THE LEGAL STATUS OF MIGRANTS ADMITTED FOR EMPLOYMENT

Committee of experts on the legal status and rights of immigrants

A comparative study of law and practice in selected European states

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1. Introduction

Problem description

The labour migration of foreigners into Europe, which is generally regarded as having come to a halt after the energy crisis of the early 1970s, was initially perceived as a temporary phenomenon. However, many foreign labour migrants, whether for humanitarian or practical reasons, did not leave European countries and stayed permanently, often bringing their families with them.[1] In the last few years, the question of foreign labour migration has once again risen to prominence on the political and economic agendas of Council of Europe member states for a number of reasons. While combating irregular migration and the exploitation of such migrants has arguably occupied centre stage on the policy level, European countries are coming to the realisation that foreign migrant labour is required to sustain future economic growth. Demographic indicators, pointing to ageing populations in these countries, and lower unemployment rates have further underscored the need for migrant workers. Moreover, the demand for foreign labour is also an aspect of the changing environment in the world of work, which is reflected in the following developments: the advent of new technologies and the resulting need for unexpected sources of expertise; different working norms giving rise to an increase in self-employment, consultancy and a greater diversity in working times and practices, which change the relationships of competition within the labour force; and an increasing globalisation of European economies in the context of the rules of the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO).

Indeed, this more favourable climate for new foreign labour migration is evident in a number of recent policy developments at the national level.[2] For example, both Germany and Sweden opened schemes to attract highly skilled labour migrants, while the United Kingdom amended its labour migration rules to make it easier for employers to move staff to the United Kingdom and has introduced the Highly Skilled Migrant Programme, which permits the individuals concerned to enter the United Kingdom to seek employment. In some cases these new simplified rules will lead to a more secure status, while in others they will not. In general, however, there would appear to be fewer opportunities for lower skilled migrants to gain a more secure status, leading to economic and social integration in the country of employment, than for highly skilled migrants. In the Netherlands, the Foreigners Employment Act was amended in September 2000 to introduce a rotation system whereby labour migrants would be admitted for less than three years without further access to the labour market. Both Spain and Italy have introduced quota systems for lower skilled migrants, which seem to preclude applicants from gaining a secure residence independent of their work. Spain also signed agreements on migrant workers with Colombia, Ecuador and Morocco in 2001 and has negotiated further agreements with other non-European Union countries. The labour migration of third-country nationals is also on the agenda of the European Union (EU). The European Commission discussed the admission of economic migrants and their integration in receiving countries in a Communication on a Community immigration policy adopted in November 2000.[3] In July 2001, the Commission advanced a proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities,[4] which, in addition to rules on admission, also includes provisions on their equal treatment with EU citizens.

Given that new policies are being developed to attract labour migrants, the legal status of those migrants admitted for employment in Council of Europe member states is also of concern. This question is

1. This research also complements earlier research published by the Committee on Migration of the Council of Europe on the security of residence of long-term migrants and on the legal status of persons admitted for family reunion. See respectively Groenendijk, Guild and Dogan (1998) and Peers, Barzilay, Groenendijk and Guild (2000).
2. See generally Apap (2002).
3. COM (2000) 757 final of 22 November 2000.
4. COM (2001) 386 final of 11 July 2001.

particularly important in the light of past experiences with labour migration policies, which revealed that those policies that were aimed exclusively at ensuring the eventual departure of labour migrants were unsuccessful in practice. An important objective of this study, therefore, is to establish whether the national rules (and particularly those adopted recently) relating to the legal status of migrants admitted for employment are structured in such a way as to assist eventual integration in the country of employment for the migrants concerned or whether they discourage or even prevent such integration. In this regard, the following three different perspectives on the status of labour migrants can generally be distinguished:

a. the migrant is offered the opportunity to remain and integrate in the country of employment (including a secure residence status and equal rights);

b. the official scheme is indifferent to the migrant's future position in society; it is left to the worker or the employer (local company or multinational) whether or not to encourage integration or participation in the social or political life of the country;

c. the aim of the official rules is to prevent the integration of migrants, who are only admitted for employment in the country for short periods of time.

This study does not examine the legal rules relating to the first admission of migrants for employment. Its principal focus is the treatment of and legal status granted to non-citizen migrants after they have been admitted for lawful employment in the country concerned. Nevertheless, the conditions of admission may well determine the legal status granted in that country and these rules are taken into account in the framing of the research questions (see below). Moreover, this study does not cover the implementation of Community law on the free movement of workers in EU member states and European Economic Area (EEA) countries (with the exception of Community Agreements with third countries), nor seasonal labour schemes unless such schemes permit migrant workers to work for more than six months per year and to return after a short stay abroad.

Research questions

The main research questions as to the national law and practice are:

a. Where are the principal rules regarding labour migration to be found? Within these general rules, what are the categories of migrant workers admitted for employment in the country concerned and how are they distinguished in law or practice?

b. What are the fundamental differences resulting in a migrant worker falling into one category or the other? To what extent are the categories determined on a sectoral basis (agricultural or high-tech/information technology workers, for example) or skills-related (university graduates or technical workers, for example)? To what extent are the categories dependent on the rules relating to the first admission of migrant workers into the country?

c. Does the country concerned operate a quota system in relation to any particular category, and if so, what is this quota and how is it established? Is the quota adjusted on a periodical basis?

d. What are the rights of migrant workers in the main categories identified with regard to the following:

- *Employment:* duration of first work permit and possibility of an extension (is this a right or is such an extension subject to discretion?) Right to change job, employer or employment sector: are migrant workers in each category permitted to change their employment, employer or employment sector and, if so, under what conditions?
- *Residence:* can migrant workers in the categories in question acquire a secure right of residence independent of their employment and, if so, after how many years of employment or residence? Are some categories of migrant workers eligible after a period of time to a right of permanent residence?
- *Housing:* who is responsible for the housing of migrant workers (the migrant workers or the employer)? Do migrant workers have a right to be considered for public accommodation and, if so, under what conditions?

- *Health:* are migrant workers excluded from the national health system altogether or only from certain branches (for example, only qualifying for emergency health care)?
- *Social security:* are there any branches of social security from which migrant workers are excluded partially or altogether?
- *Family unity:* are family members permitted to join the migrant worker and, if so, which family members? Is family reunion subject to conditions?
- *Access to vocational training:* can migrant workers enrol on a vocational training course while in employment? If so, who is responsible for funding this course?
- *Access to language and integration courses organised by public authorities:* do migrant workers have access to such courses and, if so, what kind of courses are offered by public authorities?
- *Protection against unemployment and protection against expulsion:* do migrant workers have a right to claim unemployment benefit and, if so, under what conditions? Is there a period for which unemployment benefit will be paid and is there a period of unemployment after which migrant workers may face expulsion from the country?
- *Trade union rights:* do migrant workers have a right to join a trade union? Can they form their own trade union to protect their employment interests?
- *Political rights:* is there any established mechanism through which associations or organisations of migrant workers can be consulted with regard to the development of rules or policy on migration for employment and have these organisations actually influenced the development of such rules or policy?

e. Do the regulations relating to migrant workers apply to foreign or multinational companies moving employees to offices or establishments in the country concerned?

f. Are statistical data available in the country concerned on the number of migrant workers employed in each of the categories identified? If yes, what was the total number of migrant workers in each category identified in 1998, 1999, 2000 and 2001?

g. Has the country in question since 1995 entered into any bilateral or multilateral agreements with any country or countries relating to labour migration (with the exception of European Community agreements with third countries) and, if so, with which country or countries have such agreements been adopted? Is the government of the country concerned currently negotiating such agreements and, if so, with which country or countries?

h. In the past three years, has there been any public or political debate about the treatment of migrant workers in the country concerned?

i. Which Council of Europe and European Community agreements with third countries have influenced the way migrant workers are treated in law or in practice and how?

j. Have GATS rules[1] had any influence on labour migration policy in the country concerned?

Methodology

We sent a questionnaire to experts in the following ten Council of Europe member states: Austria, France, Germany, Hungary, Lithuania, Netherlands, Poland, Spain, Sweden, and the United Kingdom. The questionnaire included the core research questions identified above. We also requested the experts to send us copies of the relevant laws, regulations or publications on the subject of this research as well as information on relevant practice in the available literature. For each country, we contacted one expert working with central government, one practising immigration lawyer and one academic expert. The

1. The GATS rules enable persons to move from one country to another for a maximum period of three months in order to carry out service provision in the second country that does not involve the establishment of a commercial presence. For a good description of the GATS system in a labour migration context, see *Guild and Staples* (2002), pp. 11-14. Although this study is concerned with migrants admitted for employment for a period of over six months, this question was included so as to ascertain whether the rationale of the GATS system, which emphasises the role of the private enterprise or employer in labour migration, has had any significant impact in the countries examined.

research also contains a more in-depth study of law and practice in three Council of Europe member states: Germany, the Netherlands and the United Kingdom.

The names of those experts who assisted us with the preparation of the report are listed in the Acknowledgements. We are most grateful to them for the time they spent answering our questions and for sharing their expertise with us. However, only the author is responsible for the content of the report.

Terminology

In this report we use the term "foreigner" or "foreign national" to indicate persons who are not nationals (citizens) of the state where they are living. "Nationality" and "citizenship" are used alternately to indicate the legal relation between a person and a state as defined by the legislation of that state, irrespective of the ethnic origin of the person. Persons who have that legal relationship with their state of residence are "nationals" or "citizens".

The terms "migrant for employment", "labour migrant", "migrant worker", "foreign worker" and "economic migrant" are used interchangeably in relation to a foreigner who has been admitted into the state for lawful employment. These terms apply regardless of whether the person concerned is presently in employment provided that he or she held lawful employment in the country concerned at some point in the recent past.

2. Relevant European and international instruments

2.1. European Convention on Human Rights

The European Convention on Human Rights (ECHR)[1] applies clearly to everyone within the jurisdiction of a state party, which means that all migrant workers admitted for employment in Council of Europe member states are covered by its provisions irrespective of their country of origin.[2] This is particularly important given that the personal scope of the other Council of Europe instruments considered below is limited to nationals of other states parties.

There are no provisions in the ECHR specifically concerned with the legal status of migrant workers. Given that the ECHR primarily safeguards civil and political rights and that the legal status of migrant workers is strongly connected to the protection of their economic and social rights, the ECHR's role in this field is limited. Nevertheless, where economic and social rights are protected, the discriminatory application of these rights in respect of migrants may well lead to a violation of the ECHR. In Gaygusuz v. Austria,[3] the European Court of Human Rights ruled that the refusal of the authorities to pay a Turkish national an emergency advance on his pension, to which he had contributed through his employment, solely on the ground that he was not an Austrian national, was contrary to Article 14 (the non-discrimination provision) taken in conjunction with Article 1 of the First Protocol to the ECHR, which is concerned with the protection of property rights. Moreover, the complete withdrawal of social protection from legally resident foreigners, and healthcare in particular, may amount to a breach of Article 2 (right to life) or Article 3 (right to be free from degrading treatment).[4] The provision of substandard accommodation may also violate Article 8 (the right to respect for one's private and family life, home and correspondence), which includes a positive obligation on the state to ensure its effective protection.[5] Article 8 is particularly relevant for those labour migrants who have been resident in a country for a considerable period of time. Such migrants may benefit from the case-law of the European Court of Human Rights in respect of Article 8 on the right to respect for private and family life, where the Court has found on a number of occasions that the authorities in member states have not acted proportionately in expelling foreigners in accordance with the limitations in Article 8(2).[6] While most of this case law has been concerned with expulsion for reasons of public order, in Berrehab v. Netherlands,[7] expulsion to protect "the economic well-being of the state" in Article 8(2), in the sense of protecting the national employment market, was found to infringe on the right of an unemployed father to maintain a relationship with his daughter.[8] The Article 8 case-law on expulsion also indicates that in certain circumstances migrants may acquire a right of residence independent of economic activity. This case-law, therefore, might be particularly valuable in protecting from expulsion those migrants who have

1. 4 November 1950; *ETS* No. 5; ratified by all forty-four Council of Europe member states as of 15 September 2002.
2. Article 1 reads: "The High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section 1 of this Convention". Emphasis added.
3. Gaygusuz v. Austria (1996) 23 EHRR 364.
4. D v. United Kingdom (1997) 24 EHRR 423.
5. See Lopez Ostra v. Spain (1994) 20 EHRR 277 and Guerra v. Italy (1998) 26 EHRR 357, which both concerned the failure of national authorities to take adequate steps to prevent pollution. See also Application 7367/76, Guzzardi v. Italy, Eur. Comm. H.R., Report of 7 December 1978, where the European Commission of Human Rights argued that even though there is no obligation in the ECHR to provide housing, the Convention did not "discount the possibility that the right to respect for family life [can] be violated in a case where the authorities impose intolerable living conditions on a person or his family."
6. E.g. Moustaquim v. Belgium (1991) 13 EHRR 802; Beldjoudi v. France (1992) 14 EHRR 801. See also Groenendijk, Guild and Dogan (1998), pp. 8-16; Peers et al. (2000) pp. 9-10.
7. Berrehab v. Netherlands (1988) 11 EHRR 322.
8. See also Ciliz v. Netherlands, Eur. Ct. H.R. judgment of 11 July 2000 (available from the Court's website at http://www.echr.coe.int/) where the Court found a violation of Article 8 concerning the failure of national authorities to co-ordinate expulsion and access proceedings in respect of the removal of a Turkish national, on non-public-order grounds, who wished to obtain access to his child.

been resident and employed in a Council of Europe member state for a considerable period of time and whose status in the host country becomes precarious on the loss of their employment, whether as a result of a downturn in the national economy or other reasons. Moreover, the Court has recently applied Article 8 to entry, by recognising that state parties are under a positive obligation to admit a spouse in a situation where the family unit cannot reasonably be expected to relocate to the country of origin.[1]

Article 16 of the ECHR specifies that "nothing in Articles 10 [freedom of expression], 11 [freedom of assembly and association] and 14 [non-discrimination] shall be regarding as preventing [states parties] from imposing restrictions on the political activity of aliens". Although this provision cannot permit states parties to completely deny such fundamental rights to foreigners, a broad application of its scope would seriously undermine the protection afforded by these rights. Indeed, in 1977 the Council of Europe's Parliamentary Assembly recommended its repeal.[2] Article 16 should also be viewed in the context of the Council of Europe's 1992 Convention on the Participation of Foreigners in Public Life at the Local Level, which promotes the rights of foreigners to freedom of expression, assembly, and association and to participation in local public affairs, and which effectively amends Article 16 for those states parties that have ratified the instrument.[3] Moreover, Article 16 has been narrowly interpreted by the European Court of Human Rights in Piermont v. France,[4] where a German Member of the European Parliament was expelled from French Polynesia for participating in peaceful protests supporting independence for the colony and opposing the holding of French nuclear tests in the area. The Court found a violation of the right to freedom of expression in Article 10(1) and interpreted the term "aliens" restrictively by concluding that Article 16 could not be raised against the applicant because she was an EU national and a Member of the European Parliament in which people living in overseas territories could also participate through elections.[5]

2.2. European Social Charter

As of 15 September 2002, the European Social Charter[6] was in force in twenty-five Council of Europe member states. Although the social protection afforded in the Charter is generally not as extensive as that granted by Community law and therefore has less relevance in those Council of Europe member states which are also EU member states and EEA countries, the importance of the Charter, as well as interest in the instrument, has grown in recent years given that it has been ratified by seven Council of Europe member states which have not yet acceded to the EU.[7] In 1996, a revised Charter was adopted and entered into force in July 1999.[8] As of 15 September 2002, the revised Charter was ratified by fourteen Council of Europe member states, which include a number of non-EU countries that have not ratified its predecessor.[9]

1. Sen v. Netherlands (Application No. 31465/96), Eur. Ct. H.R., judgment of 21 December 2001, available in French from the Court's website at http://www.echr.coe.int/
2. Parliamentary Assembly Recommendation 799 (1977) of 25 January 1977 on the political rights and the position of aliens, paragraph 10(c).
3. 5 February 1992, ETS No. 144; entry into force 1 May 1997. As of 15 September 2002, the Convention has been ratified by six member states: Denmark, Finland, Italy, Netherlands, Norway and Sweden. It has also been signed by Cyprus, the Czech Republic and the United Kingdom.
4. Piermont v. France (1995) 20 EHRR.
5. *Ibid.,* paragraph 64. The concept of "political activity" was also understood restrictively by the Commission of Human Rights, which recognised that "in placing [Article 16] in the Convention those who drafted it were subscribing to a concept that was then prevalent in international law under which a general unlimited restriction of the political activities of aliens was thought legitimate". The Commission then added that "the Convention is a living instrument, which must be interpreted in the light of present-day conditions and the evolution of modern society". Applications 15773/89 and 155574/89, Piermont v. France (Eur. Comm. H.R. Report of 20 January 1994), paragraphs 58 and 59 respectively.
6. 18 October 1961: *ETS* No. 35.
7. The Charter has been ratified by the fifteen EU member states, two EEA states (Iceland and Norway) and eight EU candidate countries: Czech Republic, Cyprus, Hungary, Latvia, Malta, Poland, Slovakia, Turkey. It has also been signed by seven other Council of Europe member states: Croatia, FYROM, Liechtenstein, Romania, Slovenia, Switzerland, and Ukraine.
8. 3 May 1996; *ETS* No. 163.
9. The following countries have ratified the revised Charter: *Bulgaria,* Cyprus, *Estonia,* Finland, France, Ireland, Italy, *Lithuania, Moldova,* Norway, Portugal, *Romania,* Slovenia and Sweden. The countries in italics did not ratify the original European Social Charter. The revised Charter has also been signed by 18 Council of Europe member states.

In contrast to the ECHR, the Charter has a limited personal scope because it only applies to foreigners who are nationals of other contracting parties. Article 1 of the Appendix to the Charter, which is described in Article 38 as "an integral part of it", provides that most of the rights in the Charter (Articles 1-17) apply only to nationals of other contracting parties who are "lawfully resident or working regularly within the territory of the Contracting Party concerned". Although Articles 18 and 19, which specifically concern migrant workers, are not included in the above exclusion, it is clear that only migrants from other contracting parties are covered, both implicitly from the text of these provisions and explicitly from paragraphs 18 and 19 of Part I of the Charter, which contains a list of rights regarded as the declaration of aims by states parties and which mirrors the more detailed provisions in Part II.

Although the whole Charter applies to foreigners lawfully resident or working regularly within the territory of states parties, Article 1 of the Appendix directs that Articles 1-17 are to be interpreted in the light of Articles 18 and 19, which are the most important provisions as far as the legal status of migrant workers is concerned. Other particularly relevant provisions are Article 12(4), which is concerned with ensuring equal treatment between the nationals of contracting parties in respect of social security rights by the conclusion of bilateral or multilateral agreements (or by other means) and Article 13(4), which is concerned with the treatment of foreigners lawfully within the territory of contracting parties in respect of social and medical assistance in accordance with the obligations of contracting parties under the European Convention on Social and Medical Assistance (discussed in section 2.5 below). The revised Charter does not alter these two provisions.

Article 18 is concerned with the right to engage in a gainful occupation in the territory of other contracting parties, whereas Article 19 is concerned with the right of migrant workers and their families to protection and assistance. Article 19 also constitutes one of seven core articles of the Charter, of which at least five have to be accepted by the contracting parties (Article 20(1)(c)).[1]

The first three paragraphs of Article 18 read as follows:[2]

> "With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Contracting Party, the Contracting Parties undertake:
>
> 1 to apply existing regulations in a spirit of liberality;
>
> 2 to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;
>
> 3 to liberalise, individually or collectively, regulations governing the employment of foreign workers;"

Article 18 applies only to those contracting party nationals already in the territory of another contracting party. The Appendix to the European Social Charter clarifies that Article 18(1) is "not concerned with the question of entry into the territories of the contracting parties and [does] not prejudice the provisions of the European Convention on Establishment [see section 2.4 below]". Article 18(1) relates to administrative practice rather than law and calls for national administrative authorities to exercise discretion favourably in applying the existing regulations even if these are restrictive in substance. It is arguable that this provision operates as an implicit standstill clause precluding contracting parties from making their rules more restrictive. Article 18(2) is concerned with the relaxation of formalities governing the employment of foreign workers, such as fees required for work permits, and Article 18(3) calls for the relaxation of the substantive rules relating to access to employment, such as the reasons for which work permits are issued, the permitted changes in

1. However, Bulgaria, Denmark, Hungary, Iceland, Latvia, Malta and Slovakia have not accepted Article 19; the Czech Republic does not consider itself bound by Article 19(1-8) and (10); Moldova and Romania have not accepted Article 19(1-6 and 9-12); Lithuania has not accepted Article 19(2, 4, 6 and 8); Austria has not accepted Article 19(4, 7-8 and 10); Finland does not consider itself bound by Article 19(10); and Norway has not accepted Article 19(8).
2. Hungary, Latvia and Norway have not accepted Article 18; Bulgaria, Czech Republic, Estonia, Malta and Poland do not consider themselves bound by Article 18(1-3); Lithuania has not accepted Article 18(2-3); Moldova and Romania do not consider themselves bound by Article 18(1-2); Slovenia has not accepted Article 18(2); and Austria and Slovakia have not accepted Article 18(3).

employment, and the restrictions that can be imposed in each case.[1] The Committee of Independent Experts, which supervises the application of the Charter, has described Article 18 as a "dynamic" provision in the sense that contracting parties are obliged to progressively improve the position of foreign workers from other contracting parties with regard to access to employment, although it would appear that the obligation in Article 18(1) is more immediate.[2] The extent of the dynamism inherent in the obligations under Article 18 was the subject of a difference of opinion between the Committee of Experts and the Governmental Committee, which is composed of one representative from each state party. The former considered that the implementation of this provision by states parties should aim for treatment of foreign workers from other contracting parties as far as possible identical to that of nationals, whereas the latter was of the view that this treatment should occupy a space somewhere between the protection afforded by European Community rules and that granted to third-country nationals or persons from countries which had not ratified the Charter.[3] The obligations in Article 18 are subject to a significant limitation in paragraph 18 of Part I of the Charter, which stipulates that the right of nationals of contracting parties to engage in any gainful occupation in the territory of other contracting parties on an equal footing with the nationals of the latter is "subject to restrictions based on cogent economic or social reasons". The Committee of Experts has interpreted this limitation narrowly and has found a number of restrictions commonly imposed by contracting parties on access to employment as contrary to the progressive obligations in Article 18.[4] The revised Social Charter makes no changes to Article 18.

Article 19 of the Charter governs the whole migration process, although it also contains salient provisions concerning the status of migrants admitted for employment into contracting parties, which are reproduced below:

> "With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting Parties undertake:
>
> (...)
>
> 4 to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:
>
> *a* remuneration and other employment and working conditions;
>
> *b* membership of trade unions and enjoyment of the benefits of collective bargaining;
>
> *c* accommodation;
>
> 5 to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons;
>
> 6 to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;
>
> 7 to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article;
>
> 8 to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality;

1. Harris (1984), pp. 148, 153; Cholewinski (1997), p. 295.
2. Harris (1984), p. 142; Cholewinski (1997), *ibid.*
3. Cholewinski (1997), p. 296. However, the Governmental Committee no longer exercises an interpretative function in the supervisory mechanism, where it was able to produce a separate report to that of the Committee of Experts, and has now adopted its revised role, as stipulated in the 1991 Protocol Amending the Charter, which is to prepare the decisions for the Committee of Ministers and select the situations that should be the subject of recommendations to contracting parties (Article 4). See Governmental Committee, *12th Report (I) (1988-89)* (Strasbourg: Council of Europe Press, 1993), pp. 13-14, paragraph 16; Cholewinski (1997), pp. 218-220.
4. Cholewinski (1997), pp. 297-298.

(...)

10 to extend the protection and assistance provided for in this article to self-employed migrants insofar as such measures apply;"

The revised Charter has added two provisions to Article 19, which are both concerned with language teaching. The first is aimed at the integration of migrant workers and their families in the host society, whereas the second concerns the need to ensure that the children of migrant workers are able to learn the mother tongue of their parents:

"11 to promote and facilitate the teaching of the national language of the receiving state or, if there are several, one of these languages, to migrant workers and members of their families;

12 to promote and facilitate, as far as practicable, the teaching of the migrant worker's mother tongue to the children of the migrant worker."

Generally speaking, Article 19 has been subject to a liberal interpretation by the Committee of Experts. For example, the Committee observed that Article 19 as a whole should not only ensure equal treatment between national and migrant workers but also requires the adoption of positive measures to assist the latter group.[1] The Committee views Article 19(4) as providing for equal treatment between migrant and national workers in the event of dismissal or redundancy, which is particularly important in the event of an economic downturn where contracting parties might be tempted to dispense with the foreign labour force in order to protect national workers.[2] The obligation in Article 19(4)(c) to secure equal treatment between migrant workers and nationals in respect of accommodation has also been broadly interpreted. The Committee has concluded that measures such as reserving public housing for nationals, allocating such housing in accordance with a quota and restricting migrants' accommodation to certain regions in the country of employment are contrary to Article 19(4)(c). Moreover, positive measures promoting housing for migrant workers and their families are consistent with this provision.[3] Indeed, the Committee has interpreted the duty to facilitate family reunion in Article 19(6) as entailing the positive obligation to assist migrant workers and their families in finding suitable public or private accommodation.[4] With regard to family reunion itself, the Committee has found unduly lengthy waiting periods set by contracting parties in respect of such reunion as contravening the Charter.[5]

2.3. European Convention on the Legal Status of Migrant Workers

This convention is the most comprehensive Council of Europe instrument covering the subject matter of this study.[6] Its objectives, as expressed in the preamble, are, *inter alia*, to regulate the "legal status of migrant workers ... so as to ensure that as far as possible they are treated no less favourably than workers who are nationals of the receiving state in all aspects of living and working conditions" and to "facilitate the social advancement of migrant workers and members of their families".[7] In the view of one commentator, "the possibility of improving their economic and social position is of fundamental importance to migrant workers and their families".[8] However, the convention's significance in this respect is limited by three factors. First, it only encompasses the treatment of migrant workers, authorised to work and reside in one Council of Europe member state, who are nationals of another Council of Europe member state party to the agreement. Secondly, only eight member states have

1. *Conclusions I,* p. 81: "Contracting Parties should not limit the fulfilment of their obligations under this article to ensuring non-discrimination between their own nationals and foreigners but should pursue a positive and continuous course of action".
2. *Conclusions IV,* p. 119; Harris (1984), p. 171; Cholewinski (1997), p. 288.
3. Cholewinski (1997), pp. 328-329.
4. *Ibid.,* pp. 344-345.
5. *Ibid.,* p. 345.
6. 24 November 1977; *ETS* No. 93. For a comprehensive analysis of the scope and benefits of the Convention in the light of its interpretation by the supervisory body, the Consultative Committee, and official government and NGO/expert views on the instrument from Council of Europe member states (comprising ratifying, signatory as well as other states), see the study by Guild (1999).
7. Second and third paragraphs.
8. Guild (1999), p. 9.

ratified the convention as of 15 September 2002: France, Italy, the Netherlands, Norway, Portugal, Spain, Sweden and Turkey.[1] Given that economic migrants from seven states parties benefit from the superior protection afforded by the freedom of movement arrangements under the European Community (EC) and EEA treaties, the practical importance of this convention, for the moment at least, is confined to relations between these countries and Turkey. However, as noted in section 2.6.2 below, Turkish labour migrants can also access the protection of community law under the EEC-Turkey Association Agreement and implementing measures. Clearly, the relevance of the convention would be enhanced if other Council of Europe member states also ratified it, which would contribute greatly to bridging the gap in the superior treatment afforded EU citizens resident and working in other EU member states and that afforded migrants from Council of Europe countries who are lawfully resident and employed in the EU,[2] particularly those migrants from countries which are not in line for the forthcoming accession to the EU (Bulgaria and Romania) or which do not aspire to EU membership (Russia and other countries formerly part of the Soviet Union). It would also provide the latter states with an international framework for the protection of migrant workers.[3] Thirdly, the convention is recognised as a framework instrument, which does not regulate all aspects of the legal status of migrant workers, but refers instead to other relevant multilateral and bilateral instruments as well as to national legislation. Moreover, most of its provisions are phrased in terms of inter-state obligations rather than in terms of the rights of migrant workers, despite the convention's emphasis on their equal treatment with the nationals of contracting parties.[4]

As with Article 19 of the Charter, the convention governs the whole migration process, encompassing the recruitment and admission,[5] reception, stay and return of migrant workers. The bulk of its provisions, however, are concerned with the legal status of labour migrants while in the country of employment and equal treatment with nationals in respect of important economic and social rights. In addition to specific provisions on work and residence permits (Articles 8 and 9), which also include limited protection for unemployment migrant workers,[6] and family reunion (Article 12), chapter III of the convention calls for the equal treatment of migrant workers with national workers in the following areas: housing (Article 13); education and vocational training (Article 14); conditions of work (Article 16); social security (Article 18); social and medical assistance (Article 19); occupational health and safety (Article 20); inspection of working conditions (Article 21); taxation on earnings (Article 23); expiry of contract and discharge (Article 24); measures to facilitate re-employment (Article 25); right of access to courts and administrative authorities (Article 26); use of employment services (Article 27); the right to organise (Article 28); and participation in the affairs of an undertaking (Article 29). In addition, the convention contains a number of obligations, which are specific to migrant workers, such as the teaching of the migrant worker's mother tongue to children (Article 15), the transfer of savings (Article 17), and, in chapter IV, assistance in their return to the country of origin (Article 30). Chapter V of the convention preserves national legislation and bilateral or multilateral agreements, which provide for more favourable treatment of migrant workers.[7] There are no provisions in the convention, however, granting migrants a right of access to employment. A contracting party is merely under an obligation,

1. The convention has also been signed by five member states: Belgium, Germany, Greece, Luxembourg, and Moldova.
2. Cf. Guild (1999), p. 22; Lary de Latour (1991).
3. Guild (1999), pp. 24-25.
4. Cholewinski (1997), pp. 222-223.
5. Chaper II of the convention. However, as noted by Guild (1999), pp. 12 and 23 respectively, these provisions regulating recruitment from states of origin to states of employment through official authorities in both countries "appear fairly dated" today, given the more limited state role in directing international labour migration.
6. Article 9(4) authorises migrant workers no longer in employment, as a result of a temporary incapacity to work because of illness or accident or involuntary unemployment, to remain on the territory of a receiving state for a period of at least five months. However, states parties are under no obligation to permit such migrants to remain in their territory beyond the period for which unemployment benefit is payable. Guild (1999), p. 13 (n. 15) explains that this provision is designed to protect the social assistance systems of host countries, but is arguably contrary to ECHR case-law and International Labour Organization (ILO) obligations (i.e., Convention No. 97 of 1949 concerning migration for employment, Article 8, prohibiting the return of migrant workers admitted on a permanent basis who cannot continue in their occupation by reason of illness contracted or injury sustained subsequent to entry).
7. Articles 31 and 32.

subject to the conditions laid down in its legislation, to issue or renew a work permit for those migrants whom it has permitted to enter their territory to take up paid employment (Article 8(1)). A degree of protection is afforded in Article 8(2) stipulating that "a work permit issued for the first time may not as a rule bind the worker to the same employer or the same locality for a period longer than one year".[1] The reasons for these rather illiberal rules on access to employment are clearly connected with the time period of the convention's adoption (1977), which was a few years after the energy crisis where the official emphasis was on controlling labour migration and encouraging migrant workers to return to their countries of origin.[2]

2.4. European Convention on Establishment

This convention[3] is concerned with the entry and residence of the nationals of contracting parties into the territory of other contracting parties and was, as of 15 September 2002, in force in twelve Council of Europe member states.[4] Its personal scope, therefore, is effectively the same as in the European Social Charter and the European Convention on the Legal Status of Migrant Workers. Moreover, its practical value is limited in the same way as the latter instrument, given the development of superior protection under Community and EEA freedom of movement rules. Nonetheless, it is clear that the convention has served as the basis for the development of Community norms as well as other Council of Europe standards in this field.[5]

The convention facilitates temporary visits and prolonged or permanent residence in the territory of contracting parties and provides protection against expulsion for nationals of other contracting parties, which is increased according to their length of residence (Articles 1-3). It contains extensive rules concerning access to employment (Articles 10-16). Article 10 provides for the principle of equal treatment between contracting party nationals in respect of access to employment, which may however be subject to the important exception based on "cogent economic and social reasons". Section I.*a.*2 of the protocol to the convention states that these reasons are to be judged by "national criteria". Article 11 prevents the additional imposition of restrictions upon nationals of contracting parties who have already taken up employment in the host country unless such restrictions are also applied to nationals in similar circumstances. Article 12(1) is a significant provision, which exempts lawfully resident nationals of a contracting party from any restrictions imposed under Article 10, if they have been lawfully employed in that country for five years, lawfully resident for ten years, or admitted to permanent residence. However, Article 12(1) also enables contracting parties, on ratification, to opt out of up to two of these conditions and Article 12(2) permits contracting parties to increase the period of employment in the first condition to a maximum of ten years. Further restrictions are found in Article 13, which enables contracting parties "to reserve for its own nationals the exercise of public functions or occupations connected with national security or defence", and in Article 14, which permits restrictions with regard to certain prescribed occupations.

