The Member States of the EU and immigration in 1994: Less tolerance and tighter control policies

Information network on migration from third countries (RIMET)

GENERAL REPORT

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Pages 129-178 contain the Supplemental Report published under the title: "Education Systems and Immigration in the EU: The Challenge of Preventing Social Exclusion." Is is available as a separate document on AEI.

Employment & social affairs

Social dialogue and social rights

European Commission
Directorate-General for employment, industrial relations and social affairs
Unit V/D/4

Manuscript completed in 1995

NOTE

The contributions from 12 independant correspondants, who make up the Information Network on Migration from Non EU-Countries (RIMET in its french acronym), have for the forth time running been synthesized into a summary report by Claude-Valentin MARIE, with support of the Services of the European Commission.

The report covers the evolution in the Member States for the year 1994. The information given does not necessarily reflect the positions or opinions of the European Commission.

A great deal of additional information on the European Union is available on the Internet.
It can be accessed through the Europa server (http://europa.eu.int)

Cataloguing data can be found at the end of this publication

Luxembourg: Office for Official Publications of the European Communities, 1997

ISBN 92-827-9731-7

Printed in Belgium

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INTRODUCTION

The fears expressed last year that increasing hostility to foreigners might jeopardize social harmony and democracy proved will founded in 1994. The realities dominating the scene - increasing xenophobia and electoral successes by the parties of the far right - are a considerable cause for concern. Few Member States escape these realities.

A variety of explanations have been offered. In Spain, this increase in intolerance seems to be linked to the economic crisis, whose full impact is now being felt. The massive losses of jobs over the last two years and the feeling that things are getting worse are indisputably helping to create more rigid attitudes towards immigration. In Italy, the reasons seem to be more political. The confusion that characterizes Parliamentary and Governmental activity piles on the feeling of helplessness among the worst-off, and exacerbates their feeling of being left alone to cope with their everyday problems. With all the campaigns to discredit foreigners, the result is a damaging climate which provides fertile soil for xenophobia and racism. In Germany, it is still the problem of the asylum seekers which is the touchstone, a typical example being the clash between church and government over the expulsion of unsuccessful asylum-seekers. Much the same has happened in Portugal, where the bishops believe their Government's defence of immigration control is liable to encourage xenophobia.

The most significant event of 1994 was that this increasingly guarded attitude towards immigration was reflected in election results, even in what seemed to be the most tolerant countries. The Netherlands is a good example. The electoral breakthrough by the far right at the local elections in March was followed in May, on the eve of the general elections, by an opinion poll whose results indicated that half of the Dutch population regarded the problem of ethnic minorities as their most serious concern, ahead of unemployment, social security and crime. It was in Belgium that this trend had the most marked effect, with the success of the far right in the municipal elections undoubtedly changing the political landscape of the country.

Mindful of these developments, the representatives of the democratic parties - supported in this case by human rights organizations - regard mere adjustments to anti-racist legislation as totally inadequate. In their eyes, the threat is directed no longer merely at one particular sector of the population but at democracy itself, calling for an entirely fresh look at such issues as freedom of the press and freedom of expression - especially as far as the extremist parties are concerned.

In the first case the issue is the treatment of racist and xenophobic propaganda by the criminal courts, and in the second the prohibition of extremist political parties. The debate is still wide open. Should we restrict freedom of expression in order to preserve democracy? Or is it necessary, in the very name of democracy, to hold that any opinion

is entitled to be freely expressed? Since it is ineffectual to "demonize" the far right, should we instead engage it in dialogue and seek to demonstrate the foolishness of its ideas, or should we give it no access to the media? Or, going even further, should we outlaw its representatives for inciting racial hatred?

These questions have gone beyond the realms of pure speculation in Belgium and the Netherlands. With the shock waves of the electoral successes by the far right still reverberating, the Belgian Prime Minister himself suggested the idea of an electoral reform designed to prevent the spread of the "brown plague". Along the same lines, in the Netherlands, the Centre for Immigrants and the National Office for Combating Racism suggested to the Minister of Justice that consideration be given to imposing a statutory ban on the far right. For neither option has there been unanimous support. Many feel that such a ban would not be sufficient to eradicate racist ideas.

So is pessimism necessarily the order of the day? Not to judge by the example of Luxembourg. Paradoxically, it is in Luxembourg, where the proportion of foreigners is highest, that tolerance seems greatest. A recent study indicates that the people of Luxembourg regard immigration as a source of enrichment and believe they derive a genuine benefit from it in at least four areas: cultural identity, living standards, the position of the Luxemburgish language, and demographic trends. There are hopeful signs here, as elsewhere, of a desire among the public at large to reverse the negative trend.

MIGRATION DYNAMICS AND CONTROL POLICIES

Migration dynamics in 1993 and/or 1994 in the European Union were notable for their wide variations, not only between countries but between population groups within the same country. In some cases inward migration continued essentially for the purpose of family reunification (France); in others restrictions on family reunification have already begun to take effect, while applications for asylum continued to increase (Denmark). On the other hand, all Member States recorded a fall in the number of permanent and seasonal workers legally entering the country.

Overall, the Member States fall into two groups: one in which legal immigration has fallen, and another where an overall increase has persisted, albeit with variations. The first group comprises Italy, the Netherlands, Germany and France. In the second group are Portugal, Denmark, Ireland, Belgium, Spain and Luxembourg.

This leaves Greece, where the situation is still a special one because of the scale of illegal immigration, especially from Albania. A recent study by the Piraeus Trade Union Confederation estimates the number of foreigners residing in the country at over 600,000, of whom fewer than 5% are apparently in possession of a valid work permit.

Asylum-seekers: a particularly sensitive issue

Incoming asylum-seekers are still the main subject of concern everywhere. Even where they are not the dominant element in the general pattern of migration, they are the cause of - or at least the pretext for - new initiatives by governments or pressure on governments for tighter controls. The division between countries where the number of asylum-seekers is declining (Belgium, Italy, France, Luxembourg and Germany) and those where it is increasing (Ireland, Portugal, Denmark and the Netherlands) is not the same as for the general immigration pattern (see above).

The hardening attitude to asylum-seekers sometimes causes doubt to be cast on the legitimacy of the aid offered to them. Although reactions are sharpest in Belgium, the refusal to grant aid is not specific to Belgium. The German courts have had cases of the same type, while in Luxembourg the Council of State has been called upon to rule on this point. The sometimes contradictory nature of court judgments emphasizes the extent to which even the principle of such aid is challenged.

In addition to this question of principle, there are practical realities too. Despite all the efforts it is no simple matter to categorize asylum seekers: between those who qualify for refugee status and those whose applications will be rejected as "manifestly unfounded" comes another category - displaced persons. These are people who are fleeing from countries devastated by civil war, and the danger, for them, is beyond dispute; their situation is thus entirely comparable to that of refugees, but that is not to say that it fully satisfies the criteria of the Geneva Convention.

This category is difficult to define accurately, and is all the more awkward to manage in that its numbers are constantly increasing. Depending on the specific case, such people

may be regarded as "impossible to deport" to their countries of origin, and be granted humanitarian relief status or, more rarely, refugee status. The case of nationals of former Yugoslavia (now a problem practically throughout Europe), and more specifically the Algerians in France and the Rwandans in Belgium, confirm how topical this question is.

Ever tighter legislation

More rigorous selection at ports of entry, tighter and more frequent checks in the Member States, broader administrative detention procedures, more databases on foreigners and measures for networking information from various administrative and social departments - every means of stepping up checks on foreigners has been reinforced this year.

It is in the Netherlands that the authorities have taken the firmest stand this year; they believe that their policy of integration would be compromised unless they adopt a tough stance on illegal immigration and asylum-seekers. In a submission to Parliament in January 1994, the government proposed three major lines of thrust for its immigration policy: a crackdown on illegal working, stricter control on entry, and more effective deportation procedures. The Law on Foreigners of 1 January 1994 and the Justice Ministry's circular on foreigners (February 1994), defining the ways in which the law is to be applied, seek to put this policy into effect.

In addition to these concerns, there are also the more recent problems associated with "abuses" of social protection. In the eyes of many of those in positions of responsibility, consistency of action in the campaign against illegal immigration means that social benefits should be denied to, or withdrawn from, foreigners with no right of residence. This is what happens in the Netherlands, where the registration offices are required to check the validity of residence permits of all new applicants. The same occurs in Germany, where the law on family allowances has been amended, and in France, where at least three new pieces of legislation define the conditions a foreigner has to meet in order to qualify for certain administrative procedures and the enjoyment of certain rights. As in the Netherlands, the objective is to exclude those whose situations are irregular. Belgium, not to be outdone, has adopted new rules specifying the conditions for welfare aid to be granted to asylum-seekers and illegal residents.

Once again, however, priority has gone, as in previous years, to minimizing the number of asylum-seekers. In some cases new legislation has been adopted (Spain), while in others legislation adopted last year has come into force (Netherlands); elsewhere, reforms were still under consideration. The objectives are still the same everywhere: speeding up the procedures, and making appeal procedures less accessible and deportation procedures effective.

Confronted with these restrictions, would-be immigrants are finding new ways of delaying or even preventing their deportation: loss of identity papers, adoption of false names and nationalities, or refusal to give fingerprints. These practices, in turn, are used to justify even more restrictive provisions. Thus, the Dutch government proposed two amendments to the new Law on Foreigners in 1994: one relating to "no-risk countries of origin" and the other to "no-risk third countries", both designed to reduce the number of "admissible" applications for asylum by strengthening the selection criteria. Germany served as a model here. Its Asylum Law of 1 July 1993, which incorporates these two principles, now deprives any person who has passed through a "safe" third country of the right to make

an application for asylum.

By the same token, two instruments have been introduced in Belgium to supplement an already substantial regulatory structure: the waiting register and the distribution scheme. Linked to the national register, the waiting register serves a dual purpose of registering all asylum seekers (and, consequently, all foreigners in an insecure residence situation) and acting as a basis for the distribution scheme. According to the authorities, this device will allow a more equitable spread of the "burden" of asylum seekers over the various local authorities and will solve the problem of authorities refusing to accept the burden of providing for such people.

Stricter control of family reunification and mixed marriages

It is now accepted that the regulations on family reunification form part of the general provisions to control immigration flows, in the same way as the other provisions governing the entry of foreigners. In recent years, all the Member States, or virtually all, have revised their legislation in this respect. A resolution has even been adopted at EU level calling on Member States to harmonize their legislation.

