56], while citizens of those CEE countries who have signed an agreement on temporary employment of contract workers, seasonal workers, transfrontier workers or “new guest workers” are eligible for a work permit within set limits.[57] These different categories cannot be described in detail here.

3.3. Admission for economic purposes

The basic provisions of the contemporary admission procedure as it is described in several reports[58] would fundamentally change with the enactment of the scheduled Immigration Act. We will here concentrate on the most recent changes and future developments.

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[52] Weller-Monteiro Ferreira (2002).
[53] Foreigners Act of 1 January 1991.
[54] Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners of 20 June 2002 (Immigration Act).
[55] All relevant documents are available on the website of the European Commission: http://europa.eu.int/comm/justice_home/unit/doc_asile_immigrat.
[56] The Association Agreement EEC/Turkey guarantees a wide range of rights to Turkish nationals but does not exempt them from the requirements to hold a residence and work permit if they enter Germany for the first time (ECOTEC 2000: 108; see also Commissioner 2002: 118f).
[57] ECOTEC 2000: 108.
[58] For an account of the juridical provisions of the admission procedure see ecotec (2000: 105-119), Federal Ministry of the Interior (2000: 44), Husmann (2002), Schulte (2002). A description and analysis of the implementation of work permit regulations is offered in Cyrus and Vogel (2003).

3.3.1. Single national application procedure

Currently, the application procedure is complicated and involves at least two authorities: the foreigners' office is responsible for the residence permit, and the local labour office is in charge of granting a work permit[59]. While the present law knows more than one procedure including more than one authority – with the foreigners' authorities functioning as a sort of administrative link[60] - the new legislation proposes a one-stop-government approach in accordance with the European procedural standard[61]. As a general rule the stopped Immigration Act contains a provision[62] explicitly stressing the priority of the Law of the European Union and the EU/Turkey accession agreement. With regard to the admission of third country nationals the priority of the law of the European Union is confirmed as well[63].

3.3.2. Economic needs tests and benefit test – horizontal assessment

Dependent Employment

At the moment the recruitment ban is still valid in Germany. Labour immigration to Germany is still defined as an exception from the rule of non-immigration[64]. However, in order to cope with the necessities of a globalised economy and labour shortages in particular sectors, the German law provides a wide range of opportunities for the temporary and sometimes unlimited admission of third country nationals after - for particular cases - individual assessments, or within the limits of fixed quotas. The labour market test as a mean to guarantee the priority of resident workers is the core element of present employment restrictions against applicants from abroad (labour immigrants) and from within (refugees)[65]: "The Federal Labour Office may approve the granting of a residence permit to take up employment (... only when) no German workers, foreigners who possess the same legal status as German workers with regard to the right to take up employment or other foreigners who are entitled to preferential access to the labour market under the law of European Union are available for the type of employment concerned..."[66] As a general rule, admission to the labour market is only allowed if "the foreigner is not employed on terms less favourable than apply to comparable workers".[67] Under these requirements the employment of seasonal workers,[68] transfrontier workers[69] is and will be allowed. After passing the labour market tests, seasonal workers receive a residence permit for particular purposes[70] and a work permit temporarily limited for the period the work contract lasts but not longer than three months[71] and tied to the employer.

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[59] For a description of the application requirements see ECOTEC (2000), and Groenendijk, Guild and Barzilay (2000).
[60] See Cyrus and Vogel (2003) for a detailed description of the contemporary implementation procedure according to the Foreigners Act 1991.
[61] Section 18, sched. Immigration Act.
[62] Section 4, 1, sched. Immigration Act.
[63] Section 39, 2 b, sched. Immigration Act.
[64] Federal Ministry of the Interior (2000: 9).
[65] Section 284, Social Code, Book 3.
[66] Section 39, 2 b, sched. Immigration Act. Currently the relevant provision demanding a labour market test is section 285, 1, 1, Social Code, Book 3.
[67] Section 39, 2 sched. Immigration Act. At the moment this provision is stipulated by Section 285, 1, 3, Social Code, Book 3.
[68] Section 4, 1 Ordinance on Exemptions Relating to the Issue of Work Permits to Foreign Workers (ASAV); Section 24 sched. Ordinance on Foreigners' Employment; see Art 12, COM (2001) 386 final.
[69] Section 6, Ordinance on Exemptions Relating to the Issue of Work Permits to Foreign Workers (ASAV); Section 27 sched. Ordinance on Foreigners' Employment; see Art. 14, COM (2001) 386 final.
[70] Section 28 Foreigners Act.
[71] The opportunity is restricted to particular sectors. For showmen the work permit may be valid up to nine months. There are many particular conditions to be met. Section 4, Ordinance on Exemptions Relating to the Issue of Work Permits to Foreign Workers (ASAV). The new, now withdrawn Foreigners Employment Ordinance had provided a general duration of the work permit up to four months .

Transfrontier workers[72] also have to pass the labour market test but do not need a residence permit. The work permit serves instead as a "commuter card"[73] which is tied to the employer and allows employment for a limited period. The new proposal keeps this element - in accordance with the proposed directive[74].

Provisions for employers' contributions as a substitute for a labour market test are neither in force nor planned.[75] At the moment some fees are raised from employers applying for seasonal workers but this should finance the administrative work and is not used as a substitute for a labour market test.

No labour market test is required for admission of qualified intra-corporate transferees for up to three years,[76] trainees[77] and youth and au pairs, provided that the employment does not in the first instance serve economic purposes[78].

The labour market test as an individual assessment is waived in some cases[79]. Already the contemporary law provides that for the employment of CEE-contract workers or 'guest-workers' (trainees) on the basis of bi-lateral agreements the labour market test is replaced by a system of centrally administered fixed quotas.[80] However, workers have to apply for the work permit, which will then be granted within the quota without labour market test.

An ordinance on the employment of highly qualified workers (IT-ordinance)[81] introduced an abbreviated labour market test within the limits of a set quota of 20 000 admissions for a maximum duration of five years. The qualification can be proven by a high school diploma or an income of at least 51 200 €. In spite of a stated demand of 75 000 IT specialists, from 2000 onwards the turnover remained below expectations with 12 000 placements.

For highly qualified workers (without restriction to computer experts), the scheduled Immigration Act provides an income threshold[82] of a salary corresponding to at least twice the earnings ceiling of the statutory health insurance scheme, if the federal Labour Office has granted approval after labour market assessment. In this case the Office is expected to grant a settlement permit[83].