The convention also provides for equal treatment with nationals in respect of private rights (personal rights or rights relating to property) (Article 4), access to judicial and administrative authorities (Article 7), free legal assistance (Article 8), wages and working conditions (Article 17), participation in economic and professional organisations (Article 18) and access to education, including primary and secondary education as well as technical and vocational training (Article 20). The granting of scholarships, however, is left to the discretion of individual contracting parties.

1. The provision concerning the renewal of work permits (Article 8(3)) is also rather weak: "In case of renewal of the migrant worker's work permit, this should as a general rule be for a period of at least one year, in so far as the current state and development of the employment situation permits".
2. Cholewinski (1997), p. 299.
3. 13 December 1955; *ETS* No. 19.
4. Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, Turkey, United Kingdom. Three other member states have signed it: Austria, France and Iceland.
5. Cholewinski (1997), p. 214.

2.5. European Convention on Social and Medical Assistance

The purpose of this convention[1] is to ensure that nationals of contracting parties lawfully present in the territory of another contracting party, and who are without sufficient resources, are entitled to social and medical assistance on the same basis as nationals (Article 1). As of 15 September 2002, this convention was in force in seventeen member states.[2]

The convention prohibits a contracting party from repatriating nationals from other contracting parties who are lawfully resident in its territory on the sole ground that they are in need of assistance (Article *6.a*), although it may still do so if the following three conditions in Article *7.a* are satisfied:

"i the person concerned has not been continuously resident in the territory of that Contracting Party for at least five years if he entered it before attaining the age of 55 years, or for at least ten years if he entered it after attaining that age;

ii he is in a fit state of health to be transported; and

iii has no close ties in the territory in which he is resident."

This possibility is tempered somewhat by Article *7.b*, which states that "[t]he Contracting Parties agree not to have recourse to repatriation except in the greatest moderation and then only where there is no objection on humanitarian grounds".

The importance of this convention is that both the provisions concerning social and medical assistance in the European Social Charter (Article 13(4)) and the European Convention on the Legal Status of Migrant Workers (Article 19) refer specifically to the obligations of contracting parties under the convention. Articles 13(1)-(2) of the Charter require contracting parties to ensure that persons without adequate resources are provided with adequate assistance and health care and that they do not suffer from the diminution of their political and social rights because they receive such assistance. Article 13(3) provides that everyone should be able to benefit from public or private services to prevent, remove or alleviate personal or family want. These rights also apply to nationals of contracting parties who work regularly or reside lawfully within the territory of another contracting party on the same basis as nationals. Article 13(4) of the Charter extends the scope of these provisions by stipulating that they are to be applied by contracting parties on an equal basis to the nationals of other contracting parties lawfully within their territories in accordance with their obligations under the European Convention on Social and Medical Assistance. The Committee of Experts has confirmed that the obligation in Article 13(4) also extends to the provisions in the European Convention on Social and Medical Assistance concerned with repatriation.[3] By virtue of the Appendix to the Charter, contracting parties, who are not parties to the convention, may accept Article 13(4) "provided that they grant to nationals of other contracting parties a treatment which is in conformity with the provisions of the said convention".[4]

2.6. European Community law

This study does not cover the implementation of Community law on the free movement of workers in EU member states. It is not concerned with the extensive protection afforded by the EC Treaty and its implementing legislation to EU citizens, who exercise their freedom of movement rights, or the equivalent protection afforded to nationals of Iceland, Norway and Liechtenstein under the European Economic Area Agreement.[5] However, Community regulations affecting the legal status of migrants who

1. 11 December 1953; *ETS* No. 14.
2. Belgium, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Turkey, United Kingdom. The convention has also been signed by Estonia.
3. *Conclusions XIV-1,* Vol. 1, pp. 53-55, paragraphs 59-61.
4. The following states parties to the Social Charter (including the revised Charter) have not ratified the European Convention on Social and Medical Assistance: Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Hungary, Ireland, Italy, Lithuania, Moldova, Poland, Romania, Slovenia, Slovakia. The following states parties have not accepted Article 13(4): Bulgaria, Cyprus, Estonia, Lithuania, Moldova, Poland, Romania, Slovakia and Slovenia.
5. OJ 1994 L 1/1. The Community and member states have also recently ratified an agreement on the free movement of persons with Switzerland. See OJ 2002 L 114/6.

are third-country nationals are covered. In this regard, it is important to recall that the family members of EU nationals, who qualify for reunion with the worker under Article 10 of Regulation 1612/68/EEC have the right to take up employment (Article 11) and can also benefit from equivalent economic and social rights.[1] Moreover, third-country nationals employed by EU nationals providing services in another member state can move with them without the need to obtain a work permit for the member state concerned[2] and third-country nationals with refugee status enjoy equal social security rights with EU nationals under Regulation 1408/71/EEC. As discussed in section 2.6.1 below, the Community has also gained competence to adopt legally binding measures in respect of the conditions of entry and residence of third-country nationals (Article 63(3)(a) EC) and the rights and conditions under which third-country nationals legally resident in one member state may reside in other member states (Article 63(4) EC). In February 2002, the Commission used the latter provision as the legal base for a proposal to extend Regulation 1408/71/EEC to all third-country nationals and the Council has recently reached political agreement on such a measure.[3] Another relevant provision is Article 137(3) EC, which obliges the Council to act, on the proposal from the Commission, after consultation with the European Parliament, the Economic and Social Committee and the Committee of the Regions, in respect of, *inter alia*, "conditions of employment for third-country nationals legally residing in Community territory". To date, however, no such measures have been adopted. It should also be underlined that the non-legally binding EU Charter on Fundamental Rights,[4] solemnly proclaimed by the Community and its member states in Nice in December 2000, seeks to protect a number of rights of relevance to the legal status of migrants admitted for employment in EU member states.[5] Finally, the Community has also entered into Association Agreements with some third countries, which provide certain groups of third-country nationals employed in EU member states with varying levels of protection.

2.6.1. Title IV of Part Three of the EC Treaty

The amendments to the EC Treaty introduced by the Treaty of Amsterdam mean that the Community now has competence to make legally binding rules in respect of third-country nationals, which is located in Title IV of Part Three of the EC Treaty on Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons. Such rules can be adopted in a number of immigration policy areas including "conditions of entry and residence, and standards on procedures for the issue by member states of long term visas and residence permits, including those for the purpose of family reunion" (Article 63(3)(a) EC). The Presidency Conclusions, adopted by the European Council at Tampere, Finland in October 1999, called for, *inter alia*, "the need for approximation of national legislations on the conditions for admission and residence of third-country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin".[6] In November 2000, in a Communication on a Community Immigration Policy, the Commission discussed the future orientation of such an immigration policy and proposed an approach that generally favoured the controlled admission of labour migrants into the EU:

> The analysis of the current situation with respect to migration flows in the EU suggests that a different, more flexible approach common to all member states on the issue of legal immigration now

1. See Peers *et al.* (2000), pp. 18-20 for a fuller treatment of the Community law in this area.
2. Case C-43/93, *Vander Elst v. Office des Migrations Internationales (OMI)* [1994] ECR I-3803.
3. See respectively COM (2002) 59 final of 6 February 2002 and Council (Employment and Social Policy) Doc. 9673/02 (10 June 2002). I am grateful to Steve Peers for drawing my attention to the latter document.
4. OJ 2000 C 364/1. See also Peers (2001).
5. The following rights in the EU Charter are not limited to EU citizens: right to education (Article 14); right to engage in work and to pursue a freely chosen or accepted occupation (Article 15(1)); right to information and consultation within the undertaking (Article 27); right of workers and employers to collective bargaining and action to defend their interests, including strike action (Article 28); right of access to a free placement service (Article 29); protection against unjustified dismissal (Article 30); right to working conditions with respect to the worker's health, safety and dignity (Article 31); social security and social assistance (Article 34); right of access to preventive health care and the right to benefit from medical treatment (Article 35). Article 15(3) stipulates specifically that third-country nationals authorised to work in member states are entitled to "working conditions equivalent to those of citizens of the Union".
6. *Tampere European Council: Presidency Conclusions,* 16 October 1999, Bull. EU 10-1999, paragraph 20.

> needs to be taken. Such a proactive immigration policy should be based on the recognition that migratory pressures will continue and that there are benefits that orderly immigration can bring to the EU, to the migrants themselves and to their countries of origin. The opening up of channels for immigration for economic purposes to meet urgent needs for both skilled and unskilled workers has already begun in a number of member states. Given the present economic and labour market situation the Commission believes that it is now time to review longer term needs for the EU as a whole, to estimate how far these can be met from existing resources and to define a medium-term policy for the admission of third country nationals to fill those gaps which are identified in a gradual and controlled way.[1]

More specifically, the Commission recognised that such a policy must be targeted at facilitating the admission of a wide range of labour migrants, including both skilled and unskilled workers. With regard to their legal status after admission, the Commission was of the view that "a hard-core of rights should be available to migrants on their arrival, in order to promote their successful integration into society".[2] It advocated a flexible scheme, to operate in consultation with member states, which would enable admitted migrants to gradually access more rights with increased residence.[3]

In July 2001, the Commission proposed a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities.[4] In line with the Commission's earlier communication, the objective of the directive is to respond to labour market shortages, particularly in skilled labour.[5] With regard to paid employment, third-country nationals would effectively acquire a right to enter and reside in a member state for this purpose if it can be demonstrated that a job vacancy in that member state cannot be filled from within the domestic labour market and if no national measures have been taken to limit economic migration.[6] A "residence permit – worker" would be issued to those third-country nationals to be admitted.[7] The permit would be valid, in the first instance, for a period of up to three years and would be renewable for further periods of up to three years.[8] Once third-country nationals have been holding the permit for more than three years, they would no longer be required to meet the national labour market test when applying for renewal.[9] The permit would initially have to be restricted to the exercise of specific professional activities or fields of activities. Member states would also be able to restrict the permit to the exercise of activities as an employed person in a specific geographic region. All restrictions would have to be

1. COM (2000) 757 final of 20 November 2000, p. 13. The approach should be contrasted sharply with the previous restrictive approach of the Justice and Home Affairs Council, based on the following "principle": "member states will refuse entry to their territories of third-country nationals for the purpose of employment". See Resolution of 20 June 1994 on limitations on admission of third-country nationals to the territory of the member states for employment, OJ 1996 C 274/3, paragraph C(i).
2. COM (2000) 757, p. 17.
3. *Ibid.,* pp. 17-18: "EU legislation should ... provide for a flexible overall scheme based on a limited number of statuses designed so as to facilitate rather than create barriers to the admission of economic migrants. The aim should be to give a secure legal status for temporary workers who intend to return to their countries of origin, while at the same time providing a pathway leading eventually to a permanent status for those who wish to stay and who meet certain criteria. One option would be to start with a temporary work permit ... . This permit could be renewable and would then be followed by a permanent work permit, after a number of years to be determined, with the possibility of long-term residence status after a certain period. Agreement would be needed on the rights and obligations to be provided for at each stage, based on the principle of equal treatment with nationals, and these should be cumulative, leading to those of long-term residents. Based on a "best practice" approach the details of the scheme would be worked out in close consultation with member states who would be responsible for implementing national admissions policies within the general framework".
4. COM (2001) 386 final of 11 July 2001 [hereinafter Draft Directive on the employment of third-country nationals]. This proposal was accompanied by a Communication to the Council and the European Parliament on an Open Method of Co-ordination for the Community Immigration Policy, COM (2001) 387 final of 11 July 2001, where the Commission suggested a number of issues that might be addressed by the Council in the approval of European guidelines on immigration, including the establishment of "a coherent and transparent policy and procedures for opening the labour market to third country nationals within the framework of the European employment strategy" (*Ibid.,* pp. 9-10).
5. See Draft Directive on the employment of third-country nationals, *ibid.,* Preamble, Recital 6: "In an increasingly global labour market and faced with the shortage of skilled labour in certain sectors of the labour market the Community should reinforce its competitiveness to recruit and attract third-country workers, when needed. ..."
6. *Ibid.,* Chapters II (and in particular Article 6(1)) and IV respectively. See also the Commission's Explanatory Memorandum, *ibid.,* p. 4.
7. *Ibid.,* Article 4.
8. *Ibid.,* Article 7(1).
9. *Ibid.,* Article 7(2).

removed after three years.[1] The draft directive also contains a number of provisions concerning the legal status of third-country labour migrants and, in particular, their equal treatment with EU citizens in Article 11(1)(f):

"1. During the period of its validity, a "residence permit – worker" shall entitle its holder at a minimum to the following:

f. enjoyment of equal treatment with citizens of the Union at least with regard to:

i working conditions, including conditions regarding dismissals and remuneration;

ii access to vocational training necessary to complement the activities authorised under the residence permit;

iii recognition of diplomas, certificates and other qualifications issued by a competent authority;

iv social security including healthcare;

v access to goods and services and the supply of goods and services made available to the public, including public housing;

vi freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations."[2]

This obligation only sets "minimum" standards and member states would clearly be able to afford more favourable protection. However, the draft directive would also permit member states to restrict access to vocational training and the rights regarding public housing to third-country nationals who have been staying or who have the right to stay in their territory for at least one and three years respectively.[3] Moreover, member states would also be able to adopt national measures to limit the issue of permits to a set ceiling (or quota) or to suspend or halt the issue of such permits for a defined period "taking into account the overall capacity to receive and to integrate third-country nationals on their territory or in specific regions".[4]

In addition to the draft directive on the employment of third-country nationals, a number of access to employment provisions have also been inserted in other measures already adopted under Title IV of the EC Treaty or presently under consideration in the Council. Article 12 of Council Directive 2001/55/EC relating to temporary protection obliges member states to authorise persons enjoying temporary protection to engage in employed or self-employed activities, although for reasons of labour market policies member states may also give priority to EU and EEA nationals and legally resident third-country nationals in receipt of unemployment benefit.[5] The access to employment obligation in the directive laying down minimum standards for the reception of asylum seekers, in respect of which the Council has reached political agreement,[6] is considerably weaker. Member states are required to determine a period of time from the moment that the asylum application is lodged during which the asylum-seeker would not have access to employment. However, if this decision is not taken within one year of the asylum application, asylum seekers will be authorised to work subject to the conditions laid down in the member state, which may include priority for EU and EEA nationals and legally resident third-

1. *Ibid.,* Article 8. Changes relating to the employer or the professional activity within the three-year period would be possible but approval would first have to be sought from the competent authorities (Article *9*(1)).
2. *Ibid.,* Article 11(1)(f). In this respect, it should also be emphasised that Recital 13 of the Preamble provides that the "Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union".
3. *Ibid.,* Article 11(2).
4. *Ibid.,* Article 26. By virtue of Article 30.e, these measures would have to be notified to the Commission. member states would also be able to refuse to grant, renew, or revoke permits "on grounds of public policy, public security or public health" (*ibid.,* Article 27).
5. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof. OJ 2001, L 212/12.
6. Council Directive laying down minimum standards for the reception of asylum seekers in member states, Doc. *9098/02* (17 June 2002), Article 11.

country nationals. The Commission has also proposed that family members joining a third-country national in a member state should be entitled to access to employment and self-employed activity on the same terms as the latter, although member states would be able to restrict such access in respect of relatives in the ascending line or children of full age.[1] With regard to Geneva Convention refugees and those persons enjoying subsidiary protection, the Commission has recommended that the former should have access to employment on an equal basis with member state nationals immediately after refugee status is granted whereas the latter should obtain access to employment under the same conditions no later than six months after such status is granted.[2]

2.6.2. European Community agreements with third countries

Turkey

The EEC-Turkey Association Agreement,[3] as implemented by Association Council Decisions 2/76, 1/80 and 3/80,[4] provides for certain rights for Turkish nationals and their family members employed and resident in EU member states. In particular, Decision 1/80 grants incremental access to employment rights for Turkish workers, who are already part of the labour force, in accordance with their length of employment in a member state. Article 6(1) of Decision 1/80 provides for a right to Turkish workers lawfully employed in a member state to renew their work permit with the same employer after one year of legal employment. After three years of legal employment, such workers have the right to change employment within the same occupation and after four years of such employment, they obtain the right to free access to the labour market in the host country. Article 7(1) is concerned with access to employment for the family members authorised to join Turkish workers. They are able to respond to offers of employment after three years of legal residence in the member state concerned, subject to EU nationals' priority, and acquire free access to the labour market after five years of lawful residence. By virtue of Article 7(2), the children of Turkish workers, who have completed a course of vocational training in a member state, have the right to take up employment there provided that one of their parents has been legally employed in that state for at least three years.[5] The European Court of Justice (ECJ) has consistently held that all of these provisions are capable of having direct effect and can therefore be relied upon by Turkish workers in the domestic courts of member states.[6] The ECJ has also ruled that the rights in relation to employment necessarily imply a corresponding right of residence as otherwise the right of access to the labour market would be rendered nugatory.[7] Moreover, short periods of voluntary unemployment do not affect the rights of Turkish workers under Decision 1/80 and they should be given a reasonable time to find new employment in the member state concerned.[8]

Turkish workers resident in EU member states are also entitled to the same protection from expulsion as EU nationals employed in other member states. Article 14(1) of Decision 1/80 contains identical wording to Article 39(3) EC only permitting limitations on the specific rights granted by the decision if the limitations are "justified on grounds of public policy, public security or public health". The European Court of Justice has ruled that these words should be given the same meaning as those in Article 39(3) EC and therefore the expulsion of Turkish nationals solely on the basis of general preventative grounds

1. European Commission, Amended Proposal for a Council Directive on the right to family reunification, COM (2002) 225 final of 2 May 2002, p. 21 (draft Article 14).
2. European Commission, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM (2001) 510 final of 12 September 2001, p. 51 (draft Article 24(1 and 3)).
3. OJ 1973 C 113/1. See generally Rogers (2000).
4. For the texts, see EEC-Turkey Association Agreement and Protocols and Other Basic Texts (1992) and Rogers (2000).
5. For the relevant case law relating to Article 7 of Decision 1/80, see Peers et al. (2000), pp. 20-21.
6. Case C-192/89, Sevince [1990] ECR 3641; Case C-237/91, Kus [1992] ECR I-6781, paragraphs 26-27; Case C-355/93, Eroglu [1994] ECR I-5113, paragraph 11; Case C-36/96, Günaydin [1997] ECR I-5143, paragraph 24; Case C-98/96, Ertanir [1997] ECR I-5179, paragraph 24; Case C-1/97, Birden [1998] ECR I-7747, paragraph 19.
7. Sevince, *ibid.* paragraph 29; Kus, ibid. paragraphs 29-30; Eroglu, *ibid.* paragraphs 18-20; Günaydin, *ibid.* paragraph 26; Ertanir, *ibid.* paragraph 26.
8. Case C-171/95, *Tetik* [1997] ECR I-329.

(as a deterrent to others) cannot be justified.[1] With regard to social security rights, the European Court of Justice has also held that Article 3(1) of Decision 3/80, which affords Turkish workers and their family members treatment equal to that of nationals of member states, confers direct effect.[2]

Algeria, Morocco and Tunisia

The agreements with the Maghreb countries of Algeria, Morocco and Tunisia[3] confer equal treatment on Maghreb nationals employed and resident in EU member states as regards their working conditions or remuneration and social security.[4] These non-discrimination provisions have been found by the European Court of Justice as containing sufficiently clear and precise obligations to confer direct effect in EU countries of employment.[5] Equal treatment in social security extends to family members, who have been defined broadly by the ECJ to include the parents of the worker and his or her spouse residing in the host member state.[6] Moreover, although the ECJ has held that the right to non-discrimination in respect of working conditions does not provide for a right of continued residence as long as the Maghreb worker is in employment, member states cannot terminate the worker's residence before the expiry of his or her work permit, unless there are public policy, security or health reasons for doing so.[7]

Europe Agreements

The Community has entered into Europe Agreements with the ten countries of central and eastern Europe,[8] which are also candidates for accession to the EU. These agreements include a provision guaranteeing equal treatment of migrant workers and nationals as regards working conditions, remuneration or dismissal,[9] which the European Court of Justice has confirmed confers direct effect.[10] While these agreements do not provide for a right of access to wage-earning employment, such a right is granted to the spouse and children of those workers who have been admitted to the EU member state concerned for the purpose of employment.[11] Moreover, the Europe Agreements effectively provide for a right to enter and reside in a member state for the purpose of self-employment in the context of a right of establishment,[12] which the European Court of Justice has recognised in recent judgments as conferring direct effect.[13] In contrast to the agreements with the Maghreb countries, however, equality of treatment in the Europe Agreements in respect of social security is dependent on the adoption of provisions for the co-ordination of social security schemes by the Association Council established under each agreement, and no such provisions have yet been adopted.[14]

1. Case C-340/97, Nazli [2000] ECR I-957, paragraphs 56-61.
2. Case C-262/96, Sürül [1999] ECR I-2685. Article 3(1) of Decision 1/80 also applies to indirect discrimination. Joined Cases C-102/98 and C-211/98, Kocak and Örs [2000] ECR I-1287.
3. OJ 1978 L 263/1, 264/1 and 265/1 respectively. See now OJ 1998 L 97/2 (new treaty with Tunisia) and OJ 2000 L 70/2 (new treaty with Morocco).
4. For example, Articles 64-65 of the new Association Agreement with Morocco, ibid.
5. Case C-18/90, Kziber [1991] ECR I-199; Case C-58/93, Yousfi [1994] ECR I-1353; Case C-103/94, Krid [1995] ECR I-719; Case C-126/95, Hallouzi-Choho [1996] ECR I-4807; Case C-113/97, Babahenini [1998] ECR I-183.
6. Case C-179/98, Mesbah [1999] ECR I-7955.
7. Case C-416/96, El Yassini [1999] ECR I-1209, paragraph 67.
8. OJ 1993 L 347 (Hungary); OJ 1993 L 348 (Poland); OJ 1994 L 357 (Romania); OJ 1994 L 358 (Bulgaria); OJ 1994 L 359 (Czech Republic); OJ 1994 L 360 (Slovak Republic); OJ 1998 L 26 (Latvia); OJ 1998 L 51 (Lithuania); OJ 1998 L 68 (Estonia); OJ 1999 L 51 (Slovenia). For a detailed discussion of the history and scope of the Europe Agreements, see Guild (2001), pp. 173-210.
9. For example, Article 37(1) first indent of the Poland Europe Agreement.
10. See Case C-162/2000, Pokrzeptowicz-Meyer, judgment of 29 January 2002 (not yet reported in ECR but available from the web site of the European Court of Justice's at http://europa.eu.int/cj/en/jurisp/index.htm under recent case law).
11. For example, Article 37(1), second indent of the Poland Europe Agreement.
12. For example, Article 44 of the Poland Europe Agreement. For a discussion of the right to establishment in the Europe Agreements and its implementation in four member states, see respectively Guild (2001) and Böcker and Guild (2002).
13. See Cases C-63/99, Gloszczuk, C-235/99, Kondova, C-257/99, Barkoci and Malik (judgments of 27 September 2001) and C-268/99, Jany (judgment of 20 November 2001). These cases can all be accessed from the web site of the European Court of Justice at http://europa.eu.int/cj/en/jurisp/index.htm under recent case-law.
14. For example, see respectively Articles 38 and 39(1) of the Poland Europe Agreement. Towards the end of 1999, however, the Commission proposed that such provisions should be drafted. COM (1999) 675 to 684 final of 20 December 1999. See also Peers et al. (2000), p. 21.

3. Law and practice in three Council of Europe member states

3.1. Germany

3.1.1. Principal rules regarding migration for employment

The principal rules concerned with migration for employment are the Foreigners Act 1990 (*Ausländergesetz*)[1] as amended, which is concerned with entry and residence, and Social Code III (*Sozialgesetzbuch III*) 1997,[2] which sets out the conditions under which non-citizens can take up employment. There are also a number of important regulations, in particular: Regulation on residence permits for the exercise of salaried employment (*Arbeitsaufenthalteverordnung*) 1990,[3] as amended; Regulation on work permits for highly qualified foreign specialists in the field of information and communications technology 2000 (*Verordnung über die Arbeitsgenehmigung für hoch qualifizierte ausländische Fachkräfte der Informations- und Kommunikationstechnologie*);[4] Regulation on exceptions to the granting of a work permit to a new foreign worker (*Anwerbestoppausnahmeverordnung*) 1998,[5] as amended; and Regulation on work permits for foreign workers (*Arbeitsgenehmigungsverordnung*) 1998,[6] as amended. A number of significant changes will be introduced by the new immigration law, which is due to enter into force on 1 January 2003, and these are discussed in section 3.1.6 below.

3.1.2. Categories of migrant workers

Migrant workers in Germany can essentially be divided into two broad categories, which can be further divided into a number of sub-categories depending on the migrant's residence and employment status, nationality, or sector of employment.

The first category concerns those migrants who are already legally resident in Germany. If such migrants hold a residence permit allowing employment (*Aufenthaltserlaubnis*) (as opposed to a temporary residence title or permit for specific purposes excluding employment – *Aufenthaltsbewilligung* –, such as a residence permit for study purposes) they are permitted to take up employment provided they obtain a work permit (*Arbeitsgenehmigung*), which can be issued for general or specific employment. If migrant workers hold a permanent residence status (i.e. either an unrestricted residence permit – *unbefristete Aufenthaltserlaubnis* – or an establishment permit – *Aufenthaltsberechtigung* –, a work permit is no longer required. A work permit will only be issued if the labour market test, which is applied at the regional level by the local labour office, is met. This test normally comprises the following criteria: a declaration by the employer expressing a willingness to employ the migrant; the existence of a genuine vacancy; the post has been advertised at the local labour office for a period of four weeks and remains vacant; there are no German or other privileged applicants (EU or EEA nationals or third-country nationals who do not require work permits[7]) available for the post in question; the labour conditions in which the migrant would be expected to work are not less favourable than those applicable to German nationals. As a result of the Community Association Agreements with Turkey and the Maghreb countries, which are discussed in section 2.6.2 above, Turkish and Maghreb migrant workers in Germany are in a

1. 9 July 1990, *Bundesgesetzblatt* (BGBl.) I, p. 1354.
2. 24 March 1997, BGBl. I, p. 594.
3. 18 December 1990, BGBl. I, p. 2994.
4. 11 July 2000, BGBl. I, p. 1146.
5. 17 September 1998, BGBl. I, p. 2893.
6. 17 September 1998, BGBl. I, p. 2899.
7. Nationals of the following countries may obtain a work permit without having to satisfy the labour market test: Andorra, Australia, Canada, Cyprus, Israel, Japan, Malta, Monaco, New Zealand, San Marino, Switzerland, and the United States of America.

privileged position with regard to other third-country nationals and are not affected by some of the restrictions that are applicable to the latter (see also sections 3.1.4 and 3.1.7 below).

The second category of migrants relates to those permitted to enter Germany for the purpose of employment. Although in principle the 1973 ban on new labour migration is still in place, some exceptions are permissible, which are mainly defined in accordance with the employment sector in which migrants will work and their qualifications. The Regulation on Exceptions to the Granting of a Work Permit to a New Foreign Worker distinguishes between five sub-categories of migrants undertaking the following employment activities: vocational training (for example, government trainees or guest workers); work under a specific labour contract (*Werkvertrag*, such as in the construction sector); temporary employment, such as seasonal or agricultural work; employment in the context of a bilateral agreement regulating frontier work; and employment in other occupations. With the exception of the last general activity, the feature of the first four sub-categories is the temporary nature of the employment. These migrants only receive temporary work permits limited to the duration of the employment and their residence permits are not renewable. In addition, there are also other categories of migrants whose admission cannot give rise to a secure residence status.[1] In contrast, migrants admitted for employment for a specific occupation, such as scientists, qualified skilled workers (if their employment is in the public interest), nurses, artists and professional sportspersons, are granted a long-term residence permit. Indeed, the general shortage of information technology (IT) workers in Germany has led to the recent adoption of more favourable provisions in this area and the admission of such migrant workers for employment is now regulated by the Regulation on Work Permits for Highly Qualified Foreign Specialists in the Field of Information and Communications Technology 2000. Qualified migrants in the IT sector (who have a university degree or a contract with a German employer guaranteeing them an annual salary of at least approximately €50 000 (formerly DM 100 000)) are issued a residence permit for five years once they have obtained their work permit. This permit can also be granted without the need to fulfil the labour market test.

While employment and residence permits in Germany are not issued on the basis of an overall formal quota, limits are placed on the admission of particular groups of migrant workers. The admission of highly qualified IT migrants is limited to 10 000 in the first instance, but can be increased to 20 000 in accordance with demand, although in practice this has not occurred (see section 3.1.3 below). The numbers of guest workers (*Gastarbeitnehmer*) and labour contract workers (*Werkvertragsarbeitnehmer*) under bilateral agreements with central and east European countries are also limited and fixed by each individual agreement. There is also a special quota for migrants of German origin from these countries (*Spätaussiedler*), which is set annually at 100 000.

3.1.3. Statistical data

Table 1 below relates to the number of work permits issued in the principal migrant worker categories in the years 1998-2000. These figures are not indicative of the actual number of migrant workers entering Germany (since a person might hold more than one permit in a given year) or the duration of the employment.

While these figures on the whole concern temporary employment, they nonetheless indicate a steady increase in the annual demand for migrant labour in Germany, which sits uneasily with the official policy banning recruitment. As discussed in section 3.1.6. below, however, the German Government has recognised that this official position is no longer tenable. In 1999, the total foreign population in Germany stood at approximately 7.3 million (8.9% of the whole population) and included (approximately) two million foreigners holding unrestricted residence permits (*unbefristeten Aufenthaltserlaubnis*), 1.75 million with restricted residence permits (*befristete Aufenthaltserlaubnis*), 820 000 with establishment permits (*Aufenthaltsberechtigung*), and 230 000 in possession of a temporary residence title (*Aufenthaltsbewilligung*).

1. These categories concern native language teachers, university language teachers and specialised cooks. See Regulation on residence permits for the exercise of salaried employment, paragraph 4.