More stringent conditions have been imposed on foreigners wishing to exercise their right to bring their families to join them, and tighter checks have been introduced. Some countries have strengthened their existing mechanisms (France, Belgium and Spain). Elsewhere, uncertainties remain as to how the law should be applied (Portugal), or consideration is being given to changes in the law (Luxembourg). A somewhat more unusual case is the current debate in Germany on the independent right of residence for women admitted under the family reunification scheme, and on the rights and interests of children.

Attitudes are hardening too on the question of mixed marriages. The move towards tougher legislation to prohibit marriages of convenience has continued, sometimes at the risk of a shift towards prima facie suspicion. New legislation has come into force in the Netherlands (1 November 1994) which not only authorizes registrars to refuse to perform suspected marriages of convenience but also allows the state prosecutor to annul a marriage a posteriori on the same ground. In Belgium, the Justice and Interior Ministers have sent a joint circular to local authorities specifying when and why the Registrar must refuse to perform a marriage.

To make the new control procedures more effective, Member States are increasingly using computerized databases and networking arrangements. One example of this can be seen in Belgium, where a joint project has been set up by the Aliens Office, the General Inspectorate for Refugees and Stateless Persons and the CPAS to monitor and trace foreigners in irregular situations through a central database located at the Ministry of Public Health. Similarly, the Netherlands decided to connect all registration offices to the GBA - "Gemeentelijke Basis Administratie" - network; this is shortly to be connected to the VAS system, bringing together the data on all foreign residents. In Germany, after being in use for 40 years, the Central Register of Aliens (AZR) has finally been given proper legal status (Law of 2 September 1994).

A new call for European coordination

All the official European bodies (the Parliamentary Assembly of the Council of Europe, the Commission of the European Communities and the European Parliament) have reaffirmed the need for consultation between Member States with a view to a common policy on migration. Consequently, they recommend the Member States to avoid bilateral agreements in favour of harmonizing their procedures to ensure a better spread of responsibilities. The Commission Communication on Immigration and Asylum Policies, COM(94)23 final, of 23 February 1994 stresses all these points.

This desire for improved coordination is not confined to monitoring the movements of individuals, but also concerns the realities of employment. This is the purport of the resolution adopted in Luxembourg on 20 June 1994 by the EU Interior and Justice Ministers, recommending a limit on the number of work permits issued and establishing a form of "Community preference" in the area of employment.

However, these arguments in favour of a common policy have not prevented the deferment of the Schengen Agreements, on the "official" ground of a malfunction of the computer system (SIS). One of the consequences of the delay will be to favour direct cooperation between the Member States.

At the same time, more and more partners of the EU believe that cooperation with the countries of origin is essential to make the "deportation" aspect of the control policies a success. One of the main issues here is to pinpoint people with no identity documents; after all, countries which agree to take back their nationals want to make sure that the person concerned is indeed one of theirs. Germany, which initiated cooperation in this area with its Eastern neighbours, has signed new agreements on readmission with Switzerland, the Czech Republic and Bulgaria.

This question is also one of the priorities of the "ambassador for immigration policy", who is attached to the Belgian Ministry for Foreign Affairs and is responsible for negotiating agreements with the countries of origin on controlling migration flows and repatriating people who are unlawfully resident in Belgium. On this point, Morocco is indisputably a pioneer among the countries of emigration, having embarked on a course of genuine partnership with several Member States (the Netherlands, Belgium, Spain, Italy and Portugal).

Apart from readmission agreements with third countries, there is renewed interest in tackling illegal immigration through cooperation agreements, focusing on projects which meet people's real needs. In Germany, for example, the Government is using financial aid for returning refugees as a major element in cooperation with their countries of origin. Agreements to this effect have been concluded with Vietnam, Eritrea, Chile, Croatia and Slovenia. The Netherlands concluded a similar agreement in June with the Vietnamese government. Mention may also be made of the voluntary repatriation initiatives sponsored by the International Organization for Migration.

LABOUR MARKET, ILLEGAL WORKING AND EMPLOYMENT

The tertiary sector as the main employer of foreigners

The latest published surveys confirm that the trend in the employment of foreigners is irreversibly away from industry and towards services, a trend that applies equally in the north and in the south of the Union. In France, for example, the Employment Survey of March 1993 shows that more than half of foreign wage-earners are now concentrated in the tertiary sector, far ahead of industry and construction. This preponderance increases from year to year, partly because there are more jobs in that sector and partly because of job-shedding in other sectors, most especially building and public works.

The same trend is apparent in Germany. While the increase in the numbers of foreign workers has been more marked there than in France, it has primarily benefited the service industries and trade, whereas numbers are decreasing in the construction industry. The same is true in Italy, where the majority of the work permits issued in 1993 were for domestic service, and in Spain, where nearly two-thirds of employed foreigners work in the service industries, especially in domestic service and in bars, cafes and restaurants. Things are even more clear-cut in Luxembourg, where the tertiarization of foreign employment also extends to the public services. The special feature here is the high proportion of EU nationals among foreigners working in Luxembourg, all of them benefiting from freedom of movement and the principle of non-discrimination in public employment.

In Spain, the most striking feature has been the effect of regularization and of the quota policy. As expected, regularization has profoundly changed the profile of the legally admitted foreign working population, revolutionizing its composition both in terms of gender (marked increase in the numbers of males) and in terms of origin (rapid growth in the number of Africans and Latin Americans). The effects of the quota policy have been judged positive by the "Dirección General de Migraciones". The system appears not to have conflicted with the restrictive line taken by the government. It has not led to an increase in the number of entries; on the contrary, the effect has been to ease the arrangements for legal access to the labour market by prioritizing Spanish nationals or foreign workers who have already settled in Spain.

Changing legislation on the employment of foreigners

In general terms, foreigners are still more affected by unemployment than nationals; they also seem less inclined than in the past to take advantage of favourable economic conditions to improve their position among job seekers. This explains why all the Member States are trying to keep a tighter rein on foreign workers and to combat illegal working, in some cases in combination with an active policy for the most disadvantaged.

All three elements are to be found in the Netherlands. Dutch legislation on the employment of foreigners has been totally revamped to adapt it to a labour market which, according to the Dutch authorities, is no longer beset with a shortage of labour. The new legislation, which is also designed to combat illegal working, reflects a distinctly more

restrictive policy on admitting workers. It is based primarily on the rule of "Community preference", which postulates the principle that a work permit should be refused when there is a job seeker with the necessary qualifications within the country or elsewhere in the EU. However, minority groups who have already settled in the Netherlands are not abandoned to their fate. To encourage their employment, the Dutch government at the same time adopted a law on "equitable participation in the employment market for ethnic minorities", which requires enterprises to ensure that employment and working conditions are scrupulously fair for all population groups.

Without going to these lengths, the Luxembourg government has also adopted new legislation on employment. One text is designed to stop the proliferation of temporary-employment agencies operating outside any proper legal framework; another imposes the principle of a bank guarantee where an employee is recruited from a third country and creates a special commission responsible for controlling labour-force movements. Similarly, Belgium has designated the Advisory Council on Foreign Labour and the Interministerial Conference on Migration Policy as bodies responsible for improved coordination of the way the three regions grant work permits to foreigners.

Apart from the situation with regard to foreigners, the general employment crisis is universally regarded as the major question of the coming years. Among the numerous initiatives and suggested ways of tackling the problem, frequent reference is made to reducing the non-wage cost burden on poorly paid work. The Dutch government has resolutely embarked upon this course, citing the possibility of an exemption from the minimum wage law, though this would be restricted to certain sectors and for only a specific period. Elsewhere, other measures have been adopted in respect of non-graduates under the age of 26 and job seekers who have been registered for more than six months. The renewal, in France, of the "sponsorship networks" launched in 1993 is a good example. They enable young people in difficulties to be introduced into enterprises by "sponsors" who stand surety for them, keeping an eye on them and assisting them to make their way in the working world.

Illegal working

With unemployment rising steadily and the threat of economic crisis, it is small wonder that all governments are increasingly concerned about tackling illegal working and "social dumping". This is universally regarded as a critical issue in the fight for jobs, and numerous initiatives have been launched to deal with it, in Belgium, the Netherlands and Spain. However, it is certainly in Luxembourg that the greatest efforts have been made. Encouraged by Parliament, the determination of the public authorities is endorsed by the social partners, more and more of whom are calling for a clampdown on suppliers of cheap labour and firms which engage in this form of unfair competition. It is worth recalling that, in a growing number of countries, illegal working is no longer confined to the question of the illegal employment of foreigners.

It is no surprise, then, to find that the question of illegal working has given rise to substantial legislative and regulatory activity. Sanctions against employers of illegal foreign workers, and for assisting illegal immigration, have been tightened, as have the penalties for breaches of various social laws. In many cases (Belgium, Luxembourg, Netherlands), these harsher penalties may extend to excluding offending firms from public contracts. The new provisions clarifying conditions of employment include the social

identity card issued by employers to workers (Belgium, Luxembourg) and the principle of joint liability of all parties deriving benefit from an illegal working situation (France, Netherlands, Belgium). The staffing level of some of the inspectorates has been stepped up, and there is evidence of greater vigilance on the international secondment of workers. There are also moves to improve interdepartmental coordination in the face of more and more complex types of offence. This approach was adopted several years ago by France, and has now been taken up in Belgium, through a protocol on cooperation between the various inspectorates, and in Spain through a joint inquiry by the Under-Secretariats for the Interior, Labour and Social Security and Social Affairs.

INTEGRATION

Compared with the interest shown in controlling migration flows or the labour market, the integration issue once again appeared less pressing, and the authorities responsible for it often fell far short of their targets. The year-long inertia of the High Council for Integration in France is a good illustration of this. On resuming office in March 1994, the Prime Minister gave no indication of new elements in his government's priorities, proposing merely to continue along the path followed by his predecessors. At best, he could be said to have shown some concern for the impact on integration of foreigners retaining their links with their original cultures.

The same is true of Portugal, though in a very different context. None of the planned meetings between the Minister for Employment and a variety of bodies (including the immigrant associations) to implement the integration policy laid down in 1993 was held. Only the municipalities of Lisbon and Amadora really made any commitment, the former in the Advisory Council on Immigration and the latter within a Secretariat for Immigration.

There are similar reservations regarding Germany, cf. the report by the Federal Commissioner on Aliens, which considers the Law on Aliens relatively unfavourable to integration compared with legislation in the other European states. The report says the same about naturalization, dual nationality, family reunification for children and independent residence permits for married women.