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[72] Transfrontier workers are admitted in particular border municipalities for work liable to social insurance. They have to return daily to the country of origin or work maximum two days in a week. In part
[73] Section 6, Ordinance on Exemptions Relating to the Issue of Work Permits to Foreign Workers Entering the Federal Territory for the First Time (ASAV)
[74] Art. 6, COM (2001) 386 final.
[75] Art. 6, 5, COM (2001) 386 final.
[76] Section 18, sched. Ordinance on Foreigners' Employment. At the moment section 5, No. 4 Ordinance on Exemptions Relating to the Issue of Work Permits to Foreign Workers (ASAV) stipulates that a work permit may be granted without time limit.
[77] Section 2, sched. Ordinance on Foreigners' Employment. Contemporarily, section 2, Ordinance on Exemptions Relating to the Issue of Work Permits to Foreign Workers (ASAV) provide, that a work permit may be granted for the purpose of education and professional training (section 2 ASAV).
[78] Section 9, sched. Ordinance on Foreigners' Employment.
[79] Art. 6, 4, COM (2001) 386 final.
[80] Section 3, Ordinance on Exemptions Relating to the Issue of Work Permits to Foreign Workers Entering the Federal Territory for the First Time; Section 33 sched. Ordinance on Foreigners' Employment.
[81] Ordinance on the granting of a residence permit for highly qualified foreign skilled workers of the information and communication technology from 11.07.2000, Federal Law Gazette 28.07.2000 and Ordinance on the granting of a work permit for highly qualified foreign skilled workers of the information and communication technology from 25.07.2000, Federal Law Gazette, 28.07.2000.
[82] Art. 6, 5, COM (2001) 386 final.
[83] Section 19, 2, 3, sched. Immigration Act.

As a general rule, the scheduled Immigration Act proceeded with the already established channels of temporary and permanent labour immigration,[84] but for the first time introduced additional opportunities for immigration for economic purposes, most of all for highly qualified workers[85]. The scheduled Immigration Act will provide for labour market related immigration without an application for a particular job, via a selection procedure hitherto unknown in the German juridical system. The criteria for selection are personal characteristics of the applicant such as education, age, language competence, professional skills, linkages with Germany and nationality[86]. Each year the Federal Office for Migration and Refugees and the Federal Labour Office jointly decide on a quota for this immigration channel. The admitted applicants will receive a settlement permit[87]. However, this provision is now contested and may be waived. The scheduled Immigration Act further provides that the administrative board of a local labour office may have the right, within the labour office area, to waive the individual assessment for particular professions or economic sectors with labour shortages as long as the foreigner is not employed under unfavourable conditions[88].

There are no legal provisions on the implementation of the permission procedure provided by the Immigration Act.[89] At the moment as well as in the future, implementation will be defined in ordinances and administrative regulations only. This approach has led to some inconsistencies in the past. At least one State Labour Office has decreed a "general admission restriction" for vacancies of particular, mostly unqualified professions without a proper review of the individual application.[90] Trade unions and the Federal Commissioner have criticised this practice, which is now officially abandoned.

Self-employment

Currently, the admission for settlement of self-employed third country nationals is subject to administration on the state and local levels. As a rule, income generating activities are not allowed unless the competent authority gives a certification. Generally, third country nationals seeking to come to Germany to set up a business are subject not only to restrictions posed by regulations on access to trades and professions, but also to the condition that their economic activities serve an essential economic interest or a special local need[91]. The public interest requirement also applies to third country nationals who have been admitted to Germany for other purposes and subsequently wish to engage in self-employed activities. Temporary residence permits are as a rule issued with the restriction that self-employment is not allowed[92].

Citizens from countries that have signed the Europe Agreements[93] enjoy a more favourable treatment. The Europe Agreement stipulates: "Each member state shall grant from entry into force of this Agreement a treatment no less favourable than that accorded to its own companies and nationals..."[94]. In the case of these CEEC nationals, the Trades Offices and relevant chambers are not asked to subject the application to a public interest test. Instead, they should only verify if the applicant meets the relevant requirements for establishment for the

[84] For skilled and unskilled workers. Labour authorities may limit the work permit, see sections 18 and 39 of the sched. Immigration Act.
[85] Section 19, Immigration Act.
[86] Section 20, sched. Immigration Act.
[87] Section 20, sched. Immigration Act.
[88] Section 39, 2, sched. Immigration Act.
[89] Art. 6, 2, COMM (2001) 386 final.
[90] Federal Commissioner (2002: 83f).
[91] Böcker and Guild (2002: 50), see also Böcker (2002).
[92] Allgemeine Verwaltungsvorschrift zum Ausländergesetz, 14.2.4, 10.03.
[93] Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia (see Böcker and Guild (2002: 7).
[94] Art. 44 Poland Agreement, see Böcker and Guild (2002: 14).

trade or professions in which he or she intends to establish him/herself[95]. In order to produce evidence of capital, not only to start up the business but also to pay the costs of living during the first year, an applicant as a rule needs at least 25 000 € to pass this means-test[96].

For the admission of self-employed third country nationals, the scheduled Immigration Act provides that "a foreigner may be granted a residence permit for the purpose of self-employment if an overriding economic interest or a special regional need applies, the activity is expected to have positive effects on the economy and personal capital on the part of the foreigner or a loan undertaking is available to realise the business idea."[97] The work permit should be limited at maximum three years. If the business is successful, a settlement permit has to be granted after three years[98].

In general, regarding admission for economic purposes the privileged access of German, EU-citizens and lawfully residing third country nationals to the German labour market will continue. For unskilled work the recruitment ban will last in practice.

3.3.3. Regularisation practices

German law does not provide for the regularisation of illegal employment of foreign workers. After detection, third country nationals without residence status are required to leave the country and shall not be permitted to re-enter[99]. German government and authorities reject calls for general regularisation programmes with the argument that this would have a pull effect and counteract immigration policy[100]. However, behind the strict rhetoric some attempts at a more pragmatic approach can be found.

To generalise, third country nationals without residence status may register with the foreigners' authorities and obtain a tolerated status if they are incapable of leaving the country – be it for personal reasons (sickness), reasons in the country of origin (civil war) or practical reasons (missing travel documents). This toleration halts the obligation to leave the country. It gives access to basic welfare provisions, but not to the labour market. There were some programmes to issue residence permits to particular groups of third country nationals who held tolerated status for a long time (Altfallregelungen)[101] About 24.000 employed Bosnian civil war refugees benefited from such a programme in 2001[102]. The new law eliminates toleration provisions, gives civil war refugees a better status and leaves uncooperative immigrants (e.g. those who have no papers and do not disclose their country of origin) without status and protection.

Another programme served a regularisation function without giving any individual the right to regularise: the seasonal workers programme. In the first year of its official existence, 98% of employers did not apply with their labour office for workers, but used the opportunity to name individual workers they would like to employ – so they must have known them before. This is an indication that the programme enabled many employees who had worked off the record to come back with a regular temporary status[103]. Finally some states may grant regularisation in individual cases of particular hardship after appeal to a hardship commission.

[95] Böcker and Guild (2002: 50).
[96] Böcker and Guild (2002: 51).
[97] Section 21, sched. Immigration Act.
[98] Section 21, 4, sched. Immigration Act.
[99] Section 42 Foreigners Law, Section 50, sched. Immigration Act.
[100] Federal Ministry of the Interior (2001).
[101] Section 32, Foreigners Act.
[102] Federal Commissioner (2002: 71).
[103] ZAV (1992: 6).

3.3.4. National law reviewed in the light of the proposed European directive

Germany opposes the proposed directive[104], partly because some particular features of the German law do not fit and partly for general reasons.[105] Germany criticizes, for instance, that the instrument of a selection procedure with a point system on the basis of personal characteristics of applicants favouring professional skills, language competences and other aspects of integration foreseen in the scheduled Immigration Act is not included in the draft directive. In the Council meeting of April 2002, Germany therefore proposed a formulation providing for such a selection procedure. Further reservations refer to the particular German dual organisation of vocational training, which means that trainees are treated as workers and are as such subject to the work permit requirement. Finally, the German position is deeply influenced by the negative stance of the Bundesrat. With a resolution passed on 1.3.2002[106], the Bundesrat denied the competence of the European Union for the policy on the admission of third country workers and urged the Federal Government to reject the directive.