Table 1: Work permits issued to migrants permitted to enter Germany for the purpose of employment, 1998-2000

	Workers entering for vocational training (for example, guest workers)	Contract Workers*	Other Migrant Workers (for example, scientists, nurses, artists or "Green Card" holders)	Seasonal Workers**	Frontier Workers
1998	3 083	32 988		201 579	9 650
1999	3 705	40 033		223 358	8 835
2000	5 891	43 682	6 716	232 540	9 375

Source: Federal Ministry of the Interior.
* Annual average.
** The activity of seasonal workers is limited to a maximum of three months in each calendar year. During this period no work permit is required.

3.1.4. Rights of migrant workers

a. Employment and residence rights

Duration of work permit and possibility of extension: in practice, work permits are generally limited to one year in duration and cannot be extended or renewed without meeting the labour market test, although exceptions may apply in respect of certain groups of Turkish and Maghreb workers under the Community Association Agreements.[1]

Rights to change job, employer or employment sector: these rights depend on the work permit. Since most work permits are limited to a specific job and a specific employer, it is not possible to change to another occupation without re-applying for employment and meeting the labour market test. However, migrant workers possessing an unrestricted work permit can change their job, employer or employment sector. This right is acquired if the migrant possesses a residence permit, has been employed for five years in Germany, or has been lawfully resident there for six years. Migrants who arrived in Germany before their sixteenth birthday and have completed their schooling also have free access to the labour market.

Possibility of acquiring a secure residence status or permanent residence independent of employment: migrant workers may qualify for an unrestricted residence permit (*unbefristeten Aufenthaltserlaubnis*) after five years and an establishment permit (*Aufenthaltsberechtigung*) after eight years. In the first instance, they must have held a residence permit for five years, have free access to the labour market and the necessary approval for permanent employment, possess sufficient knowledge of the German language, adequate housing and not be subject to expulsion. In the second instance, they must have held a residence permit for eight years, possess a guaranteed personal income, contributed to pension insurance (either voluntary or compulsory, private or public) for a period of at least sixty months, and also comply with the other remaining criteria listed above. Migrant workers holding a residence permit that cannot be renewed are excluded from unrestricted residence status. This applies to migrants with a temporary residence title excluding employment (*Aufenthaltsbewilligung*) engaged in vocational training, employed under a labour contract between an enterprise in Germany and an enterprise in a third country based on a bilateral agreement with a central and east European state and with a residence permit for temporary employment discussed above. In such circumstances, permanent residence can only be obtained through marriage to a German national.

1. For example, Maghreb migrant workers holding a work permit, the duration of which is longer than that of the residence permit: this would apply to the spouses of German nationals and recognised refugees, whose marriage has ended. According to national law, the residence permit would not be renewed, but following the decision of the European Court of Justice in El Yassini (discussed in section 2.6.2 above), this (relatively small) group of persons have a right to renewal of their residence permit, unless there are public policy, security or health grounds precluding such renewal.

b. Housing, health and social security rights

Housing: migrant workers are responsible for arranging their own accommodation. The German state does not participate in the housing market, although it does support social housing.[1] Moreover, persons on low incomes can receive support from the state for the payment of rent, provided that their income does not exceed a specified amount, and also have a right to social assistance (*Hilfe zum Lebensunterhalt*) if they cannot acquire accommodation by their own means and fulfil the necessary support conditions. Although migrants have the same rights as German nationals in the housing field, acceptance of social assistance constitutes a ground for expulsion under the 1990 Foreigners' Act, which, although not mandatory, represents a real risk. However, if migrants have an establishment permit or an unrestricted residence permit and were born in Germany or arrived there as a minor, they cannot be expelled on this ground.

Health: the health system in Germany operates on two levels: the first relates to legal health insurance, which covers 95% of the population, and the second concerns social assistance. Migrants in employment are legally insured and have unlimited access to health care on the same terms as German nationals. Similarly, unemployed migrants in receipt of unemployment benefit are also insured. If they no longer have a right to health insurance based on unemployment benefit, they can seek support for health care from social assistance, although claiming this support may lead to expulsion unless they have permanent residence status.

Social security: in accordance with Social Code IV (*Sozialgesetzbuch IV*), all persons employed in Germany have equal access to social security. However, there are some restrictions in respect of certain non-contributory benefits. Child benefit and the payment for raising children are only open to migrants in possession of a residence permit (but not those holding a temporary residence title) or an establishment permit and if their children are also residing in Germany; family credit for health insurance is only paid for family members in Germany; and the payment of a pension is reduced by 30% if the beneficiary has his or her residence abroad, although the pension will be paid in full if there is a social security agreement with the migrant's country of origin. These restrictions, such as those relating to child benefit and family credit, are no longer applicable to Turkish nationals since the decision of the European Court of Justice in Sürül (see section 2.6.2 above) ruling that the provision on social security in the Community Association Agreement with Turkey confers direct effect.

c. Family unity

Migrant workers can be joined by their spouse, a partner of the same sex if the relationship has been formalised (*Lebenspartnerschaft*), and their unmarried children under the age of 16. If the children are 16 or over they may join the migrant if they know sufficient German or if it is assumed, based on their previous education and circumstances, that they are able to integrate into German society, or in situations of exceptional hardship. Family reunion of other family members is also permissible in cases of exceptional hardship.

Before family reunion can take place, migrant workers must, in all cases, possess a residence permit or an establishment permit, adequate accommodation and sufficient means of subsistence, either through their own employment, possession of property or other resources. Moreover, migrants must meet one of the following conditions before their spouse or partner can join them: possession of an establishment permit (residence of at least eight years); possession of a residence permit (although in this case, there is also the additional requirement that the relationship was already in existence when the migrant first came to Germany and that it was mentioned in the first application for a residence permit); birth in Germany or arrival in the country as a minor, possession of an unrestricted residence permit or an establishment permit, lawful residence in Germany for eight years, and have reached the age of majority.

1. Persons on a low income have a right to a housing right certificate *(Wohnberechtigungsschein)*, which enables them to be offered government-supported accommodation. In practice, all migrants, irrespective of the nature of their residence permit (unrestricted or permanent), can obtain the certificate, although migrants possessing only a temporary residence title (*Aufenthaltsbewilligung*) often experience more difficulties in obtaining this document.

With regard to the children of migrant workers, the other parent must also possess a residence permit or an establishment permit, although this latter condition is not applicable if the marriage no longer exists.

d. Access to vocational training and language and integration courses

Vocational training: migrant workers have access to vocational training, although they need to obtain the permission of their employer if this training would entail absence from work. Unless the employer agrees to pay for the training (for example, where it is necessary for the employment in question), migrants are responsible for covering the cost of the training themselves. Employers are under no obligation to support vocational training. However, migrant workers are eligible for support to meet the costs of vocational training, which is financed from employment insurance if, at the start of the training, they have been resident in Germany for five years and lawfully employed there, or one of their parents has been resident for three years and lawfully employed there and, after completing the course, there is a prospect that they will be employed in Germany. Unemployed migrants or those who are at risk of becoming unemployed can also obtain assistance for vocational training, which is based on unemployment benefit. In 1999, 9% of migrants benefited from this support. Support for vocational training in these two situations is not subject to the condition that the migrant remains with the same employer or employment sector unless of course the labour contract stipulates otherwise.

Language and integration courses: the current law does not regulate the provision of language and integration courses. Insofar as public language courses exist, they are offered on a voluntary basis and in the context of what is financially possible. The state also covers the cost of language courses for immigrants of German origin (*Aussiedler*).

e. Protection against unemployment and expulsion

Migrant workers are treated on an equal basis with German nationals as far as the receipt of unemployment benefit is concerned. The period for which unemployment benefit is payable depends on the time spent in employment and the age of the person concerned and ranges between six and thirty-two months. On expiry of the right to unemployment benefit, there is a right to unemployment assistance, which is payable if the person concerned is still unemployed and has no other means of subsistence. The legal situation is precarious for those migrant workers possessing a temporary residence title, which in practice can expire as soon the migrant becomes unemployed. In accordance with the case-law of the German social courts, migrants whose work permits have expired are not regarded as available for the labour market if they have not found new employment within one year since they do not fall within the definition of "unemployed" necessary for the payment of unemployment benefit or unemployment assistance. Migrant workers cannot be expelled during the period they are receiving unemployment benefit because this payment is based on their unemployment insurance contributions. But once the right to this benefit expires, the receipt of unemployment assistance or social support is a legal ground for refusal to renew the residence permit (although this ground does not apply to those foreigners in possession of permanent residence permits) and if such renewal is refused the person concerned is obliged to leave the country. The receipt of social support also constitutes an explicit ground for expulsion under the Foreigners Act, although migrants with an establishment permit cannot be expelled for this reason.

f. Trade union rights and consultation

Migrant workers have the right to join trade unions and to form their own trade unions, although in practice this has not occurred. With regard to consultation, advisory councils have been set up on the municipal level and there is also a Federal Commissioner for Foreigners' Affairs (*Bundesbeauftragte für Ausländerfragen*) on the national level as well as in most *Länder*. These bodies are important for the general political climate and a significant voice in the formation of public opinion even though the positions they adopt are not always followed. There are also a number of migrant workers' organisations, particularly the organisation for Turkish migrant workers, which is the most influential, although no

formal mechanism exists for consultation with these organisations. However, co-operation among migrant workers' organisations takes place at the level of the Federal Commissioner for Foreigners' Affairs.

3.1.5. Bilateral or multilateral agreements

Since 1 January 1995, Germany has adopted bilateral migrant labour agreements with the following central and east European countries: Bosnia and Herzegovina, Bulgaria, Estonia, Slovak Republic and Slovenia. Prior to 1 January 1995, there were already bilateral migrant labour agreements in place with Poland, Turkey, the Czech Republic, Hungary and Romania and the latter three have since been amended. An agreement on migrant labour with Croatia is also in preparation.

3.1.6. Political and public debate

In the past three years, there has been considerable political and public discussion on foreigners' issues, which has impacted both indirectly and directly on the treatment of migrant workers in Germany. After the election of a new "red-green" coalition government in 1998, proposals were introduced in 1999 to simplify the conditions for obtaining German nationality, including measures such as reduction of the eight-year waiting period, automatic acquisition of German nationality at birth, and the introduction of possibilities for possession of dual citizenship. However, the law that was finally adopted constituted a clear political compromise because of the need to gain the approval of the upper house of parliament (*Bundesrat* – where the German *Länder* are represented) in which there was a conservative majority. The law did not shorten the waiting-period for nationality and only slightly increased the possibilities for holding dual citizenship. Moreover, while the law provided for the first time that children born to parents with eight years' residence and permanent residence status in Germany acquire German nationality, it also stipulated that they must relinquish their second nationality on their eighteenth birthday, or else lose their German nationality.

In early 2000, when it became evident that there were shortages in the IT sector in the domestic labour market, the regulation on work permits for highly qualified foreign specialists in the field of information and communications technology, referred to in section 3.1.1 above, was introduced, which provided for a "green card" for skilled IT workers. Shortly afterwards, a broader debate ensued concerning the establishment of a new system of immigration with a view to increasing the access of highly qualified workers to the German labour market and addressing the question of the integration of foreigners particularly with regard to language learning. The Federal Ministry of the Interior established an Independent Commission on Migration to Germany (*Zuwanderungskommission*[1]), which issued its report in the summer of 2001. The report contained a number of landmark pronouncements.[2] Significantly, it underlined that Germany has been a country of immigration for some time and that it needs immigrants. It proposed, *inter alia*, an end to the official policy prohibiting recruitment of new migrant workers (introduced in the early 1970s), the need to structure immigration to Germany and measures for the promotion of integration, the introduction of a points system for the entry of labour migrants, and improvements in the treatment of immigrants and refugees. A diluted version of these proposals in the form of a draft immigration bill were presented by the German Government to the German Parliament, although a number of restrictive amendments were introduced after the September 11 terrorist attacks on the United States. The lower house of parliament (*Bundestag*) approved the bill on 1 March 2002 and it was passed in the *Bundesrat* by a disputed vote at the end of March 2002 when the *Land* of Brandenburg was deemed to have voted in favour despite a disagreement over the bill by the coalition parties governing the *Land*.[3] The President signed the bill on 20 June 2002.[4]

1. Also known as the Süssmuth Commission after its chairperson, Professor Rita Süssmuth.
2. *Structuring Immigration - Fostering Integration* (*Zuwanderung gestalten - Integration fördern*) (July 2001).
3. Schmidt (2002), p. 5.
4. Law for Controlling and Limiting Immigration to Germany and for Regulating the Stay and Integration of EU Citizens and Foreigners (Immigration Law) (*Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz)*), 25 June 2002, BGBl. I, p. 1946 ff. [hereinafter New Immigration Law].

The new immigration law[1] simplifies the current system of residence permits by creating only two kinds of permits: a restricted residence permit (*befristete Aufenthaltserlaubnis*) and an unrestricted settlement permit (*unbefristete Niederlassungserlaubnis*).[2] It also sets up a competitive points system for the recruitment of skilled workers, experts and specialists.[3] Controversially, however, the law would limit the entry of some children over 12 years of age who wish to join their parents in Germany unless they can demonstrate that they possess a satisfactory knowledge of the German language, although it would enable children of up to 18 years of age to enter if this is required by the family situation or is in the best interests of the child.[4] The law also contains measures aimed at fostering the integration of immigrants into German society, providing for the right as well as the obligation to participate in integration programmes, which will include intensive language courses and seminars on German culture, history, legal system and society.[5]

However, the German conservative parties (CDU/CSU) have announced that in view of the disputed way the bill passed through the *Bundesrat* they will apply to the Constitutional Court to have the Act declared null and void. The new law is due to enter into force in January 2003, although the future of this legislation in its present form might be in some doubt if the conservative parties were to gain sufficient votes in the federal general elections on 22 September 2002 and form a new coalition government.

3.1.7. Relevance of Council of Europe conventions and European Community agreements

The ECHR and the EEC-Turkey Association Agreement have had most influence on the treatment of migrant workers in German law and practice. The case-law of the European Court of Human Rights has influenced the judgments of German courts, particularly in respect of the interpretation of Article 8 of the ECHR. However, some of the Court's case-law is not being applied; for example, there is still no implementation of the Gaygusuz v. Austria judgment discussed in section 2.1 above. The other relevant Council of Europe conventions have had a more limited impact. The European Convention on Establishment is applied in respect of the conditions of expulsion after migrants have been lawfully resident for ten years (see section 2.4 above). The European Social Charter has had no real influence on the status of migrant workers, largely because it is considered not directly applicable, and Germany has only signed (but not ratified) the European Convention on the Legal Status of Migrant Workers. The official position concerning the latter instrument is that ratification is impossible for the time, being given continuing unemployment in Germany and in the light of the uncertainty that surrounds the impact of future EU enlargement eastwards and the new immigration law.[6] The EEC-Turkey Association Agreement and the decisions of the Association Council (2/76, 1/80 and 3/80) have had the most marked impact. The relevant case-law of the European Court of Justice, discussed in section 2.6.2 above, which has largely developed as a result of preliminary referrals from German courts, has significantly improved the status of Turkish migrants resident in Germany. To date, the Europe Agreements have not had any influence on the treatment of migrants from central and east European countries,[7] although this situation may change as the case-law of the European Court of Justice develops.

3.1.8. Relevance of GATS rules

GATS rules have not influenced labour migration policy in Germany.

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1. See also Schmidt (2002), pp. 9-13.
2. New Immigration Law, Article 1, paragraphs 4, 7 and 9.
3. *Ibid.,* Article 1, paragraph 20.
4. *Ibid.,* Article 1, paragraph 32(2) and (4). The former requirement, however, does not apply to the foreign children of German citizens, children of migrants holding a *Niederlassungserlaubnis* or of refugees, and children arriving together with one of the parents. In such cases, the 18-year age limit is applicable. *Ibid.,* Article 1, paragraph 28(1) 2 and 32(1).
5. *Ibid.,* Article 1, paragraphs 43-45.
6. See also Guild (1999), p. 27, where the reasons cited for non-ratification of this Convention were continuing high levels of unemployment and the existence of similar obligations in the European Social Charter.
7. While the provisions in the agreements on the right to establishment have been sparsely used by nationals from these countries, they have benefited those migrants who already held a residence permit, but who were unable to engage in self-employed activity. See Böcker (2002), pp. 33 and 37.

3.2. Netherlands

3.2.1. Principal rules regarding migration for employment

The specific rules regarding migration for employment to the Netherlands are found in the Aliens Employment Act (*Wet arbeid vreemdelingen*) 1994, as amended in 1997 and 2000,[1] and in the following pieces of subordinate legislation: Regulation implementing the Aliens Employment Act *(Besluit Uitvoering Wet arbeid vreemdelingen)*; other implementing rules (*Delegatie en Uitvoeringsbesluit Wet arbeid vreemdelingen; Uitvoeringsregels Wet Arbeid vreemdelingen*); and Policy Rules of the Administration of Labour Authorities (*Beleidsregels Algemene Directie voor de Arbeidsvoorziening*). The Immigration Act (*Vreemdelingenwet*) 2000[2], the implementing Royal Decree and Order of the Ministry of Justice (*Vreemdelingenbesluit;*[3] *Vreemdelingenvoorschrift*[4]) and the Immigration Circular (*Vreemdelingen-circulaire*) are also of particular relevance.

3.2.2. Categories of migrant workers

There are essentially three categories of migrant workers admitted for employment to the Netherlands, which are all dependent on the rules relating to their first admission. The principal category relates to employment for which a work permit (*tewerkstellingsvergunning, tvv*) is required and which is subject to the full labour market test (namely, there is no one on the Dutch and EU labour markets to undertake the employment in question). The second category concerns employment for which a work permit is also required, but which is subject to a limited, or no, labour market test. This category is determined on an occupational/sectoral, skills-related and income basis. No labour market test is needed for inter-company transferees provided that the employee earns an annual gross income of at least €50 000, possesses at least a college-level education (HBO+), and is a specialist or holds a senior managerial position within the company. The inter-company transfer policy is also dependent on the physical and financial size of the company, which has to have offices in at least three countries and an annual global turnover or revenue of at least €50 million.[5] Furthermore, no labour market test is required for migrants admitted in accordance with international obligations, such as the movement of third-country national employees in the context of the provision of services by a EU national and the GATS (see section 3.2.8 below), university staff[6] and trainees[7] as well as those entering the Netherlands to undertake practical experience.[8] A limited labour market test is applied to IT specialists with educational qualifications at HBO+ level or above, management staff and specialists receiving a monthly gross salary of more that €3 630.24. The third category relates to employment for which no work permit is required and concerns self-employed workers holding a residence permit and temporary migrant workers, who do not establish permanent residence in the Netherlands and whose labour is incidental and limited to certain specific activities. Examples of the latter include journalists and business people in the country negotiating contracts or attending trade fairs. Generally speaking, none of these categories are subject to a quota

1. 21 December 1994, *Staatsblad* (Stb.) 959; 6 November 1997, Stb. 510; 28 September 2000, Stb. 496.
2. 23 November 2000, Stb. 495; amended most recently on 14 September 2001, Stb. 432.
3. 23 November 2000, Stb. 497; amended on 19 March 2001, Stb. 143.
4. 18 December 2000, *Staatscourant* (Stcrt.) 2000, 10; amended most recently on 27 March 2002, Stcrt. 2002, 69.
5. This policy constitutes an obstacle to those companies opening their first overseas office in the Netherlands (usually as their European headquarters) and wishing to transfer senior management personnel to establish this European base. In such instances, because the company only has two offices, the full labour market test as well as the company economic needs test will have to be met. The company may seek to facilitate the former process by "requesting" an official recruitment agency to conduct an unsuccessful recruitment exercise so that the company may then be in a position to apply for a work permit for their own staff. If it is an American company, it might also be able to circumvent these tests on the basis of the 1956 USA-Dutch Friendship Treaty concerning trade between the two countries. In practice, however, in those cases where no visa is required to enter the Netherlands, such inter-company transferees often work illegally before their status is regularised. In May 2002, an inter-departmental commission advised the Dutch government to remove the requirement of office locations in three countries. The government has agreed to follow this advice but the requirement has not yet been officially removed.
6. This exemption is limited to the following staff in University, HBO and research institutions: a) those conducting PhD research; b) those conducting postgraduate research for a maximum of three years and c) highly qualified researchers on a temporary assignment on the recommendation of the Dutch Academy of Sciences (*Nederlandse Academie voor Wetenschappen*).
7. Duration is limited to a maximum of one year.
8. Duration is limited to a maximum of six months and an employer quota is applicable.

system, although, as regards the first category, the Ministry of Labour and Social Affairs has entered into an agreement with the social partners in the health sector with a view to recruiting nursing staff.

3.2.3. Statistical data

The statistical data available (see Table 2) indicate the number of work permits issued annually between 1998 and 2000 rather than the actual number of migrants employed in the Netherlands during this period. The figures reveal a steady annual increase in the number of work permits issued, with quite a marked rise in the number of work permits granted in 2000 to migrant workers meeting the full labour market test.

Table 2: Work permits (tewerkstellingsvergunning, twv) issued for employment in the Netherlands, 1998-2000

	Twv: Full labour market test	**Twv: Limited, or no, labour market test**
1998	3 783	Total: 11 397 including: 1 597: asylum seekers with temporary protection 1 718: extensions 2 655: intra-company 1 635: *stagiaires/praktikanten* 955: academic staff
1999	4 667	Total: 16 149 including: 4 136: asylum seekers with temporary protection 2 520: extensions 2 499: intra-company 2 375: *stagiaires/praktikanten* 1 118: academic staff
2000	6 057	Total: 21 621 including: 5 884: asylum seekers with temporary protection 3 137: extensions 2 717: intra-company 3 809: *stagiaires/praktikanten* 1 374: academic staff

3.2.4. Rights of migrant workers

a. Employment and residence rights

Duration of work permit and possibility of extension: the maximum duration of the first work permit in those employment categories for which a work permit is required is three years. A work permit is no longer needed if migrant workers have been legally resident for three years, employed with a work permit, as they therefore qualify for free access to employment on the Dutch labour market. With the exception of migrant workers from Turkey, where work permits can be extended for the duration of the employment contract under Association Council Decision 1/80, it is not possible to extend a work permit for temporary employment, which applies in practice to all employment contracts entered into for less than three years. In such cases, in order to extend the period of employment, the employer must apply for a new work permit and demonstrate that all the requirements (including the labour market test) are fulfilled. In practice, this application process is more straightforward and less time consuming for the category of employment which is subject to a limited, or no, labour market test. In order to avoid the difficulties connected with an application for a new work permit, employers sometimes prefer to enter into three-year or indefinite employment contracts with the migrant worker at the time of the first work permit application. In these cases, therefore, migrant workers find themselves in a more advantageous position than Dutch nationals employed in equivalent positions, who normally receive

one-year contracts with the possibility of extension subject to satisfactory job performance. However, the authorities issuing work permits often try to induce employers to accept a first work permit valid for less than three years.

Right to change job, employer or employment sector: there are no legal obstacles to migrant workers in each work permit category changing their job, employer or employment sector. However, if migrants wish to change their employment within the first three years, the employer is required to obtain a new work permit for them and meet all the requirements, including the labour market test. In practice, therefore, it is somewhat theoretical to suggest that migrant workers have a right to change employment, particularly as migrants employed on three-year work permits are frequently advised not to try to change their jobs within the first three years.

Possibility of acquiring a secure residence status or permanent residence independent of employment: migrant workers are exempted from the work permit requirement after having had a temporary residence permit valid for employment for three consecutive years. After five years, the migrant worker can acquire a secure right of residence provided that they are able to demonstrate that they possess sufficient financial means to support themselves.[1] Where the employment contract is less than three years in duration, the attainment of these more secure residence statuses is dependent on employers applying for a new work permit for their migrant employees in good time before the completion of the first employment contract. Otherwise, there will be a break between work permits and residence permits (which are issued concurrently), with the result that a gap will be created in legal residency, which means that the periods to be completed in order to obtain a secure right of residence independent of employment or permanent residence have to run again from the beginning.

b. Housing, health and social security rights

Housing: normally, migrant workers are responsible for finding their own accommodation unless the employer agrees to provide it, although a work permit application might well be rejected if the employer is unable to convince the authorities that suitable housing is available for the migrant employee. In practice, however, no evidence of a rental agreement is required, merely a statement that accommodation will be arranged on arrival. There are also some rental agencies and real estate brokers which specialise in finding accommodation for migrants. Prices for a one-bedroom apartment in cities start from a minimum of approximately €950 per month, and depend largely on the city in question as well as the market situation. Migrant workers are also eligible for public housing once they have obtained a residence permit. In practice, however, waiting periods for such accommodation can be unduly lengthy. For example, in Amsterdam, new applicants usually have to wait approximately, between ten and fifteen years, before public housing becomes available.[2]

Health: the access of migrant workers to the Dutch national health care system is dependent on their income. Migrants who earn more than €30 700 per annum are not covered by this system and are required to take out private health insurance. Those migrants who work for larger companies will often be covered by corporate health schemes with the result that their employer will pay part of their subscription.

Social security: in general, migrant workers are not excluded from any branch of social security provided that they are legally resident in the Netherlands and are employed in accordance with the Aliens Employment Act. Therefore, they are entitled to unemployment benefit, long-term disability benefit, child benefit, access to the national pension scheme, and national insurance in respect of extraordinary health costs, such as long-term hospitalisation.

1. Migrant workers holding a temporary residence permit (*tijdelijk*) are excluded from permanent residence. Article 3.5(2), *Vreemdelingenbesluit* 2000.
2. On the other hand, in a smaller location, such as a village near Leeuwarden, it might be possible to obtain public housing immediately.

c. Family unity

Family members permitted to join the migrant worker comprise the spouse, defined broadly to include married and unmarried partners of both sexes, and minor children under 18 years of age. Children over the age of 18 and other relatives may only join the worker if they are financially and emotionally dependent and lived with the worker in the same household before the worker left for the Netherlands. In accordance with a new policy, announced on 30 October 2001, children under 18 must join the migrant worker within five years of his or her arrival in the country. In effect, the only condition on family reunion is that migrant workers must possess sufficient resources to take care of their dependants. There is no requirement that they must have been resident in the Netherlands for a particular length of time before family reunion can take place or that they possess suitable accommodation.

d. Access to vocational training and language and integration courses

Vocational training: in general, migrant workers can enrol on a vocational training course while in employment, with the employer's permission. If employers consider the course to be useful for their employees, they will normally meet the cost of the course. Although migrants can also enrol freely on other available courses to develop their skills, they may encounter considerable practical obstacles. For example, migrant workers from countries with less developed labour standards might not even consider the possibility of enrolling on such courses during working hours. Moreover, enrolment outside of working hours may also be impossible. It is not unknown for experienced IT workers from east European or Asian countries, such as India, to be asked to work twelve-hour days, which they would consider normal back home, with the result that they have little time to enrol on courses to upgrade their skills.

Language and integration courses: the Law on Integration of Immigrants (*Wet Inburgering Nieuwkomers*)[1] excludes migrant workers from language and integration courses (for example, courses for integration into Dutch society – *inburgeringscursus*), which are organised by public authorities. The only migrant workers that are currently not exempted from the *Inburgeringscursus* are clergy.[2] Some companies also organise Dutch language courses as part of the in-house training for their migrant employees, although this does not, for example, occur in smaller IT companies where English is generally the language spoken.

e. Protection against unemployment and expulsion

As noted above, migrant workers legally resident in the Netherlands and employed in accordance with the Aliens Employment Act are entitled to social security protection, which includes the right to unemployment benefit. This right and the amount of benefit payable depend on the length of the period of previous employment rather than the length of residence. If prior to the first day of involuntary unemployment migrants have worked for a period of twenty-six weeks out of the previous thirty-nine weeks, they are entitled to temporary unemployment benefit of 70% of the minimum wage for a period of six months. If migrants have worked in four out of the previous five years (for at least fifty-two days per year), they are eligible for salary-related unemployment benefit of up to 70% of their last earned wage. The period during which unemployment benefit is payable depends on the duration of employment as well as the age of the employee and varies between six months and five years. In principle, unemployment in itself does not constitute a ground for expulsion. In practice, however, if the migrant worker is still unemployed at the time of the expiry of the residence permit, its validity will not be extended.

1. 9 April 1998, Stb. 261.
2. 28 June 2001, Stb. 351, and 19 December 2001, Stcrt. No. 247, p. 9.

f. Trade union rights and consultation

No legal obstacle precludes migrant workers from joining trade unions and the right to form trade unions is also protected by the Constitution of the Netherlands. The Dutch legislation on the freedom of association does not distinguish between citizens and non-citizens. In practice, however, migrants have tended not to organise their own unions, although at the beginning of 2002 a union called the VIA (*vakbond illegale arbeiders*) was established by illegal migrants, who have also received the support of the largest Dutch trade union (FNV – *Federatie Nederlandse Vakbeweging*) as of 1 May 2002.[1]

While there are no associations representing the specific interests of migrant workers, there are a number of organisations, which try and influence the development of migration law and policy in general, such as the Forum – Institute for Multicultural Development (*Forum, Instituut voor multiculturele ontwikkeling*), the Association of Turks in the Netherlands (*Inspraakorgaan Turken in Nederland*) and the Clara Wichmann Instituut. These organisations were responsible for influencing the recent Immigration Act 2000, which resulted in a number of changes to family reunion policy affecting migrant workers. However, it is employers' organisations, such as the VNO-NCW (*Verbond van Nederlandse Ondernemingen-Nederlands Christelijk werkgeversverbond*), and branch-specific organisations such as the Dutch Agricultural and Horticultural Association (*Land en Tuinbouw organisatie Nederland*) and the Federation of IT Companies (*Fenit, branche vereniging voor IT sector*), which are especially active in attempting to influence the development of labour migration policy.

3.2.5. Bilateral or multilateral agreements

With the exception of European Community agreements with third countries, which are referred to below, the Netherlands has not entered into any other agreements relating to migration for employment during the last six years. However, the Dutch Parliament has acknowledged that private employment agents recruit nursing staff in Poland. Indeed, there have been reports recently in the media[2] of agreements having been entered into between such agents and the Polish authorities concerning the recruitment and training of Polish nurses. Furthermore, the Dutch Government has entered into an agreement with representatives of Chinese restaurants in the Netherlands regarding the recruitment of Chinese cooks.[3]

3.2.6. Political and public debate

In the last three years, the political and public debate has focused on whether there is a need for migrant workers in the Dutch economy and the numbers of migrants entering the Netherlands. It has not been concerned with the rights of migrant workers or their treatment. However, the debates, as well as the amendments to the legislation, emphasise the temporary nature of (admission for) employment.

3.2.7. Relevance of Council of Europe conventions and European Community agreements

All the relevant Council of Europe instruments discussed in Chapter 2 above have been ratified by the Dutch Government and are therefore applicable in the Netherlands. While various aspects of domestic law have been amended to accommodate a number of key provisions in these instruments, there is little evidence of any practice to test their application. For example, this is the position with the implementation of Article 9(4) of the European Convention on the Legal Status of Migrant Workers, which authorises migrant workers no longer in employment, as a result of a temporary incapacity to work because of illness or accident or involuntary unemployment, to remain on the territory of a receiving state for a period of at least five months.[4] In the 1980s, Article 8(2) of this convention inspired

1. E. de Waard and E. Krebbers, "Vakbond voor illegale arbeiders krijgt steun van FNV" *De Fabel van de illegaal* 52/53 (Summer 2002); available from http://www.gebladerte.nl/10841f52.htm
2. See de Lange (2001) and the daily newspaper *NRC Handelsblad,* 23 May 2001 and 6 April 2002.
3. *Beleidsregels Wet arbeid vreemdelingen,* Stcrt. 2002, No. 19, p. 17.
4. But states parties are under no obligation to allow migrant workers to stay beyond five months if they are no longer entitled to receive unemployment allowance. See also *Vreemdelingencirculaire* 2000, B11/10.

amendments to Dutch policy with the result that after the first year of employment with a work permit granted after a labour market test was conducted, the migrant worker could change employers and the new employer would be eligible for a work permit for this migrant without the labour market test being conducted again.[1] This policy was continued after amendments to the Aliens Employment Act in 1994, but was reversed by the changes in the legislation of November 2001, without any references being made to the convention. If the migrant worker changes employers a full labour market test is now applied.[2] Another pertinent development concerns the cancelling in 2001 of the obligation to seek the advice of the Advisory Commission for Aliens (*Advies Commissie Vreemdelingenzaken, ACV*) when seeking to expel a migrant,[3] originally introduced to comply with Article 3(2) of the European Convention on Establishment, which grants nationals of contracting parties who have been lawfully resident for two years in the territory of another party the right to first submit reasons against their expulsion and to appeal to a competent authority.