The year tended to be dominated by what may be termed a defence of basic rights, with important court cases on such varied topics as entry and residence, right of asylum, detention and deportation, or social rights. This is what happened in Belgium, Germany, France, Portugal, Luxembourg and the Netherlands. More and more, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was used to challenge decisions on foreigners' right of residence and, especially, deportation.

With regard to legal disputes over foreigners' rights, two of the main issues were, firstly, what is sometimes referred to as the strictly "police" administration of the right of asylum, and secondly the procedures for detaining unsuccessful asylum seekers and, indeed, any foreigners with no residence permit. The asylum seekers' defence associations, who disapprove of these practices both in principle and in the way they are applied, believe they reflect a general shift towards enforcement, to the detriment of positive measures for asylum seekers.

In Germany, these questions (asylum, detention or even expulsion) were behind strenuous moves by the churches, culminating in an informal network of two hundred Catholic and Protestant churches to handle unsuccessful asylum seekers threatened with expulsion. There were equally sharp reactions in Belgium, where failure to comply with the basic humanitarian rules (poor reception facilities and poor treatment of unsuccessful applicants) in the aliens' detention centres were repeatedly denounced, including in an internal report by the Ministry of Public Health.

Another legal dispute related to the introduction into asylum legislation of the concepts of "safe third country" or "safe countries of origin". The German association Pro Asyl considers that such countries are not as "safe" as is made out, and that the use of these concepts renders the procedure unfair. The UN High Commission for Refugees, for its part, declared its opposition to the Law on Carriers, which it regards as contrary to the principle of not turning away refugees as enshrined in the Geneva Convention, with access to the national territory no longer being guaranteed to a refugee who lacks the necessary documents. Still on the question of tighter checks, the use of ever more sophisticated computer resources represents another cause for concern. There is much opposition to this, with the stress on the risks for individual freedoms and, consequently, for the rule of law.

Racism

The increase in xenophobia might represent a further threat to the rule of law. Although sometimes reflected in the electoral successes of the extremist parties, this growing intolerance is mainly experienced in everyday life, through a proliferation of more or less violent incidents, whose implications for integration are all the more worrying in that in several cases members of the security forces would seem to be involved. Just as serious is the fact that ways of legitimizing discrimination appear once again to be on the increase, including declarations by politicians.

Against this background, the judiciary sometimes gives the impression of reluctance to act on the grounds of freedom of expression. The European Court of Human Rights, however, spoke out clearly for a restriction on that freedom where racism and xenophobia are concerned (judgment in Jersild vs Denmark of 23 September 1994). The European Commission of Human Rights adopted the same attitude, holding - in another case - that exceptions from the principle of freedom of expression must be allowed when that principle is invoked in order to propagate a racist, xenophobic and antisemitic ideology. Although they emphasize the unsuitability of judicial proceedings to combat racism, xenophobia and neo-Nazism, these judgments are highly encouraging to all those who advocate civic action. Such action was most notable during the year in Belgium, Germany and Luxembourg.

The need to revive urban policies

Less fashionable than in previous years, urban policies in favour of integration were nevertheless still pursued, and even improved, as in the Netherlands, with the "Major Cities Policy", in Belgium with the "Safety Contracts" and the "policy of integration and urban action", and in France, with the "urban policy", though here the policy appeared much more unsure.

The financial predicament of the worst-off households, an increasing proportion of which are threatened by permanent poverty, fully justifies the need for something to be done in this area. In this respect, commitment on the part of the public authorities was most clearly apparent in the Netherlands. In a note of April 1994, the government updated its policy on minorities, integrating it into a revived "Social Renewal Policy", under the heading of "Major Cities Policy". It recommends that the available funding be concentrated on a limited number of municipalities and priority given to the traditional problems of the inner cities: unemployment, housing, educational under-achievement, and crime.

Nationality and political rights

The right to nationality remains central to the whole integration debate. Though disputes are frequent, the basic line here also favours restriction, with new selection criteria designed to restrict access to this right. Official reluctance is still most marked in Germany; neither the government nor the ruling coalition regards the amendment of the Law on Nationality as a priority, and all proposals for reform have been rejected. The absence of any results at parliamentary level means that this subject too is generating a substantial body of case law in the administrative courts.

Though falling short of this level of restriction, there has been increased interest in immigrants' will to integrate, again reflecting the kind of rigour we referred to earlier. This desire to integrate has been the cause of much debate in France, Portugal and Belgium. It is in France that things have changed most rapidly in this context: the Law of 22 July 1993 and Decree of 30 December 1993 established that a demonstration of intent to integrate was a new condition of access to nationality. Others, however maintain that broader access to the right of nationality would be a decisive factor in creating integration and equality between the various sectors of the population. In Belgium, the electoral successes of the far right have strengthened the Centre for Equality of Opportunity in its firm belief that such entitlement should be the focus of any integration policy, much more so than giving foreigners the right to vote.

Taking the debate a stage further, the choice between acquisition of nationality and direct access to political rights continues to divide political opinion. With the status of European citizenship giving foreigners access to limited political rights (in local and European Parliament elections), controversy has intensified as people have come to realise that the principle of nationality is no longer sacrosanct. Again, the greatest impact has been felt in Luxembourg. With so many EU nationals of voting age living in the country, Luxembourg, more than other countries, was entitled to introduce into its legislation the conditions for derogation provided for by the Directive on European Citizenship. Once these derogations had been obtained, agreement among politicians was virtually unanimous. Only the Chamber of Civil Servants and Public Employees maintained its opposition to this institutional "heresy", regarding it as a threat to Luxemburgish identity.

GENERAL REPORT

MIGRATION DYNAMICS

If we look no further than legal arrivals, the years 1993 and/or 1994 (depending on the available results) were notable for their wide variations, not only between countries but between population groups within the same country. In some cases, the increase in arrivals continued mainly for the purpose of family reunification (France); in others restrictions on family reunification have already begun to take effect, while the number of asylum seekers continues to increase (Denmark). Frequently, the increase in arrivals (excluding asylum seekers) has been attributable to nationals of EU States (Portugal, Luxembourg) or Scandinavian countries (Denmark). However, a common factor to all the Member States has been a fall in legal entries by permanent or seasonal workers.

Overall, the EU Member States could be broadly divided into two groups: one in which legal immigration has declined and the other in which it has generally continued to increase. The first group comprises Italy, the Netherlands, Germany and France, while the second is made up of Portugal, Denmark, Ireland, Belgium, Spain and Luxembourg.

This leaves Greece, where the situation is still exceptional because of the scale of illegal immigration, especially by Albanian nationals. A recent study by the Trade Union Confederation of Piraeus estimates the number of foreigners residing in the country at between 590 000 and 640 000. Out of this estimated total, only 26 000 have work permits, and 15 000 of those are EU nationals. The Ministry of the Interior estimates the number of "illegals" arrested and deported by the security forces during the last four years at 700 000.

These deportations have aroused heated debate; the Communist Party has objected strenuously to the form in which deportation has been applied to Albanians, claiming that it is based "on a racist ideology which is dangerous now and a danger for the future". The account of the ill-treatment meted out by the special unit of the Greek police force has been worked up by the authorities in Tirana, with references to people "killed and injured"; the international press agencies have taken up the theme. The Greek government has, of course, categorically denied these allegations.

A downward trend in some cases ...

In Italy, the latest statistics supplied by the Ministry of the Interior show, for the first time, a reduction of 6.7% (or -64 699 individuals) in the number of foreigners officially registered. At the end of December 1994, 922 706 foreigners had residence permits, 85% of them (781 129) being nationals of third countries[1]. By comparison with the last ten years, showing an annual increase of 6 to 7%, the reversal is clear cut. Two essential reasons may explain this: tighter checks and the advances in the processing of files. Great efforts have been made to update the police records every time a residence permit is granted or renewed.

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[1] Previous statistics estimated the number of current valid residence permits at 987 405, or 62 233 (+6.72%) more than in the previous year.

On the other hand, applications for family reunification[2] made by third-country nationals increased by 70% between 1991 and 1993. The number of permits issued for this reason has tripled, most instances being in the northern regions and involving the bringing-in of spouses (54%) or children under 14 (37%). Despite these results, a study undertaken by the ISMU warns of the widening discrepancy between approval of the principles of the international conventions on immigrants' rights and the practical conditions in which they are applied. The main difficulties mentioned are: disregard for the situation of adolescents who have been irregularly resident for long periods, the pernickety bureaucracy of the authorities which penalizes applicants, the discretion allowed to consulates abroad, the lack of coordination between the departments responsible for processing files and the extremely restrictive way in which the police interpret the regulations.

In the Netherlands, 103 000 foreigners entered the country legally in 1994, 16 000 fewer than in 1993. This reduction, which brings the figures back to their 1989 level and primarily concerns Turkish and Moroccan nationals (-40%), is apparently attributable to two major reasons. First, the unfavourable economic situation, which discourages a high proportion of potential candidates; secondly, and more significantly, the entry into force of two new regulations, one requiring foreigners to register with the local councils (for which they need to prove their status as residents) and the other regarding residence permits (which now have to be obtained before leaving the country of origin).

By contrast, there has been little change in the number of departures: 22 200 foreigners left the country in 1993, a similar number to the previous year, and the majority of these (10 000) were EU nationals.[3] The CBS, the statistics institute, considers that the figure should be higher in 1994, though relating essentially to EU nationals and Surinamese. The balance of foreign immigration surplus is therefore likely to increase from 20 800 in 1993 to 49 000 in 1994.

In France, the substantial reduction in permanent immigration[4] in 1993 (-14%) is the result of a combination of sometimes contradictory trends: a sharp fall in admissions of permanent workers (whether EU nationals or not), the sustained decline in the number of refugees, now down to fewer than 10 000, but a contrasting significant and continuing increase in members of French citizens' families, though the reunification of foreigners' families has stabilized.[5] The slow-down also extends to temporary immigration,[6] which

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2 Law 943/1986 lays down that foreigners legally resident in Italy may bring in their spouses, unmarried minor children who are not in work and dependent parents. Reunification is permitted on condition that the foreigner can provide his family with acceptable living conditions.

3 As regards third-country nationals, the most numerous departures from the Netherlands were Turks (1 840), followed by Moroccans (1 200) and Surinamese (650).

4 Meaning all those foreigners receiving residence permits (or resident workers' permits) for the first time for a period of one year or more, whether they be first-time immigrants, individuals whose situations have been regularized or people achieving this "permanent" status for the first time.