3.4. Family reunion

Family reunification is one of the contested issues in the debate on the reform of immigration law.[107]

3.4.1. Legal framework for family reunion

The new Immigration Act does not substantially revise provisions for family reunion, as far as definitions are concerned.[108] Today, the term ‘family’ encompasses the nuclear family. In cases of particular hardship other family members may be covered as well.[109] As a rule, the granting of a residence permit for the purpose of family reunion requires proof of sufficient housing and income[110] and a secure residence status.[111] The right to obtain a residence permit for family reunion is distinguished according to the residence status of the principal.[112] If the principal is a German citizen, the conditions of sufficient housing and earning is waived[113], children may be up to 18 (EU-citizens: 21) and the family members receive a residence permit valid for three years.[114] Spouses of a third country national have the right to family reunion if the principal fulfils particular conditions that may be generalised as the possession of a secure residence status.[115] This requirement excludes e.g. asylum applicants and de facto refugees and serves as a “hidden waiting period”.[116] Children must be unmarried and under 16 in the present law. The proposed law draws a general age limit of 12 with exceptions.[117] Third country nationals who have lived lawfully in Germany as a child for at

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[104] COM (2001) 386 final, from 11.7.2001
[105] see Weller-Monteiro Ferreira (2002: 43 f).
[106] Bundesrat (2002)
[107] See Federal Commissioner (2002: 97 f) and Angenendt (2002).
[108] For an account of the contemporary legal framework for subsequent immigration of family members according to the provisions of the 1990 Foreigners Act see Groenendijk et al. (2000) and Davy (2001).
[109] Section 22, Foreigners Act; Section 36 sched. Immigration Act. A particular hardship is for instance when the family member lives alone in the country of origin and is dependent on the care of the relatives settling in Germany.
[110] Section 17, Foreigners Act, Section 5 and Section 27, sched. Immigration Act.
[111] Section 18, Foreigners Act; Section 29, sched. Immigration Act.
[112] Davy (2001: 287).
[113] Davy (2001: 285); Section 28, 1, sched. Immigration Act.
[114] Section 23, Foreigners Act.
[115] Section 18, 1, Foreigners Act; Section 30, sched. Immigration Act.
[116] Davy (2001: 289).
[117] Section 32, 2, sched. Immigration Act. It can be summarised that the sched. Immigration Act provides a differentiated approach with a number of constellations: A right of family reunion up for the age of 18 of exists for children of German citizens, recognised refugees, highly qualified workers and those admitted via “selection procedure” and in general for children coming to Germany with their parents.

least eight years under particular conditions have the right to return[118]. As a rule, initially the first residence permit for family members is limited[119] and shall not exceed the validity of the principal's permit. As a rule at the moment access to employment is only allowed after a waiting period of one year and then the labour market test has to be passed. The scheduled Immigration Act provides that the family member will obtain the same access to the labour market as the principal. The access to benefits of the welfare systems depends on the residence status. As holders of a residence permit, family members have access to education[120].

Spouses may obtain an autonomous residence status after five years provided that the partnership continues and the principal possesses a secure residence status[121]. In the event of termination of marital cohabitation, the spouse's residence permit shall be extended by one year as an independent right if the marital cohabitation lawfully existed in the Federal territory for at least two years or the foreigner has died while the cohabitation existed in the Federal territory and the principal was in possession of a residence permit or a settlement permit up to this time.[122] If the marital cohabitation terminates within two years the spouse may obtain an independent residence permit in cases of particular hardship[123]. According to the provisions of the scheduled Immigration Act, a foreign spouse of a German citizen shall be granted a settlement permit if he or she has been in possession of a residence permit for three years, the family household with the German continues to exist in the Federal territory, there are no grounds for expulsion and the foreigner is able to communicate verbally in the German language on a basic level. Otherwise the residence permit shall be extended as long as the family household continues to exist[124].

An immigrated third country child[125] may apply for an independent residence right at the age of 16, if he or she possesses a residence permit for at least eight years[126]. According to the reformed Nationality act, children of foreign parents who are born in Germany will receive German nationality if one parent was born in Germany or entered the country before the age of 14 and possesses a residence permit. If they acquire another nationality, they will have to choose between the German and the foreign nationality upon coming of age[127].

3.4.2. Standstill and deadline clauses

The German government is making strong efforts at the European level to obtain directives that correspond with the concepts of German immigration policy. Taking into account that immigration was and is a highly contested field of political debate and that immigration policy is linked to national sovereignty, it is likely that the government will not accept any European directive that would demand substantive policy changes or restrict the space of discretion.[128] Once a directive has come into force, the culture of legalism salient in German public offices indicates that it will be implemented according to the stipulation of superior Federal state authorities with interpretative competence. Only a few *Laender* deviate from European stipula-

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Besides, the right for subsequent immigration of family members requires that the children is not older than 12 years or, otherwise, possesses sufficient competence of the German language perceived to be necessary for successful integration.

[118] Section 16, Foreigners Act; Section 37 sched. Immigration Act.

[119] Davy (2001: 290).

[120] The access to the benefits of welfare systems for subsequent migrated family members is equivalent to the rights described in the section on third country nationals with a long term residency (see 3.3).

[121] See Davy (2001: 284).

[122] Section 19, Foreigners Act changed 1.7.2000; Section 31, 1, sched. Immigration Act.

[123] Section 19, 1, 2, Foreigners Act; Section 31, 2, sched. Immigration Act.

[124] Section 28, 2, sched. Immigration Act.

[125] Section 17, Foreigners Act; Section 32 sched. Immigration Act.

[126] Section 26, Foreigners Act.

[127] Nationality Act, see Ministry of the Interior (2000: 44) ; Federal Commissioner (2000: 27 ff).

[128] Weller-Monteiro Ferreira (2002: 73).

tions.[129] But as a general rule German authorities act in accordance with European standards.

3.4.3. National law reviewed in the light of the proposed European directive

An examination of the accordance of the German provisions with the draft of the European directive on the right to family reunification[130] must take into account that the German government had raised fundamental reservations against the first proposal of 1999.[131] Taking into account that family reunification used to be the main legal channel for immigration into Germany, accounting for more than half of total immigration[132], the proposal of a European directive was highly sensitive.[133] Germany opposed the 1999 proposal because of its more generous character compared to the German regime. The Ministry of the Interior feared that the proposal would increase the potential of people entitled to family reunification and create burdens for the social systems. Most of the reservations raised by Germany have been worked into the recent proposal. The definition of family members covered by the directive has been restricted to the nuclear family, the directive no longer covers EU-citizens who do not make use of their right of freedom of movement, and Germany was allowed to keep the age limit of twelve years provided that integration conditions (language competence) are not met. All in all the Germany succeeded in "softening" the proposal so far that the national provisions fit into the proposal with the help of amended derogations.