Similarly, there is no evidence of any practice with regard to the interpretation of the provisions of the European Social Charter precluding the withdrawal of a residence permit in the event that the migrant worker applies for a social benefit.[4] The Charter however, has not influenced the development of the domestic law relating to work permits and the possibility of their extension. In this regard, it has been argued that Article 18 of the Charter, and particularly Article 18(3) obliging states parties to liberalise their rules governing the employment of foreign workers from other states parties, should allow for the temporary work permits of such workers to be extended,[5] which, as noted earlier, is not possible at the moment. The only exception relates to Turkish workers and flows from the EEC-Turkey Association Agreement, as interpreted by the European Court of Justice. With regard to Article 19(6) of the Charter, the obligation to facilitate family reunion of children under 21 years of age is recognised in the *Vreemdelingencirculaire* 2000,[6] but is not applied in practice. Moreover, Article 18(2), the implicit standstill clause concerning fees for residence permits has not been honoured as the fees increased in 1994 and in May 2002.[7] On the other hand, the Europe Agreements with the central and east European countries have not had any significant influence on Dutch law and policy,[8] with the exception of the recent changes to the inter-company transfer policy where the conditions discussed in section 3.2.2 above are not applied if the transfer is based on the Europe Agreements.[9]

3.2.8. Relevance of GATS rules

While the GATS rules have been implemented in Dutch law,[10] as of August 2001 there had been no record of an actual application for a work permit based on these rules. Given that the rules only enable the migrant to work for three months out of a possible twenty-four months and that employees are not required to obtain a long-term entry clearance visa or residence permit if they come to the Netherlands for less than three months, it is assumed that the work in question is probably performed illegally (in other words, without a work permit or, if required, on the basis of a three-months business or tourist visa).

1. Sociaal Economische Raad, Advies Wijziging Wet arbeid buitenlandse werknemers, No. 92/06, March 1992, p. 77.
2. The Brochure produced by the authorities responsible for the work permit (*Vademecum Wet arbeid vreemdelingen 2002*) states that the full labour market test is not in conflict with the obligations under Article 8(2) as the labour market test does not forbid a change of employers.
3. *Vreemdelingencirculaire* 1994, A8/2.4.2.e and B5/1.4.
4. *Ibid.,* B11/9.
5. de Lange (2001).
6. B11/10.
7. K. Groenendijk, "Exorbitante verhoging van de leges: Justitie als grootgrutter met oogkleppen" (2000) *Migrantenrecht* No. 4, pp. 90-91.
8. With regard to the right of establishment and as in the case of Germany (see section 3.1.7 above), the agreements have primarily been of benefit to migrants already within the country, although unlawfully resident migrants were more likely to invoke this right in the Netherlands than in Germany. See Bocker (2002), pp. 37 and 40.
9. Stcrt., 20 August 2001, No. 159, p. 9.
10. *Uitvoeringsregels Wet Arbeid vreemdelingen,* paragraph 20.*c.*

3.3. United Kingdom

3.3.1. Principal rules regarding migration for employment

The principal rules concerning migration for employment in the United Kingdom (UK) are based on subordinate legislation known as the Immigration Rules, which lay down the practices to be followed in the administration of the Immigration Acts of 1971 and 1988 for regulating the entry into and stay of persons in the UK. These rules are varied periodically by the Secretary of State for the Home Department by way of Statements of Changes to the Immigration Rules, which have to be approved by Parliament. Further policy guidance is also found in the Instructions of the Immigration and Nationality Directorate (IDIs), which provide detailed directions to officials as to how these rules should be applied.

3.3.2. Categories of migrant workers

The principal category of migrant workers in the UK concerns those who are in work-permit-based employment.[1] The Government White Paper, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain,* published by the Home Office in February 2002, describes the work permit system as "primarily designed to address recruitment of people outside the EU with medium- and high-level skills, and to fill specific 'shortage occupations'".[2] The work permit scheme is administered by an authority of the Immigration and Nationality Directorate (IND) of the Home Office – Work Permits (UK) – which publishes detailed guidance on the criteria for the granting of the two main kinds of work permits, namely business and commercial work permits and training and work-experience work permits.[3] The business and commercial work permit scheme is the principal scheme and is aimed at skilled workers coming to the UK to fill a genuine vacancy for which there is no one in the resident labour force available to undertake the job. The guidance notes of Work Permits (UK) specifically state that "[w]e do not issue work permits for unskilled jobs".[4] The scheme is divided into Tier 1 and Tier 2 applications. Tier 1 applications are for intra-company transfers, concerning senior board level positions, posts related to inward investment, or occupations for which Work Permits (UK) acknowledge that suitably qualified persons are in very short supply. The occupations listed encompass most jobs in the IT, health care and engineering sectors. Other occupations in short supply are actuaries, teachers and veterinary surgeons. The procedure for Tier 1 applications is simplified in that fewer documents are required to accompany the application and the resident labour test is applied differently because employers do not have to advertise for the job in question, although they must still demonstrate why there is no suitable alternative worker or why that particular person's special skills are needed. Tier 2 applications relate to all other work permit applications under this scheme. Within the business and commercial work permit scheme, a new multiple entry permit has recently been introduced, which enables persons based overseas to enter the UK on a regular basis to work, without the need to obtain a permit each time they enter.[5] As noted below, the employment and residence rights attached to this permit are very limited. The training and work experience work permit scheme (TWES) is designed for those persons coming to the UK to gain skills and experience through work-based learning.[6]

In January 2002, the UK Government launched its Highly Skilled Migrant Programme, which enables highly skilled migrants to enter the UK to seek employment initially for up to one year. This new initiative, therefore, differs radically from the work permit schemes described above, which are based on employers selecting individuals for particular jobs and applying for work permits for them. The programme is administered on the basis of a points system according to, *inter alia*, to the following criteria: educational qualifications, work experience, past earnings, and achievement in the chosen field. Although applicants have to complete a form and provide evidence that they meet the criteria, no

1. Paragraphs 128-135 of the Immigration Rules HC 395, as amended.
2. White Paper (2002), p. 39, paragraph 3.8.
3. Available from the web site of Work Permits (UK) at http://www.workpermits.gov.uk
4. Work Permits (UK) (Business and Commercial work permits) (2002), paragraph 11.
5. *Ibid.,* paragraphs 44-49.
6. Work Permits (UK) (TWES work permits) (2002), paragraph 4.

specific job offer from an employer or work permit are required prior to entry to the UK provided that applicants can support themselves.[1] As of July 2002, 1 200 applications had been received under this programme.[2]

Other numerically less important employment-related categories, such as sole representatives of overseas companies, journalists, writers, artists and composers, and Ministers of Religion, are defined in the Statement of Changes to the Immigration Rules. In addition, there are concessions to the rules, which permit the entry of agricultural workers (Seasonal Agricultural Workers' Scheme (SAWS)) and domestic servants. A mix of rules and concessions provides for a number of other employment-related schemes and particularly the Working Holidaymaker Scheme, which permits young Commonwealth citizens to enter the UK for up to two years to take up employment incidental to their holiday.[3]

The UK Government's February 2002 White Paper describes the recently introduced Highly Skilled Migrant Programme and also proposes the review of the Seasonal Agricultural Workers' and Working Holidaymaker schemes with a view to their development and expansion.[4] These reviews were conducted by the Home Office in May 2002 and sought consultation on a number of issues relating to both schemes.[5] In particular, the review of the Working Holidaymaker Scheme considered *inter alia* the greater inclusion of all Commonwealth countries (as currently most workers come from Australia, Canada, New Zealand and South Africa), its extension to young workers from EU candidate countries, and lifting some of the employment restrictions relating to full-time work and the prohibitions on working in certain professions. However, the Nationality, Immigration and Asylum Bill, introduced into Parliament in April 2002, makes no reference to labour migration issues with the exception of the possibility of charging for work permits.[6]

3.3.3. Statistical data

Unfortunately, the total number of migrants in each category at any given time cannot be identified, since Work Permits (UK) does not verify whether those migrant workers permitted to enter the UK remain in the country for the duration of their permit. However, the available statistical data (see Table 3) indicates that the number of migrants admitted for employment in each category has risen steadily in the last four years and, in the main work permit category, over 104 000 new work permits were issued (work permits and first permissions) in 2001.[7]

Table 3: Migrants admitted to the UK for employment, 1998-2001

	Work Permits	**Agricultural Permits***	**Working Holiday Schemes**
1998	38 000	10 000	40 800
1999	42 000	10 000	45 800
2000	86 000	10 000	38 500
2001	104 000	15 200	

Sources: Work Permits (UK); Work Permits (UK), IND, Review of the Seasonal Agricultural Workers' Scheme (May 2002), Annex C; IND, *Working Holidaymaker Scheme: Consultation Document* (2002), Table 1.
* refers to annual quota.

1. White Paper (2002), pp. 119-120 (Annex D3) and Spencer (2002), p. 4.
2. Note of Work Permits (UK) User Panel Meeting, 17 July 2002.
3. Employment "incidental to a holiday" is defined as full-time work for more than twenty-five hours a week for fifty per cent or less of the stay, or part-time employment for more than fifty per cent of the stay provided that it is clear that the worker will take a holiday at some point.
4. White Paper (2002), pp. 42-43 and pp. 44-45.
5. See respectively Work Permits (UK), Immigration and Nationality Directorate (IND), *Review of the Seasonal Agricultural Workers' Scheme 2002* (May 2002) and IND, *Working Holidaymaker Scheme: Consultation Document* (2002).
6. Nationality, Immigration and Asylum Bill, 2001-2002, Clause 109.
7. See also White Paper (2002), *ibid.,* p. 39.

These categories are not determined by a quota system, with the exception of agricultural workers, where the quota increased from 15 200 in 2001 to 18 700 in 2002 and is set to rise again to 20 200 in 2003.

With regard to the principal work permit scheme concerning business and commercial applications, the statistics for the last two years indicate that the work permits approved in respect of those occupations for which suitably qualified workers are considered to be in very short supply nearly doubled to 47 654 in 2001 as compared with 24 485 in 2000 (see Table 4). There was also a sixty-seven per cent increase in approved Tier 2 applications.

Table 4: Work permit applications approved by type, 2000-2001

	Intra-company Transfer	**Inward Investment**	**Shortage Occupation**	**Tier 2**
2000	26 155	53	24 485	19 103
2001	27 369	40	47 654	28 572

3.3.4. Rights of migrant workers

a. Employment and residence rights

Duration of work permit and possibility of extension: the duration of the work permit in the main category of business and commercial work permits is a maximum of five years[1] unless the employer requests a shorter period or the company is new and does not have an established employment record. The employer can also apply for an extension of the work permit.[2] Different criteria are in place for the TWES work permit category. Training permits are issued for the average time expected to complete the training up to a period of five years, whereas work experience permits are normally issued for 12 months but can be extended up to a maximum of 24 months. Extensions will only be approved if Work Permits (UK) is satisfied that the person concerned can successfully complete the training or work experience and the period is justified.[3]

Right to change job, employer or employment sector: in the business and commercial work permit category, permits are issued for a specific job and employer. Consequently, a change of employment requires the new employer to apply for another work permit and to meet the resident labour test where this involves a change of occupation. If the migrant will be undertaking a similar job, this test is waived.[4] In the TWES work permit category, it is possible to change employer but only where the migrant is to continue a training or work experience programme that has already been approved.[5] It is also possible to switch from a training to a work experience programme.

As far as changing jobs between employment sectors is concerned, the Immigration Rules, strictly-speaking, preclude switching between one immigration status to another. Indeed, this approach is reflected in the rather restrictive guidance notes of Work Permits (UK) relating to the training and work experience work permit category, which provide that "[a] person who has held a TWES permit will not normally be eligible for another work permit until they have completed a period of time outside the UK", which is set at twelve or twenty-four months depending on the original period of validity of the TWES permit.[6] An exception is made for students, who may switch their immigration status to a TWES permit. In practice, however, it is possible for migrants to change their immigration status after arrival in the UK

1. Work Permits (UK) (Business and Commercial work permits) (2002), paragraph 41.
2. *Ibid.,* paragraphs 50-55. The duration of a multiple entry work permit is from a minimum of six months to a maximum of two years. Applications for extensions are not permitted. *Ibid.,* paragraphs 46, 48 and 51.
3. Work Permits (UK) (TWES work permits) (2002), paragraphs 24, 32 and 40.
4. Work Permits (UK) (Business and Commercial work permits) (2002), paragraphs 56-57. It is not possible to change employment under the multiple entry work permit arrangements. *Ibid.,* paragraph 59.
5. Work Permits (UK) (TWES work permits) (2002), paragraphs 46-47.
6. *Ibid.,* paragraph 15; Work Permits (UK) (Business and Commercial work permits) (2002), paragraph 9.

provided that they fully meet the criteria of the category to which they wish to change. For example, students are permitted to switch from student status to a business and commercial work permit unless their home government is sponsoring them. With regard to switching, the recent UK Government White Paper merely proposes a minor change with a view to formalising the above practice by amending the Immigration Rules in order to enable degree-level students to transfer into the work permit category where certain conditions are met, including the permission of any international sponsor.[1]

Migrant workers are not required to work in a particular job, with a particular employer, or in a particular employment sector for a specific length of time before they can change statuses, although applications to switch from a training to a work-experience programme must be made within three months of the start of the first TWES permit.

Possibility of acquiring a secure residence status or permanent residence independent of employment: migrants with a business and commercial work permit, with the exception of multiple-entry work permit holders, may acquire a secure residence and indeed permanent residence (indefinite leave to remain) after four years in continuously approved employment. Migrants holding a training and work-experience work permit do not qualify for such status and must leave the UK after the expiry of their permit.

b. Housing, health and social security rights

Housing: migrant workers are responsible for finding their own accommodation unless there is a contractual obligation on the employer to do so. Public housing is not available to migrants until they have obtained indefinite leave to remain (permanent residence). Although the Europe Agreements provide for non-discrimination in respect of working conditions, this principle is not implemented in relation to housing.

Health: the Immigration Rules do not prevent migrant workers from obtaining health care under the National Health Service (NHS). Although NHS rules stipulate that "overseas visitors" can be charged in certain circumstances, these rules are not applied in respect of persons who have either been in the UK for twelve months or had come to the UK with the intention of remaining permanently or for the purpose of employment. While General Practitioners are free to register any patient, the Department of Health guidelines recommend that they only take as private patients those who have been in the UK for less than six months.

Social Security: the Immigration Rules prevent migrant workers from accessing non-contributory or means-tested benefits (for example, income-based job seeker's allowance and income support, housing benefit and council tax benefit, family credit, child benefit, and disability allowances). Leave to remain would otherwise not be granted to those migrants who could only support themselves with recourse to public funds. The social security regulations also exclude applications for these benefits from "persons from abroad".

c. Family unity

Spouses, unmarried partners and children under the age of 18 can join the migrant worker. There is also a concession in the Immigration Rules by virtue of which parents and over-age children of intra-company transferees can join the worker provided that they formed part of the household overseas and are wholly or mainly dependent on the worker. While family reunion is not constrained by a waiting period, it is subject to a number of other conditions depending on the members of the family who are joining the worker. With regard to spouses, each of the parties must intend to live together during the worker's stay in the UK, there must be adequate accommodation and maintenance without recourse to public funds, and the spouse must not intend to remain in the UK beyond the duration of the worker's permission to stay. Spouses of migrant workers also acquire the right to work, which is not limited by

1. White Paper (2002), p. 44, paragraph 3.23. The government also states in the White Paper, *ibid.,* p. 45, paragraph 3.28, that it will be consulting on the question whether Working Holidaymakers should be able to change to work-permit employment.

employer or occupation. Unmarried partners are subject to the same conditions, although they will only be permitted to enter where there is an impediment to marriage and if they have lived together for two years or more prior to the application. As far as children are concerned, in addition to the requirements of adequate accommodation and maintenance, they must be unmarried and have not formed an independent family unit or lead an independent life. Moreover, both parents must be admitted, although it is possible under the Immigration Rules for children to accompany one parent in certain circumstances.

d. Access to vocational training and language and integration courses

Vocational training: this question is not addressed specifically in the Immigration Rules or instructions. However, if the training were of a type that would normally require a TWES permit or permission to stay in the UK as a student, the status of the worker would then probably need to be changed.

Language and integration courses: there is currently no specific provision for migrant workers, although courses in English for speakers of other languages (ESOL) are available free of charge to those who have been granted indefinite leave to remain or who have been settled in the UK for three years, such as refugees, asylum-seekers receiving support and persons with exceptional leave to remain and their spouses and children, and whose command of English is non-existent or poor. In its February 2002 White Paper, the government also stated that it would review the eligibility criteria for such courses in order to remedy discrepancies, in particular the inability of spouses joining their partners to access these courses free of charge and the inconsistencies in provision in different parts of the country.[1] The White Paper also proposed requiring applicants for naturalisation to demonstrate that they have acquired a certain standard in English as well as an understanding of British society.[2]

e. Protection against unemployment and expulsion

The fact that migrant workers are no longer in employment means that their limited leave to stay is at risk of being curtailed, though this risk is more theoretical than practical. While they may be able to claim unemployment benefits where these depend on contributions paid through the national insurance scheme, the unemployment benefit rules require a person to be "available for work" and migrant workers who are no longer in employment and are seeking work elsewhere, which would also necessitate an application for a work permit by the prospective employer, are classified as not available for work under the rules.

The possibility of expulsion is not a real threat in the majority of cases. Once it has come to the attention of the authorities that the migrant is no longer in employment, leave can be curtailed, although this is unlikely to occur if the worker has been out of work for three months or less. No action is normally taken until the migrant's limited leave is about to expire. They are then excluded unless they are able to switch to another immigration status or obtain compassionate leave to remain. In practice, greater control is exercised by refusing to readmit those migrants who have held a work permit and who have left their employment. They will not in principle be admitted as work permit holders, although they may still be able to satisfy the immigration officer that they should be admitted as visitors for a short period.

f. Trade union rights and consultation

Migrant workers are not precluded from joining trade unions or from establishing their own unions, although there is no evidence of them having formed their own associations specifically to protect employment rights. While there is no statutory duty to consult with associations or organisations of migrant workers, consultation does take place informally and with a number of NGOs, such as the Immigration Law Practitioners' Association (ILPA), the Joint Council for the Welfare of Immigrants (JCWI), and employers' organisations, such as the Confederation of Business and Industry (CBI).

1. *Ibid.,* p. 33, paragraphs 2.15-2.16.
2. *Ibid.,* p. 33, paragraph 2.14.

3.3.5. Bilateral or multilateral agreements

Since 1995, the UK Government has not entered into any agreements relating to migration for employment, with the exception of Community Agreements with third countries, which are considered below.

3.3.6. Political and public debate

With the election of the Labour Government in June 1997, there has been a shift in the UK's labour migration policy, recognising that migration will increasingly constitute a central feature of the global economy and that it may bring considerable economic benefits to the UK economy if managed properly. This shift in policy is partly a response to the demands of employers for skilled workers due to labour shortages caused by excess demand for particular skills in specific areas of the private sector, such as managerial positions, but also by non-competitive salary levels and conditions in particular areas of the public sector, such as health and education.[1] Indeed, as noted in section 3.3.3 on statistical data, the shift in policy has clearly led to an increase in labour migration to the UK. Recent political and public debate in this area has focused on how to open up migration for employment to meet actual and anticipated labour market needs, but less on the conditions of migrant workers once they are in employment. The publication in February 2002 of the UK Government's White Paper, which includes a chapter entitled "Working in the UK", contains further proposals for change (some of which have been described above), and has generated intense debate because of the very short consultation period provided. In general, the reaction of organisations working with and for migrants to the proposals in the White Paper chapter on employment has been one of disappointment. For example, the Joint Council for the Welfare of Immigrants (JCWI), an independent national voluntary organisation providing free legal advice for persons affected by immigration, nationality and refugee laws, views the proposed measures as inadequate largely on the basis that the admission of migrant workers for the purpose of unskilled employment remains restricted to short-term, casual and seasonal work and that the proposals do little to extend positive rights to such workers.[2]

3.3.7. Relevance of Council of Europe conventions and European Community agreements

Council of Europe conventions and European Community agreements have had limited impact overall on the rules and practices relating to migrants admitted into the UK for employment. The principles of ECHR case-law under Articles 3 and 8 have found their way into the Instructions of the Immigration and Nationality Directorate (IDIs), but these relate to humanitarian cases and there is no specific guidance concerning migrant workers. However, it is by no means inconceivable that migrant workers might benefit from these provisions, particularly as the ECHR has now been given effect in UK law by the Human Rights Act 1998, which entered into force on 2 October 2000. The European Social Charter appears to have had significantly less relevance in practice. While lawyers have occasionally sought to plead Charter provisions before tribunals, particularly in respect of the age of children for family reunion, it would appear that tribunals have not relied on such provisions directly or referred to them. The European Convention on Establishment has had more of a direct effect in that the IDIs state that the long residence concessions granting indefinite leave to remain to those persons who have resided lawfully in the UK for ten years as well as to those who have resided both lawfully and unlawfully for fourteen years is based on provisions in that Convention. The rights afforded Turkish workers by Decision 1/80, as adopted by the EC-Turkey Association Council under the Association Agreement with Turkey, are now referred to in the IDIs, although these rights have not been inserted in the Immigration Rules. The Europe Agreements have been implemented in national legislation since 1996.

1. Cf. Spencer (2002), p. 1.
2. The response of the JCWI to the White Paper is available from www.jcwi.org.uk

3.3.8. Relevance of GATS rules

The policy implications of the GATS rules are unclear. Work Permits (UK) has introduced a special scheme enabling work permits to be granted to persons coming to fulfil contracts in the UK for three months or less,[1] although the overly bureaucratic nature of the procedure has resulted in few applications being submitted under this scheme. In practice, immigration lawyers prefer to exercise alternative options, which they believe are more favourable to their clients.

1. Work Permits (UK) (GATS) (2002).

4. Law and practice in seven other countries of the Council of Europe

4.1. Austria

4.1.1. Principal rules regarding migration for employment

The principal rules are laid down in the Foreigners Act (*Fremdengesetz*) 1997,[1] the Foreign Labour Act (*Ausländerbeschäftigungsgesetz*) 1975[2] and in the regulations and ministerial decisions adopted under these laws.[3] On 9 July 2002, the Austrian Parliament passed some significant amendments to these rules in the form of a new Foreigners Act, which will enter into force on 1 January 2003.[4]

4.1.2. Categories of migrant workers

Migrant workers admitted to Austria can essentially be divided into two categories. The first encompasses managers (*Führungskräfte*), in connection with the transfer of investment capital, and specialists (*Spezialkräfte*) possessing particular capabilities and education, which are in the general economic interest.[5] This category applies to a broad range of people, for example, senior managers, top sportspersons and trainers, qualified persons in the financial and credit sectors and skilled workers in the healthcare field, such as care of the elderly. The second category relates to self-employed and wage-earning migrants. This category is not defined or limited and therefore applies to all sectors of employment.[6]

Only migrants with an "all-purpose" permanent residence status *(jeglicher Aufenthaltszweck)*[7] can work in Austria as salaried or self-employed workers.[8] To achieve this, the criteria in the Foreign Labour Act must be fulfilled. There are essentially three types of work permit. Employers may only hire migrants once they have obtained an employment licence (*Beschäftigungsbewilligung*) for them or when migrants possess their own work permit (*Arbeitserlaubnis*)[9] or exemption card (*Befreiungsschein*).[10] The issue of an employment licence is subject to the following criteria:[11] fulfilment of a labour market test to ensure that the actual situation of the labour market and the public and economic interests warrant the employment of the person concerned;[12] observance of the wage and labour regulations and the rules on

1. *Bundesgesetz über die Einreise, den Aufenthalt und die Niederlassung von Fremden,* BGBl. I 1997/75 idF BGBl. 1998/86, BGBl. I 1998/158, BGBl. I 2000/34, BGBl. I 2000/66, BGBl. I 2001/98, BGBl. I 2001/134, BGBl. I 2001/135.
2. *Bundesgesetz mit dem die Ausländerbeschäftigung geregelt wird* (20 March 1975), BGBl. 1975/218 idF BGBl. 1988/231, 1988/253, 1990/450, 1991/36, 1991/684, 1992/475, 1993/19, 1993/463, 1993/501, 1993/502, 1994/314, 1994/405, 1995/257, 1995/895, 1996/201, 1996/776, I 1997/78, I 1999/120, I 1999/199, I 2001/115.
3. See the following measures in particular: *Fremdengesetz-Durchführungsverordnung* 1997, *Bundeshöchstzahlenüberziehungs-Verordnung* (BHZÜV), *Ausländerbeschäftigungsverordnung.*
4. See also "Austria: New Aliens Bill Receives Parliamentary Approval", *Migration News Sheet* No. 233 (August 2002), p. 3.
5. Foreign Labour Act, Article 4(6) Z.3b and *Bundeshöchstzahlenüberziehungs-Verordnung,* paragraph 1 Z.3.
6. Foreigners Act, Article 18(1) Z.2.
7. This is the immigration status of the most comprehensive nature encompassing the right to pursue all kinds of activities.
8. Family members who join the migrant worker must wait four years before they may accept work, although this waiting period can be reduced if the family member was issued with an employment license previously. Foreigners Act, Articles 21(4) and 23(3).
9. Once migrants have been employed for fifty-two weeks in the previous fourteen months, they have a right to a work permit. Foreign Labour Act, Article 14a. Employment as an artist, seasonal worker or frontier worker is excluded for this purpose. The work permit is issued for two years and for the region (*Bundesland*) where they have been employed and enables migrants to accept work in all branches of employment.
10. Migrants can apply for an exemption card once they have been lawfully employed for a minimum of five years in the last eight years. The exemption card is issued for five years and is applicable to the whole Austrian territory.
11. Foreign Labour Act, Article 4.
12. The labour market test for the issue of an employment license is met only if the job in question cannot be filled by one of the following: Austrians or refugees; young migrants who finished their schooling in Austria and have lived there lawfully for a minimum of three years in the last five years; migrants who have resided in Austria for the previous eight years; migrants who have worked lawfully in Austria for three years and who are eligible for employment; asylum-seekers in conformity with Article 19 of the 1997 Asylum Law (*Asylgesetzes*). Foreign Labour Act, Article 4b.1.

social security; possession of a residence permit which includes the purpose of employment ("all purpose" residence permit; see above) or where this purpose can be extended after an employment license has been issued (this applies only to family members; see below); and in accordance with the national quota or the regional quota (as set by the different *Länder*).

The national quota (*Bundeshöchstzahl*) provides that the total amount of employed and unemployed migrants should not exceed eight per cent of the Austrian employment potential or capacity (*Arbeitskräftepotential*), in other words, the total amount of employed and unemployed nationals and migrants.[1] This quota is announced by the Minister for Economic and Labour Affairs each year and is dependent on the numbers in the preceding year. An employment licence can only be issued over and above existing quotas (both national and regional) in certain circumstances, for example, if the employment is deemed necessary on very specific grounds (for example, in the health or welfare sectors) to further general economic interests, or if it relates to seasonal work (*Saisonarbeitskräfte*). For the issuing of employment licences for special groups of persons, where the employment is in the public or general economic interest, this quota can be raised to nine per cent.

In addition to the quota for the employment of migrants, there is also a quota in respect of residence policy.[2] Austria, therefore, operates a "double quota system". The latter quota is applied in respect of managers and specialists (*Führungs-* and *Spezialkräfte*), both self-employed and salaried workers, including their family members, as well as all other categories of self-employed and salaried workers and their family members. The quota is set in accordance with the situation and development of the labour market and is adjusted annually by the Austrian Government after taking into account the advice of a national economy research institute (*Österreichisches Wirtschaftsforschungsinstitut* (WIFO)). If, during the period of validity of the ministerial regulation establishing the quota, the number of available workers will clearly exceed the number of workers needed, the Foreigners Act provides that, on issuing the regulation establishing the new quota, only managers and specialists and their accompanying family members should be taken into consideration.[3]

The law does not distinguish between different employment sectors. As noted above, distinctions between migrant worker categories are only made on their first admission, and have no influence on the issuing of work permits or exemption cards. However, the rules in relation to employment licences are applicable and distinctions between categories become relevant once more if migrants have been unemployed for a lengthy period of time and have lost their privileged status. Further distinctions are also made between employment sectors within the quota for seasonal workers. There is an annual maximum number for the employment of seasonal workers set within the general residence decree (*Niederlassungsverordnung*). The Minister for Economic and Labour Affairs may then issue further regulations for the sectors that need seasonal workers, such as agriculture, forestry, and tourism (both winter and summer). The admission of workers in the IT sector was also being facilitated in the summer of 2000.

The new Foreigners Bill passed in July 2002 will restrict labour immigration to the admission of highly skilled workers. The two different terms for highly skilled workers (*Schlüsselkräfte* in the Foreign Labour Act; *Führungs-* and *Spezialkräfte* in the Residence Act) will be harmonised: in the future only the term "*Schlüsselkräfte*" will be used in both laws and consequently these workers will be clearly defined for the first time in a uniform way. According to the new law, "*Schlüsselkräfte*" are labour migrants who have special training and/or qualifications, professional knowledge and skills and who earn at least €1 962 per month and meet one of the following requirements: the intended employment serves economic interests that go beyond those of the business wishing to employ the person in question; the intended employment contributes to the creation of new jobs or the securing of existing jobs; the migrant worker holds a key position with regard to the management of the business/enterprise; the intended employment includes a transfer of investment capital to Austria; the labour migrant holds an academic degree or the degree of a "*Fachhochschule*".

1. Foreign Labour Act, Article 12a.
2. Foreigners Act, Article 18. The quota approved for 2002 was 8 280 residence permits. See "Austria: Immigration Quota of 8 280 residence permits is approved", *Migration News Sheet* No. 226 (January 2002), p.3.
3. *Ibid.,* Article 18(6).

Seasonal labour is to be increased considerably and to be applied to branches of the economy that are not normally associated with this form of labour.[1] The concept of frontier workers (*Pendlerbeschäftigung*) is extended (the definition will be changed from daily to weekly commuting). The revised law will enable the government to conclude bilateral agreements with neighbouring countries defining the numbers of both frontier workers as well as *Schlüsselkräfte* outside the maximum numbers set by the annual residence quotas. For *Schlüsselkräfte*, there will also be a new special procedure, which combines the procedures with the residence and labour market authority. The *Schlüsselkraft* will also be issued a new type of permit that encompasses both the right to stay as well as the right to work for a specific employer for one year.

4.1.3. Statistical data

The statistical data available (Table 5) show that in 2000 there were over 240 000 migrant workers whose right to work was dependent on a type of work permit (*Beschäftigungsbewilligung*, *Arbeitserlaubnis* or *Befreiungsschein*), and further, that there has been a steady rise in first applications for employment licences since 1998.