5 The statistics on family reunification count physical persons, while those for the immigration of members of French citizens' families are based on the number of cards issued which do not include minors.

comprises, in descending order of importance, asylum seekers, students and holders of temporary work permits. In 1993, the continuing boom in the use of seasonal workers came to an abrupt halt, with a decline of 17% recorded in one year. The Poles alone account for this; their numbers, which had increased briskly between 1989 and 1992 (from 126 to 7 257) fell back to 5 012 (-31%), a similar figure to the Moroccans (5 173). In the more specific context of permanent employees, two trends - in the same direction this time - contributed to the significant drop in arrivals. First, arrivals of Portuguese fell by half (7 512 as compared with 15 221 in 1992),[7] and secondly the end of the operation to regularize the situations of unsuccessful asylum seekers, which had been in progress since July 1991.[8] Combining all the reasons for entry, 99 159 new permanent immigrants were admitted into France from Europe in 1993, 45% of them being of African origin. According to the INSEE, for each year since the last census in March 1990, the immigration balance has averaged +90 000.[9]

Though still incomplete, the data available on the inward flows in 1994 nevertheless have the value of quantifying the impact of the legislative measures adopted during the second half of 1993. These results - other than those relating to asylum seekers and statutory refugees - confirm the downward trend in all categories: by 10% as regards arrivals of new students, twice that (-20%) for permanent employees and self-employed persons, and three times the amount (-30%) for reunifications of families joining foreigners or nationals (members of French citizens' families). The only slight increase (3 to 5%) was recorded by temporary work permits, which are essentially granted to North Americans and Europeans with a high level of professional qualifications.

... and big increases in others

In Portugal, Denmark, Spain and Belgium, the trends contrast strongly with those observed above, but at the same time clearly emphasize the variation in migration patterns as between different categories. The overall positive pattern is most often associated with family reunification, movements of EU nationals, and arrivals of asylum seekers; but in all cases it is accompanied by a drop in the numbers of legal arrivals of third-country workers.

This applies, for example, in Portugal. The clear reduction in the number of residence

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6 With a residence permit valid for less than one year, which may or may not be renewable. EU nationals are no longer included, except as paid workers engaged for less than a year.

7 This result confirms that not all the new permits issued in 1992 were reflected by actual arrivals. Many were issued to regularize the situation of people who had been resident in France for many years and were taking advantage of the extension of free movement of persons to obtain official papers.

8 There were 1 376 beneficiaries of this procedure in 1993, by comparison with 9 027 in 1992. One operation took place in the île de St-Martin (Guadeloupe), and involved 1 868 foreign employees, two thirds of them being Haitians.

9 The absence of a population register prevents an accurate count of final departures by foreigners, and hence any reliable assessment of an annual migration balance. The one given here is merely an approximation, subject to review on the occasion of the next census.

permits granted in 1993 did not prevent the highest increase in the foreign population since 1987, accounted for by the increase in the number of asylum seekers (especially Romanians and Angolans) and arrivals of Community nationals. In Denmark, too, the asylum seekers - and, to a lesser extent, nationals of the EU and the Scandinavian countries - accounted for most of the arrivals recorded in 1994. Conversely, the regulation adopted in 1992 has slowed the rate of arrivals for family reunification. As far as departure is concerned, the new rules on repatriation aid, adopted early in 1994, had not yet produced any real effect.[10]

In Belgium, after ten years or so of stabilization, the upturn which began in 1989 has continued, influenced by three factors: the free movement of European Union nationals, asylum seekers and family reunification. Thus, 1993 ended with a positive balance of 18 938 units, of which nationals of EU countries contributed more than half (+9 780).

In Spain, there is an even clearer split between the increase in numbers of Community citizens (+43 051) and the fall, for the second year running, of legal arrivals by third-country nationals.[11] Three factors have combined to produce this result: the change in status of EU nationals (in January 1992),[12] the stricter control of third-country flows and the consequences of the 1991 regularization. As far as this last point is concerned, there is a clear discrepancy between the number of beneficiaries of the measure in 1991 and the number of permits renewed at the end of 1993 (28 000 fewer). This decline emphasizes the difficulty in maintaining the legal status of those who, once regularized, occupy precarious jobs in sectors where irregular hiring is commonplace (building, textiles, agriculture and domestic service).

There are other factors which also influence the results obtained in Spain, e.g. the activities of the immigrant networks, which from the outset tell their would-be immigrant compatriots of the problems of finding work in Spain, and even more so of the exemption from the need to have a visa in order to obtain a residence permit. In the last three years, 45 000 people have benefited from this provision, including 14 042 in 1993, so that the number of exemptions granted by the "Civil Governors" was greater than the number of visas granted by Spanish Embassies and consulates abroad (12 313).

These exemptions, granted to people already living in Spain, are not taken into account in calculating the annual flow of arrivals. Three-quarters of them were granted to foreigners who declared they had no intention of working (non-lucrative residence) and who, in most

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10 This provision allows a subsidy of dkr 15 000 per adult and dkr 6 000 per child, together with various relocation and travelling expenses. The immigrant may also request the transfer of his retirement pension, in accordance with the rules in force.

11 In five years, the number of EU nationals and members of their families has increased from 125 000 to 222 000. At the end of 1993 they accounted for 52% of foreigners resident in Spain, as compared with 40% in 1991. Their numbers are increasing at a steadier rate since the regularization of third-country nationals.

12 This explains the majority of the 9 500 drop in the number of visas recorded between 1991 and 1992. The following year's figure (7 000 fewer visas) is connected with the abolition of residence visas (from 1 July 1992) for non-working foreigners included in what the Spanish call the "Community system" (retired people, pensioners and family members).

cases, had families permanently resident in Spain. As a result, 26 355 people obtained permission to become legally resident in 1993, whereas the stock of residence permits increased by 37 322 foreign residents.[13] At the same time, 11 146 student cards were issued, or 1 896 more than in 1992. The universities in Madrid, which occupy first place in terms of numbers of registrations of foreign students (5 470), primarily admit those arriving from the USA and Latin America, while the universities in Grenada, ranking second with 1 326, mainly admit Moroccans.

Luxembourg, despite a very slight drop in arrivals, recorded another net increase in immigration in 1993, identical to that in 1992, because departures still number far fewer than arrivals.[14] Here again, EU nationals (76%) are very much the majority among the new arrivals, headed by the Portuguese (31.5%), despite the continuing slow-down in their arrivals. By contrast, there has been a clean break in the case of non-Community nationals: their numbers, which had increased continually since 1987, fell abruptly in 1993 (from 2 887 to 2 189), primarily because of a reduction by half in the number of arrivals of nationals of the former Yugoslavia. In September 1994, more than one-third of Luxembourg's population was made up of foreigners, 87% of them being EU nationals.

Asylum seekers to the fore

In virtually all the Member States, asylum seekers have become a primary focus of concern. Even when they are not a dominant factor in terms of the overall migration pattern, they are still the reason, or the pretext, for new initiatives by the authorities, or pressure for ever tighter controls. For this reason, the flows of asylum seekers needed to be specifically analysed. It will be noted that the split between countries where the number of asylum seekers is declining (Belgium, Italy, France, Luxembourg and Germany) and those where it is increasing (Ireland, Portugal, Denmark and the Netherlands) is not the same as for the general pattern.

In Belgium, the decline in applications gathered pace again in 1994, both as regards new arrivals (14 340 as against 26 883 in 1993, the lowest level since 1990), and as regards those already present in the country (13 166 in 1994 as against 25 776 in 1993). Two groups, however, represent an exception: nationals of the former Yugoslavia and of Rwanda. Although their total numbers are declining, the former are now the most numerous among successful applicants (15% of the total, as compared with 8% in 1993),[15] while the latter are the only group whose numbers increased in 1994.

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[13] Neither exemption from a visa nor the obtaining of a residence visa is necessarily reflected by the granting of a residence permit. These two procedures are subject to a final decision by the General Inspectorate of Documentation, which may or may not grant the kind of permit requested.

[14] This balance, not including Luxemburgers, is arrived at on the basis of arrivals (9 514) and departures (4 966) declared to the local authorities. However, a foreigner may not declare his intention to leave the country before doing so. Community nationals account for by far the majority of departures (79%), headed by the Portuguese (23.4%) and then the French (15.8%) and the Belgians (11.4%). The Portuguese alone account for 41% of the overall net migration balance. On the other hand, the balance of the non-Community nationals has fallen and is close to the 1991 level.

[15] They are followed by the Zairians (13%), the Romanians (8%) and the Indians (6%), all of whose numbers fell significantly.

This year, the accumulated backlog was partly absorbed, though not at the expense of administrative rigour. Only 7% of cases studied received a favourable response (1 595), the main beneficiaries being Turks, Rwandans and Zairians.[16] The Foreigners Office also received instructions to expedite applications for residence permits made by unsuccessful candidates who had suffered delay in the processing of their cases. Their cases are examined individually on the basis of criteria such as work, children's schooling and the learning of a national language,[17] but there are no plans for global regularization. In summary, as at 31 December 1994, Belgium had 26 503 recognized refugees, 55% of them in the province of Brabant, 28% in the Walloon Region and 17% in the Flemish Region.

Italy, which was long regarded as a "transit" country,[18] accommodated 12 000 political refugees in 1993. That year, only 1 646 applicants had received a favourable reply;[19] in the first six months of 1994, 779 new applications were registered, resulting in 112 favourable replies and 694 refusals. The UNHCR regards these low figures as evidence of the very restrictive policy adopted by the authorities and the large numbers turned back at the borders.

The same applies to Luxembourg. Admissions and favourable decisions become fewer every year: from 1 January 1993 to September 1994 only three favourable verdicts were delivered out of 326 recorded applications for asylum. This restriction has affected "Yugoslav" nationals since 1993. Out of a total of 2 538 recorded asylum seekers since 1992, 1 479 had received residence permits by November 1994.

In France, the increasingly strict procedures are speeding up the decline observed over the last five years in requests for and grants of asylum. In 1994, 25 000 cases were recorded[20] (as compared with 27 500 in 1993 and 28 900 in 1992) and only 6 500 candidates were granted refugee status (compared with 9 900 in 1993 and 10 800 in 1992). As might be expected, the situation in Algeria has given rise to an influx of nationals of that country whose numbers are difficult to assess. Reversing the general trend, therefore, the number

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16 As a proportion of applications made, the most favourably treated were the Rwandans (79%), the Burundians (77%), the Chadians (67%), the Haitians (50%) and the Afghans (49%). At the other extreme, all applications by nationals of Bangladesh, Bulgaria, Egypt, India, Senegal, Ivory Coast, Nepal, Nigeria, Niger and Macedonia were rejected.