3.5. Long-term residence rights

3.5.1. Two forms of long-term residence status

Under the current law, there are two forms of long-term residences status: unlimited residence permit[134] (unbefristete Aufenthaltserlaubnis) and 'right to unlimited residence'[135] (Aufenthaltsberechtigung). Both titles grant a secure status with only small differences. The unlimited residence permit may subsequently be limited if the third country national cannot make a living from independent means of support[136] while the right to unlimited residence cannot be subject to such restrictions and offers better protection against expulsion. Both titles entail many rights equal to those of citizens. However, political rights and the access to particular professions are reserved for German nationals.[137] Moreover, the social security and welfare systems entail some discrimination against third country nationals.[138] Although social security stipulations are neutral with regard to citizenship, third country nationals face some discrimination.[139] Pension claims of third country nationals accumulated abroad are not considered, except where bilateral agreements exist. Sick pay is only paid for persons still in the Federal territory. Only payments of accident insurance can be received while living abroad. Health insurance does not cover family members of third country nationals living

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[129] In deviation from the general policy some Laender expel citizens of EU-member states just like other third-country nationals who have given cause for expulsion.
[130] COM (2002) 225 final, from 28.2.2002.
[131] (COM (1999)638 final from 1.12.1999.
[132] Independent Commission on Migration (2001: 15)
[133] Weller-Monteiro Ferreira (2002: 42)
[134] Sections 24, 25 and 26 Foreigners Act.
[135] Section 27 Foreigners Act.
[136] If the third country national received the unlimited residence permit while unemployed and is not able to live from own employment or own e unlimited residence permit can be changed into a limited residence permit
[137] For instance, the public service is generally closed to third country nationals except where there is a specific demand for particular skills of foreigners (Davy 2001: 345). Restrictions also exist for some professions such as chimney sweeping.
[138] For a discussion of the exclusion of third country nationals from social systems see Davy (2001: 320ff).
[139] Davy (2001: 324).

abroad. Unemployment benefits demand that the recipient is available in Germany; otherwise the benefits may be shortened or withdrawn. The condition of availability is, however, difficult to meet for third country nationals who are still subject to the labour market test. In some areas and branches the number of privileged unemployed is so high that the third country national cannot pass the labour market test. This constellation implies that third country nationals may be not entitled to unemployment benefits because they are not available on the labour market in the strict sense.[140]

The entitlement of third country nationals to welfare benefits is limited and restricted to basic dimensions. The reliance on welfare benefits may even lead to the loss of a residence title. Entitlement to child allowance and child-raising allowance depends on the possession of a residence permit or right to unlimited residence and is not paid for children living abroad. Only the housing subsidy is granted for all tenants, house owners or people looking for a flat regardless of the residence status. However, the housing subsidy is not accepted as independent means of support, which causes trouble in the situation of applying for subsequent family reunion. The respective residence status under the provisions of the scheduled Immigration Act is the settlement permit.[141]

3.5.2. Five years residence provision

Many foreign nationals take up residence in Germany with a limited residence permit that is not renewable for more than a limited time: seasonal workers, au pairs, specialty cooks, contract workers, students, trainees, or interns. On the other hand, some groups of labour migrants (e.g. from industrialised countries) and family migrants receive a limited residence permit that is changed into a long-term status under certain conditions[142].

Foreign employees who are gainfully employed have a right to an unlimited residence permit[143] under the following conditions: possession of a residence permit for five years,[144] a work permit that is not restricted to a definite occupation in a specific company,[145] simple communication skills in German,[146] sufficient living space for him- or herself and the family,[147] and no grounds for expulsion[148].

Third country nationals who are not gainfully employed only have a legal right to an unlimited residence permit if their support is secured through their own means[149]. An unlimited extension is also granted in the case of unemployment, provided the foreigner is entitled to unemployment benefits or to a remaining six months of unemployment assistance[150]. Drawing social welfare does not qualify as having independent means of support. The residence permit, however, may be restricted retroactively – in these cases exclusively – and after due assessment of the circumstances, if, within a period of three years, the foreigner fails to secure his subsistence from his own gainful employment[151]. In the case of spouses only one spouse

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[140] Davy (2001: 327).
[141] Section 9, sched. Immigration Act.
[142] Special regulations apply in the case of Turkish workers on account of the association agreement between Turkey and the European Union: Most importantly, the waiting period for acquiring eligibility for an unlimited work permit has been reduced from five to four years for Turkish workers. And after having been employed with the same firm for one year, they are entitled to a work permit so that they can continue such employment. The waiting period for family members of Turkish workers has been reduced to three years (Ministry of the Interior 2000: 46; see also ECOTEC 2000: 108).
[143] Section 24, Foreigners Act.
[144] Section 24, 1, 1 Foreigners Act.
[145] Section 24, 1, 3, 4, Foreigners Act.
[146] Section 24, 1, 4, Foreigners Act.
[147] Section 24, 5, 4 Foreigners Act.
[148] Section 24, 2 Foreigners Act.
[149] Section 24, 2, 1 No. 1, Foreigners Act.
[150] Section 24, 2, 1, No. 2, Foreigners Act.
[151] Section 24, 2, 2, Foreigners Act.

needs to meet the requirement of occupational integration and independent means of support[152]. Even when the couple no longer lives together, the spouse who immigrated subsequently need not to fulfil the requirements, provided the other spouse pays for the maintenance of the latter and has an unlimited residence permit or a right of unlimited residence[153].

A right of unlimited residence is to be granted if the foreigner has been in possession of a residence permit for eight years,[154] has independent means of support from his or her own gainful employment, from his or her own assets or from other means of his or her own,[155] has paid at least 60 months' contributions to the statutory pension insurance fund or has other pension rights[156] (however, the right of unlimited residence is also granted if the foreigner is undergoing training leading to the completion of a recognised stage of school education or vocational training),[157] has not incurred any major legal penalty over the past three years[158] and meets the requirements for obtaining an unlimited residence permit.[159]

The two secure residence authorisations (unlimited residence permit and the right of unlimited residence) provided by the Foreigners Act will be replaced by a single residence authorisation, the settlement permit, in the scheduled Immigration Act[160]. The settlement permit is an unlimited residence permit that entitles the holder to pursue an economic activity. It is not subject to any time limits or geographic restrictions and must not incorporate any subsidiary provisions[161]. A foreigner shall be granted the settlement permit provided that he or she has held a residence permit for five years,[162] his or her livelihood is secure,[163] he or she has paid compulsory or voluntary contributions into the statutory pension scheme for at least 60 months or furnishes evidence of an entitlement to comparable benefits from an insurance pension scheme or from an insurance company; time off for the purposes of child care ore nursing at home shall be duly taken into account,[164] he or she has not been sentenced to a term of youth custody or a prison term of at least six months or a fine of at least 180 daily rates due to an intentionally committed offence,[165] he or she is permitted to be in employment, insofar as he or she is in employment,[166] he or she is in possession of the other permits which are required for the purpose of the permanent pursuit of his or her economic activity,[167] he or she has an adequate knowledge of the legal and social system and the way of life in Germany,[168] and he or she possesses sufficient living space for himself or herself and the members of his or her family forming part of his or her household[169].