Table 5: Applications for employment licences, 1998-2000. Total number of employment licences, 2000

	1998	**1999**	**2000**
First applications for employment licences*	15 410	18 308	28 000
Total number of employment licences			Approximately 242 000

* including frontier and seasonal workers.
Sources: WIFO, *Zur Niederlassung von Ausländern in Österreich, Endbericht,* August 2001, p. 10 and WIFO, 2001, p. 8.

However, the number of migrants in salaried or wage-earning employment as well as self-employed migrants fell significantly between July 1998 and July 2001. In contrast, there was a steady increase in the number of migrants with an all-purpose permanent residence status *(Jeglicher Aufenthaltszweck)* (Table 6). These decreases can be explained by the changes in residence authorisations from the old system under the former Residence Act *(Aufenthaltsgesetz)* 1992 to the new system under the Foreigners Act 1997 rather than in terms of having any significance on the overall size of the foreign labour force. While previously persons authorised to work held a permit in the first two categories, these were later – after the change to the new system – called migrants with an all-purpose permanent residence status. With time, persons authorised to work according to their residence status (in practice, not all such persons actually work) replaced their old permits with the new type of permit. Consequently, the number of migrants holding a permanent residence permit that enables them to work has actually increased overall.

Table 6: Employed and self-employed migrant workers and migrants with an all-purpose permanent residence status (Jeglicher Aufenthaltszweck), July 1998-July 2001

	1 July 1998	**1 July 1999**	**1 July 2000**	**1 July 2001**
Migrants in salaried employment*	161 201	99 398	76 116	37 335
Self-employed migrants*	4 531	1 679	1 044	489
Migrants with an all-purpose permanent residence status**	55 596	143 329	187 229	207 914

* According to the former Residence Act 1992.
** According to the new Foreigners Act 1997.
Sources: Information System on Foreigners of the Interior Ministry (FIS, *Fremdeninformationssystem des Innenministeriums*); WIFO, 2001, p. 45.

1. Under the new law, employers in all sectors will be able to hire seasonal workers, who will be issued with temporary work permits valid for six months. These permits will be renewable only once and migrant workers will only be able to reapply two months after their previous employment. See "Austria: New Aliens Bill Receives Parliamentary Approval", *Migration News Sheet* No. 233 (August 2002), p. 3.

4.1.4. Rights of migrant workers

a. Employment and residence rights

Duration of work permit and possibility of extension: the periods of validity for the three types of work permit are as follows: one year for an employment licence (*Beschäftigungsbewilligung*), two years for a work permit (*Arbeitserlaubnis*) and five years for an exemption card (*Befreiungsschein*). Migrants are only entitled to an exemption card after five years of lawful work-permit employment (in other words, one year with an employment licence and two times two years with a work permit). The duration of licences for trainees or apprentices is normally three years. An employment licence can only be extended on the application of an employer and the other two work permits can only be extended provided migrants fulfil certain conditions. The work permit can be extended if migrants have worked lawfully for fifty-two weeks in the previous fourteen months or for eighteen months during the two-year period of the work permit and the exemption card can be extended if migrant workers demonstrate that they have completed two and half years of employment within the requisite five-year validity period of the permit.

Right to change job, employer or employment sector: the employment licence is restricted to the employer to whom it is issued. Migrant workers can gain independence from their employer by applying, after one year of lawful employment, for a work permit, which is not restricted to the actual workplace but permits migrants to take up any employment in the region (*Bundesland*) for which it is issued (for example, Vienna). The exemption card entitles the migrant worker to work anywhere in Austria.

Possibility of acquiring a secure residence status or permanent residence independent of employment: after having resided lawfully for five years in Austria without interruption, migrant workers can no longer be expelled on the grounds of insufficient financial means when it is clear that they have attempted to secure such means through their labour and that such efforts are not proving fruitless.[1] After five years of lawful residence, migrant workers have a right to an unrestricted establishment permit (*unbefristete Niederlassungsbewilligung*), when they are in possession of an adequate and regular income from lawful employment and the authorities might expect that there will be no grounds to refuse a visa (*Sichtvermerksversagungsgrund*) in the near future. However, seasonal, rotational, and frontier workers are excluded from permanent residence. According to the new law, after five years of legal residence and employment (salaried employment or self-employment), migrants will be able to apply for a long-term residence permit (*Niederlassungsnachweis* – NN), which also requires the fulfilment of the "integration-contract" (see below). The long-term residence permit also affords a right of free access to the labour market without the need to obtain a separate work permit.

b. Housing, health and social security rights

Housing: migrant workers are responsible for their own housing. Access to public or municipal housing depends on the regulations of the different regions (*Bundesländer*), which also differ from city to city. Eight out of the nine capitals of the *Bundesländer* exclude non-EU migrants from municipal accommodation while Salzburg operates a quota system by virtue of which migrants have access to approximately ten per cent of the available municipal housing. Until recently, non-EU migrants were excluded from two important sections of the housing market in Vienna. Municipal and subsidised accommodation was only available to EU nationals and refugees, but from the beginning of 2000, so-called "emergency housing' also became available to other migrants who have resided lawfully in Austria for eight years (subsequently five years) and who have fulfilled a number of conditions. However, the housing situation of migrants has not changed much in practice, because emergency housing is in short supply. Subsidised accommodation is also now available to non-EU migrants in Vienna. Before 1990, this accommodation was in practice restricted to those migrants holding a permanent residence permit.

1. Foreigners Act, Articles 35 and 38. These provisions, however, are worded so vaguely that they will have little meaning in practice in a situation where the granting of an employment licence is not deemed possible.

Health: migrant workers are treated in the same way as Austrian and EU nationals. There are no exclusions.

Social security: third-country migrants receive a degree of different treatment compared to Austrian and EU nationals in respect of certain social security benefits. With regard to family benefit, access to equal treatment is first conditional on completion of a period of residence of five years, whereas the provision of transport benefit for students and trainees is dependent on the receipt of family benefit. Similarly, payments for child support are tied to the receipt of family benefit and are also subject to the completion of specified periods of employment before the birth of the child. Furthermore, infant support and the mother-child bonus (*Mutter-Kind-Paß Bonus*) can only be obtained after three years of residence before the birth of the child or before the child's first birthday, respectively.

c. Family unity

Family reunion is possible, but different conditions and age limits for reunion with children are applicable depending on when the migrant worker came to Austria. With regard to the family members of managers and specialists, or other employed migrants resident in Austria after 1 January 1998, the spouse and unmarried children under 18 can join the migrant worker up to one year after the first admission, but only if the migrant mentioned the children in his/her application.[1] If they were not mentioned in the application or the reunion occurred more than one year after the first admission, the position is covered by the quota applicable to the family members of those third-country migrants resident in Austria before 1 January 1998 in respect of spouses and children under 15 years of age.[2] However, this quota is insufficient to meet the number of actual applications submitted. Since 1998, there is a waiting list of 11 000 applications and the waiting period is between two and three years. Family reunion is also dependent on the possession of sufficient resources and suitable accommodation and the absence of grounds justifying the refusal of a visa, such as a criminal record.

d. Access to vocational training and language and integration courses

Vocational training: in theory, migrant workers can access vocational training courses and a number of funding opportunities exist, both from the state and employers. In practice, however, the period of vocational training is not recognised as a period of employment necessary for an extension of migrants' entitlement to work (employment licence or other work permits) under the Foreigners Act.

Language and integration courses: language courses are offered, especially in Vienna, although these are not limited to migrant workers. The new law includes a so-called "integration agreement" (*Integrationsvereinbarung*), which will subject migrants immigrating to Austria for the first time and those who have been living in the country for less than five years (since 1 January 1998) to obligatory German language and integration courses;[3] these have to be started and passed within a certain period of time with a system of differentiated sanctions for non-observance, which may, in the worst case scenario, result in the residence permit not being renewed. No specific courses, however, have been organised for particular categories of migrant workers.

e. Protection against unemployment and expulsion

Migrant workers enjoy the same right to unemployment benefits as Austrian or EU nationals in that they are entitled to these benefits after twelve months of employment. With regard to unemployment insurance, however, third-country migrants are subject to different treatment in relation to emergency benefit during their first eight years of residence. While Austrian and EU nationals have an unlimited right (in time) to this benefit, third-country nationals can only access it for six months, because after

1. Foreigners Act, Articles 18(1) Z.1 and (2), 20 and 21(1-2).
2. *Ibid.,* Articles 18(1) Z.3, 20 and 21(3).
3. The following groups of migrants are exempt from the "integration agreement": EEA nationals; those who can prove that they already possess a certain level of German language skills; high-ranking managers and other professionals who do not intend to stay in Austria longer than two years. See "Austria: New Aliens Bill Receives Parliamentary Approval", *Migration News Sheet* No. 233 (2002), p. 3.

this period the grounds for expulsion under the Foreigners Act become applicable.[1] For those migrants who have a right to employment (in other words, they are in possession of a work permit or exemption card) and who are receiving unemployment insurance, the following rules are applicable. Migrant workers lawfully resident for more than one year but less than eight years can be expelled if they have been unemployed for almost one year without interruption. Sick leave is recognised as an employment period, but not periods spent in education.[2] After eight years of uninterrupted lawful residence, migrants can no longer be expelled on the grounds of insufficient income; their residence permit has to be renewed, irrespective of whether they are in employment and regardless of the level of their income.

f. Trade union rights and consultation

Migrant workers have the right to join trade unions and to form their own unions in accordance with Article 11 of the ECHR. In practice, however, there are no associations consisting solely of migrant workers. Moreover, there are two kinds of unions in Austria: voluntary organisations representing the interests of workers (*Gewerkschaften*) and "work councils" (*Arbeiterkammer*), which are statutory organisations with compulsory membership. In practice, only the latter hold real social power because they participate in the negotiations between the social partners (government, employers and workers). Third-country migrants are excluded from the right to vote and to hold office in the work councils, which are only open to Austrian and EU/EEA nationals. However, as noted in section 4.1.6 below, the legality of this exclusion has been challenged and the matter is now also pending before the European Court of Justice. Therefore, while migrant workers can in theory form their own trade unions, this right has more symbolic than practical value for the interests of employed third-country migrants.

4.1.5. Bilateral or multilateral agreements

Austria has entered into agreements on frontier workers with Hungary[3] and, more recently, with the Czech Republic. A similar agreement with the Slovak Republic is also in preparation.

4.1.6. Political and public debate

In the past three years, debate has ensued on a number of different issues relating to the legal and social situation of migrant workers from third countries, particularly as regards their exclusion from the right to vote and stand for office in work councils. Public discussion has also focused on migrant workers from Turkey, Algeria and Morocco on account of the EU-Association Agreements, which provide for equality of treatment in respect of employment conditions and social security and which are equally applicable to this question. However, the former Minister of Labour and Social Affairs refused to withdraw the exclusion of a Turkish list in the 1999 elections to the work council and this matter is now pending before the Constitutional Court, which forwarded a question for a preliminary ruling to the European Court of Justice on 2 March 2001.[4] Another issue concerns discrimination in the field of social security, especially with regard to emergency support, which has been the subject of discussion after the judgment of the European Court of Human Rights in Gaygusuz v. Austria (see section 2.1 above and section 4.1.7 below).

1. Foreigners Act, Article 34(3) Z.2.
2. *Ibid.,* Article 34(3).
3. Agreement between Austria and Hungary on the Employment of Frontier Workers (*Abkommen zwischen Österreich und Ungarn über die Beschäftigung in Grenzzonen*), BGBL. III 1998/26.
4. See the pending reference in Case C-171/01, Zajedno/Birlikte, OJ 2001 C 173/30, on whether Article 10(1) of Decision 1/80 providing for equal treatment between Turkish workers and EU-national workers in respect of remuneration and other conditions of work precludes national measures excluding Turkish workers from eligibility to the general assembly of the work councils (*Arbeiterkammer*) and, if so, whether Article 10(1) is a directly applicable Community law. In this regard, it is also noteworthy that in April 2002, the Human Rights Committee, which monitors the implementation of the 1966 International Covenant of Civil and Political Rights, concluded that the exclusion of a Turkish migrant worker from eligibility to stand for election to the work council, constituted unjustified discrimination on the basis of citizenship under Article 26 of the Covenant. See Human Rights Committee, 74th Session (18 March-5 April 2002), Communication No. 965/2000, Karakurt v. Austria, UN Doc. CCPR/C/74/D/965/2000 (29 April 2002).

Since 1997, there has also been a debate concerning the need to harmonise legal residence with legal employment to ensure that third-country nationals who reside lawfully in Austria are also permitted to work lawfully in the country. The government announced research on this question and commissioned a study from the WIFO, which was made public in the spring of 2002. In early March 2002, the government put forward a comprehensive proposal for reform of the Residence and Foreign Labour Acts, which resulted in the new legislation on foreigners passed by the Austrian Parliament in July 2002 and set to enter into force on 1 January 2003. The reform includes the introduction of the "integration agreement" (see above), by virtue of which migrant workers immigrating to Austria for the first time and those already resident in Austria for less than five years will be required to complete integration and language courses. The proposed sanctions for non-observance include a fifty per cent reduction in state support for the cost of the courses, the imposition of fines or the non-renewal of a residence permit. In addition to these two groups of migrants, those applying for the new permanent residence status (*Niederlassungsnachweis – langfristige Aufenthaltsberechtigung – EG*), which will replace the current unrestricted residence permit, will also be affected by the new provisions. Proof of the observance of the integration agreement, therefore, will be required in order to obtain the long-term residence permit as well as fulfilment of the other conditions, which were necessary to acquire the former unrestricted residence permit. Once this new residence permit is issued, it will for the first time encompass the right to work. A separate work permit, therefore, will no longer be needed, which is a considerable improvement on the current double permit system.

4.1.7. Relevance of Council of Europe conventions and European Community agreements

The principal instruments that have influenced the treatment of migrant workers in Austrian law and practice are the ECHR and European Community agreements with third countries. The former has affected in a positive manner the question of access to emergency support as reflected in the Gaygusuz v. Austria judgment (see section 2.1 above), where the European Court of Human Rights found that the exclusion of non-Austrian nationals from this benefit constituted unjustifiable discrimination on the grounds of nationality. The EEC-Turkey Association Agreement has had a significant impact in respect of the employment of family members, equal treatment in social security and the right to vote and stand for office in the work councils (see section 4.1.6 above); the Maghreb agreements have influenced the question of equal treatment in the field of social security as well as the above voting right; and the Europe Agreements have affected the residence rights of self-employed workers. However, the European Convention on Establishment, the European Social Charter and the European Convention on the Legal Status of Migrant Workers[1] have had no impact on the development of national law and practice.

4.1.8. Relevance of GATS rules

As of May 1998, Austria has attached a reservation to the GATS agreement confirming that all foreigners are subject to the provisions of the domestic legislation concerning entry, residence and employment, although a number of exceptions are applied in respect of certain investors.[2] In addition, non-EU migrants holding a right of residence based on an agreement with another state, a formal law or a directly applicable EU measure, but who are not exempt from a visa obligation, have a right of entry or

1. Austria has not ratified or signed this convention because the official position is that national law makes adequate provision for the legal status of migrant workers. See Guild (1999), p. 28.
2. The full text of the reservation reads: "Notwithstanding the obligations and specific commitments undertaken under the GATS, all foreigners are subject to the provisions of the Foreigners Act and the Residence Act concerning entry, stay and work. In addition, foreign workers, including key personnel and investors and their spouses, except for EEA nationals, are subject to the provisions of the Foreign Labour Act, including the labour market test and the quota system. If an investor commits an investment, which has a positive effect on the entire Austrian economy or a whole sector of the Austrian economy, the labour market test can be waived for him and for individual cases of essential key personnel. Investors who furnish proof that they hold at least twenty-five per cent in a partnership (*Personengesellschaft*) or a public limited company (*Gesellschaft mit beschränkter Haftung*) and that they exert a decisive influence on that company are exempted from the Foreign Labour Act. The Reservation secures an orderly labour market and employment policy and shall prevent the disproportionate extension of GATS commitments and obligations". See http://www.bmwa.gv.at

residence. This question is regulated in Article 30(2) of the Foreigners Act and in drafting this provision reference was made to the GATS Agreement.

4.2. France

4.2.1. Principal rules regarding migration for employment

The principal rules are found in the Order of 1945 relating to the conditions of the entry and stay of foreigners in France (*Ordonnance relative aux conditions d'entrée et de séjour des étrangers en France*) as amended (hereinafter referred to as the 1945 Order)[1] and the Law of 17 July 1984 relating to individual rights of residence and work (*Loi relative au titres uniques de séjour et de travail*).[2] The Labour Code (*Code du Travail*) also contains a number of pertinent legislative and regulatory provisions relating to migrant labour. In addition, there is an array of relevant secondary legislation (decrees – *décrets* and decisions – *arrêtés*)[3] and circulars, which contain instructions from the ministries to local authorities[4] as well as bilateral agreements between France and third countries, such as the 1968 Franco-Algerian agreement (as amended in July 2001),[5] discussed in section 4.2.5 below.

4.2.2. Categories of migrant workers

France closed its doors to labour migration in 1974 and it would be more appropriate therefore to speak of foreigners coming to France to exercise a wage-earning or salaried activity rather than migrants admitted for employment. Despite this restrictive immigration context, however, there are a number of possibilities in which foreigners can be admitted to employment, and in essence there are three principal categories of migrant workers. The same rules also apply to foreign employees of multinational companies.

The first category relates to those holding a temporary residence permit, which refers to wage-earning or salaried employment (*carte de séjour temporaire "salarié" – CST*) and grants the holder access to the labour market.[6] This permit may be granted to foreigners who find themselves in an irregular situation on French territory for humanitarian reasons or in the context of a regularisation programme, which occurred in 1997. There are also foreigners who may obtain a temporary residence permit on the grounds of family ties, length of stay, or health (*carte de séjour temporaire "vie privée et familiale"*). This permit is valid for a period of one year, is renewable and grants automatic access to the labour market. The groups of migrants eligible for this permit are listed in the 1945 Order and include, *inter alia,* the

1. Order No. 45-2658 of 2 November 1945. The Order was amended most recently by Law No. 98-349 of 11 May 1998 on the entry and residence of foreigners in France and the right of asylum (*Loi relative à l'entrée et au séjour des étrangers en France et au droit d'asile*), Official Journal (*Journal officiel* - JO) of 12 May 1998.
2. Law No. 84-622 (JO of 12 January 1985), as implemented by Circular No. 84-24 of 21 December 1984.
3. See in particular Decree No. 46-1574 of 30 June 1946 regulating the conditions of entry and residence of foreigners in France (*Décret réglementant les conditions d'entrée et de séjour des étrangers en France*) as amended; Decree No. 84-795 of 24 August 1984 applying Article 6 of Law 89-622 amending Order No. 45-2658 and the Labour Code and relating to foreigners residing in France and to individual rights of residence and work (*Décret portant application de l'article 6 de la loi n° 84-622 portant modification de l'ordonnance n° 45-2658 et du code de travail et relative aux étrangers séjournant en France et aux titres uniques de séjour et de travail*) (JO of 25 August 1984); Decree No. 94-885 of 14 October 1994 and Decree of 14 December 1984 establishing the categories of foreigners pursuant to Article R-341-4 of the Labour Code in respect of which the employment situation is not pertinent at the time of the work permit application (*Arrêté fixant les catégories d'étrangers visés à l'article R-341-4 du Code du Travail auxquels la situation de l'emploi n'est pas opposable lors d'une demande d'autorisation de travail*) as amended (JO of 22 December 1984).
4. See in particular Circular No. 84-24 of 21 December 1984 relating to the implementation of Law No. 84-622 relating to individual rights of residence and work (above) (*Circulaire relative à la mise en oeuvre de la loi n° 84-622 relative aux titres uniques de séjour et de travail*), JO of 12 January 1985; Circular DPM/DM 2-3 No. 96-256 of 15 April 1996 on the system regulating foreign executives of companies (*Circulaire sur le régime des cadres de direction étrangers d'entreprises*), BO MTAS-MATVI No. 96/18 of 15 June 1996; Circular DPM/DM2-3 No. 98/767 of 28 December 1998 relating to the issue of work and residence permits to foreign computer scientists (*Circulaire relative à la délivrance d'autorisations de travail et au séjour des ingénieurs informaticiens étrangers*).
5. Franco-Algerian Agreement of 27 December 1968 relating to the movement, employment and residence of Algerian nationals and their families (*Accord franco-algérien relatif à la circulation, à l'emploi et au séjour des ressortissants algériens et de leurs familles*).
6. 1945 Order, Article 12(5).

foreign spouse and minor children of the lawfully resident migrant who are beneficiaries of family reunion; migrants who can demonstrate that they have resided habitually in France since the age of 10, for more than ten years or for more than fifteen years if they held a temporary residence permit for study purposes (*carte de séjour temporaire "étudiant"*) during this period; and migrants married to a French national, provided certain conditions are satisfied, or to a foreign national holding a temporary residence permit for the purpose of exercising a scientific occupation (*carte de séjour temporaire "scientifique"* – see below).[1] Moreover, migrants unable to leave France for health or family related reasons and not covered by the rules on family reunion are also able to benefit from this status.[2]

The second category concerns those migrants holding a secure or long-term residence permit (*carte de résident*), which is valid for ten years with a right of renewal and also grants full access to the labour market. This permit is issued to specific groups of migrants in a regular situation on the basis of their family and personal ties as well as their length of residence in France and includes, *inter alia,* the following persons:[3] beneficiaries of family reunion, where the applicant also possesses a secure or long-term residence permit; the dependent foreign child (under 21 years of age) of a French national and dependent relatives in the ascending line of both the French national and his or her spouse; the spouse of a French national; the foreign parent of a minor who is a French national; and those in possession of a temporary residence permit for ten years (unless they have been students during this period). Foreigners holding a temporary residence permit, granted for personal and family reasons, who fall into one of the above groups or who can show that they have held this permit for five years, will also qualify for a secure or long-term residence permit.

The third category relates to those migrant workers unable to satisfy the conditions for obtaining a temporary residence permit for wage-earning employment but who can obtain a temporary authorisation to work with a particular employer and for a limited period (*Autorisation Provisoire de Travail – APT*).[4] Such workers receive a temporary residence permit labelled "temporary worker" (*carte de séjour "travailleur temporaire"*).

In addition to these principal categories, there are also other specific groups of migrants, who may access the French labour market, albeit in a limited manner. These include: foreign scientists and persons exercising an artistic or cultural profession, who can be issued a temporary residence permit for the particular activity (*carte de séjour temporaire 'scientifique'* or *'profession artistique et culturelle'*); foreign students, who may work part-time provided that they first obtain a temporary authorisation to work from the competent authority (and which will only be granted for the employment requested and with a particular employer); individual tradespersons, those running small businesses and company officers, who qualify for a commercial permit (*carte de commerçant*), which is valid for one year;[5] and seasonal workers, who hold an employment contract and who can work for a maximum of six months in one year.

The pertinent provisions of the 1945 Order are interpreted very restrictively by the administration and it is difficult to obtain a residence permit which also allows the migrant to take up employment. In theory, all migrants holding residence permits that prohibit employment may apply for an authorisation to engage in a wage-earning activity to the competent authority (for example, the regional Department of Labour, Employment and Vocational Training (*la Direction Départementale du Travail, de l'emploi et de la formation professionnelle (DDTEFP)*), although in practice this possibility is very limited. Article R.341-4 of the Labour Code stipulates clearly that a work permit can be refused because of the current

1. *Ibid.,* Article 12 bis.
2. For example, foreigners suffering from an illness of exceptional gravity who cannot benefit from treatment in the country of origin and foreigners who do not fall into the preceding categories, or who do not have a right to family reunion, but whose personal and family links are such that to refuse them residence would disproportionately affect their right to respect for their private and family life.
3. 1945 Order, Article 15.
4. Decree No. 46-1574 of 30 June 1946 regulating the conditions of entry and residence of foreigners in France, Article 7-1(2).
5. See Decree No. 98-58 of 28 January 1998 relating to the conditions of the granting of an identity card to a foreign tradesperson (*Décret relatif aux conditions d'attribution de la carte d'identité de commerçant étranger*), JO of 31 January 1998, p. 1556.

and future employment situation in the occupational sector and the geographical region where the migrant worker intends to be employed. While the above migrant worker categories are not generally determined on a sectoral basis, particularly in those instances where migrants possess a right to a temporary or secure residence permit, this question is clearly relevant in respect of those other migrants lawfully in France who wish to seek access to the labour market, as discussed above in connection with the application of Article R-341-4. Consequently, migrants falling into an occupational sector in which there are domestic labour market shortages or possessing certain skills or knowledge that are in demand for a specifically defined job will have the opportunity to obtain a work permit. In such a case, it might also be possible to derogate from certain regulations concerning first admission and to issue an "ad hoc" visa. However, in order to obtain a work permit, such migrants must provide an undertaking from their employer concerning payment of a fee to the International Migration Office (*Office des Migrations Internationales – OMI*), which is responsible for their admission, and undergo a medical examination.

4.2.3. Statistical data

The statistical data in Table 7 only relates to the number of migrant workers admitted to temporary employment in respect of two of the principal categories discussed above, namely migrants possessing a temporary residence permit enabling them to take up employment and those holding a temporary work permit, as compared with the number of seasonal migrants. The figures demonstrate a steady annual increase in each of the first two categories, particularly with regard to the issue of APT permits, which indicates a rising demand for migrant workers in certain types of employment.

Table 7: Migrant workers admitted to employment in France, 1998-2000

	Temporary residence permits (carte de séjour temporaire – CST)	Temporary work permits (Autorisation Provisoire de Travail – APT)	Seasonal labour
1998	4 149	4 295	7 523
1999	5 326	5 791	7 612
2000	5 990	7 502	7 929

Source: Office des Migrations Internationales (OMI).

4.2.4. Rights of migrant workers

a. Employment and residence rights

Duration of work permit and possibility of extension: the duration of a secure residence permit (*carte de résident*) is 10 years and is automatically renewable. With regard to a temporary residence permit by virtue of family ties (*carte de séjour temporaire "vie privée et familiale"*), the duration is one year and is renewable if the person concerned continues to meet the conditions set on the first issue of the permit. Temporary residence permits for wage-earning employment are valid for one year and can be renewed if the employment continues. The temporary work permit (*Autorisation Provisoire de Travail – APT*) is limited in the first instance to nine months and is only renewable once, although further extensions are possible by way of exception.

Right to change job, employer or employment sector: workers holding a secure residence permit or a temporary residence permit by virtue of family ties have the right to free access to employment, with the exception of public service employment, which is prohibited for non-EU nationals. By virtue of the EEC-Turkey Association Agreement, Turkish nationals also have free access to employment after four years of regular employment. For those migrants holding other temporary resident permits enabling them to work, the degree to which they can change their job, employer or employment sector, will depend on the actual permit, which often contains sectoral as well as geographical limitations. Such restrictions, however, are not usually found in permits issued to employees of multinational companies. No changes, however, are permitted for migrant workers with temporary work permits, which by definition are limited to the specific employer.

Possibility of acquiring a secure residence status or permanent residence independent of employment: the notion of "permanent residence" does not exist in France, with the exception of EU nationals. However, as noted in section 4.2.2 above, migrants can obtain secure residence status if they come within one of the categories listed in Article 15 of the 1945 Order. Moreover, by virtue of Article 14 of the Order, if migrants are able to demonstrate that they have resided in France on an uninterrupted basis for at least three years in conformity with the laws and regulations in force, they can apply for secure or long-term residence status. The decision granting or refusing this status to migrants takes into account, *inter alia*, their means of subsistence and the conditions of their professional activity, although the authorities possess considerable discretion, which in practice makes it difficult for the applicant to obtain this status.

b. Housing, health and social security rights

Housing: when the migrant applies for a work permit, the DDTEFP is required to examine the application in accordance with the criteria in Article R.341-4 of the Labour Code, which include compliance of employers with the regulations relating to accommodation and the measures that have been taken to ensure the housing of the migrant worker. Nevertheless, migrant workers are generally responsible for their own housing, although employers are obliged to provide accommodation in certain occupational sectors, such as agricultural and construction work. As far as access to state-supported accommodation is concerned, the right to housing is a social right found in the preamble to the 1946 French Constitution (included also in the 1958 Constitution) and the Constitutional Council (*Conseil Constitutionnel*) has recognised that the right of everyone to adequate housing is "an objective of constitutional value" (*un objectif de valeur constitutionnelle*). Moreover, local authorities also have responsibilities regarding housing and the housing of migrants in particular. The Secretary of State for Housing and the Department of Population and Migrations (*Direction de la Population et des Migrations – DPM*) are the two principal organisations concerned with the housing of foreigners in France. However, since the 1960s, these organisations have largely been concerned with the reception and housing of temporary migrant workers, perceived as mainly male, who have come to France without their families and who will eventually return to the country of origin. Such an approach has undoubtedly contributed to the current poor housing conditions experienced by migrants. An inter-ministerial commission for the housing of the foreign population was established by a decree of 9 June 1998 and has, as its principal mandate, the formulation of proposals and the co-ordination of action in favour of the housing of immigrant populations and their families and particularly the accommodation of migrant workers.

Health: lawfully resident migrant workers have access to the national health system on an equal basis with nationals. France has also ratified two relevant International Labour Organization (ILO) Conventions in this field, namely ILO Convention No. 97 of 1949 on Migration for Employment (Revised) and ILO Convention No. 118 of 1962 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security. Consequently, discrimination on the grounds of nationality, race, religion or sex is not permissible in the health field.