17 Theoretically, the application may not be made before the legal conclusion of the foreigner's residence in Belgium and making it does not in itself regularize the residence, even temporarily. Pending a decision, therefore, the foreigner holds no right to reside on Belgian territory.

18 Until 1990, the "geographical reserve" concept allowed refugee status to be granted only to nationals of Eastern European countries, with a few exceptions for Chileans, Turks, Indochinese, Iranians and Afghans.

19 The very great majority of the 1 646 applicants admitted in 1993 were young people between the ages of 18 and 27. More than half had secondary school leaving certificates, one out of ten had higher education qualifications, and only 2% had not attended school. Two thirds of them entered Italy on tourist visas, and one third illegally.

20 Compared with the "peak" of 61 372 asylum requests in 1989, this seems an absolutely spectacular result.

of applicants of African origin, both sub-Saharan and Algerian, increased in 1993 (11 145, 20% more than in 1992).

In Ireland, Portugal, Spain, Denmark and the Netherlands, by contrast, the situation has been the reverse of this: the increase in the numbers of asylum seekers has continued, and more often than not they represent the majority of new arrivals from third countries. In Ireland, their number increased from 40 in 1992 to 250 in 1994, while the Portuguese admitted three times as many in 1993 as in the previous year.[21]

In Spain, the official figures record an 8% increase in 1993 (or a total of 12 615 new candidates for asylum), but the "Office for Asylum and Refugees" itself accepts that this result is unreliable, very frankly emphasizing the weakness of its organization and resources.[22] It estimates the actual number for the year at 16 094 (including non-assistance cases and non-formalized applications), an increase of 37%. As elsewhere, the "Interministerial Committee for Asylum and Refugees" absorbed part of its backlog in 1993 but still without relinquishing any rigour: the rate of positive responses was no higher than 4%.[23] Only 12 313 residence visas (V)[24] were granted in 1993, as against 19 314 in 1992, a drop of 7 000.[25] This strictness is, logically, accompanied by a substantial increase in the number of appeals (1 421 in 1993 as compared with 237 in 1992).

Increased reluctance to admit new asylum seekers ...

The hardening attitude towards asylum seekers is having direct repercussions in terms of the conditions under which applicants are accepted, and is also reflected by a challenge to the legitimacy of the aid offered to them. Reaction has been sharpest in Belgium. Many local authorities - other than those expressly authorized to do so by a Royal Decree - are still refusing to register new applicants officially, despite many adverse judgments by the

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21 From 519 applications in 1992 the number increased to 1 659 in 1993, of which 71.5% were of Eastern European origin.

22 In Spain, asylum seekers arrive more frequently from America than from Europe. Three nationalities dominated the 1993 batch: the Dominican Republic, China and Romania (38% of the total, compared with 17% in 1992). Conversely, the figures for three other countries fell sharply: Peru, Poland and Senegal.

23 As elsewhere, this mean conceals sharp discrepancies between different nationalities. While those originating from Bosnia-Herzegovina (36%) and Cuba (18%) were most favourably treated, others failed to record a single positive response. This was true of those from the Dominican Republic, although they accounted for the largest group of candidates. The Peruvians too, from a country torn by violent internal conflict, also ranked below average (2.8% of favourable responses).

24 The regulations implementing the Organic Law of 1985 ("Foreign Nationals Law") lays down that "*foreign nationals who wish to transfer their place of residence to Spain shall apply for a residence visa*". There are four types of visa: two for periods of less than 30 days (R) and less than 90 days (Y); another (Z) known as a "courtesy visa" intended for personnel of diplomatic missions; and finally the visa granted for residence or asylum (V). It is this last type which concerns immigrants planning an extended stay.

25 The number of visas corresponds to the number of passports and not to the number of individuals, since a passport may include more than one individual.

courts. They justify this by referring to the administrative burden resulting from the increasing number of applications, and the discontent of the public. It is true that an opinion poll showed that 89% of people questioned regarded the establishment of Red Cross[26] acceptance centres as a problem for their local authority area, while 50% regard them as directly personally damaging.

At Hastière, incidents took place between potential refugees and the local populace, while at Nassogne the municipal authorities complained of excessive numbers of asylum seekers accommodated in the area. At Haine-St. Pierre, the inhabitants demonstrated pronounced hostility at the opening of the latest "open centre", which had previously been the subject of an arson attack - the only one of its kind in Belgium. The prosecution was discontinued and the file marked "no further action". The Equal Opportunities Centre, which had been a private party to the prosecution case, "*is particularly concerned at the spiral of incidents and the damaging climate surrounding the arrival of asylum seekers in Belgium. This fire represents a further, very serious escalation of a process whose tragic results are familiar from certain other European countries*".

... and a challenge to the legitimacy of aid provision

In Belgium, once again, the distribution of the welfare aid to refugees entrusted to the CPAS [Public Welfare Aid Centre][27] has been another subject of heated controversy. For two years, several of these institutions have refused to accept these instructions, despite penalties already imposed by the courts (cf. 1993 Rimet Report)[28] and tensions with would-be refugees. Some CPASs represent this refusal as a pressure exerted on the government to induce them "*finally to face up to their responsibilities*" by spreading the burden over all local authorities. Others - more and more numerous - justify themselves by putting forward a dubious interpretation of their territorial jurisdiction. They refuse aid to asylum seekers who change residence, referring them to the CPAS in their previous local authority area, which - following the same logic but interpreting the text the other

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26 Under a convention concluded with the Belgian government, the Red Cross is responsible for organizing 1 860 beds for asylum seekers, distributed over some fifteen centres providing what is referred to in Belgium as *second-level admission*. The occupancy rate is no more than 60%, and the Romanians are the most numerous, followed by the Bulgarians and Zairians. The Red Cross employs 203 people on this activity and has been granted a further financial subsidy for 1994.

27 In Belgium, the right to welfare aid is strictly personal and individual, and its sole purpose is to enable the individual to lead a life compatible with human dignity. The CPAS also has a general mandate to provide personal assistance; it offers psychological, moral or educational follow-up to enable the recipient gradually to overcome his own difficulties. It cannot therefore be confined to the role of a paying body - support is part of the actual principle of its mandate.

28 The Courts have on occasion made order to damages of the interest and for seizure "*of assets not essential for the continuity of the public service*" against guilty CPASs. More and more often, CPASs are also deciding to grant a refugee applicant a lower level of aid than would be granted to another category of foreigner or to a Belgian.

way round - refuses to continue aid to those leaving its territory.[29] Others, finally, base their arguments on an incorrect interpretation of the Law on Foreign Nationals (Article 18 bis) in order to refuse registration of newcomers, who thus cannot claim welfare aid.

Carrying this logic one step further, the CPAS of Brussels City "*has perfected what is literally a chain of illegal and inhuman exploitation of the asylum seekers.* [...] *It has two motives: first, discriminatory administrative harassment (increasing the measures designed to harass the asylum seekers), and secondly economic exploitation*". Asylum seekers newly arriving within its territory are compelled to "*demonstrate willingness to work*", upon which they will be allocated to duties of repairing, cleaning and maintaining public facilities within the framework of APO ("Work Aid"). Unlike other citizens, the asylum seeker has no choice of what work he does, his remuneration is derisory and his work does not qualify him for unemployment benefit. "*Since the APO programmes are not regulated by the ordinary social legislation, the guiding principles are totally arbitrary.*" Welfare aid is granted to asylum seekers only after they have begun compulsory working (usually full-time), and any lack of enthusiasm (absenteeism, for example) results in the aid being suspended. Other CPASs have introduced daily check-in systems or made the learning of French compulsory.

The refusal to grant refugees the aid due to them is not a specifically Belgian feature. In Germany, too, the courts have had to hear cases of the same type. The sometimes contradictory nature of the judgments handed down emphasizes the extent to which the principle of welfare aid for asylum seekers is still disputed, and simply by doing so establishes the importance of the issue. For example, the Administrative Court of Freiburg established that an asylum seeker was not automatically entitled to welfare assistance in cash but might receive it in kind. If the assistance in kind is inadequate, he can then make an application for financial assistance. Meanwhile, the Administrative Court of Mannheim took an opposite decision, finding that after a year's residence in Germany an asylum seeker is entitled to financial assistance, payments in kind being reserved to specific cases and conditional on an enquiry into the situation. This judgment ran counter to a temporary administrative regulation (Verwaltungsvorschrift) by the Ministry of the Interior of the Land of Baden-Württemberg, which authorized payments in kind to asylum seekers even in the second year of their stay in Germany if they were living in a reception centre.[30]

In Luxembourg, the Council of State was called upon to rule on this point. It found that aid should be reserved for those whose applications deserved examination on the merits.

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[29] The Waiting List Law actually provides (Art. 2 (5)) that by way of "*derogation from Article 1), the power to grant welfare aid to a candidate for refugee status shall lie with the public welfare aid centre: a) of the local authority area in which he appears on the waiting list or b) of the local authority area in which he appears on the population registers or on the register of foreigners. When a plurality of local authority areas are named in the registration of a candidate for refugee status, the CPAS designated pursuant to Article 54 of the Law of 15 December 1980 shall have the power to grant him welfare aid*". Many CPASs shelter behind this provision, even though it is not yet applicable (since the Royal Decree on the Waiting List and the distribution plan have not yet appeared), in order to cite their lack of territorial jurisdiction.

[30] The Land authorities had proposed this amendment to Article 2 of the Law on Asylum, which, in their view, lacked precision as to the form in which the social benefits were to be provided (in kind or in cash). This has sometimes resulted in tensions between asylum seekers living under the same roof or of whom some are receiving benefits in kind and others in cash.

As grounds for this judgment, it cited the need to avoid the influx of excessive numbers "*of asylum seekers whose applications are inadmissible or manifestly unfounded and who are then difficult to remove from the territory*". It added that, by attracting such people, "*our country will be unable, because of its ultimately very small reception capacities, to admit other applicants whose applications seem justified under the Geneva Convention*". This very restrictive interpretation at least has the merit of clarifying some of the issues. And it is valid only for Luxembourg. The NGOs evidently do not share this opinion: they call for welfare aid to be granted to all applicants while their cases are being investigated and until such time as they are asked to leave the Grand Duchy.