3.5.3. Withdrawal of status

Under the provisions of the 1990 Foreigners Act the right of unlimited residence has no time-related and geographical restrictions. It cannot be tied to any conditions or obligations. Accordingly, foreigners who hold a right of unlimited residence may be self-employed provided that they meet the general requirements governing occupations or trades that are also appli-

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[152] Section 25, 1, Foreigners Act.
[153] Section 25, 2 Foreigners Act
[154] Section 27, 2, No 1, Foreigners Act.
[155] Section 27, 2, No 2, Foreigners Act.
[156] Section 27, 2, No 3, Foreigners Act.
[157] Section 27, 3, No 4 a, Foreigners Act.
[158] Section 27, 2, No 4, Foreigners Act.
[159] Section 27, 2, No 5, Foreigners Act.
[160] Section 9, sched. Immigration Act.
[161] Section 9, 1, sched. Immigration Act.
[162] Section 9, 2, No. 1, sched. Immigration Act
[163] Section 9, 2, No. 2, sched. Immigration Act
[164] Section 9, 2, No. 3, sched. Immigration Act
[165] Section 9, 2, No. 4, sched. Immigration Act
[166] Section 9, 2, No. 5, sched. Immigration Act
[167] Section 9, 2, No. 6, sched. Immigration Act
[168] Section 9, 2, No. 8, sched. Immigration Act
[169] Section 9, 2, No. 9, sched. Immigration Act

cable to Germans. Persons holding a right of unlimited residence may only be expelled on serious grounds of public security and order. However, serious delinquency (a sentence of at least three years' imprisonment on account of an intentional offence under the Narcotics Act or the breach of the peace[170] generally leads to expulsion, even if a person holds a right of unlimited residence; as for the rest, if foreigners have committed other considerable crimes the circumstances will be duly assessed to decide on their expulsion[171].

In the case of a loss of passport, only the residence authorisation may be revoked. Foreigners, however, remain under the obligation to possess a valid passport issued by their country of origin. If a foreigner fails to fulfil this obligation, even though he or she could reasonably be expected to do so, his or her residence authorisation may be revoked and he or she may be asked to leave Germany[172]. The residence authorisation expires when the third country national is abroad for more than six months[173]. Foreign Offices are authorised to limit the residence permit later in case a condition necessary for the granting or renewing of the residence permit is no longer met. This may lead to the withdrawal of the residence authorisation[174].

The scheduled Immigration Act grants long-term resident third country nationals a special protection from expulsion:[175] those who possess a settlement permit and have lawfully resided in the territory for at least five years;[176] or possess a residence permit, were born in the Federal territory or entered the Federal territory as minors and have been lawfully resident in the Federal territory for at least five years;[177] or possess a residence permit, have lawfully resided in the Federal territory for at least five years and cohabit with a foreigner who possesses particular protection from expulsion as a spouse or in a registered partnership,[178] cohabit with a German dependent or partner in a family household or a registered partnership,[179] are recognised as a person entitled to asylum, enjoy the legal status of a refugee in the Federal territory or possess a travel document issued by an authority of the Federal Republic of Germany under the Convention relating to the Status of Refugees[180]. He or she shall only be expelled on serious grounds pertaining to public security and law and order. In cases the conditions of mandatory expulsion[181] are met, the third country national shall generally be expelled. In the case the conditions of regular expulsion[182] are met, a discretionary decision shall be reached on his or her expulsion. In cases of mandatory or regular expulsion a discretionary decision shall be reached on the expulsion of an adolescent who has grown up in the Federal territory and possesses a settlement permit, and on the expulsion of a minor who possesses a residence permit or settlement permit. If the parents or the parent possessing the sole right of care and custody are/is lawfully resident in the Federal territory, the minor shall be expelled in the cases of mandatory expulsion only; a discretionary decision shall be reached on his or her expulsion[183].

The residence authorisation may be revoked only in cases where a third country national no longer possesses a valid passport or passport substitute; changes or losses nationality; has

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[170] Section 47, 1 Foreigners Act.
[171] Section 47, 3, Foreigners Act.
[172] Federal Ministry of the Interior, see Section 43, Foreigners Act (on the revoking of the residence authorisation)
[173] Section 44, Foreigners Act (on the expiration of the residence authorisation).
[174] see Davy (2001: 297).
[175] Section 56, sched. Immigration Act.
[176] Section 56, 1, No 1, sched. Immigration Act
[177] Section 56, 1, No 2, sched. Immigration Act
[178] Section 56, 1, No 3, sched. Immigration Act
[179] Section 56, 1, No 4, sched. Immigration Act
[180] Section 56, 1, No 5, sched. Immigration Act
[181] Section 53, sched. Immigration Act
[182] Section 54, sched. Immigration Act
[183] Section 56, 2, sched. Immigration Act.

not yet entered the Federal territory; or where the recognition as a person entitled to asylum or refugee status lapses or becomes null and void. However, the law provides for exceptions in several case constellations[184].

The residence permit expires at the end period of validity; upon the occurrence of an invalidating condition; upon the withdrawal of the residence title; upon revocation of the residence title; if the foreigner leaves the Federal territory for a reason which is not of a temporary nature; if the foreigner leaves the Federal territory and fails to re-enter the Federal territory within six months or within a longer period set by the foreigners authority; or if a foreigner files an application for asylum following the granting of a residence title[185]. Particular cases are exempted from the expiration of the residence authorisation if certain conditions are met, for instance, if the foreigner holds a settlement permit for longer than 15 years and has independent means of support[186].

3.5.4. Recognition of qualifications

The competent authorities in charge of the recognition of qualifications are situated at the state and local levels. Each *Land* has several offices dealing with often one particular aspect of the recognition of qualification. In Berlin, for example, the office for the recognition of professional certificates is located with the Senate for Economy and Labour; the office for the recognition of school exams with the Senate for Schooling, and the certification of university diplomas and high school exams required for taking up university studies with the Senate for Science.[187] Moreover, the Trade Chamber and the professional associations are competent to examine and recognise the vocational certificates of particular professions. The certification process is somewhat arbitrary. While high school and university diploma are more easily accepted, the certification of professional skills is particular complicated und often impossible. Recognition depends on the existence of agreements with the sending countries. This leads to the situation that for instance citizens of Bosnia have difficulties to pass the certification because no such agreement exists with Bosnia[188]. NGOs report another problem: the immigration status of applicants influences the implementation. The education and the certificates of a physician from Russia are accepted if the applicant entered as an ethnic German.[189] If the applicant is non-German (for instance a Jewish quota refugee) the same education and certificates will not be recognised[190]. The certification of skills and education acquired abroad is a complicated and often futile endeavour, most of all for third country nationals who came with professional skills as refugees or subsequent family members. The competent authorities and trade chambers intensively evaluate the comparability of skills and often demand to repeat professional training and exams.