Social security: the principle of equal treatment is also applicable in the field of social security, although a number of exclusions operate regarding the export of certain benefits if migrant workers return to live in their country of origin. In such circumstances, invalidity benefit will only be paid if the migrant concerned returns to France on a regular basis and continues to hold a valid residence permit there or if the country of origin has entered into a reciprocal bilateral agreement, which is the case for all the Maghreb countries. Similarly, the export of benefits for work-related accidents or occupational diseases is only possible if a reciprocal agreement exists or if both countries have ratified ILO Convention No. 19 of 1925 concerning Equality of Treatment for National and Foreign Workers as regards Workmen's Compensation for Accidents. Retirement benefits may also be exported, but on the condition that they are initially applied for in France. Since 1998, it has been possible for retired migrants and their spouses to apply for these benefits from their home country on receipt of a special "retired persons" permit (*carte de séjour "retraité"*), which is valid for ten years and which also enables them to reside in France for

periods of one year (but not to work) and to be eligible for health care (but which does not apply to other dependents) if they require emergency treatment during their stay.[1] However, provided that retired migrants do not leave France for a period of more than three years, it is of greater advantage to them to retain their long-term residence permit, which guarantees fuller health coverage, the right to reside in France for an unlimited period and the right to work. One significant disadvantage is that retired migrants resident in their country of origin cannot obtain health benefits there, despite having paid employee contributions for health coverage while working in France and even though since 1998 foreigners receiving a French retirement pension equivalent to fifteen or more years of retirement contributions are required to pay social contributions out of their pension.

c. Family unity

Migrant workers in France holding a long-term or temporary residence permit can only be joined by their spouse and children who are minors (under 18 years of age). Family reunion is subject to a waiting period of at least one year and to possession by the migrant of stable and sufficient resources (which are at least equivalent to the level of the minimum wage) and accommodation considered normal for a family of the same composition residing in France. Moreover, the family members must also be residing outside of France, not be considered a threat to public order, and agree to a medical examination in the country of origin.[2]

d. Access to vocational training and language and integration courses

Vocational training: the principle of equal treatment in respect of access to vocational training is found in Article L.900-3 of the Labour Code, and migrant workers have the same rights as nationals either to training organised by their employer or of their own choosing. Responsibility for funding vocational training is held jointly by the state, employers, employer organisations and trade unions and all employers are also obliged to pay a small percentage of the amount of the annual salary to fund such training for their employees, including migrant workers.[3] After completing two years of employment (including one year with their current employer), migrant workers may follow, on the same basis as French employees, an individual vocational training course.[4]

Language and integration courses: during the last three years, a special integration programme comprising general information on France as well as social and language components has been organised for new migrants. This programme, which has been run by the OMI exclusively for foreign families, encompassed 20 000 persons in 2000. Moreover, a publicly funded body, the Social Action Fund for Migrant Workers and their Families (*Fonds d'Action Sociale pour les travailleurs immigrés et leur famille – FAS*), considers funding applications from associations and other bodies providing language courses and integration programs. Organisations that have received support include CLP (*Comité de liaison pour la promotion des migrants et des publics en difficulté d'insertion*), which runs literacy courses and vocational training, and AEFTI (*Association d'enseignement et de formation des travailleurs immigrés*).

e. Protection against unemployment and expulsion

Migrant workers are entitled to the same treatment as nationals as regards the receipt of unemployment benefits; in other words, they must generally have worked for a total of 606 hours in a period of eighteen months prior to the loss of employment. The length of time for which unemployment benefit is payable depends on the preceding period of employment. The maximum period for which the benefit is payable is thirty months for workers under 50 years of age and sixty months for those over 55. If the period of unemployment is prolonged, migrant workers may face difficulties with the renewal of their residence and work permits. Migrants may then be asked to leave the country *(invitation à quitter le territoire)* within a period of one month from notification of the decision. However, if the migrant

1. 1945 Order, Article 18 and Circular No. NOR/INT/D/98/00108C.
2. 1945 Order, Article 29(1).
3. Labour Code, Article L.950-1.
4. *Ibid.,* Article L.931-2.

becomes involuntarily unemployed, the residence permit is renewed for another year. On expiry of the second period, if the migrant continues to be unemployed, the permit will only be renewed if its holder is receiving unemployment benefit, and only for the period during which the benefit is payable.[1]

f. Trade union rights and consultation

Migrant workers have the right to join a trade union and are entitled to the same trade union rights as nationals; they can participate equally in trade union elections and are eligible for trade union office. They can also form their own trade unions, although no such unions exist in practice since migrants prefer to join the large national unions, which are more representative of workers in most employment sectors and hold greater bargaining power with the government and employers. Migrant workers may also vote in elections selecting the members of employment tribunals (*conseils des prud'hommes*), although they cannot vote in municipal or national political elections (with the exception of EU workers, who have a right to vote in local elections and elections to the European Parliament). While no formal consultation mechanism is in place, there are a number of associations of migrants according to nationality or region, which are usually consulted by persons designated to write reports for the government on the situation of foreigners.

4.2.5. Bilateral or multilateral agreements

France has entered into a number of bilateral agreements on establishment with African countries, which are relevant for labour migration: central African Republic (entry into force 1 May 1996); Congo (not yet in force); Mali (entry into force 1 April 1996); Togo (entry into force 31 January 2001); Algeria (amendment to 1968 agreement concluded on 11 June 2001; not yet in force). Two agreements with Hungary and Morocco on the exchange of trainees were adopted in 2001 and there are also recent agreements with Japan, New Zealand and Canada enabling young people from these countries to take working holidays (*visa "vacances/travail"*) in France for a maximum of one year.[2]

4.2.6. Political and public debate

In addition to the recent public debate voicing support for an increase in migrant labour because of the labour shortages in the economy,[3] there have also been a series of public statements by different organisations and public authorities. In July 2001, Michel Charzat, French member of parliament, produced a report for the Prime Minister, which made a series of recommendations favouring the entry and residence of migrant workers needed by France.[4] Other debates have focused on questions relating to the integration of foreigners, such as whether the second-generation migrant children of those foreign workers who arrived in the 1960s and early 1970s should qualify automatically for French citizenship, the housing conditions of migrant workers and their families, the problems of criminality among migrant youth and migrants' education.

1. *Ibid.,* Article R.341-3-1, paragraphs 3 and 4.
2. See, respectively, Circular DPM No. 99/640 of 22 November 1999 relating to the situation of young foreign nationals from countries that have concluded a working holiday programme with France (Japan and New Zealand) (*Circulaire relative à la situation des jeunes étrangers ressortisants des pays ayant conclu un programme vacances-travail avec la France (Japon et Nouvelle-Zelande)*) and Circular DPM/DMI3/2001/357 of 19 July 2001 relating to the situation of young Canadians, who are beneficiaries of the Franco-Canadian Agreement on the exchange of young persons within the framework of a working holiday programme (*Circulaire relative à la situation des jeunes canadiens bénéficiares de l'Accord franco-canadien sur les échanges de jeunes dans le cadre d'un programme "Vacances-Travail"*).
3. For example, see C. Wolmark, "Les travailleurs immigrés sont de retour", *Plein Droit,* No. 45 (May 2000), pp. 39-40; J.-P. Alaux, "Ouverture à la tête du client", *Plein Droit,* Nos. 47-48 (January 2001), pp. 3-7; A. Math, "Une politique au service du néo-libéralisme", *Plein Droit,* No. 51 (November 2001), pp. 27-29; Fondation Copernic, "Egalité sans frontière. Les immigrés ne sont pas une marchandise" (September 2001), (available at http://www.gisti.org/doc/presse/2001/copernic/index.html).
4. M. Charzat, *Rapport au Premier Ministre sur l'attractivité du territoire français* (Rapporteurs: P. Hanotoux and Claude Wendling (July 2001)). The report is available at http://www.ladocumentationfrancaise.fr/BRP/014000523/0000.pdf

4.2.7. Relevance of Council of Europe conventions and European Community agreements

The ECHR has had the most impact in France and the majority of cases concern Articles 3 and 8. Progress has also been made in the elimination of discrimination in the field of social security protection as a result of the combination of Article 14 and Article 1 of Protocol No. 1. The European Social Charter has liberalised the rules concerning the age limit of children for the purpose of family reunion with the result that children of migrants from states parties to the Charter can join their parents up to the age of 21. The other Council of Europe instruments have not influenced the way migrant workers are treated in domestic law and practice and the European Community Association Agreements with third countries are not widely known. While France ratified the European Convention on the Legal Status of Migrant Workers in 1983, its influence has been minimal since it is only applicable once migrants have been admitted to the labour market and cannot prevent the authorities limiting such access in the first place. However, the convention has served a useful purpose as a comparison for legislation.

4.2.8. Relevance of GATS rules

GATS rules have had no influence on labour migration policy in France, although the regulations applied with respect to the issue of temporary work permits (APT) are consistent with the conditions found in the GATS Agreement.

4.3. Hungary

4.3.1. Principal rules regarding migration for employment

Labour migration in Hungary is governed by Act No. 4 of 1991 on the Promotion of Employment and Unemployment Contributions[1] and the implementing Ministerial Decree of 1999 on the Authorisation of Employment for Foreigners in Hungary.[2] In addition, Hungary has concluded a series of bilateral agreements with a number of European countries regulating the mutual exchange of migrant workers and trainees, which are discussed in section 4.3.5 below. Act No. 86 of 1993 governs the entry (visa) and residence of foreign workers and a range of legislative measures protect their labour and social rights.[3]

4.3.2. Categories of migrant workers

Five categories of migrant workers can be distinguished in Hungary:

- those employed lawfully without work permits and comprising recognised refugees, refugees enjoying temporary protection, settled migrants holding a green card, and twelve sub-categories of foreigners as defined in the Ministerial Decree);
- migrants with work permits obtained in accordance with the general rules (in other words, without benefiting from any particular status);
- migrants in possession of work permits obtained on the basis of a particular favoured or privileged status (for example, EU nationals and "tolerated" migrants whose employment is promoted by the Immigration and Citizenship Office on humanitarian grounds);
- migrants with work permits obtained in accordance with a framework authorisation (for example, a foreign company recruiting own nationals on a group basis for work on an investment project in Hungary); and
- migrants with work permits obtained in accordance with a bilateral agreement and within the annual quota established by that agreement.

The work permit system in Hungary is highly bureaucratic and permits are issued upon the application of the employer. Hungarian labour migration policy has not been constructed on the basis of any

1. Act No.4 of 23 February 1991, Article 7 (as amended by Act No. 89 of 2000 and Act No. 16 of 2001).
2. Decree No. 9 of 10 November 1999 (issued by the Minister of Social and Family Affairs).
3. See Acts No. 22 of 1992, No. 3 of 1993, No. 81 of 1997, and No. 83 of 1997.

particular normative framework and is merely a reaction to the appearance on the domestic labour market of foreigners from poorer countries, who have arrived individually as economic migrants or refugees or as persons in need of protection. As a general rule, therefore, labour migrant categories are not determined on an occupational basis, with the exception of bilateral labour agreements, which only apply to certain economic sectors. While foreign or multinational companies operating in Hungary are also subject to the same rules on employment of migrant workers, some foreigners employed by these companies can work in Hungary without the need to obtain a work permit, such as the leaders or representatives of Hungarian branch offices of companies registered abroad on the basis of an international agreement. In addition, more relaxed rules on work permits are applied in respect of key personnel of joint ventures or for persons constituting up to two per cent of the annual registered labour force of foreign-owned companies.

With the exception of the bilateral agreements on the mutual exchange of migrant workers and trainees, which are adjusted on an annual basis, the numbers of migrants in each of the other categories identified are not determined on the basis of a quota. While the 1991 Act on the Promotion of Employment and Unemployment Contributions mandates the Minister of Labour to set the maximum number of foreigners who can work in a particular region or within a specific economic sector or to totally exclude them from a certain sector, these powers have never been exercised.

4.3.3. Statistical data

The available statistical data in Table 8 record the combined number of migrant workers issued with work permits and the number of valid work permits at the end of each calendar year (figure in parenthesis) in two of the categories, in other words, migrant workers with work permits obtained in accordance with the general rules and those with work permits obtained on the basis of a favoured status. No distinction is made between these categories with the exception of the number of EU nationals issued permits in the latter category. It is not possible therefore to gauge from this data the number of migrants who have been issued a permit for the very first time in a given period or the duration of the permits. Nonetheless, the figures demonstrate a steady annual increase of migrants in these categories.

Table 8: Work permits issued for employment in Hungary, 1998-2000

	Work permits issued	**Of which EU nationals**
1998	26 310 (22 466*)	2 514
1999	34 138 (28 469*)	2 699
2000	40 203 (35 014*)	2 374

* Number of valid work permits as at 31 December of each year.

4.3.4. Rights of migrant workers

a. Employment and residence rights

Migrants admitted to lawful employment in Hungary without a work permit are not subject to any limitations and are afforded equal rights with nationals in respect of access to employment. Their rights to work and residence are tied to their individual status in the country, which means, for example, that the withdrawal of their refugee status or green card results in the loss of their employment and residence rights.

Duration of work permit and possibility of extension: the maximum duration of a work permit held by migrants in accordance with the general rules or on the basis of a favoured status is one year. In both instances, the permit can be extended or renewed on a discretionary basis. If the application is submitted in a period of thirty to sixty days before the expiry of the work permit, it is treated as a renewal application; otherwise, it is considered as an application for a new work permit. In the favoured

status category, the duration of the work permit can also be tied to the length of the particular status. The duration of validity of a work permit held by migrants on the basis of a framework authorisation is determined in accordance with the length of the investment project as stipulated in the private contract and the authorisation. An extension is not possible. The duration of work permits issued in accordance with bilateral agreements, and the possibility of their extension, are determined by the terms of the agreement concerned.

Right to change job, employer or employment sector: with regard to all the work permit categories, there is no right to change job, employer or employment sector. The work permit is only valid for the defined job and employer.

Possibility of acquiring a secure residence status or permanent residence independent of employment: migrants possessing work permits are not entitled to any secure residence status or permanent residence independent of their employment. They are issued with a residence permit, which is strictly tied to the work permit.

b. Housing, health and social security rights

Housing: obtaining housing is the responsibility of migrant workers unless the employment contract stipulates otherwise. For example, migrant workers employed by an investing company on the basis of a framework authorisation may well be provided with accommodation by the terms of the employment contract. With regard to settled migrants and refugees, local government and the refugee authority respectively are legally obliged to provide housing. While the law does not exclude migrant workers from access to public social housing, in practice it is difficult for them to obtain such accommodation given the shortage of housing generally and the lengthy waiting lists for vacancies. Moreover, foreigners are often unable to meet the residence requirements set by municipal governments.

Health: migrant workers who are in employment, and their families, have access to all the health services, which are provided within the framework of social insurance. Settled migrants eligible for employment without a work permit, but who are still seeking employment, as well as those holding a residence permit, but who are no longer in work, can also conclude an alternative contract for health services with the social insurance authority.

Social security: social security provision concerning family support and invalidity support falls outside of the social insurance system, which means that migrant workers, with the exception of settled migrants and recognised refugees, are unable to enjoy these benefits. With regard to benefits that are included in the social insurance system (that is, pensions and invalidity provision), migrant workers with work permits who lose their jobs cannot access these benefits in practice because their residence permit is no longer valid, even though they are required to pay the same rate of social insurance contributions as other workers while in employment.

c. Family unity

The entry of family members to join migrants with work permits is regulated by the rules on visas, letters of invitation and residence permits and the new Aliens Act, which came into force on 1 January 2002.[1] These rules apply to the entry of all non-nationals and are subject to the broad discretionary powers of the "Aliens police". The Aliens Act lists the following family members who may join the migrant in Hungary for the duration of his or her work permit: spouse, minor and dependent children, children of one of the spouses, and dependent parents. The entry of family members in such circumstances is also subject to the availability of suitable accommodation and a suitable level of income to cover medical, travel and other expenses related to residence. Moreover, the invited family member must not be included on the list of non-nationals who are prohibited entry.

1. Act No. 29 of 2001.

With regard to the entry of family members joining nationals, settled migrants and recognised refugees for settlement, the Aliens police may issue a green card to the following family members: spouse, minor children, dependent parents or grandparents, and adult children. There is a waiting period of three years, although this can be reduced or waived at the discretion of the Aliens police. The other conditions on family reunion are as follows: a clean criminal and security record; a lawful and appropriate level of income (either from own resources or from the resources of the household); suitable housing conditions; not constituting a risk to public health; and submission of relevant documents, such as those proving marital status. By virtue of the new Aliens Act, family members can also obtain a green card if they have been living in Hungary with the national, settled migrant or recognised refugee for at least one year or, in the case of the spouse, if they were married for at least two years prior to entry.

d. Access to vocational training and language and integration courses

Vocational training: migrants in work-permit employment can access vocational training if the employer is prepared to finance such training. Settled migrants and recognised refugees are entitled by law to obtain public funding for vocational training, re-training or further training courses on the same terms as nationals through the labour offices. In practice, however, the availability of such services are non-existent, given that the offices are overworked and possess little motivation to set up programmes for specific groups. In general, these offices are not equipped, in terms of their capacity, ability or interest, to provide services for vulnerable groups finding themselves in "extraordinary" or special situations, such as the Roma, disabled persons, refugees or settled migrants.

Language and integration courses: there are no publicly funded language and integration courses for migrant workers. With the exception of recognised refugees, for whom some labour offices might organise such courses, the economic, social and cultural integration of migrants remains a private matter.

e. Protection against unemployment and expulsion

Migrant workers are required to pay full social insurance contributions and in theory, therefore, on losing their job, they should be eligible for unemployment benefit covered by social insurance if they have completed the minimum qualifying period of employment. However, in practice it is not possible for them to access such provision because of the close connection between work and residence permits under the regulations of the Aliens police, which require unemployed migrants to leave the country, thus preventing them from remaining to claim benefit or seek new employment. Moreover, although migrants have free access to the services of labour offices, there is no specific expertise available there to assist them.

Migrants can be expelled if they do not possess a stable income. On loss of employment, employers and migrants are under a joint obligation to inform the Aliens police of this within three working days. While the Aliens police have discretion to renew the residence permit, it is unlikely that their powers will be exercised in this way unless the migrant concerned possesses substantial private income that meets the cost of their residence. If the migrant does not leave the country by the given deadline, an expulsion order will be issued. These rules apply in a blanket fashion irrespective of the length of residence or the quality of the employee.

f. Trade union rights and consultation

While the employment rights of migrants, including trade union rights, are equal to those of nationals, trade unions have not actively involved migrant workers or devoted particular attention to their interests. Migrant workers may also establish their own unions, but there are no known examples, largely because migrants are widely distributed across a number of employment sectors.

4.3.5. Bilateral or multilateral agreements

As noted in section 4.3.2 above, an important category of migrant employment in Hungary is regulated by bilateral agreements on the mutual exchange of migrant workers and trainees. The principal agreements are listed in Table 9 below and are mainly concerned with the exchange of trainees, where the period of the exchange ranges from six months to two years.

Table 9: Bilateral agreements concluded by Hungary with European states and other countries on the mutual exchange of labour (October 2001)

Type of agreement	Country	Content	Annual quota
Seasonal work	Romania	Up to 6 months annually; ratified but not in force.	800 persons (planned)
	Slovakia	In 1999, 25 Slovaks came to Hungary but in 2000, 400 workers arrived; no age limit.	400 persons
Commuters in border zone	Austria	Up to 6 months from some border regions.	900 persons (in 2000)
Guest workers	Germany	For persons of 18 to 40 years of age for a period of 12 to 18 months (with prolongation).	2 000 persons
Exchange of trainees	Slovakia	Up to 12 to 24 months (with prolongation); no age limit. In 1999, 4 000 Slovaks came to Hungary.	400 persons
	Czech Republic	For persons of 18 to 40 years of age for a period of 12 to 18 months (with prolongation).	300 persons
	Romania	For persons of 18 to 35 years of age for a period of 12 to 18 months (with prolongation); ratified but not in force.	700 persons (planned)
	Switzerland	For skilled persons of 18 to 30 years of age for a period of 12 to 18 months (with prolongation); work permit does not depend on labour supply *in situ.*	100 persons
	Austria	For skilled persons of 18 to 35 years of age with basic language knowledge for a period of 6 to 18 months (with prolongation); the joint committee can exclude employment in certain labour sectors.	400 persons (in 2000)
	Netherlands	Up to 24 weeks; no age limit; work permit does not depend on labour supply *in situ.*	Not defined
	Luxembourg	For persons of 18 to 30 years of age for a period of 12 to 18 months (with prolongation); work permit does not depend on labour supply *in situ.*	20 persons
	France	For skilled persons of 18 to 35 years of age with basic language knowledge for a period of 12 to 18 months (with prolongation).	300 persons
Remuneration of the work of diplomats and family members	UK, France, Italy, USA, Canada, Chile, Argentina, Poland	Exclusively during the period of accreditation; work permit not required.	No quota

Source: Table provided by Dr. Judit Tóth, Faculty of Law, University of Szeged.

4.3.6. Political and public debate

With one small exception, there has been no political or public debate about the status of migrants admitted for employment in Hungary. In 1999, the Hungarian Parliament ratified the European Social Charter and the Socialist party submitted a motion to opt into Article 18 of the Charter. Although this motion was rejected, the government issued a decision, which was reiterated in 2001, agreeing to investigate the possibility of opting into Articles 18 and 19 of the Charter and ratifying the European Convention on the Legal Status of Migrant Workers. However, these questions were not debated publicly.

4.3.7. Relevance of Council of Europe conventions and European Community agreements

As referred to in section 4.3.6 above, Hungary has not opted into Articles 18 or 19 of the Charter or ratified the European Convention on the Legal Status of Migrant Workers. Neither is it a party to the European Convention on Establishment. While the ECHR is sometimes applied in favour of recognised refugees, asylum seekers and settled migrants, it has not had any impact to date on the treatment of migrant workers. As far as the Europe Agreement is concerned,[1] Articles 37 and 38 are explicitly referred to in the 1991 Act on the Promotion of Employment and Unemployment Contributions and its implementing decree, which provide for the more favourable treatment of EU nationals in the context of work permit applications.

4.3.8. Relevance of GATS rules

The GATS rules have had no impact on labour migration policy in Hungary.

4.4. Lithuania

4.4.1. Principal rules regarding migration for employment

The main piece of primary legislation governing migration for employment in Lithuania is the Law on the Legal Status of Foreigners of 17 December 1998, as amended.[2] This law is supplemented by the Order of the Ministry of Social Security and Labour of 1 June 2000 on the Approval of the Procedure of Employment of Foreign Nationals in the Republic of Lithuania under the Contract of Employment and the Order on Issuance, Change and Termination of Residence Permits for Foreigners in the Republic of Lithuania, approved by a government resolution of 1 May 2000 (as amended on 22 December 2001). The Law on Support of the Unemployed[3] and Articles 37 to 43 of the Europe Agreement are also relevant.

4.4.2. Categories of migrant workers

The rules on first admission to Lithuania in the Law on the Legal Status of Foreigners identify the following categories of workers that may be admitted and granted temporary residence permits: persons registering a company with capital or the value of shares of at least 250 000 Litas (approximately €72 000); persons coming to Lithuania to undertake scientific research or to take up teaching positions at institutions of higher education, research or other educational institutions; and persons who have been issued with a work permit.[4] The first two categories of migrants are not required to obtain a work permit.[5] In addition, the following categories of workers are also exempt from the work permit requirement: persons employed in accordance with a joint governmental program of their home country with Lithuania; heads (or their authorised representatives) of foreign companies or institutions, which have entered into joint ventures with Lithuanian companies or institutions; heads of companies or their authorised representatives or specialists, who come to Lithuania to launch or adjust equipment acquired abroad or to train staff to operate such equipment; consultants coming to work for a maximum period of three months; professional sportspersons coming to work for a maximum period of six months.[6] Moreover, as of 1 January 2002, EU nationals and members of their families intending to work in Lithuania under a contract of employment no longer require a work permit.[7] Another important distinction in Lithuania, which is explained below, relates to migrant workers with temporary residence status and those with permanent residence status. The law, however, does not regulate the status of employees of foreign or multinational companies moving to offices or establishments in Lithuania. Their

1. As implemented by Act No. 1 of 1 February 1994.
2. Official Gazette (OG), 1998, No. 115-3236. The law was last amended on 12 June 2001.
3. OG, 1991, No. 2-25.
4. Law on the Legal Status of Foreigners, Article 19(2).
5. *Ibid.,* Article 26(2).
6. *Ibid.,* Article 26(3)-(6).
7. *Ibid.,* Article 48.5.

status is regulated separately by bilateral agreements, which are discussed in section 4.4.5 below, although difficulties arise when the employees come from countries which have not concluded such an agreement. In such cases, the persons concerned would be required to conclude employment contracts in Lithuania. Amendments to the Law on the Legal Status of Foreigners to address this question have been drafted but are still awaiting approval.

The admission of foreigners to employment in Lithuania in the work permit category is set in accordance with a quota, which is adjusted on an annual basis.[1] The quota is approved by the government on the recommendation of the Ministry of Social Affairs, which receives information from the Labour Exchange. The quota does not relate to particular economic sectors or geographical regions, but is established on a national basis and after the labour market situation and the level of unemployment have been taken into account. For the last three years, the quota has remained at 1 300 foreign workers per year rising from 1 000 foreign workers in 1998 and 1999. EU nationals filled approximately twenty-five per cent of this quota, but as EU nationals no longer need to obtain a work permit and due to the general reduction of the number of foreigners coming to work in Lithuania (only 599 of the 1 300 quota places were filled in 2001), the Labour Exchange proposed to reduce the quota for 2002. However, the government decided to retain the quota at 1 300. Although the work permit category is not determined on a sectoral basis, in practice distinctions are made according to profession. Work permits are normally issued to highly skilled foreign workers and are unlikely to be issued to workers in those professions that do not correspond to labour market needs.

4.4.3. Statistical data

The statistics available in Lithuania relate to the number of work permits issued under the annual quota and are divided according to profession and country of origin (Table 10).

Table 10: Total work permits issued to foreigners in Lithuania in accordance with principal professions and countries of origin, 1995-2001

Year	Number of Work Permits Issued	Top three Professions	Top three Countries of Origin
1995	410	Teachers (87) Mechanics of refrigerator carriages (81) Engineers (35)	Ukraine (73) Russia (43) USA (37)
1996	468	Teachers (115) Engineers (55) Managers (45)	Ukraine (87) Russia (64) USA (46)
1997	754	Teachers (167) Welders (ship hulls) (88) Engineers (73)	Ukraine (148) Russia (122) China (65)
1998	1000	Assemblers (ship hulls) (253) Welders (ship hulls) (151) Teachers (127)	Ukraine (335) Russia (199) USA (69)
1999	1214	Assemblers (ship hulls) (231) Welders (ship hulls) (188) Engineers (145)	Ukraine (341) Russia (261) Belarus (82)
2000	701	Engineers (89) Cooks (80) Teachers (65)	Ukraine (128) China (72) USA (55)
2001	599	Engineers (99) Cooks and bakers (94) Economists (33)	China (103) Ukraine (69) USA (66)

1. *Ibid.,* Article 27(2). It is possible for the government to review the quota if it is filled before the end of the year, but to date there has been no need to do this.

The figures reveal a steady increase in work permits issued between 1995 and 1999 in accordance with the increased quota, although the decline in work permits issued in 2000 and 2001 is significant. The principal work permit professions have varied, but there was a clear demand for workers in shipbuilding jobs between 1997 and 1999. The "engineers" category has remained a profession in demand, especially in the last three years. Finally, a significant number of migrants admitted for employment to Lithuania since 1995 have come from four countries: Ukraine, Russia, the United States of America and China.

4.4.4. Rights of migrant workers

a. Employment and residence rights

Duration of work permit and possibility of extension: work permits are normally issued for a period of up to one year, but can be extended to a period of two years in total.[1] It is not possible to issue a work permit for longer than two years[2] and the migrant therefore has to apply for a new permit in order to remain lawfully employed in Lithuania.

Right to change job, employer or employment sector: work permits are issued for a specific job and employer, enterprise or institution.[3] Furthermore, the contract of employment must specify the job of the migrant, the duration of the employment, and the undertaking of the migrant to be employed only for the position indicated in the contract and to depart from Lithuania after the expiry of the period indicated in the contract.[4] In practice, therefore, changing jobs, employer or employment sector requires the acquisition of a new work permit.

Possibility of acquiring a secure residence status or permanent residence independent of employment: on entering Lithuania to take up employment (whether work-permit-based or other employment), migrant workers are first issued with a temporary residence permit for one year[5] with the exception of EU nationals, who are normally issued with five-year temporary residence permits. Migrants can obtain permanent residence status after five years of residence in Lithuania provided they possess the following: a temporary residence permit for the previous five years; a place of residence in Lithuania; and a lawful source of subsistence in Lithuania. While permanent residence is not tied to employment and no specific migrant categories are excluded, foreigners who meet the above conditions will be granted this status only after the interests of the state (for example, the labour market situation) have been taken into account.[6]

b. Housing, health and social security rights

Housing: migrants and stateless persons are afforded equal rights in the use of living premises (with the exception of acquisition for the purpose of ownership) to those of citizens by the Law on Provision of Residents with Living Premises,[7] which also encompasses the provision of public assistance for such accommodation.[8] Therefore, migrant workers should be granted access to public housing on the same terms as Hungarian citizens. Despite these assertions of equal treatment in the law, it would appear that in practice migrant workers with temporary residence permits are not eligible for public housing.

1. Foreigners are required to submit the application for extension to the regional labour exchange office no later than one month prior to the expiry of the permit stating their reasons for such an extension. A reference letter from the employer relating to the extension of the employment contract must be attached to the application.
2. Law on the Legal Status of Foreigners, Article 29.
3. *Ibid.*
4. *Ibid.,* Article 30(2).
5. *Ibid.,* Article 18(2).
6. *Ibid.,* Article 22(3).
7. OG 1992, No. 14-378 (20 May 1992). The law contains provisions providing for the establishment of a special procedure for the acquisition of accommodation by foreign nationals and stateless persons. However, no such procedure has been put into place and, in practice, foreigners enjoy equal rights in respect of the acquisition of living premises for the purposes of ownership and there are no indications that this position will change in the near future.
8. *Ibid.,* Article 2.

There is no requirement in the law that either the employer or migrant worker should be responsible for housing. In order to obtain a residence permit, migrant workers are only required to declare their place of residence. As far as the employment contract is concerned, the provision of housing is a matter for agreement between the employer and employee. Indeed, the standard employment contract between a Lithuanian employer and a foreigner not possessing a permanent residence permit, approved by ministerial order, contains an optional clause leaving responsibility for housing to be determined between the parties to the contract.

Health: the Law on Health Insurance[1] and the Law on the Legal Status of Foreigners regulate health care provision for migrants. According to the former, migrants with permanent residence status have equal access to compulsory health insurance (in other words, all the benefits of the national health care system) on the same terms as Lithuanian citizens. However, migrant workers with temporary residence permits, notwithstanding the fact that they pay social insurance taxes, are only entitled to emergency health care free of charge and have to pay for other health services privately. Indeed, the Law on the Legal Status of Foreigners stipulates that foreign nationals are required to demonstrate that they have valid health insurance cover before they can obtain a temporary residence permit. The provision of such insurance is a matter of agreement between the employer and the migrant worker. The Ministry of Health is currently considering an amendment to the Law on Health Care,[2] which would ensure that foreigners with temporary residence status and with the right to work are granted access to compulsory health insurance on the same conditions as citizens.

Social security: under the Law on Social Services,[3] foreign nationals and stateless persons with permanent residence status are guaranteed the right to social services. As far as migrants with temporary residence permits are concerned, the Law on State Social Insurance[4] provides that all employed persons with a labour contract and receiving a salary, irrespective of citizenship, are to be insured under the state social insurance system, which means that they are entitled to social benefits such as child and maternity benefits, pension and invalidity benefits. However, they do not have access to other forms of social assistance, such as home-help services or special care establishments.

c. Family unity

According to the Law on the Legal Status of Foreigners, members of a migrant worker's family are eligible for a temporary residence permit.[5] Those that qualify comprise the spouse, unmarried children (including adopted children) under 18 and other dependent family members.[6] Temporary residence permits are issued to family members for the same period as the residence permit held by the worker. However, they can only join and reside with the worker if they meet the same conditions for entry and residence, in particular that they are able to demonstrate that they possess sufficient means of subsistence and a valid document certifying that they have health insurance coverage.[7] These restrictions do not apply to migrants with permanent residence status and those specialised categories of migrants with temporary residence, identified in section 4.4.2 above, who do not require a work permit.

d. Access to vocational training and language and integration courses

Vocational training: in principle, migrant workers should have the same access to vocational training as nationals. The Law on Vocational Education and Training[8] does not limit eligibility for such training to

1. OG 1996, No. 55-1287 (1 January 1997).
2. OG 1994, No. 1-554 (19 July 1994).
3. OG 1996, No. 104-2367 (9 October 1996).
4. OG 1991, No. 17-447 (20 June 1991).
5. Law on the Legal Status of Foreigners, Article 19(4).
6. *Ibid.,* Article 1(11).
7. *Ibid.,* Article 14(1), sub-paragraphs 4 and 5.
8. OG 1997, No. 98-2478 (14 October 1997).

nationals only. Similarly, the entitlement to scholarships, provided in Article 26 of this law, should also apply to foreigners.