In Portugal, the debate is focused on legal aid. A judgment by the Supreme Court of Justice on 18 November 1993 ruled that the provisions denying this aid to applicants for political asylum were unconstitutional. Since the right of access to the courts, of which legal aid is a component part, is recognized by the Constitution as being one of the accepted fundamental rights (rights, freedom and guarantees), the Court held that no distinction could be made on this point between resident and non-resident foreigners.[31]

[31] We should point out that the entry into force of the new legislation on the right of asylum (Law 70/93 of 29 September) resolved this controversy by providing that proceedings relating to the right of asylum will be free of charge.

CONTROL POLICIES

EVER TIGHTER LEGISLATION

Stricter selection on entry, tighter and more frequent checks in the Member States, extended procedures for administrative detention, increasing numbers of databases on foreigners and measures for networking information from administrative and social departments - every means of stepping up checks on foreigners has been reinforced this year. Once again, the priority has been given to asylum seekers, with the same intent - now apparent for several years - of reducing their number as far as possible.

The position occupied by these matters in the year's legislative activity has changed only in relation to the scope of the measures adopted in the previous year. In France, leaving aside the adoption of a law amending the 1945 order on holding areas[32], 1994 was notable for a complete pause in legislation. This was utilized in order to publish regulations implementing texts adopted in 1993 which radically changed French legislation on foreigners[33]. The same applies in Spain: a number of new texts have been adopted, particularly in relation to asylum, but the main focus of attention has been on the lessons of regularization and the quota policy.

It is in the Netherlands that the authorities have taken the firmest stand this year, at all levels: their belief is that their policy of integration would be compromised unless they were to adopt a tough stance on illegal immigration and asylum seekers.[34] The government recorded this in January 1994 in a submission to Parliament in which it defined the three major lines of thrust for its immigration policy: a crackdown on illegal working, stricter control of entry and more effective deportation procedures. The new Law on Foreign Nationals which came into force on 1 January 1994, and the Justice Ministry's circular on foreigners (February 1994), defining the ways in which the law is to be applied, seek to put this policy into effect.

To underline this firm approach, the Secretary of State for Justice decided in March to deploy a thousand additional military police on Dutch borders with instructions to warn their flying-squad colleagues of movements by foreigners that might contravene the provisions of the new Law of January 94. Personnel responsible for the supervision of

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32 Law No. 94-1136 of 27 December 1994 refers to the creation of holding areas in railway stations handling international traffic (supplementary to those existing at ports and airports) for the transfer of a foreigner from one holding area to another, with a view to arranging his departure, without his being considered as having legally entered into France. Moreover, a law of 4 January 1994 has extended to customs officers the right to inspect residence permits in the frontier zone and within the precincts of ports, airports, railway stations and international bus stations.

33 Three important texts were thus adopted: the first relating to entry and residence conditions, the second to deportation arrangements (which required an amendment to the constitution) and the third to the right of nationality.

34 According to the Dutch authorities, their flows have increased significantly since the revision of the German constitution.

foreigners in the country were strengthened by 700 units, and military police previously posted at the borders were assigned to Foreign Nationals Offices in the major cities. In October, the same Secretary of State announced the experimental deployment of immigration officers at Dutch embassies (in Russia, Sri Lanka and Ghana) to inquire into the networks for smuggling immigrants into the Netherlands.

Conversely, it was certainly in Italy that public activity was seen at its most confused. In the early months of 1994, although no clear policy had been displayed, subjects of minor importance gave rise to a multitude of legislative and regulatory texts. In May the Minister for the Interior decided to give the broadest discretionary powers to the police forces in the field, their only instructions being that the rules in force should be rigorously applied. Suddenly, it was learned that the Minister for Family Affairs and Social Solidarity had submitted a draft legislative reform to the Prime Minister and obtained the appointment of an Interministerial committee on this matter. The aim of this project was a radical modification of the rules governing immigration policy and the powers of the public bodies responsible for implementing them, and it set out to be more ambitious than the previous Law 37/1990. Its special features were that it covered **all** foreigners (both Community and non-Community nationals) and dealt with all the legal aspects of their situation (entry, residence, asylum, deportation, work, education and social services).[35]

The serious political crisis caused by the question of reducing retirement payments and pensions during the last months of 1994 shuffled the deck once again. The parties making up the governing coalition profited from this to call for radical measures to deal with unemployment among foreigners, illegal immigration (more deportations and more frequent prison sentences) and clandestine working, while the opposition parties, religious groups and NGOs denounced this approach and called for a rational and balanced policy.

Further tightening of all control measures

All the procedures relating to the entry and residence of foreigners have been revised or reinforced. New legislation has been adopted (Portugal), or the regulations implementing laws adopted last year have been published (France, Spain, Netherlands),[36] or structural reforms previously initiated have been continued (Belgium, Italy).

In Portugal, the governing majority in Parliament adopted a decree-law on identity checks intended to facilitate the tracing and deportation of foreigners without papers. (For unspecified) reasons of internal security, the text provides that any individual over the age of 16 must carry an identification document which he can be required to produce by the

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35 The Minister for Family Affairs and Social Solidarity, who expected a vote on this project before the end of 1995, announced the preparation of a number of new measures in rapid succession. They were to cover not only the regularization of seasonal work and deportation of foreigners but also the establishment of an electronic link-up between consulates, police forces and frontier posts to give more effective control over entries.

36 In France, a decree of 2 September 1994, with a view to controlling entries, lays down the arrangements for the granting of an accommodation certificate which can be required for a private visit, and also lays down the conditions for the granting (and withdrawal) of residence permits following the legislative changes of 1993. The compulsory nature of the accommodation certificate has been extended to Algeria (previously excluded) by a decree of 19 December 1994.

police in public places, places which are open to the public, and places which are subject to special surveillance. In the event of a refusal, the offender will be taken to the nearest police station where he may be held for up to six hours while an identity check is carried out.

This legislation gave rise to heated controversy. The Constitutional Court, asked by the President of the Republic to give a preliminary opinion, found that these provisions exceeded the permissible restrictions on liberty laid down in Art. 27 of the Constitution, dealing with personal freedom and security. The procedure was considered excessive and disproportionate in terms of the objectives, and the text was held to be unconstitutional. The other subject of controversy was the rejection by Parliament of a new scheme for extraordinary regularization. The supporters of this project argued that at least two reasons justified it: the relative inefficiency of the previous regularization, which supposedly left thousands or tens of thousands of foreigners in an irregular situation in Portugal;[37] and the activities of the State itself, which was supposedly manufacturing "illegals" by not facilitating the renewal of residence permits by those who benefited from the extraordinary regularization.[38]

In the Netherlands, the new Law on Foreign Nationals, primarily drafted in order to provide stricter control of the right of asylum, came into force on 1 January 1994. It also clarifies the liability of carriers, provides the possibility of unlimited detention for those without papers, pending deportation, establishes that the recruitment of foreigners in an irregular situation is a breach of public order and imposes harsher penalties on those who assist irregular immigration for gain. The implementing circular adopted by the Minister for Justice in February 1994 emphasizes that any foreigner wishing to stay in the country for more than three months is obliged to obtain an MVV (Provisional Residence Permit) from the Dutch diplomatic representation in his country of origin before departure.[39]

Furthermore, a decree by the Secretary of State for Justice substantially reduced the guarantees previously offered to foreigners in a position to claim a residence permit (or "blue card") valid for five years. This card, previously granted after one year's residence, protected its recipient against virtually all grounds for deportation (even in the event of an offence) throughout its period of validity. Now, the immigration police are required to check each year that the foreigner's situation complies with the conditions that justified his

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37 According to an interview given by an official of the Ministry of the Interior, 38 364 residence permits were granted, 230 were refused on the grounds of a criminal record and 6 400 were pending.

38 Additional factors were the effects of the tighter entry controls on requests for asylum and, above all, the non-recognition of the state of civil war in Angola, which denies the right of asylum to nationals of that country who state that they are escaping from the war. This situation is giving rise to fears of the growth of networks to provide false papers (passports and visas), with the apparent complicity of the consulate in Luanda.

39 The intention is to put a stop to the regularization within the Netherlands of those who have entered on tourist visas. According to the Ministry of Justice, 42 000 foreigners made applications of this kind to the Foreign Nationals Offices in 1993. This new regulation does not apply to nationals of the majority of European countries or the United States, those who have applied for asylum, or the families of refugees recognized by the government. Foreigners who have applied for a permanent residence permit are also exempt.

admission. If his income is considered inadequate or his accommodation inappropriate, his permit may be withdrawn and he may be deported. During March, a parliamentary debate on this subject induced the government to soften its position: foreigners admitted on the ground of family reunification would not be deported on the grounds stated above except in the event of a breach of public order.

In Spain, three new measures are worth pointing out. The first two relate to the "quotas" for the years 1993 and 1994. The objective is to fill the available jobs not covered by Spaniards, EU nationals or workers from third countries who are lawfully resident in Spain, by trying to improve immigration flow management so as to prevent recourse to illegal employment. As for the third, this is more concerned with the control of foreigners already established in Spain: it concerns a circular on visa exemption which reasserts the exceptional nature of this arrangement and specifies that, in the absence of humanitarian grounds, applications must be rejected and those concerned ordered to leave Spain immediately. In addition to these three provisions, an Instruction of February 1994 relates to visas for family reunification and the amendments to legislation regarding carrier liability and asylum.

New institutional changes in Belgium and Italy

In Belgium, the reforms instituted after the ministerial decision of the summer of 1992 were completed on 1 January 1994 by the transfer of responsibility for immigration policy from the Ministry of Justice to the Ministry of the Interior,[40] which is now responsible for running the Foreign Nationals Office. On this occasion the Office was reformed, a major programme of computerization was begun and a database set up on all foreigners with files there. This computerization, also undertaken with Schengen in mind, has a number of objectives: enhancing coordination between services, preparing the forthcoming establishment of the waiting list, automating the procedure for visa applications sent to the Office by Belgian consular and diplomatic representatives abroad, and allowing swifter and more efficient processing of cases, especially in connection with asylum.[41]

The resignation of the former Minister for the Interior also resulted in a change in the approach to the control of irregular immigration. The former minister was no believer in the virtues of a wholly repressive system, and wanted to replace massive police checks with voluntary departures. Since he left office, this approach has been abandoned in favour of expediting actual repatriations, by force if necessary. The new minister was awaiting an increase in holding centre capacities before ordering more systematic checking

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[40] The Department of Public Security in the Ministry of Justice has been abolished. The Ministry of the Interior coordinates activity between all the ministries concerned (Justice, Social Integration, Employment and Labour, Foreign Affairs); a permanent consultation procedure involves fortnightly meetings of the ministers responsible (or their deputies) and representatives of the authorities concerned.