3.5.5. Mobility of long-term residents within the EU

At the moment there are no provisions in force nor scheduled that tackle the individual freedom of movement of third country nationals lawfully residing in another member state. Germany has particular reservations against the introduction of free movement for long-term resident third country nationals. The government fears that established third country residents will use the freedom of movement to immigrate into the social systems[191]. Germany

[184] Section 52, sched. Immigration Act.
[185] Section 51, sched. Immigration Act.
[186] Section 51, 2 sched. Immigration Act.
[187] Rieger (2002).
[188] For example, a Bosnian citizen worked in Germany as a posted skilled construction site manager. When the civil war broke out he decided to stay in Germany as a refugee. As he refugee his qualification was not accepted and he had to register with the Federal Labour Office as an unskilled worker.
[189] Bundesvertriebenengesetzes (BVFG) in der Fassung der Bekanntmachung vom 02.06.1993 (BGBl. I S. 829), zuletzt geändert durch Art. 1 des Gesetzes vom 30.08.2001 (BGBl. I S. 2266)
[190] Rieger (2002), Wittgen (2002)
[191] Weller-Monteiro Ferreira (2002: 42)

has the position that every member state shall have the right to make sovereign decisions on the admission of third country nationals residing as long-term residents in another EU-member state. The German government demands that the member states should have the right to require that an immigrant meet conditions for integration (language capacity and sufficient orientation in the cultural, political and social order) independently of whether he or she enters from another EU-member state or from outside the European Union[192].

3.5.6. National law reviewed in the light of the proposed European directive

It is striking that the German position is based on fears of significant unwanted immigration into the social systems and a loss of national control of the labour market with regard to third country nationals. This position disregards that EU-citizens do not change their place of residence easily. This is even more valid for third country nationals who had a troublesome experience to feel at home in the country of residence[193]. It seems to be the case that Germany will achieve a directive that allows for a continuation of the restrictive German immigration law and policy. Most recently, for instance, Germany gained consent for proceeding with the practice that some family subsidies may still be dependent on the residence status[194].

[192] Weller-Monteiro Ferreira (2002: 42)
[193] Weller-Monteiro Ferreira (2002: 43).
[194] Weller-Monteiro Ferreira (2002: 43).

Chapter 4: Recommendations and open method of co-ordination

4.1. The Commission proposal for an open method of co-ordination

The fourth chapter reviews the state of art of German immigration policy with particular reference to the six guidelines mentioned in the Communication.

Our assessment of national immigration policy with reference to the six guidelines proposed by the European Commission in the "Communication on an open method of co-ordination for the community immigration policy"[195] focuses on the basic elements and trends. The six guidelines proposed by the European Commission cover a wide range of subjects and objectives so that a detailed analysis is not possible within the scope of this report.

An evaluation of the proposed European guidelines shows a mix of clearly formulated repressive measures to prevent, restrict and control immigration and more vaguely formulated measures to protect human and social rights of immigrants. Legal, administrational and technical co-operation is developed in the field of restrictive measures (co-operation of border police, visa requirements etc.) but underdeveloped in the field of facilitating immigration (proactive provision of information on admission in sending countries).

All in all we consider that it is unlikely that the "open method of co-ordination for the community immigration policy" proposed by the Commission will be supported by Germany. Since German authorities already have to document their own activities in several reports and statistical accounts, technical feasibility is not the problem. The scheduled Immigration Act includes agreements on objectives of immigration, a permanent monitoring of immigration and the opportunity for an expert commission to declare immigration quota. For German authorities it would be easily possible to produce annual reports on the development of immigration and the implementation of immigration policy.

The main obstacles are in the political arena: As already mentioned, there is a political consensus in Germany against a shift of responsibilities in immigration policy to the European level. The *Laender* in particular insist that immigration must remain a concern of the member states, which shall decide according to their preferences and needs.

Guideline 1: Comprehensive and co-ordinated policy

The first guideline proposed in the Communication calls for a comprehensive and co-ordinated approach to migration management at the national level. The policy of non-immigration that is still valid in Germany does not fit with the objective of a comprehensive migration management. The scheduled Immigration Act aims to establish an institutional arrangement with a concentration of basic services related to immigration policy in a new Federal Office for Migration and Refugees in Nuremberg. This Office would develop from the former Federal Office for the Admission of Foreign Refugees and take over responsibilities and functions from other authorities. Thus with the coming into force of the Immigration Act a concentration process of managing functions would take place. This can be seen as an indicator that the linkages between different categories of immigration will be more acknowledged in the future.

Another aspect connected with the linkages of categories are the legal obstacles to a change in status: As a rule, immigrants have to apply for a residence authorisation with a specification of the purpose of stay (e.g. work, family reunion, education etc.) before entering the country. The provisions of the new Immigration Act allow that a change of residence authorisation may be excluded with the exception of students who may apply for a residence authorisation after passing their exams.

[195] (COM/2001/0387 final).

It was hitherto common practice that a change of residence authorisation while residing in the country was nearly impossible. It is difficult to assess if this restrictive practice will be abolished in favour of a more generous procedure allowing changes of status. The scheduled Immigration Act stipulates that the residence authorisation is limited[196] and will be waived in case the reasons for and circumstances of immigration are no longer salient[197]. The implementation practice will depend on administrative regulations. The contemporary discussion indicates, however, that categories of immigration will still be neatly separated by law and in the implementation practice.

Over the past years, the authorities have made considerable progress in providing more data on immigration. The Federal Commissioner for Foreigners' Issues took the lead with compiling and publishing data on foreigners' and immigration issues that go beyond the national statistics.[198] German statistics as a rule never differentiate by country of birth but only by nationality.

With regard to statistical registers, the situation in Germany is strongly influenced by the German organisational structure of authorities concerned with immigration aspects. Nearly all data are collected in the course of administrative acts and not for the purpose of statistical documentation and analysis. Therefore, most data are deficient from a scientific point of view. Basically, there are three types of statistics: (1) Data from the registration offices: These data include all registered migration across international borders. They are compiled from data in all German municipalities, allowing only a broad differentiation by nationality (including German nationality) and country of origin. It has to be noted that it is a case statistic. An example: If a Polish woman registers in June because she does a seasonal job in agriculture for two months, she has to deregister in August when she leaves. If she comes back in October to marry a German citizen, this will again be counted as an inflow of the same year. As a result, inflows usually overestimate the number of persons regularly entering the country, and outflows are usually underestimated, as people without intent to return to Germany often do not make the effort to deregister. Data of total flows are based on these statistics, as well as some estimates. (2) Case data of administrative authorities: As has been shown in the preceding chapter, different authorities are responsible for the administration of different migrant categories and different areas of concern. These organisations present data on case management in the yearly reports, which are used to present inflows in selected migration categories. (3) The Federal Employment Service produces sophisticated statistical accounts of its own work as well as of the characteristics and trajectories of its clients. The client group of third country nationals is reviewed separately in statistics of unemployment, participation in professional training schemes, granting of work permits and apprehension in labour market controls on federal, regional and local level. However, since personal qualifications and language competencies of third country is not covered in spite of extensive data collecting, the general impression of "unqualified third country nationals" is confirmed. (4) Data from the Central Aliens Register: Other categories of migration can only be estimated by comparing stock data for different points in time in the Central Aliens Register.[199] Three types of migration data, which are often used in other countries, do not influence German statistics: (1) Entries at German borders are neither counted nor registered or differentiated in any way. With a low estimate of 666 million entries in 1996 (Vogel 2000a), it can be stated that there is a huge amount of traffic across German borders, indicating the country's high degree of international integration. (2) Germany does not make any comprehensive effort to know how many people have entered the country with the prospect of medium or long-term residence. A categorisation of immigrants and non-immigrants in a single year cannot be presented. Data in some migration categories are estimates derived from the comparison of different statistics. (3) For many countries, censuses and official representa-

[196] Section 7, sched. Immigration Act.
[197] Section 8, sched. Immigration Act.
[198] see Federal Commissioner for Foreigners Issues: 1997, and following issues
[199] see Ministry of the Interior (2000: 19).

tive surveys form the most important basis of population statistics. This is not the case in Germany. The last census, which was carried out 1987, resulted in a downward correction of 1 million fewer resident third country nationals. Annual micro-censuses include little information that is useful for analysing migration flows[200].