Language and integration courses: no specific courses have been set up for migrant workers, because it would appear that there is no demand for them, although access to other general courses is open to all persons regardless of nationality.

e. Protection against unemployment and expulsion

Only migrant workers with permanent residence status can claim unemployment benefit, which is regulated by the Law on the Support of the Unemployed.[1] Migrant workers possessing temporary residence permits are required to leave Lithuania on termination of the employment, an undertaking that must also be stipulated in the employment contract. Loss of employment results in cancellation of the work permit, and since the latter is directly linked to the temporary residence permit, the cancellation of the residence permit also.[2] Once migrants have been issued with an order to leave the country, they must do so within ten days of its service, otherwise they are subject to a formal expulsion decision.[3] In expelling migrants, the authorities have to take into account such matters as the period of lawful residence, social, economic and other ties with the country, and the impact on lawfully resident family members.[4] Expulsion must be postponed in the following circumstances: where the migrant faces a real threat to life and health or the possibility of persecution in the country of destination; refusal by a country of destination to accept the migrant; in the event of an appeal to the court against the expulsion; and where the migrant is in need of urgent medical assistance.[5]

f. Trade union rights and consultation

By virtue of Article 1 of the Law on Trade Unions,[6] only Lithuanian citizens and other persons who are permanently resident in the country have the right to join trade unions and to participate in their activities. Consequently, foreigners residing in Lithuania on a temporary basis cannot join trade unions, although an amendment to this law is expected shortly. The Law on Trade Unions provides that unions can be formed on the basis of profession, job, production sector, territory or other principles established by the union itself, and therefore it would be possible for migrant workers to form their own trade unions, although no such unions exist in practice. However, the law also contains a limitation as to minimum membership stipulating that there must be at least thirty members or at least three members if these constitute at least twenty per cent of all employees in a specific enterprise or establishment.

There are no known associations or organisations of migrant workers and no specific mechanisms have been established for the purpose of consulting with migrants. However, under ordinary legislative procedures, the views of NGOs and other interest groups should be sought, and, consequently, migrant workers' organisations, if they did exist, would also be consulted in respect of the development of rules or policy affecting their interests.

4.4.5. Bilateral or multilateral agreements

Lithuania has entered into bilateral agreements on the mutual employment of citizens (for temporary work) with Poland (1994; entry into force 1995), Russia (2000; entry into force 2000) and Ukraine (1995; entry into force 1996). There is also a similar agreement with Belarus (1996), although this has not yet entered into force. Currently, negotiations are in progress to adopt a trilateral agreement with the other two Baltic states regarding the liberalisation of labour. Lithuania has also entered into agreements on

1. No. I-864(13 December 1990).
2. Law on the Legal Status of Foreigners, Article 21(1), sub-paragraph 4.
3. *Ibid.,* Articles 33(1) and 34(1).
4. *Ibid.,* Article 36(1), sub-paragraphs 1-3.
5. *Ibid.,* Article 36(2), sub-paragraphs 1-4.
6. OG 1991, No. 34-933 (10 December 1991).

the exchange of trainees with Germany (1993), Sweden (1994) and the Czech Republic (2000). The latter agreement has not yet entered into force.

4.4.6. Political and public debate

Recently, there has been political and public debate in Lithuania concerning the provision of health care to foreigners resident on a temporary basis. As noted in section 4.4.4 above, such foreigners are only entitled to emergency medical treatment and there have been a number of cases, verified by a ministerial report, where foreign nationals, lawfully employed and contributing to taxes, have not been compensated by the special health-care funding institutions because of an "absence of legal basis". In particular, public attention to this issue was drawn by the incident of a 62 year-old Byelorussian national, who did not receive adequate medical assistance for a heart attack because he did not possess health insurance.

Moreover, there has been some debate on the political level in relation to a proposal to establish a separate minimum wage for migrant workers at a lower level to that for citizens, which was rejected by the Social Ministry on the grounds that it would be discriminatory. The absence of rules regulating the movement of employees of foreign and multinational companies, identified in section 4.4.2 above, has also been the subject of discussion at the executive level.

4.4.7. Relevance of Council of Europe conventions and European Community agreements

EU law and relevant Council of Europe instruments are taken into account during the drafting of laws. Draft laws are reviewed by the European Law Department for their compliance with the EU *acquis communautaire* and international human rights obligations. More specifically, in 2001, Lithuania ratified the revised European Social Charter with the result that a wide range of social and labour laws have been aligned with the Charter's provisions. The European Convention on the Legal Status of Migrant Workers has also influenced the drafting of domestic employment laws, even though this instrument has not been ratified by Lithuania. The influence of the Europe Agreement has been considerable in that some of the amendments adopted have gone beyond the specific terms of the agreement. For example, the employment conditions of EU nationals are more favourable than those required under this agreement. The amendments to the Law on the Legal Status of Foreigners, adopted on 12 June 2001 and which entered into force on 1 January 2002, introduce a separate chapter devoted to the treatment of EU nationals, including in the employment field. Recently, a new draft Labour Code was introduced into Parliament, which states specifically that international and EU employment standards have been taken into account.

4.4.8. Relevance of GATS rules

The GATS rules have only been in force in Lithuania since 31 May 2001 and consequently it is too early to assess their impact on labour migration policy. However, the Ministry of Foreign Affairs recently sent information to the other ministries and government departments outlining Lithuania's obligations under the GATS with instructions that account should be taken of these obligations when drafting laws and other legal acts.

4.5. Poland

4.5.1. Principal rules regarding migration for employment

The principal rules in Poland regarding migration for employment are found in the Law of 14 December 1994 on Employment and Combating Unemployment (*Ustawa o zatrudnieniu i przeciwdziałaniu bezrobociu*), as amended, and the Law of 25 June 1997 on Aliens (*Ustawa o cudzioziemcach*), which was revised on 11 April 2001.[1]

1. See, respectively, Official Journal of Laws (*Dziennik Ustaw*) 2001, No. 6, item 56, as amended and Official Journal of Laws 2001, No. 127, item 1400.

4.5.2. Categories of migrant workers

There are three main categories of migrant workers admitted for employment in Poland. The first relates to foreigners performing gainful employment for employers, who have their official seat in Poland. On entering Poland with a visa permitting them to work, migrants now have to obtain a work permit from the provincial governor (*voivod*), who has territorial jurisdiction in the region where the employer's seat is located. Prior to 1 January 2002, the employer was responsible for obtaining the consent of the district authorities (*starostas*). The second category concerns migrant workers posted to Poland by foreign employers within the context of services provision. Special regulations have also been adopted in respect of "key personnel" as defined in Article 52 of the EC-Poland Europe Agreement. The work permit application procedure for "key personnel" has been simplified and such migrants can obtain a work permit without having to meet the labour market test. The third category encompasses those foreigners allowed to settle in Poland or recognised as refugees. This group is afforded equal treatment with Polish citizens in the field of employment. The category into which foreigners fall depend on the type of visa they received and the status of the employer (Polish or foreign national). These categories are not determined on a sectoral basis or related to any particular skill and are not subject to a quota system.

4.5.3. Statistical data

Table 11 below indicates the number of foreign nationals employed in Poland in the first two categories. The figures indicate a steady increase in migrants working for employers with an official seat in Poland between 1998 and 2000, but a reduction in 2001. The number of foreigners posted to Poland by foreign employers in the context of services provision dropped markedly in relative terms in 2000 from 3 505 to 1 860 persons, although there were 2 755 such persons in 2001.

Table 11: Foreign nationals employed in Poland, 1998-2000

	Foreign nationals performing gainful employment for employers with an official seat in Poland	**Foreign nationals posted to Poland by foreign employers in the framework of the export of services**
1998	16 928	3 831
1999	17 116	3 505
2000	20 081	1 860
2001	17 038	2 755

4.5.4. Rights of migrant workers

a. Employment and residence rights

Duration of work permit and possibility of extension: the duration of the work permit is fixed by the provincial governor, according to the local labour market situation. However, work permits cannot be issued for an indefinite period of time and cannot exceed the validity of the migrant's entry visa, which permits him or her to take up employment in a particular category, or the validity of the residence permit.

Right to change job, employer or employment sector: migrant workers are entitled to change their job, employer or employment sector, but they have to seek a new work permit on each occasion of specific employment.

Possibility of acquiring a secure residence status or permanent residence independent of employment: migrant workers can be granted a residence permit for a specified period at their request if they are able to demonstrate that circumstances have arisen justifying their residence in Poland for a period of six months.[1] In particular, such circumstances may include, *inter alia*, obtaining a work permit or a permit

1. Law on Aliens, Articles 16(1) and 17(1).

for undertaking other gainful work, or a written declaration from the employer indicating the intention to employ the migrant where such permits are not required.[1] Such a residence permit may be granted for a period of up to two years and can be extended for additional periods not exceeding two years once the circumstances justifying further stay in Poland have been confirmed.[2]

Migrant workers may obtain a permit to settle (permanent residence) in Poland at their request under the following conditions: if they are able to demonstrate the existence of permanent family or economic ties with Poland; if they have secured accommodation and maintenance in Poland; and if they have resided in Poland continuously for at least five years on the basis of visas or residence permits for a specified period or for three years if the residence permit for a specified period was issued for the purpose of reuniting with a family member.[3] In addition to these conditions, the application for a permit to settle can be refused on a number of specified grounds and, in particular, if migrants have committed serious criminal and immigration offences, if they are considered to be a threat to public health or state security and defence, or they have failed to perform fiscal obligations.[4] Migrants can also obtain a permit to settle at their request if they have resided in Poland continuously for at least ten years based on visas or residence permits for a specified period.[5] The permit to settle is granted for an indefinite period.[6]

b. Housing, health and social security rights

Housing: there are no rules specifically relating to the housing of migrant workers, either in the private or public accommodation sectors. Therefore, it remains the migrant worker's responsibility to arrange his or her own accommodation unless the employment contract provides otherwise. The only rules that might be relevant are those concerned with homelessness, where the commune is under a legal obligation to provide shelter for homeless people, which might also include migrant workers.

Health: migrant workers are not excluded from the national health care system provided that they pay the insurance premium.

Social security: migrant workers are not excluded from any branch of social security.

c. Family unity

The provisions relating to family reunion for foreigners are found in the revised Law on Aliens and permit the spouse and minor unmarried children (including adopted children) to join the migrant. While migrants staying in Poland on the basis of a permit to settle or a residence permit for a specified period of time in connection with the granting of refugee status can be joined by their family members immediately, other migrants holding a residence permit for a specified period must have been in the country for at least three years before members of their family are able to join them.[7] Moreover, a residence permit for the purpose of family reunion will only be granted under the following conditions: if the residence of the family member in Poland does not constitute a risk to public health; if the material and housing conditions of the applicant demonstrate that the residence of the family will not burden the social welfare system; if migrants are able to guarantee medical care for their families; and if the residence of the family member does not constitute a threat to national security or public order.[8] Importantly, the Law on Aliens also specifically identifies the intention of family members to accompany

1. *Ibid.,* Article 17(2), point 1.
2. *Ibid.,* Article 18(1)
3. *Ibid.,* Article 19(1), points 1 to 3. The accommodation and maintenance conditions are deemed to be fulfilled if migrants possess income or property sufficient to cover the cost of their maintenance and the medical treatment of family members supported by them without recourse to social assistance or if they have family members in Poland obliged to provide for their maintenance and who are in a position to fulfil this obligation.
4. *Ibid.,* Article 23(1), point 2 and Article 13(1).
5. *Ibid.,* Article 19b. However, applications can be denied for reasons of national defence or national security or the protection of public order and if migrants are not in possession of their own means of maintenance, medical insurance to cover the costs of medical treatment, or are unable to undertake employment. *Ibid.* Article 23(2) and (3).
6. *Ibid.,* Article 19(4).
7. *Ibid.,* Article 24a(1).
8. *Ibid.,* Articles 24a(2), 24d(3).

a migrating worker, in accordance with the European Social Charter, as one of the circumstances justifying their residence in Poland for a period exceeding six months and thus qualifying them for the granting of a residence permit for a specified period.[1]

d. Access to vocational training and language and integration courses

Vocational training: migrant workers are free to enrol on vocational training courses to upgrade their skills. Whether the employer pays for such training depends on the employment contract. Normally, the employer would be expected to pay for the costs of any training required during the course of employment.

Language and integration courses: in general, there are no language and integration courses offered by the public authorities. However, Polish language courses, funded by the state and the UNHCR, are organised within the framework of integration programmes for recognised refugees.

e. Protection against unemployment and expulsion

Migrant workers have a right to unemployment benefit for a period of six, twelve or eighteen months depending on how long they were previously in lawful employment. The period of time for which unemployment is payable also depends on the unemployment rate in a given region. In practice, however, no information appears to be available as to whether there are indeed unemployed migrants receiving this benefit. Unemployment in itself, however, is not a reason for expulsion from the country.

f. Trade union rights and consultation

Migrant workers have a right to join a trade union. They are not precluded from forming their own trade unions provided that they possess employment status, although in practice this has not occurred. There are no mechanisms established in Poland through which associations or organisations of migrant workers can be consulted with regard to the development of rules or policy relating to labour migration.

4.5.5. Bilateral or multilateral agreements

In addition to the EC-Poland Europe Agreement, which entered into force on 1 January 1994 and which extends reciprocal rights to EU nationals, in October 1996 the government entered into an agreement with Luxemburg concerning the exchange of trainees and is currently negotiating similar agreements with Italy and Spain. There is also an agreement with Lithuania on the mutual employment of citizens for temporary work (see Section 4.4.5).

4.5.6. Political and public debate

The only debate in the last three years relating to the treatment of migrant workers concerned the passage of amendments in parliament to the Law on Employment and Combating Unemployment, which introduced a number of changes to the work permit application procedure. However, the main topic of public debate and media interest regarding immigration issues is irregular migration, which is estimated at amounting to 100 000 persons annually.[2]

4.5.7. Relevance of Council of Europe conventions and European Community agreements

The only Council of Europe instruments of relevance to Poland in this area are the ECHR and the European Social Charter, ratified in 1992 and 1997, respectively. Poland has not ratified the European Convention on Establishment or the European Convention on the Legal Status of Migrant Workers. In particular, the Polish Government has striven to ensure that its national law and practice complies with the standards in the Charter, including the principle of equal treatment of the nationals of states parties. Although these two instruments have not affected the treatment of migrant workers in any specific way,

1. Ibid., Article 17(2), point 9.
2. P. Stachańczyk, *Aliens: A Commentary on the Law* [Cudzoziemcy: Komentarz do Ustawy] (Warsaw, 1998), p. 10.

they have undoubtedly influenced the content of domestic labour legislation in respect of all employees.[1]

4.5.8. Relevance of GATS rules

To date, the GATS rules have had no impact in practice on labour migration policy.

4.6. Spain

4.6.1. Principal rules regarding migration for employment

The principal rules in Spain regarding migration for employment are found in Organic Law 4/2000 of 11 January 2000 on the Rights and Freedoms of Foreign Nationals living in Spain and their Social Integration, as amended by Law 8/2000 of 22 December 2000 (*Ley orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, reformada por la Ley orgánica 8/2000*).[2] The rules are based on the following three pillars: control of migration flows; assistance to developing countries; and the social integration of migrants. The implementing measures for this law were approved by Royal Decree 864/2001 of 20 July 2001 approving the Regulation implementing Organic Law 4/2000, as amended by Organic Law 8/2000 (*Real Decreto 864/2001, por el que se aprueba el Reglamento de ejecución de la Ley orgánica 4/2000, reformada por la Ley orgánica 8/2000*), which entered into force on 1 August 2001.[3] Other relevant rules are found in bilateral labour agreements with third countries, discussed in section 4.6.5 below, and labour and asylum legislation.[4] In 2001, the Spanish Government also established the Global Programme to Regulate and Co-ordinate the Affairs of Foreign Residents and Immigration to Spain (Greco Plan) under the auspices of the Immigration Department of the Ministry of Interior. The Greco Plan recognises the need for migrants and their positive contribution to Spanish society and aims to regulate their admission and subsequent integration.

4.6.2. Categories of migrant workers

The following eleven categories of migrant workers can be distinguished in Spain:

- migrants granted a work permit for specific employment;
- those granted a temporary work permit;
- those granted a permanent work permit;
- those not requiring a work permit, but who are nonetheless subject to an administrative check prior to taking up employment;[5]
- employees of multinational (transnational) companies;
- persons established in Spain or who belong to exceptional sub-categories authorised to work, such as students, professional practitioners, asylum-seekers,[6] undocumented persons;
- those in the country for humanitarian reasons;

1. For example, the 1996 amendments to the Labour Code relating to non-discrimination and fair wages (Articles 11 and 83-84 respectively) were most likely influenced by the Charter and its impending ratification one year later.
2. *Boletín Oficial del Estado* (BOE) (Official State Bulletin) of 23 December 2000. See also Gortázar (2002), p. 1.
3. BOE of 21 July 2001. Gortázar (2002), *ibid.*, p. 2.
4. Law 5/1984 of 26 March 1984 governing the right of asylum and the condition of refugee, as amended by Law 9/1994 of 19 May 1994 (*Ley 5/1984 reguladora del derecho de asilo y de la condición de refugiado, modificada por la Ley 9/1994*). The implementing rules for this law were approved by Royal Decree of 203/1995 of 10 February 1995 (*Real Decreto 203/1995 reglamento de aplicación de la Ley de Asilo*).
5. Law 8/2000, Article 41 (foreign technicians and scientists invited or contracted by the state; visiting academics; foreign administrative and teaching personnel of cultural institutions; civil servants or military personnel from foreign state administrations; foreign journalists; members of international scientific delegations carrying out authorised projects and research in Spain; artists coming for specific performances; ministers of religion; foreign nationals from internationally recognised trade unions; persons of Spanish origin who have lost their Spanish nationality).
6. Asylum-seekers are given an authorisation to work if they have not received a reply to their asylum application within six months and if they are not responsible for the delay. Royal Decree 864/2001, Article 79.1.*c.*

– stateless persons;

– persons admitted for temporary or seasonal employment either for a maximum of one year (Type "A") or nine months within a 12-month period (Type "T");

– frontier workers (Type "F"); and

– diplomatic personnel.

These categories can also be organised into the following four groupings of foreign nationals whose interests are legally protected in Spain: diplomats; migrants of particular benefit to Spain because of special qualities or experience; ordinary migrant workers with the intention of working in Spain on a temporary or permanent basis; and persons who are already present in Spain, who are unlikely to leave and whom the law permits to obtain authorisation to work in order to prevent their social exclusion.

A basic distinction made in Spain is between those migrants who obtain a work permit on the basis of a personal application by an employer and those who do so on the basis of the quota (*contingente*). In the first instance, the employer has to meet a labour market test by considering the "national employment situation", which entails posting the vacancy with the labour authorities. The migrant can then be offered the job if there is no positive response to the vacancy after a certain period of time (in other words, if no Spanish, EU nationals or migrant workers with work permits are available).[1] The work permit granted is for a specific job and employer. In the second instance, the migrant can be offered the job if their skills or profession are covered by the quota, which is concerned with professional categories in which there are shortages on the Spanish labour market according to region. However, in the past, this quota system was not used to control labour migration flows to Spain, but mainly to regulate migrant workers already in the country who were in an irregular situation, although it would appear that the quota is currently being applied in the former sense, given that offers of employment contracts must now be directed to persons outside the country. The Minister of Labour and Social Affairs establishes this quota on an annual basis in response to proposals made by the regional governments after consultation with trade unions and employer organisations.[2] Both of these procedures are parallel processes and are not mutually exclusive (that is, a migrant whose professional category falls within the quota may still obtain the job on the basis of a personal application). The annual quota cannot be changed after it has been set, a position criticised as short-sighted by employers, who would prefer a more flexible procedure which is more responsive to the changing labour market.

In addition to the quota system, work permits can also be granted on the basis of other criteria determined in accordance with a particular employment sector or the specific skills of the migrant. For example, persons with high qualifications, such as company directors or scientists, or who hold positions of importance in the organisation employing them can obtain a permit without having to meet the national labour market test.[3] Other special categories concern high-level employees of multinational companies, for whom there exists a special procedure with specific criteria (type "G" work permits),[4] and those practising certain specific professions or establishing enterprises in Spain. With regard to temporary work, type "A" permits are granted on the basis of the specific activity of the employer that can be demonstrated to be of economic interest to Spain (for example, employment in the construction of infrastructure, utilities or communications) and type "T" permits are granted for activities or services of a temporary nature and, in practice, are mainly issued for agricultural work (for example, picking fruit and vegetables).[5]

1. Royal Decree 864/2001, Article 70.
2. Law 8/2000, Article 39 and Royal Decree 864/2001, Article 65. The labour migration quota for 2002 was 32 079 comprising 10 884 places for stable employment and 21 195 places for temporary work. See "Spain: Final Labour Migration Quota for 2002 is set at 32 079 - Morocco Risks Losing its Place of Priority", *Migration News Sheet* No. 226 (2002), p. 5.
3. Royal Decree 864/2001, Articles 68 and 71.2.
4. *Ibid.,* Article 77.
5. *Ibid.,* Article 78.

4.6.3. Statistical data

Table 12 below provides official statistical information on the total number of residence and work permits issued (in all categories) in 1998-2000 as compared with the numbers of students and asylum-seekers. While the student and asylum-seekers categories are not labour categories *stricto sensu,* persons in both of these groups can nonetheless obtain an authorisation to work.

Table 12: Total number of residence and work permits issued in Spain in 1998-2000 as compared with the numbers of students and asylum-seekers

	Residence and Work Permits	**Students**	**Asylum-seekers**
1998	197 074	22 066	6 764
1999	199 753	27 410	8 405
2000	Not available	28 820	7 926

Source: Spanish Ministry of the Interior.

As indicated in Table 13, the vast majority of work permits are issued to migrants employed in the services sector, although the number of permits granted for this sector decreased in 1999 as compared with increases in the agricultural and construction sectors.

Table 13: Work permits issued in spain by labour sector, 1998-2000

	Services	**Agriculture**	**Construction**
1998	123 234	37 919	15 896
1999	116 814	42 256	18 699
2000	Not available	Not available	Not available

As at the end of November 2001, the total number of foreigners in Spain, including EU nationals, non-EU nationals and undocumented migrant workers who had been regularised, stood at 1 495 000.[1]

4.6.4. Rights of migrant workers

a. Employment and residence rights

Duration of work permit and possibility of extension: on taking up employment, work permits labelled "B initial" *(B – inicial),* for salaried work in a specific sector or activity and geographical region, or "D initial" *(D – inicial),* for self-employment, are issued to most migrants.[2] Both are valid for a maximum duration of one year and can also be extended or prolonged in accordance with the requirements listed in Article 38(3) of Law 8/2000 and Article 72 of Royal Decree 864/2001, which provide for hardly any margin of administrative discretion on behalf of the authorities. Consequently, once these requirements are satisfied, migrants effectively possess a right to have their permit extended. In accordance with Article 40(c) of Law 8/2000 and Article 71 (1)(b) of Royal Decree 864/2001, the national employment situation is no longer taken into account on renewal. As a general rule, the renewal is granted on proof that a genuine labour relationship exists, which is achieved by obtaining a certificate from the social security authorities indicating payment of social security contributions. On renewal, different permits are issued: "B and D renewed" *(renovado),* which allow for any employment activity in any region and are valid for a period of two years. These permits can then be renewed for a further two years under the same conditions ("C" permit). Once they have obtained all of these permits in succession, migrants qualify for permanent residence (see below).

1. Spanish Population Census (Nov. 2001).
2. Royal Decree 864/2001, Article 69(1)(a) and (2)(a).

Right to change job, employer or employment sector: Article 73 of Royal Decree 864/2001 provides for the possibility of changing employment. It is possible to change job on renewal of the permit, or to change the employment category stipulated in the "B initial" permit. In the latter case, however, the new permit does not constitute a renewal and will only be valid for the remaining duration of the original "B initial" permit it is replacing, although it would appear that the possibility of changing employment is subject to a greater degree of administrative discretion than extension or renewal of the permit.

Possibility of acquiring a secure residence status or permanent residence independent of employment: residence status is tied to work status and it is not possible to acquire secure residence status independently. Migrant workers qualify for permanent residence after five years provided that they have met the requirements for each work permit extension (for example, possession of a new or pending employment contract) and that they have been in Spain continuously on consecutive temporary residence permits during this period (1+2+2) with the exception of absences for holidays.[1] The right of foreign workers to permanent residence is not dependent on the professional category and in principle no category is excluded, but, for some categories, it is only possible to obtain temporary extensions without the express possibility of acquiring permanent residence, which is the case for temporary workers with type "A" permits and those employed by companies established in a non-EU or non-EEA country (type "G"). However, in accordance with Article 78(2) of Royal Decree 864/2001, migrant workers holding type "T" permits (mainly agricultural workers), which are only valid for nine months initially, do have a route into a more secure residence status. After they have been employed in temporary activities for a period of four years (whether consecutively or not), they can be considered for a "B initial" permit.

b. Housing, health and social security rights

Housing: the migrant worker is responsible for finding accommodation, although this should be viewed in the context of the general obligations of the public administration, which has political responsibilities for housing and social housing in particular. The administration operates a number of diverse housing programmes for migrants, without which it is almost impossible to find accommodation. With regard to migrant workers holding type "A" or "T" permits, however, the agent is obliged to assist the worker in finding housing. In accordance with Law 8/2000, such workers must be "housed in conditions of dignity and adequate hygiene".[2] As far as access to public housing is concerned, Law 8/2000 stipulates that "[r]esident foreign nationals have the right of access to the public system of housing assistance in the same conditions as Spaniards".[3] The term "resident" is only applicable to regular and not irregular migrant workers.

Health: access to the right to public health care depends on whether the foreigner has been registered in the census or local register. According to Article 12(1) of Law 8/2000, foreign nationals registered in the census of the municipality in which they normally reside have the right to public health care under the same conditions as Spanish nationals. This includes registered foreigners who do not possess a residence permit. If they are not registered, migrants can only access emergency public health care to which all foreign nationals are entitled in the case of serious illness or accident.[4] Although the legal norms do not refer specifically to temporary workers, in so far as such workers hold residence and work permits they also have the right to public health care. This right is provided in bilateral social security agreements, such as those with Morocco and Ecuador, and the EU Association Agreements with Morocco, Tunisia and Turkey.

Social security: foreigners legally resident in Spain are not excluded from any branches of social security.[5] By virtue of Article 14(1) of Law 8/2000, they have the right to the benefits and services of the social security system under the same conditions as Spanish nationals. However, where Spanish workers in

1. Law 8/2000, Article 32(2); Royal Decree 864/2001, Article 42.
2. Law 8/2000, Article 42(2).
3. *Ibid.,* Article 13.
4. *Ibid.,* Article 12(2).
5. *Ibid.,* Article 10(1).

certain employment sectors are excluded, migrant workers are excluded as well. For example, all employees in the domestic services sector are excluded from the right to unemployment benefit.

c. Family unity

Articles 17 to 19 of Law 8/2000 regulate the right of resident foreign nationals to be reunited with their families. The right to family reunification can only be exercised if migrants have resided legally in Spain for one year and have authorisation to reside for at least another year.[1] According to Article 17, the following family members can join the migrant workers: the spouse, provided they are not separated *de facto* or *de jure* and that the marriage was not entered into fraudulently; unmarried children under the age of 18, including adopted children and disabled children;[2] relatives in the ascending line of the foreign national or spouse if they form part of the same household and where there are reasons justifying the need to authorise their residence in Spain. The conditions for family reunion are stipulated in Articles 18 and 19 of Law 8/2000 as supplemented by Royal Decree 864/2001. Migrants must demonstrate that suitable housing is available for their families and that they possess sufficient means of support to provide for them once reunited.

d. Access to vocational training and language and integration courses

Vocational training: foreign nationals with legal residence have the same opportunities as nationals to enrol on vocational training courses and it is usually the employer who organises and pays for the training. Resources provided by the EU European Social Fund are also available in Spain to support vocational training. These resources are distributed by the state administration to regional governments and are used to support a range of courses for the unemployed (including migrants) with a view to assisting them in finding employment. Moreover, funds from the FORCEM programme,[3] which also has its origins in the European Social Fund, are distributed by the state administration to companies and trade unions and are used wholly to assist unemployed workers. In theory, unemployed migrant workers have the right to freely enrol on any vocational training course they wish, although in practice it is normally the agent who organises the enrolment. Consequently, a possibility of "discrimination" exists in those instances where the "chosen" course does not necessarily conform to the worker's choice.

Language and integration courses: migrants have access to such courses, although there is a considerable variation in the courses provided. The Ministry of Social Affairs has established special programmes focusing on language and culture as well as courses aimed at improving the employment prospects of migrant workers. Normally, the courses are organised by NGOs or trade unions and funded by public authorities. In general, no specific language or social integration courses are organised for particular categories of migrant workers, although certain employment sectors, such as the construction sector, arrange language classes for immigrants. Special attention is also paid to women and young persons.

e. Protection against unemployment and expulsion

As noted in respect of social security above, resident foreign nationals have the right to the same social security benefits as Spanish nationals, which include unemployment benefits. However, certain categories of migrant workers, such as temporary or seasonal workers (type "A" or "T" permits), frontier workers (type "F") and students authorised to work, do not make unemployment contributions and are therefore not entitled to unemployment benefit. Their authorisation to work is strictly related to their residence permit and they are expected to leave the country after they have completed their employment or studies. With regard to those migrants who are eligible for unemployment benefit, the

1. *Ibid.* Article 18(1) and (2).
2. In the case of the children of only one parent, that parent must exercise parental authority over the child individually or have been granted legal custody of the child. *Ibid.,* Article 17(1)(b). Moreover, under certain conditions, specified family members effectively gain free access to the labour market. Article 40(d) of Law 8/2000, as implemented by Article 71(1)(a) of Royal Decree 864/2001, provides that the national employment situation should not be taken into account when the work contract or job offer is directed to the spouse and children of a migrant worker residing in Spain with a renewed permit.
3. *Fundación para la Formación Continua.* See http://www.forcem.es/

period for which the benefit is payable depends on the number of days the person concerned was in salaried employment, which is regulated by the law on social security.[1] The work permit does not expire when the job has ended, but only after unemployment benefit has been paid.[2] On becoming unemployed, the migrant can seek alternative employment and try to obtain a new work permit. Migrant workers cannot be expelled when they are in receipt of unemployment benefit.[3] On expiry of their work permit, migrants effectively have three months within which to find work and they cannot be expelled during this period;[4] after three months, however, they may face expulsion.[5]

f. Trade union rights and consultation

According to Article 11 of Law 8/2000, foreign nationals have "the right to unionise freely or to join a professional organisation, under the same conditions as Spanish nationals, and may exercise it when they have obtained authorisation for their stay or residency in Spain". It can be assumed also that legally resident migrant workers have the right to form their own trade unions. Article 1 of Law 11/1985 on Trade Unions stipulates that all workers possess this right and does not exclude foreign workers. An example of a migrant workers' organisation in Spain is the association of Moroccan workers, known as ATIME (*Asociación de trabajadores e inmigrantes marroquíes en España*),[6] although, strictly speaking, this is not a trade union.

Two mechanisms for consulting migrant workers can be identified in Spain. First, there is a legal obligation to consult all interested social organisations, which is concretised in Article 20 of Law 8/2000 in respect of foreign workers. Second, there are a number of organisations, which are consulted on matters of immigration and in which migrants participate, such as the Forum for the Social Integration of Immigrants (*Foro para la Integración Social de los Inmigrantes*), established in 1995 to provide non-binding advice to public authorities on the social participation and integration of all migrants and comprising representatives of the public administration, migrant and refugee associations, NGOs and social assistance organisations, trade unions and professional organisations,[7] and regional bodies, such as the Consultative Council for Immigration (*Consell Assessor d'Immigració*) in Cataluña.[8] Despite the existence of these mechanisms, however, it would appear that their opinions have had minimal practical influence on the development of recent law and policy.