[41] The Foreign Nationals Office receives an average of 4 500 documents daily. The delay in classifying them has been reduced, and the files are forwarded to the competent offices within two weeks of arrival.

that deportation orders had actually been implemented[42]. The target was set at 3 400 deportations per month (mainly of unsuccessful asylum seekers), and coordination between the services (Foreign Nationals Office and police forces) will be improved to that end. Although the actual deportation of illegal foreigners is a priority, the minister specifies that constraint must be used only as last resort.[43] However, deploring the uncooperative attitude of Sabena, he has threatened "*to prevent certain aircraft from taking off*" if the airline persists in its refusal "*to take asylum seekers back to their countries of origin*". It is true that numerous incidents are caused by rejected candidates for refugee status who refuse to board voluntarily. Consequently, for safety reasons, the pilots refuse permission to board to passengers who argue or might prove violent.

Italy, too, has seen a number of institutional changes with the publication of two decrees by the Council Presidency on 9 and 27 May. The first reorganized the Department of Social Affairs, creating an office with specific responsibility for the drafting of immigration policy and the planning, coordination and administration of all initiatives relating to it. The second made the Minister for Family Affairs and Family Solidarity responsible for coordinating everything connected with the reception of immigrants. Finally, on 15 September, the Council of Ministers appointed a prefect responsible for certain specific problems, in particular coordinating government action on gipsies, escorting illegal Albanian and Tunisian immigrants to the frontier, and supervising the "ghetto" of Villa Literno.

Family reunification under scrutiny

It is now generally accepted that the regulations on family reunification form part of the general provisions on the control of migration flows, alongside the other legislation regulating the entry of foreigners. A resolution has been adopted at EU level inviting the Member States to take a harmonized approach to this question, and in recent years all, or virtually all, have revised their legislation along these lines. Stricter conditions have thus been imposed on foreigners wanting to exercise their right to reunite their families, and stricter verification procedures have been instituted, although sometimes there are certain measures which potentially favour applications (Belgium). Some states which had already fulfilled the requirement further reinforced their arrangements this year (France, Belgium, Spain) while others are still thinking about it (Portugal and Luxembourg). Overall, the restrictions seem to have swiftly complied with the government's objective (Denmark, France, Spain).[44] A more unusual discussion in Germany concerns the right to independent residence of women admitted under the family reunification arrangements, and the rights and interests of children.

In Spain, the arrangements for implementing the Agreement by the Council of Ministers

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42 The minister accused lawyers of lodging too many appeals, with varying degrees of justification and the judiciary of impractical theoretical judgements which obstructed the proper administration of asylum procedures.

43 The Foreign Nationals Office forcibly deports only those foreigners who have not complied voluntarily with an order to leave the territory or who are unable to do so when, for example, they have no travel documents.

44 In Denmark, 6 000 reunifications were accepted in 1994, as compared with 8 091 in 1992.

of 12 November 1993 have been laid down in an Instruction of 15 February 1994 which sets more stringent criteria and imposes stricter checks. A foreign resident who applies for a visa for family reunification has to have a renewed permit and prove that he has sufficient reliable resources to enable him to cater to the needs of his family (last three pay slips, declaration of income or retirement pension). He has to be registered with Social Security and produce a notarial deed certifying that his accommodation is in keeping with the standards of his area of residence. The members of his family (non-divorced spouse and dependent children) must produce proof of their age, relationship and legally dependent status and provide medical certificates and extracts from their police records.

In Belgium, a better balance seems to have been sought between strict controls and concern for the applicant's position. A Royal Decree of 3 March 1994 has given executive effect to the new procedure established by the Law of 6 August 1993, the most important points in which are the so-called "*probation*" period prior to the granting of an unlimited right of residence and the greater involvement of the local authorities in the examination of applications. As far as the first point is concerned, the changes that have taken place have benefited applicants: the waiting period before an unlimited right of residence is obtained has been reduced to a maximum of one year (plus 3 months in doubtful cases). After this period, if no decision has been taken, the foreign national is automatically accepted as a resident for an unlimited period.

This change represents an obvious improvement. It should avoid the all too common event of an unreasonably long wait (often several years), which in some cases resulted in situations of "residence blackmail" for some couples. The other improvement introduced by this legislation is the recording in the register of foreigners, during this waiting period, of those who have produced the requisite documents. They then receive a registration certificate allowing them to go ahead with official procedures (insurance and school registration, etc.) which were formerly very difficult.

The other side of the coin is that foreigners are subject to more rigorous examination of their files and stricter compliance with procedure. For example, anyone claiming a right of residence based on family reunification must be in possession of a special visa on arrival; without it, he is liable to have a deportation order served on him. The same penalty applies if he fails to support his application with the necessary additional documents before the expiry of his short-term residence entitlement. Since he is not authorized (or no longer authorized) to reside in Belgium, it will not be possible, as it used to be, for him to regularize his position while in the country.

The third major change is the greater involvement of the local authorities in this matter, although precautions have been taken to safeguard the interests of applicants against authorities which might be tempted to impose unreasonable conditions. To prevent this failing, it is laid down that the presentation of a passport bearing the words "*family reunification visa*" or "*visa issued pursuant to Article 1 of the Law of 15 December 1980*" exempts the local authority from verification of the admissibility of the residence application, the necessary documents having already been checked by the Belgian diplomatic or consular representative or by the Foreign Nationals Office. The local authority only undertakes such verification if the foreigner is exempt from the visa obligation or fails to produce a visa issued pursuant to Article 10. It is also confirmed that no document can be demanded other than those expressly designated by the minister.

On the other hand, as the Minister for the Interior has stressed, cohabitation creates no entitlement to reside in Belgium. The same applies to "marriages" between homosexuals conducted abroad; they are not recognized in Belgium and cannot take place there. Temporary residence permits will be granted only at the discretion of the minister. During 1993, 3 000 nationals of third countries arrived in Belgium under the family reunification arrangements; the figure for 1994 was expected to be similar.

In other Member States, uncertainties remain as to the implementation of the law (Portugal), or thought is still being given to the changes that need to be made (Luxembourg). Confronted by the protests of the immigrant associations regarding the problems foreigners have in asserting their rights, the head of the Foreign Nationals Service in Portugal has acknowledged that there are still uncertainties as to how the law is to be implemented. He accepts the scale of the problem, though immediately adding that the government authorities still have no clearly defined philosophy. Among the main difficulties, he cites the major differences between the matrimonial practices of the immigrants' countries of origin and the Portuguese regulations, with all the resulting uncertainties regarding the parentage of children. This is specifically the problem with the polygamous traditions of Guinea-Bissau or the uncertainty surrounding matrimonial relations in Cape Verde.

In Luxembourg, deliberations were still continuing with a view to bringing legislation into line with the principles of the Community Resolution. The debate also covered the United Nations Convention on Children's Rights, Article 10 of which establishes the principle of the right to family reunification and particularly stresses the prohibition of separating children from their parents. The Council of State and the parliamentary committees (the Committees on Legal Affairs and Family Affairs) have held that this right to reunification is not absolute. They reacted favourably to the government's reservation to the effect that no provision of the Convention authorizes unlawful entry and residence or limits the legal grounds relating to the entry of foreigners into Luxembourg or their residence there. For the present, only those who hold a type "B" work permit, valid for 4 years, and have appropriate accommodation (the two criteria for permanent residency) can apply for family reunification.[45]

Women's independence and children's rights under family reunification

A more unusual debate has arisen in Germany following a legislative proposal by the SPD regarding the right of foreign women to independent residence under the family reunification system. As presently worded, the Law on Foreign Nationals lays down (Art. 19) that wives do not acquire a right of residence independent of their husbands' right until after four years of marriage, or three years in extreme cases. The major disadvantage of this provision is that it makes these women excessively dependent on their husbands, in the fear that a divorce may result in their deportation. The SPD tabled a draft law reducing the statutory period to two years and abolishing any requirement in extreme cases. The SPD majority, the CDU/CSU and the FDP in the Bundestag rejected

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[45] In answer to a parliamentary question, the Minister for Justice stated on 6 December 1994 that applications for family reunification by nationals of the former Yugoslavia would be denied if those concerned had no residence permit entitling them to it. For other nationals, each application is examined on its merits.

the proposal, arguing that it was not neutral in its treatment of the sexes (sic): it took account only of the situation of women.

At the same time, the PDS/Left List and the SPD raised two other matters relating to children's interests. The first requires that the well-being of the child (Kindeswohl) be the priority consideration in any decision relating to reuniting a child with family members other than its parents. The Law on Foreign Nationals imposes no constraints on the authorities here; for example, in the city of Cologne alone more than a hundred children are at risk of deportation for this reason. The government is contemplating legislation on this point. The SPD, for its part, is demanding that children leaving Germany involuntarily with their parents at between 15 and 23 years of age should retain a right of return within eight years after departure.

Finally, in this area of copious case law,[46] we should note the precedents relating to "*consent prior to visa*" (Vorabzustimmung). It has been established that, if the legal conditions for applying for a residence permit for the family have been complied with, consent will be given prior to the obtaining of a visa even if no "personal" circumstance (pregnancy or child already born) requires it. However, this consent will be given by the German representative in the country of departure and not to the person living in Germany or to his family.

Mixed marriages

More than ever, mixed marriages are the subject of great suspicion and are therefore subject to close scrutiny. The process of toughening legislation designed to prevent marriages of convenience has been continued, with a risk that general suspicion is drifting towards prima facie suspicion.

This year, it was in the Netherlands that new legislation came into force (1 November 1994) authorizing registrars to refuse to perform the marriage of a foreigner if he suspects that the only purpose is to obtain a residence permit. On the same ground, the State prosecutor may declare a marriage null and void a posteriori. This law makes it an offence to participate in a marriage of convenience. Finally it requires that foreigners wishing to marry must obtain a written declaration from the Foreign Nationals Office containing details of their residence permits and personal information.

In Belgium, the Justice and Interior Ministers have sent a joint circular to the local authorities specifying the conditions under which a Registrar must refuse to perform a marriage. They recall, nevertheless, that the principle of freedom of marriage requires a degree of caution, and on that ground they recommend that any prima facie suspicion should be avoided. Consequently, the Registrar may only refuse to perform the marriage if he considers that all the information unequivocally and clearly indicates a marriage of

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[46] According to the Federal Administrative Court, the regulations on family reunification (Article 17 of the Law on Foreign Nationals) does not apply to unmarried couples, by virtue of the principle of equality of treatment.

convenience:[47] if necessary, he can consult the Prosecutor's Office, but the intended spouses must be given the benefit of the doubt. Unless there is convincing evidence to cast doubt on cohabitation, the local authority will not conduct an inquiry until after the eighth month of the residence application.