At the moment we can identify two main European initiatives to collect and present data on immigration. (1) EURO-STAT is currently concerned with the compilation of a yearbook on asylum and migration. The yearbook, which will be a substitute for the internal CEREVI and CEREA reports, will probably be published in summer 2003. The country profile for Germany was produced in a joint effort by the Federal Foreign Office, the Federal Ministry for Labour and Social Order, the Federal Office for the Recognition of foreign refugees, and the Federal Office of Statistics in co-operation with the Federal Ministry of the Interior. The yearbook collects country profiles of all member states and will contribute to common statistical standards. (2) German authorities refused to participate in the European Migration Observatory (MOB) in Thessalonica with the argument that the Council has not come to final conclusion concerning this institution. After an evaluation of the European Migration Observatory scheduled for 2003 the Federal Ministry will reconsider its participation. (3) A third initiative in the field of European statistics was a meeting by a "task force on legal migration statistics" in September 2002 in Brussels with German participation. However, there are no follow-up meetings scheduled.

Guideline 2: Improving information

Due to its self-perception as a non-immigration country, German authorities have not undertaken pro-active efforts to disseminate information abroad about the conditions for immigrant admission. The diplomatic representations abroad give information only on request. So far German authorities have not established web sites, information offices or special publicity measures to inform abroad about immigration opportunities. The only exception is the Federal Ministry for Labour and Social Order with relation to the temporary relief programme to attract IT-specialists. At the moment only the Federal Employment Service pro-actively distributes information on the application procedure for highly qualified computer experts through a web site and information sheets in English. However, the information presented on the web sites of the Federal Employment is limited to the admission of IT-Specialists[201].

Currently, the Federal Commissioner for Foreigners' Issues is developing a manual for immigrants entitled "Welcome to Germany", which will be distributed over the internet and as hardcopy. The main objective is to give bilingual information to immigrants already in the country, but as a side effect applicants who are interested in immigration to Germany will find basic information about immigration application procedure.

The Federal Foreign Office (Auswärtiges Amt) strongly promotes the co-operation of German agencies abroad with those of the other EU member states. The respective decrees and implementing regulations are transmitted and the quality and frequency of co-operation is an aspect of the reports.

According to the understanding of German authorities, the information of foreign citizens abroad does not belong to their tasks. German authorities co-operate with the IOM to launch activities in this field.

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[200] They include interesting information on the stocks of foreign population, but are still rarely analysed under migration aspects (see Velling 1995)

[201] www.arbeitsamt.de

Guideline 3: Reinforcing the fight against illegal smuggling and trafficking

NGOs criticize that policies fail to achieve a balance between humanitarian responsibilities, lawful migration and the fight against criminal smuggling and trafficking networks. There are integrated approaches only in a few specific areas, namely trafficking in women. In this field, counselling services, police, Federal Border Patrol and state authorities co-operate[202]. NGOs co-operate despite their perception that the approach is still too restrictive and police orientated.

All in all German immigration policy is characterised by a dominance of restrictive measures. Security considerations dominate the public policy, and considerations to improve the protection of immigrants in emergency are neglected. According to NGOs the vulnerability of unauthorised immigrants is increased as a result of a predominantly restrictive policy.

The Federal Border Police, the Federal Criminal Police Office and the Federal Intelligence Service collect and evaluate information on the paths that undocumented immigrants use to get into the country. Some information is published in the annual report of the Federal Border Police,[203] while most information is kept internal[204]. Also, the German intelligence service has found a new area of activity in the observation of illegal immigration.

A number of sanctions are in force under the Foreigners' Act and the Penal Code. Over the last years, sanctions have constantly been raised. The problem is, however, the implementation. At the moment those convicted of smuggling human beings have to fear sentences of up to ten years.[205] This level is maintained in the scheduled Immigration Act.[206] A confiscation is only possible in proven cases. Since the confiscation has to be in a proper relation to the advantage gained from the criminal activities, but the real amount of criminal activity is difficult to prove, the measure of seizure is more of a theoretical nature than of practical relevance.

The Federal Border Police has developed two kinds of pre-frontier co-operation. (1) About 115 members of Federal Border Patrol are sent to international airports and serve as document officers in order to detect fraudulent documents before entry into the airplane. (2) The German border patrol and the Polish border patrol have established a close co-operation. The German authorities have provided the Polish border patrol with material and personnel support in order to establish controls adhering to the common European standards. German patrol officers have been invited to go on patrol with Polish colleagues on the Polish side of the border.

Moreover, in order to optimise the exchange of information and to co-ordinate concepts to combat illegal migration, the Federal Border Police has so far deployed border police liaison officers to the Schengen states France, Italy, the Netherlands and Austria, as well as to ministries/central offices, and to Poland, Bulgaria and the Czech Republic; in all cases these officers work at the German embassies. In the medium term, 40 border police liaisons officers are to be deployed to German diplomatic representations (as at February 1999).

At the request of air transport carriers and in conjunction with the local border police authorities and the German diplomatic representations abroad, document specialists from the Federal Border Police carry out training and counselling measures at airports in third countries which are perceived to be problematic. This move aims to reduce the number of inade-

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[202] Bundeskriminalamt (2001).
[203] Federal Border Patrol, Bundesgrenzschutz: (2001) annual reports, continuous series.
[204] Bundesgrenzschutz (2001).
[205] Section 92, Foreigners Act.
[206] Section 96,scheduled Immigration Act

quately documented passengers coming to Germany by air, and to help air transport carriers to start measures of their own[207].

Guideline 4: Establishing a coherent and transparent policy of admitting labour immigrants

Until recently, the conventional perception was that the impact of labour immigrants is, all in all, detrimental to the German society and economy. The German report for the European Employment strategy for most years did not mention the aspect of promoting the employment of third country nationals, although the 2002 National Action Plan for Employment notes that a draft act on Immigration aims to replace the existing recruitment stop for foreign workers with a multi-layered set of instruments in order to react to the new situation of labour market gaps in an appropriate way[208].

The regulations still in force for the selection of third country nationals for entry into the labour market are far from being clear and transparent. At the moment the admission procedure involves at least three agencies (visa authority, work permit authority, residence permit authority), which find it difficult to make an independent judgement of application chances. Procedures will become more transparent under the scheduled immigration law with the planned one-stop-agency.

Germany is able to comply with the obligation to notify job vacancies to the member states. Due to a highly developed standard in computer technology, German employment service notify all job vacancies to the European Employment Service (EURES).