4.6.5. Bilateral or multilateral agreements

In 2001, Spain entered into bilateral labour migration agreements with Colombia, Dominican Republic, Ecuador and Morocco.[9] It signed further agreements with Poland and Romania in

1. Royal Legislative Decree 1/1994, Article 210. At the end of November 2001, there were 87 363 migrant workers registered with the Unemployment Benefit Office. Ministerio del Interior, Delegacion del Gobeirno para la Extranjeria y la Immigracion, *Balance* 2001, p. 43.
2. Royal Decree 864/2001, Article 75(c).
3. Law 8/2000, Article 57(5)(d).
4. *Ibid.,* Article 52(b).
5. *Ibid.,* Article 53(a).
6. For the organisation's web site, see http://www.atime.es
7. Law 8/2000, Article 70; Royal Decree 361/2001. Currently, the Forum comprises thirty-three members, including eleven representatives from public authorities, eight from migrant and refugee associations, nine from NGOs, two from trade unions, and one company representative. The Forum's functions are as follows: to facilitate the flow of information and communication between migrants and society; to recommend actions promoting the social integration of the migrant population; to receive information about public authority programmes and activities relating to social integration; to provide assistance to NGOs; to promote studies and enquiries on the social integration of migrants; and to maintain contacts with local, national and international organisations.
8. Decree 125/2001.
9. See, respectively, Agreement between Spain and Colombia on the control and regulation of labour migratory flows (*Acuerdo entre España y Colombia, de regulación y ordenación de los flujos migratorios laborales*) Madrid, 21 May 2001, BOE of 4 July 2001; Agreement between Spain and the Dominican Republic on the control and regulation of labour migratory flows *(Acuerdo entre España y República Dominica relative a la regulación y ordenación de los flujos migratorios laborales)*, Madrid, 17 December 2001 (BOE of 5 February 2002); Agreement between Spain and Ecuador on the control and regulation of migratory flows *(Acuerdo entre España y Ecuador, de regulación y ordenación de los flujos migratorios)*, Madrid, 29 May 2001, BOE of 10 July 2001; and the Labour Agreement between Spain and Morocco *(Acuerdo sobre mano de obra entre España y Marruecos)*, Madrid 25 July 2001, BOE of 20 September 2001. The texts of all the agreements can be found at: http://www.extranjeria.info/inicio/index.htm

2002.[1] The agreements contain provisions on communication of job offers, assessment of the requisite professional qualifications, travel and reception conditions, and protection of the employment and social rights of migrant workers.[2] Each agreement also provides for the establishment of a mixed co-ordination committee representing both countries, which draws up the necessary measures for its implementation.

4.6.6. Political and public debate

The public debate in Spain has been mainly concerned with the increase in the number of migrant workers entering Spain, irregular migration and instances of criminal behaviour among the migrant population. However, the debate has also focused on the question of migrants' social integration. In this context, therefore, Law 4/2000 as amended by Law 8/2000 signals a turning point in the regulation of immigration in Spain, since its principal purpose is to promote the adoption of measures for the integration of those migrants in a regular situation.[3] The law is a significant improvement on the 1985 law because it grants more rights to such migrants; for example, it specifically recognises a right of family reunification. One particular aspect of the 2000 legislation, which has resulted in considerable debate, concerns the denial of rights, such as rights to family reunion, to associate and assemble freely and to protest in public, to migrants without residence permits. Certain sections of the population (mainly those opposed to the law) believe that these rights are fundamental and cannot be restricted to foreigners holding residence permits. For this reason, the main opposition party (PSOE – *Partido Socialista Obrero Español*) and a number of independent members of parliament have challenged the legislation before the Constitutional Tribunal.

4.6.7. Relevance of Council of Europe conventions and European Community agreements

It is difficult to ascertain to what extent the legislation in Spain has been influenced by Council of Europe conventions and Community agreements without conducting an extensive study of the debates in the Congress of Deputies leading up to adoption of the 1985 Law on Aliens[4] and the two laws of 2000. Article 3(1) of Law 8/2000 identifies international treaties as defining, together with the provisions of the law itself, the rights and freedoms of foreign nationals in Spain as recognised in Title I of the constitution. More specifically, Article 3(2) stipulates that "the regulations relating to the fundamental rights of foreign nationals shall be interpreted in accordance with the Universal Declaration of Human Rights and with the International Treaties and Agreements on these same issues which are applicable in Spain". Moreover, international judicial decisions have clearly had an impact in Spain, such as the rulings of the European Court of Justice on the direct effect of the social security provision in the European Community agreement with Morocco.

4.6.8. Relevance of GATS rules

Law 4/2000 as amended does not refer at all to the GATS rules. Nevertheless, Spain is required to follow these rules in accordance with its system of "lists of specific obligations" (*"lista de compromises específicos"*) of April 1994 and July 1995, which detail each of the professional services and the way each of these obligations is applied in Spain. However, the rights and obligations deriving from the GATS, and included in the lists of obligations, lack direct effect and therefore do not confer any directly applicable rights on physical or legal persons. Consequently, non-EU nationals coming within the scope of these rules must still obtain residence and work permits, although the existence of these rules will now have to be taken into account by the authorities and thus operate as a further limitation on their discretion.

1. Agreement between Spain and Poland on the control and regulation of migratory flows between both states (*Acuerdo entre España y La República de Polonia sobre la regulación y ordenación de los flujos migratorios entre ambos Estados*), Warsaw, 21 May 2002 (BOE of 20 September 2002); Agreement between Spain and Romania on the control of labour migratory flows between both states (*Acuerdo entre España y Rumania relativo a la regulación de los flujos migratorios laborales entre ambos Estados*), Madrid, 23 January 2002.
2. For example, the Labour Agreement between Spain and Morocco (25 July 2001), Chs. 1-3.
3. Gortázar (2002), pp. 7-8 and 13-14.
4. Organic Law 7/1985, BOE of 3 July 1985. For an overview of this law, see Gortázar (2002), pp. 4-6.

4.7. Sweden

4.7.1. Principal rules regarding migration for employment

The Aliens Law (*Utlänningslagen*)[1] and the Aliens Order (*Utlänningsförordningen*)[2] are the principal regulations in Sweden governing labour migration. These regulations are supplemented by guidelines issued by the National Labour Market Board (*Arbetsmarknadsstyrelsen*) and the Migration Board (*Migrationsverket*).

4.7.2. Categories of migrant workers

Generally speaking, there are three categories of migrants admitted for employment to Sweden: those admitted to address temporary shortages in the domestic labour force; those employed as part of an international exchange programme, which is targeted, in the first instance, at particular groups, such as artists, sportspersons and researchers; and those taking up employment leading to permanent residence, such as key management personnel and highly skilled migrants. Between 300 and 400 persons per year are granted a permanent residence permit in the highly-skilled employment category (see Table 14 in section 4.7.3 on statistics below). The category into which migrants fall depends on the kind of work they are offered. Only the second category, however, is determined partly according to sector of activity. No quotas operate in relation to these categories, although quotas exist for other groups not covered directly by this study, such as seasonal labour migrants and trainees who are part of an international exchange. In the framework of such international exchanges, agreements exist with the Baltic states allowing for the exchange of 300 trainees from each country.

4.7.3. Statistical data

Most of the migrant workers in Sweden are found in the categories relating to temporary employment (see Table 14).[3] Indeed, the preliminary figures for 2000 indicate a sharp rise in the number of these migrants, which is largely due to a demand for labour in certain specific sectors, such as the medical profession (for example, doctors and nurses) and the IT field.

Table 14: Migrants in temporary employment and highly skilled employment in Sweden, 1998-2000

	Temporary Employment	**Highly-skilled Employment**
1998	5 170	363
1999	5 581	343
2000	10 000*	433

* Only an approximate figure is available.

4.7.4. Rights of migrant workers

a. Employment and residence rights

Duration of work permit and possibility of extension: the duration of the work permit and the possibility of extension differs according to the category of labour migrant. With regard to the first and second categories, permits are granted for one year in the first instance, or for a shorter period if the employment itself is offered for a shorter period. Permits in the first category can be extended up to a maximum of eighteen months, after which the migrant worker is supposed to leave Sweden, and in the second category to a maximum of four years. A further extension beyond four years is possible, but is only granted in exceptional cases. Persons employed by multinational companies, who move to an office

1. SFS No. 1989:529 (Ch. 2, paragraph 6), as amended.
2. SFS No. 1989:547 (Ch. 4), as amended.
3. The figures in the column in Table 14 relating to temporary employment relate to the first two migrant worker categories taken together because the data is not broken down any further.

or establishment in Sweden, are required to obtain a work permit in the same way as other migrant workers. With regard to the third labour migrant category, the initial permit is issued for permanent residence.

Right to change job, employer or employment sector: work permits in the first two categories are limited to a particular job and employer and a change is only possible if the migrant returns to the country of origin and applies for a new work permit. Those labour migrants in the third category possessing a permanent residence permit have free access to the labour market, with the narrow exception of jobs that are limited to Swedish citizens.

Possibility of acquiring a secure residence status or permanent residence independent of employment: the acquisition of a secure residence status or permanent residence is generally not possible in the two temporary employment categories. In the first instance, migrant workers must leave Sweden after the maximum period of eighteen months has expired, while in the second instance, permanent residence can only be granted in exceptional circumstances relating mainly to a change of status, for example, recognition as a refugee or establishing a family with a Swedish national or a permanently resident foreign national. The fact that migrants have a family and that their children have attended school in Sweden for several years will also be relevant factors. By definition, migrants in the highly-skilled category are permanent residents on their arrival in Sweden.

b. Housing, health and social security rights

Housing: migrant workers are responsible for their own accommodation, which must be arranged before the work permit is issued. However, accommodation is frequently included in the employment package. Migrant workers can also apply for publicly owned housing.

Health: access to the national health and social welfare systems depends on civil registration, and foreigners can only be registered if their stay in Sweden exceeds one year. Therefore, migrant workers may only benefit fully from the national health system after one year's residence. If they are not registered because their stay is shorter than one year, they must take out private health insurance. Most employers, however, are affiliated to private business health centres, which will provide the necessary health care at the employer's expense.

Social security: as noted above, access to social security and welfare depends on civil registration and, once registered, the migrant worker has access to all branches of social security.

c. Family unity

The spouse and co-habitant (of either sex) and children under eighteen can join migrant workers in Sweden from the start of their employment. Family reunion is not subject to conditions, such as a waiting period or sufficient resources. Indeed, the possession by migrant workers of sufficient resources for their families is implicit in the acquisition by the migrant of lawful employment. For example, a work permit would not be granted to the migrant worker if he or she were not guaranteed at least a minimum wage. Moreover, after a period of six months in the country, the spouse or co-habitant can also obtain a work permit (which is not tied to a particular employment) for the same duration as the migrant worker's permit.

d. Access to vocational training and language and integration courses

Vocational training: opportunities for vocational training are limited in practice because in most cases the maximum period of lawful employment is relatively short (18 months). Moreover, it would not normally be necessary for migrant employees to undertake vocational training during this period because if they did not possess appropriate qualifications they would not have been granted the employment in the first place. However, if the need for such training arises, migrants can be enrolled on specific vocational training courses provided that the training is closely connected to their employment. The employer would normally cover the cost of such training.

Language and integration courses: migrant workers have access to such courses but they have to arrange and pay for the courses themselves, unless specific courses are organised for them and paid for by the employer.

e. Protection against unemployment and expulsion

Migrant workers in the temporary employment categories have no access to unemployment benefit, which is limited to those persons who are available for work and migrants cannot be available for other work because their work permit is tied to a particular job and employer. However, they cannot be expelled so long as they hold a valid residence permit, which is normally issued for the same period as the work permit.

f. Trade union rights and consultation

Migrant workers have a constitutional right to join trade unions and to form their own unions. However, there are no instances of migrants forming their own associations to protect their employment interests, although the powerful Swedish unions do take care of the interests of migrant workers. There are no known specific associations or organisations of migrant workers and no official mechanism through which migrants can be consulted with regard to the development of rules or policy on labour migration.

4.7.5. Bilateral or multilateral agreements

There are no agreements with third countries relating to labour migration and the government is not currently negotiating such an agreement with any country on this question. With regard to the exchange of trainees, however, a number of agreements have been signed with the Baltic states, Canada, Switzerland and the United States of America.[1]

4.7.6. Political and public debate

While there has not really been any political or public debate about the treatment of migrant workers in Sweden, there has been some discussion on receiving more labour migrants for permanent residence given the low birth rate in the country.

4.7.7. Relevance of Council of Europe conventions and European Community agreements

Sweden has ratified all the relevant Council of Europe instruments relating to migrant workers considered in section 2, although it is not possible to determine whether these instruments have directly influenced the development of current law and practice. To date, the European Community agreements have not had any influence.

4.7.8. Relevance of GATS rules

The possibility under the GATS rules to grant time-limited work permits for certain activities has been implemented.

1. Estonia (1992); Latvia (1994); Lithuania (1994); Canada (1980); Switzerland (1946); U.S.A. (1910). The agreement with Switzerland has been replaced by the agreement on the free movement of persons ratified by the EU and its member states in May 2002. See section 2.6 above.

5. Conclusions and recommendations

This study began by asking if the return of labour migration to the political agenda in recent years had led to changes in law and practice in the ten Council of Europe member states under consideration. Before the economic crisis of the early 1970s, labour migration was perceived as an essentially temporary phenomenon and migrants were not expected to remain in countries of employment and eventually integrate and settle there. Clearly, however, this policy approach, based on a temporary or rotational system of labour migration, which by definition discourages integration, did not work because the total foreign population in western European countries increased overall rather than decreased, as many labour migrants failed to return to their countries of origin and their families came to join them in their newly adopted homelands.[1] Although this trend demonstrated that settlement in these countries was indeed taking place, this process was often a difficult one fraught with numerous social problems experienced by persons belonging to these foreign populations as well as discrimination in many important spheres of life, which persist to this day. Given these past experiences, therefore, the study addressed the question of whether action taken in response to the generally recognised need for more labour migration, in accordance with the changing economic and demographic trends identified in the Introduction, had been accompanied by the development of innovative and more visionary policies towards the treatment of labour migrants in European countries of employment, including a greater willingness to enable new entrants and recent residents to integrate into the host society if they so wished. Clearly, an important aspect of such integration concerns the possibilities that are open to the migrant worker for acquiring secure residence status and having access to all the economic and social rights in the host country.

5.1. Rules governing labour migration

The framework rules governing labour migration in most of the ten countries examined are found in primary legislation, although the detailed measures are located in subordinate legislation and policy rules, such as circulars, decrees, orders and regulations. The United Kingdom would appear to be somewhat of an exception in this respect, because, though the framework legislation is the Immigration Act of 1971, the rules relating to labour migration are almost exclusively found in subordinate legislation and in the detailed guidance of an agency of the Home Office: Work Permits (UK). The Nationality, Immigration and Asylum Bill, currently passing through the UK Parliament, does not alter this approach.

A particular feature of some of these rules is the use of annually adjusted quotas in Austria, Spain and Lithuania, which reflects a strong government interest in managing labour migration and in ensuring that it is in accordance with the country's "reception capacity". However, such quotas have been criticised by employers on the basis that they cannot provide a sufficiently rapid response to the changing needs of the labour market. The quota regime is particularly exacting in Austria, where it applies to both employment and residence policy. Moreover, it also operates in respect of the entry of the spouse and minor children of non-EU migrants resident in the country before 1 January 1998 (and in respect of those family members of migrants who arrived after this date but who did not mention their family members in their application or where the reunion is taking place more than one year after admission) and appears to have caused considerable hardship to families waiting to join migrants resident in Austria. Moreover, quotas operate in some countries in other less noticeable ways in determining the entry of certain categories of migrant workers, such as IT specialists to Germany, and in the context of bilateral agreements, most of which fix the annual number of migrants to be permitted entry (for example, Hungary and Germany).

In a number of countries, the general rules governing labour migration also apply to foreign or multinational companies moving employees or offices to the country of employment, although a

1. See Cholewinski (1997), p. 334 and sources cited therein.

number of exceptions are in place, particularly in respect of the application of the labour market test, which is often relaxed considerably or lifted completely subject to the fulfilment of certain conditions.

5.2. Is international labour migration on the rise?

The statistics available, which mainly encompass the period 1998-2000, reveal a trend of increasing actual numbers of migrant workers in all the countries studied.[1] Not surprisingly, perhaps, this increase has been most marked in the larger economies, where the demand for specialists and particular skills is likely to be greatest, although steady increases have also been recorded in some of the other countries, including the central and eastern European states (especially Hungary and Poland) considered by this study.

5.3. Guest workers or integrated residents?

The treatment migrant workers may expect to receive in the country of employment as well as the opportunities for integration and settlement available to them depends to a great extent on the employment and residence status they acquire on first admission. Table 15 below is a simplified compilation of the principal features of the work- and residence-permit system in the ten Council of Europe member states. In particular, it focuses on the maximum duration of the first work permit in the principal migrant worker categories; the possibility of extending this permit without having to apply for a new one and fulfil the labour market test; the minimum period of time required to gain free access to the labour market and the minimum period required to obtain a secure or permanent residence status. Clearly, the more liberal these rules are, the easier it is for the migrants concerned to achieve secure residence status, which can only facilitate their integration into the host society.

Table 15: Employment and Residence Rights in ten Council of Europe member states

	Maximum duration of first work permit, or resident permit allowing employment	**Possibility of extending this permit without the need to apply for a new one**	**Minimum period required to obtain free access to the labour market**	**Minimum period required to obtain secure or permanent residence status**
Austria	1 year	Yes	5 years	5 years
France	1 year (CST)* 9 months (APT)**	Yes (CST)* One extension only (APT)**	Depends on permit type No	3 years Not possible
Germany	1 year	Yes	5 years	5 years (unrestricted residence permit) 8 years (establishment permit)
Hungary	1 year	Yes	Not possible	Not possible
Lithuania	1 year	Yes (up to 2 years max.)	Not possible	5 years
Netherlands	3 years	No	3 years	5 years
Poland	2 years	Yes (for a further 2 years max.)	Not possible	5 years
Spain	1 year	Yes	1 year	5 years
Sweden	1 year (temporary permit) Permanent residence (highly skilled migrants)	Yes (up to 18 months max.)	Not possible Free access to the labour market	Not possible Permanent residence on entry
United Kingdom	5 years (business and commercial) 1 year (work experience)	Yes Yes (up to 2 years max.)	4 years Not possible	4 years Not possible

* CST: *carte de séjour temporaire "salarié"* – temporary residence permit allowing employment
** APT: *autorisation provisoire de travail* – temporary authorisation to work

1. However, this increase in the actual numbers of migrant workers in the countries studied does not necessarily mean that the proportion of foreigners in the total national labour force is greater. See also SOPEMI 2001, pp. 53-54.

The majority of the countries examined operate a dual system of work and residence permits, which usually enables at least some groups of migrants to achieve secure or permanent residence status after defined periods of employment and residence in the host country. Hungary is an important exception in this respect because the rules do not appear to make allowances for any kind of secure residence status for migrant workers employed on the basis of work permits. In most of the other countries examined, there are also categories of migrant workers who do not qualify for a secure or permanent residence status. With some exceptions, these categories encompass seasonal workers, including those who are permitted to spend more than six months per year in the country at any one time (and thus a concern to the study), as well as various categories of migrants who receive permission to enter in order to take up a particular type of temporary employment. In these cases, the official rules are clearly designed to treat these migrants as guests and to preclude their integration. Indeed, this approach is evident in respect of those work permits that cannot be renewed or extended or which can only be extended for a short period of time, and is taken to an extreme degree in the United Kingdom, where previous holders of a training and work experience (TWES) permit are prevented from returning to the UK as workers for a period of up to two years either in the same work permit category or in another category.

A clear trend, however, is that highly skilled migrants are more likely to receive a more privileged employment status, which also gives them the best opportunity to integrate and settle in the host country. In a number of countries, such migrants do not have to meet the labour market test, or the test is relaxed considerably. In addition, they are also likely to receive the most favourable residence status of all the migrant workers admitted for employment to that country. Sweden operates the most enlightened policy in this respect, by granting such migrants permanent residence status from the moment of their arrival.

In some countries, however, such as the Netherlands and Spain, the system in place may in practice operate in a very rigid manner, with the result that any gaps in legal residence, which may occur for example because the worker or employer has neglected to apply for an extension to the relevant authorities, may result in the pertinent qualifying periods for a secure residence status having to run from the beginning.

5.4. Rights of migrant workers

As discussed above, the ability of migrants to access secure or permanent residence in the host country and the fuller social rights package that is normally tied to such residence depends on the status granted to them on first admission and the kind of work and residence permits that are issued to them. Furthermore, access to a more secure form of residence is clearly easier to attain if the migrant falls into a highly skilled workers category.

Migrant workers are normally responsible for their own housing in countries of employment unless the employer has agreed to provide accommodation beforehand or if the official rules require that employers are obliged to provide housing to migrants employed in a particular sector (for example,the agricultural and construction sectors in France) or for a particular period (for example, during the first year only in the Netherlands). While in most countries equal access to state-subsidised accommodation is enshrined in law, in practice such access is frequently very difficult largely as a result of the shortage of such accommodation in certain regions and particularly in the major cities. Moreover, some countries, regions or municipalities (in those instances where housing is primarily a regional or municipal responsibility) clearly apply different rules to nationals, EEA nationals and third-country migrants in respect of the provision of state-subsidised accommodation. Even where access is provided to the latter, a restrictive quota may well be applied (for example, in the case of Austria).

Health care is generally afforded to migrants on equal terms with nationals, although access to the full benefits of the health care system may well be subject to conditions, such as payment of social insurance contributions (Germany, Poland), level of income (Netherlands) and civil registration (Spain, Sweden). The situation in Lithuania is of particular concern, as migrants possessing temporary work

permits are excluded from the national health system altogether and need to obtain private insurance, which is also a condition for obtaining a work permit.

Access to the protection of the social security system is varied. Where social security benefits are based on contributory payments, equal treatment between migrants and nationals is normally ensured. However, access to non-contributory benefits, such as family or child benefit, may not be available at all (United Kingdom) or be restricted considerably according to residence status (Germany, Austria). A particular problem, identified specifically in relation to France and Germany but probably more prevalent elsewhere, is that migrants may encounter difficulties in gaining access (or at least full access) to certain contributory benefits (for example, retirement pension) on returning to their country of origin. In practice, the continued availability of these benefits will depend on the rules governing retention of permanent residence status after leaving the country of employment. In some cases, the problems relating to access to non-contributory benefits and the export of benefits are resolved by way of bilateral social security agreements between countries of employment and origin.

Family reunion is primarily confined to the spouse and minor unmarried children of the migrant, although dependent relatives in the ascending line are also permitted to join migrants in a number of countries of employment. In most cases, the maximum age of children for the purpose of family reunification is 18 years, although it is 16 years in Germany (unless the child can meet certain "integration" conditions)[1] and 15 years in Austria in those instances where the quota (see below) is applicable. The conditions for family reunion differ, although in general they relate mainly to the possession of adequate accommodation and sufficient resources. One noticeable development in some countries, however, is where the entry of family members is subject to further conditions connected with the migrant's first admission: in other words, whether the relationship with the spouse or partner was in existence before the arrival of the migrant (Germany); whether the family members were mentioned in the first application (Austria, Germany); or the requirement that the family members arrive to join the migrant within a certain period of time after the migrant's first admission (Austria, Netherlands). Waiting periods also operate in some countries, and range between one year (France, Spain) and three years (Austria – in relation to those family members subject to the quota; Hungary – in relation to settled migrants; Poland – in relation to migrants with restricted residence permits), whereas in other countries there are no such waiting periods (United Kingdom, Netherlands, Lithuania, Sweden). As noted in section 5.1 above, the situation in Austria is particularly problematic where the quota system has resulted in considerable delays to family reunification.

The right of migrants to access vocational training appears to be essentially dependent on the needs of the employer. Personal opportunities for accessing such training would seem to be very limited unless the state actively affords support. In this respect, the law and practice appear particularly commendable in France, Germany and Spain, where employers have certain responsibilities to guarantee access to vocational training and where state support is available, particularly in respect of those migrants who have completed a specified minimum period of residence or in the event of their unemployment.

The law and practice in the countries examined revealed little provision for language and integration courses specifically designed for migrant workers and their families. Where official support for such courses exists, it is mainly aimed at the reception of migrants and their families rather than their long-term integration. Indeed, migrant workers are explicitly excluded from integration courses in the Netherlands. In contrast, developments in Austria in this respect are rather different and, on the entry into force of the "integration agreement", new migrants and those resident in the country for less than five years will be required to attend obligatory German language and integration courses and be subject to a system of sanctions for non-observance including the possibility of non-renewal of residence permits. The new German Immigration Law also introduces obligatory language and integration courses.

1. However, see the changes introduced by the new German Immigration Law, discussed in section 3.1.6 above.

Significant variations in law and practice are evident in respect of unemployment protection and consequently against the risk of expulsion. In most countries, migrants are entitled to unemployment benefit on equal terms with nationals. In such cases, the principles identified in Articles 9(4) and 25 of the European Convention on the Legal Status of Migrant Workers are normally adhered to and migrants cannot be removed from the country during the period for which this benefit is payable. In some other countries, however, migrants face a real risk of expulsion on loss of their employment because of the close connection between work and residence permits. In Hungary, while in theory migrants have the right to claim unemployment benefit, in practice the loss of employment also results in the termination of the residence permit. In addition, an obligation is imposed jointly on employers and migrants to notify the Aliens police within three days of the migrant's losing his or her employment. In Lithuania, only migrants possessing permanent residence status can claim unemployment benefit, whereas other migrants have their work and residence permits cancelled when they lose their jobs and may then face an order to leave the country, which is followed by a formal expulsion decision. In the United Kingdom and Sweden, migrant workers in possession of work permits are unable to claim unemployment benefit because they are deemed as not being available for work under the rules, although expulsion is not a threat until their residence status expires. While residence permits are normally not withdrawn in countries where the migrant has been in receipt of unemployment benefit, dependency on social assistance or welfare is often a ground for the non-renewal of residence permits or may even lead to the migrant being expelled by the authorities.

The right to join trade unions is guaranteed to migrants in all countries, with the exception of Lithuania, where only citizens and permanent residents can enjoy this right, although the law is being amended. Moreover, in Austria, non-EEA migrants do not possess active and passive voting rights in the most influential trade union bodies (*Arbeiterkammer*). However, a reference for a preliminary ruling questioning the compatibility of this position with Community law in respect of Turkish workers under Decision 1/80 is pending before the European Court of Justice. While there are no legal obstacles precluding migrants from forming their own unions to protect their employment interests, in practice migrants prefer to join national unions, which have more influence with employers and government and where their interests are likely to be better protected.

While associations of migrant workers exist, particularly in those countries with large numbers of migrants of a particular nationality (for example, Turkish migrants in Germany and Moroccans in Spain), there are limited official mechanisms in place to ensure that these organisations are formally consulted in respect of changes to law and practice affecting their interests. Therefore, most consultation with these associations or NGOs working on behalf of migrant workers and their families takes place on an informal level. Where formal mechanisms exist, their influence on the law and policy-making process in the field of labour migration has been minimal.

5.5. Bilateral agreements

Bilateral agreements regulating labour migration, and particularly the exchange of trainees, are quite common in a number of the countries studied. While some countries, such as France, Germany and Spain, have been mainly inclined to conclude agreements with countries with which they possess cultural and linguistic links or are geographically close, the conclusion of quite a large number of agreements involving the countries of central and east Europe is noticeable. Not surprisingly, therefore, the countries from this region examined in the study, especially Hungary and Lithuania, have concluded such agreements with a number of their immediate neighbours as well as with countries further afield.

5.6. Impact of Council of Europe conventions and European Community agreements

Council of Europe conventions appear not to have had a significant impact on the development of labour migration law and policy in most of the countries under consideration. The most widely applicable instrument in terms of ratification and personal scope, the ECHR, has had little direct

influence on the treatment of migrant workers, with the exception of the potential application of Article 14, read together with Article 1 of the First Protocol, in respect of non-discriminatory access to social security provision. However, the study has identified a number of difficulties with regard to the implementation of the European Court of Human Rights' judgment in Gaygusuz v. Austria. The European Social Charter, the European Convention on the Legal Status of Migrant Workers and the European Convention on Establishment, while resulting in some amendments to primary laws and subordinate rules at national level, have nonetheless had a limited influence in practice.

Conversely, the European Community Association Agreements and their interpretation by the European Court of Justice have clearly resulted in improvements to the situation of migrant workers from Turkey and the Maghreb countries, particularly in those member states in which they constitute a significant proportion of the foreign population, such as Germany, Austria, Netherlands and Spain. However, the Association Agreements are less well known and used in some countries, particularly in France. The Europe Agreements have had a negligible impact to date, although this position may well change, particularly in the light of the recent case-law of the European Court of Justice on the right of establishment under these instruments.

5.7. Influence of GATS rules

On the whole, GATS rules have had little influence on national labour migration policies.

5.8. Recommendations

5.8.1. It is recommended that governments:

a. grant all migrants admitted to lawful employment for a period of at least one year and irrespective of their level of skills a residence status that would enable them to acquire a secure residence status (or permanent residence) after three to five years of employment and/or residence in the country;

b. grant all such migrants free access to the national labour market after two to four years of employment in the country;

c. ensure that economic and social rights are granted to migrant workers on equal terms with nationals in law and in practice, with particular emphasis on the provision and promotion of non-discriminatory access to housing and health care;

d. widen the access of migrants to non-contributory benefits and guarantee the export of contributory benefits, such as a retirement pension, on return of migrants to their country of origin;

e. grant unemployed migrants access to unemployment benefit on the same terms as nationals and ensure that qualification for and receipt of this benefit does not result in the loss of their residence status and the associated risk of expulsion;

f. respect the right to family reunion and not subject this right to excessively onerous conditions, such as quotas for the entry of certain family members and lengthy waiting periods, as well as other restrictions dependent on the fulfilment of certain requirements on the migrant's first admission;

g. support the right of access of migrants to vocational training, particularly for those migrants who have resided in the country for at least one year and particularly in the event of their unemployment;

h. protect the trade union rights of migrant workers in full, including their passive and active voting rights;

i. guarantee the protection of economic and social rights in bilateral agreements concluded with third countries;

j. comply with relevant rulings of the European Court of Human Rights and the conclusions of the Committee of Experts of the European Social Charter;

k. ratify the revised European Social Charter and accept Articles 18 and 19 of the Charter and ratify the European Convention on the Legal Status of Migrant Workers as well as other relevant instruments,

such as the European Convention on Establishment and the European Convention on the Participation of Foreigners in Public Life at the Local Level.

5.8.2. It is recommended that the Council of Europe:

a. (Committee of Ministers) issue a Recommendation on the legal status of migrants admitted for employment addressing at least the following elements:
- equality of residence status for all migrants admitted to lawful employment for one year or more;
- equal access to the labour market;
- effective protection of the economic and social rights of migrants admitted to employment in law and in practice;
- promotion of the economic and social rights of migrants;
- access to social security protection;
- respect for the right to family reunion and the conditions to which this right is subject;
- access to vocational training;
- guarantees for the receipt of unemployment benefit and effective protection against expulsion in the event of unemployment;
- full enjoyment of trade union rights; and
- development of common and equitable rules in connection with the adoption of bilateral agreements regulating migrant labour.

b. examine states' compliance with the rulings of the European Court of Human Rights of relevance to the status of migrants admitted for employment, and particularly compliance with the Gaygusuz v. Austria judgment; and

c. draw up Protocols to the European Social Charter, the European Convention on Establishment and the European Convention on the Legal Status of Migrant Workers extending these instruments to nationals of third countries irrespective of their nationality.

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