The German government emphasises the importance of a fight against undeclared work. Combating illegal work by foreigners is integrated into a general strategy of detecting undeclared work. Illegal employment of foreigners is a priority within this approach.[209] Undeclared work is usually treated as an administrative offence (unless intentional fraud can be proved, which is usually not the case). However, staying illegally as well as manipulating personal documents are criminal offences. Resources for controls have been considerably enhanced over the last decades. In 1981 only fifty officers of the Federal employment service conducted work site controls. Today the number is 2 900, and an additional 2 500 persons from Federal Customs as well as an unknown number of municipal staff control work sites[210].

Since 2001, there is a provision for caretakers in private households with nursing cases. Apart from this programme, no other opportunities are provided for women in particular. Women may use and use the available opportunities including seasonal labour. As contract work concentrates on construction and assembly, it is nearly exclusively available for men.

Guideline 5: Integrating migration issues into relations with third countries

The policy documents relevant to the consideration of migration issues in development and cooperation programmes are the reports of the Ministry for Economic co-operation.

To the best of our knowledge, there are no specific measures in force which aim at the maximising of the positive impact of migration as a positive factor for development for the country of origin, although these aspects are of relevance in the negotiation of bi- and multilateral agreements (e.g. between labour administrations on the recruitment of caretakers).

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[207] Federal Ministry of the Interior (2000: 66).
[208] All National Action Plans on Employment can be found on the website of the European Commission, Directorate General for Employment and Social Affairs,
http://europa.eu.int/comm/employment_social/news/2002/may/naps2002_en.html
[209] See Cyrus and Vogel (2002).
[210] Federal Commissioner (2002: 312).

As explained in some detail above, labour migration opportunities are mainly of a temporary nature. This approach follows the idea that mobility is more desirable than immigration and encourages the maintenance of home ties.

There is information exchange and support for neighbouring Eastern countries. Support in the framework of foreign aid and the like would require a more detailed analysis that we cannot offer here.

Guideline 6: Integration issues

Integration programmes differ by category of immigrant and by state of residence. They include temporary language and employment programmes and usually require a secure residence status. The whole field is under reconstruction as the scheduled Immigration Law intends to offer a comprehensive programme for newcomers – including language training and civic education.

Since 1968 the Federal Ministry of Labour and Social Order has spent 8,5 billion € on programmes to integrate the foreign population.[211] Additionally other Federal Ministries, the Federal Employment Service as well as *Laender*, municipalities and private organisations use resources to launch integration measures. Ethnic Germans and their foreign family members have a right to specific programmes.

4.2. Final Remarks

According to this overview, Germany largely complies with European requirements, last not least because it influenced these requirements in a way that compliance was acceptable. Even more frequently, the initial requirements of the directives were lowered to a minimum standard corresponding with the provisions already in force in Germany.

German elites in many societal fields have reached a consensus that it is time for a substantial legal reform in the field of migration. This reform should open transparent ways for substantial labour immigration in the future when the decline and aging of the population is more pronounced. New immigrants should receive aid for integration and fast access to secure residence rights. On the other hand, higher immigration levels are still suspicious for the German electorate. As people, in their personal environments, see asylum seekers on welfare (without realising that they are prohibited to work) and experience problems of children with immigrant background through personal experience or the local media, electoral campaigns against more immigration fall on fertile grounds. The conservative parties in particular have made use of this situation, thereby blocking substantial immigration reforms. At the same time, security and migration control issues were regarded as important by most political actors and successively built up.

Although the new Immigration Act points into the direction of improved transparency of admission and integration and European compatibility of German legislation, it fails to address two important issues: Firstly, already residing immigrants are excluded from improved measures for new immigrants in the integration field, raising questions of inter-temporal equity and lost generations with their potential for conflict and ethnic cleavages. German and EU policy should make sure that "old" immigration is not excluded from improved standards and measures. Secondly, German and European legislation fail to take account that complete control over migration in Europe is not feasible. While legislation is well developed in terms of sanctions against illegal entrants, human traffickers and residents without status, and focuses on the deportation of those who have no right to stay, it fails to secure the rights of irregular migrants as a regular feature of standard law.

[211] Ministry of the Interior (2000: 27).

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Glossary

Work Authorisation, Arbeitsgenehmigung

Work Permission, Arbeitsgenehmigung

Right to Work, Arbeitsberechtigung

Work Permit, Arbeitserlaubnis

Residence Authorisation, Aufenthaltsgenehmigung

Right of unlimited residence, Aufenthaltsberechtigung

Residence title for specific purposes, Aufenthaltsbefugnis

Residence title for exceptional purposes, Aufenthaltsbewilligung

Residence Permit, Aufenthaltserlaubnis

Limited Residence Permit, befristete Aufenthaltserlaubnis

Unlimited Residence Permit, Unbefristete Aufenthaltserlaubnis

Settlement permit, Niederlassungserlaubnis (Immigration Act)

Foreigners Act, Ausländergesetz (1990)

Immigration Act, Aufenthalts- und Zuwanderungsgesetz (2002)

Ordinance on Residence Authorisation for the Purposes of Taking Up Employment, Verordnung über Aufenthaltsgenehmigungen zur Ausübung einer unselbständigen Erwerbstätigkeit (Arbeitsaufenthalteverordnung – AAV)

Work Permit Ordinance, Verordnung über die Arbeitserlaubnis für nichtdeutsche Arbeitnehmer (Arbeitserlaubnisverordnung (AEVO)

Work Authorisation Ordinance, Verordnung über die Arbeitsgenehmigung für ausländische Arbeitnehmer (Arbeitsgenehmigungsverordnung ArGV)

Ordinance on Exemptions Relating to the Issue of Work Permits to Foreign Workers Entering the Federal Territory for the First Time, Verordnung über Ausnahmeregelungen für die Erteilung einer Arbeitserlaubnis an neueinreisende ausländische Arbeitnehmer (Anwerbestoppausnahmeverordnung – ASAV)

Ordinance on the Implementation of the Foreigners Act, Verordnung zur Durchführung des Ausländergesetzes (DVAuslG)

Ordinance on the granting of a residence permit for highly qualified foreign skilled workers of the information and communication technology (Verordnung über Aufenthaltserlaubnis für hochqualifizierte ausländische Fachkräfte der Informations- und Kommunikationstechnologie vom 11.07.2000, BGBl, 28.07, 2000)

Ordinance on the granting of a work permit for highly qualified foreign skilled workers of the information and communication technology Verordnung über die Arbeitsgenehmigung für hochqualifizierte ausländische Fachkräfte der Informations- und Kommunikationstechnologie vom 25.07.2000, BGBl, 28.07.2000)

The migration and qualification department of the **DGB Bildungswerk** (Educational institution of the Association of German Trade Unions) offers training and information for trade union and non-trade union participants. It aims to strengthen migrants' participation in debates and political decisions and to increase the knowledge and competence of all groups taking part in the integration of migrants. The Bildungswerk offers seminars, workshops, training events, and conferences. It also publishes documentation and newsletters and maintains a website.

The migration and qualification department was established in its present form in 2001 and has a staff of thirteen.

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