At all stages of the procedure, the local authorities must furnish the Foreign Nationals Office with any information they have regarding possible proceedings for the annulment of the marriage of a foreign spouse who is applying for or has already obtained the right of residence under the family reunification rules. If there is no cohabitation, the Office is empowered to refuse residence. In the unanimous opinion of lawyers "*this directive, if followed literally by narrow-minded or ill-intentioned persons, could result in grave violations of the basic principles of respect for private life*". As regards the acquisition of nationality by election after marriage, we should recall that the conditions for claiming this have been tightened since 1993. For foreigners who had no independent right of residence in Belgium before the marriage, the necessary period of cohabitation has been increased from 6 months to 3 years. The average time taken to acquire nationality after marriage has thus been extended by 2 years.

In Portugal, as elsewhere, residence permits being more difficult to obtain, endeavours to acquire Portuguese nationality by marriage have become more common. The most numerous among those resorting to this device in the hope of gaining freedom of movement in Europe are immigrants originating from the Eastern countries - Indians, Pakistanis and Macao Chinese. In order to combat this practice, although the figures as yet give no cause for concern (1 036 naturalizations by marriage during 1993), the Law[48] amending the right to nationality has established a period of three years for the acquisition of nationality by declaration following marriage (this declaration could formerly be made immediately). On the other hand, it does lay down that nationality acquired by marriage is retained after divorce.

Computerization of procedures, networking arrangements and stricter control of entitlement to social services

In order to make the new control procedures more effective, authorities everywhere are increasingly opting for computerization, the creation of centralized databases and the

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[47] The Registrar must verify that all formalities and conditions have been satisfied, and in particular that the intended spouses are consenting. He may refuse to celebrate the marriage if it appears to be a simulated one, on the strict condition that it should be clear that the intended objective (obtaining the advantage associated with married status) is taking precedence over the expressed intent (the creation of a stable relationship). In this case, it will have to be proved. A combination of circumstances can represent a serious indication of a marriage of convenience: if the parties cannot understand each other or have difficulty in conversing, or call for an interpreter; if one of the parties is cohabiting on a long-term basis with someone else; if they do not know each other's names or nationalities; or they do not know where the future spouse works. Yet other grounds for refusing the marriage are a blatant inconsistency in statements made regarding the circumstances of the marriage, the promise of a sum of money in consideration of contracting the marriage, prostitution, the intervention of an intermediary or a wide difference in age. Furthermore, recent amendments to legislation on family reunification require that the right of residence for family reunification be granted only in cases where both spouses are over the age of 18.

[48] Law 25/94 of 19 August 1994 (followed by Decree-Law 253/94 of 20 October 1994.

networking of the records held by any services capable, in one way or another, of dealing with the situation of foreigners. In Denmark, for example, Parliament adopted an amendment to the Naturalization Law authorizing the Naturalizations Office at the Justice Ministry to have access to the data recorded by the Finance Ministry computers on the applicant's tax situation.

In Germany, the centralized file of information on foreigners has existed for a very long time ... illegally, since the *Central Register of Foreign Nationals* (AZR), which provides the authorities with information on some eight million foreigners, has functioned for 40 years under the authority of the Federal Authorities without any legal basis. The Law of 2 September 1994 finally regularized this situation. At the same time it broadened the scope of the arrangement, since, apart from the specialist services, the system can now be used by the police and secret services. It is envisaged that the data held by the Federal Crime Office (BKA) and information on "suspect" foreigners will be integrated into the AZR. In addition, the Law on Data Protection has been amended: Article 71 (2) allows the transmission of social data, to be added to those already provided for in Article 68 of the Law on Foreign Nationals.

In Belgium, a new collaboration has been established since 1 October 1993 between the Foreign Nationals Office, the General Inspectorate for Refugees and Stateless Persons (CGRA) and the CPASs. In order to facilitate the monitoring and tracing of foreigners in irregular situations, a central database has been created at the Ministry of Public Health to list asylum procedures which have resulted in a final deportation order. This file is used to provide better control of social aid expenditure distributed by the CPASs, which are thus compelled to collaborate in the tracing of foreigners in irregular situations. They are, in fact, required to examine the residence status of aid applicants and notify the competent authorities in the event of doubt as to their situation. In addition, the fingerprinting hardware brought into use by the Foreign Nationals Office at the end of 1993 has made it possible to identify cases where multiple applications are made by a single person.

In the Netherlands, all the registration offices have been connected to a single network - the GBA ("Gemeentelijke BasisAdministratie"). At the same time, the compilation of data on foreign residents in the VAS system has been expedited; it was to become operational in 1995 and linked to the GBA system. A direct link will thus be established with the authorities responsible for foreign nationals, and will enable the "illegals" recorded by the registration offices to be identified. Since the new law authorizes the collation of information between the Foreign National Offices and the other public services, this system will provide easier and swifter access to the files. The effectiveness of the system should benefit from the *Compulsory Identification Law* (1 June 1994) which applies to every citizen in such varied circumstances as public transport, job seeking and social security registration (SOFI).

In Portugal, the Law on the Protection of Personal Data has also been revised (Law 28/9d of 29 August). The processing of the data required by previous legislation (criminal convictions, suspicion of illegal activities, state of health and property ownership/financial

situation) is still conditionally authorized,[49] but the processing of information on ethic origin has been prohibited. The processing of personal data is permitted subject to conditions laid down by law and prior notification of the CNPDPI; access is subject to prior authorization by the government, after consultation of the CNPDPI.[50]

Furthermore, an increasing number of politicians are calling for greater vigilance with regard to the entitlement to social benefits. The idea is that, in the interests of consistency, the campaign against illegal immigration involves denying or cancelling social benefits to foreigners without residence permits. They consider, too, that the most up-to-date resources should be used to detect unwarranted payments. This is the case, for example, in the Netherlands, where the registration offices are required to check whether those registering have a valid residence permit. It is also the case in France, where among the fifteen or so implementing regulations - followed by decrees and published circulars - there are at least three which, as in the Netherlands, lay down the conditions a foreigner has to satisfy in order to comply with certain administrative formalities and benefit from certain rights, the object being to exclude those in an irregular situation. The first of these texts (adopted on 15 April 1994) provides a list of the papers required in order to benefit from social assistance (Article 186 of the Family and Social Aid Code), subject to imperatives of public health and humanitarian considerations. The other two (dated 21 September 1994) - one for third country nationals and the other for Community nationals - amend the Social Security Code and lay down the papers and documents that must be produced to gain affiliation to a compulsory social security system and receive the benefits provided (both the member and his major dependants must be in good standing).

Administrative detention pending deportation

The new strictness applied to immigration and asylum policy has quite logically led to a continuing increase in cases of detention of foreigners who are illegally resident - either because they lack residence permits or following a rejected application for asylum - pending their deportation to their countries of origin. Paradoxically, this problem seems all the more sensitive in that there is a drastic lack of appropriate infrastructures in most Member States, large numbers of the foreigners in this position being held in the ordinary civil prisons, under conditions inappropriate to their status.

Portugal, Belgium and Germany, where this has been one of the most contentious issues, provide fine examples of heated debate on this subject. In most of the German Länder, foreigners are effectively treated as criminals, often being imprisoned with ordinary convicts although the law imposes no such penalty upon them. The majority are left in this situation for several months, because of the failure of the authorities to arrange for their deportation in a shorter time. This situation has brought a sharp reaction from the

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[49] They will be available for use by public services, with guarantees of non-discrimination and respect for privacy which are to be determined by a special law drawn up after prior consultation of the National Commission for the Protection of Computerized Personal Data (CNPDPI); and by other services subject to the agreement of the CNPDPI.

[50] The cross-border flows of personal data between States which are party to the Convention for the Protection of Individuals in relation to the Automated Processing of Personal Data will be subject to compliance with national legislation, in accordance with the said Convention.

Federal Commissioner for Foreign Nationals.[51]

The debate has been equally animated in Portugal. Detention in temporary reception centres (created by Decree-Law 59/93) has been equated with a restriction on liberty which only Parliament could resolve upon, and this subject was not within the scope of the legislative authorization granted to the government. In view of claims of unconstitutional acts made by political parties and public prosecutors, Parliament adopted a new law (34/94) on the system of admission to these centres.

Detention for security reasons, regarded as an act of deprivation of freedom, will thus be decided by a judge, and only in one of the following cases: to ensure compliance with a deportation order, non-compliance with a court order to report at regular intervals, or to ensure attendance before a legal authority.[52] This form of detention is continued until a visa or residence permit is granted or until a deportation order on the foreigner has been implemented. It is, however, reviewed by the judge every week and may not exceed two months.

In the Netherlands, the Minister for Justice has estimated that there are 9 000 places in reception centres for asylum seekers that are occupied by unsuccessful applicants who cannot be turned back, and has emphasized that shortage of space in detention centres makes it unavoidable for "illegals" to be released. His argument has been confirmed by the Governor of Tilburg prison, who believes that half of foreigners detained because they lack papers are eventually released.

In Belgium, the same issues have promoted the government to open new, specialized centres known as "*closed centres*". A "*closed centre*" is defined as a "*place located within the Kingdom but deemed to be the place referred to in Article 74/5 (1) of the Law of 15 December 1980*", designed to ensure the effective deportation of the persons in question by the Foreign Nationals Office.[53] With a total capacity of about 550 beds, they are reserved first for foreigners who have not been granted residence, pending their repatriation, and secondly for asylum seekers who are very likely to be rejected while their cases are being investigated. While they remain in one of these centres, foreigners are not regarded as authorized to enter the Kingdom, but may not under any circumstances

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51 Internment is legal only if it is absolutely indispensable for compliance with the deportation order. It may not be authorized as an alternative to imprisonment or to ease the workload of the Foreign Nationals Office.

52 Internment is also authorized in the event of attempted illegal entry if the presence of the foreigner in the international zone of the port or airport of entry is extended beyond 48 hours or if security reasons justify it. After this period, the Foreign Nationals Department informs the foreigner of his rights and reports the fact to the competent court, which decides whether to leave things as they are or order an internment. As for interned foreigners, they are subject to the legislation governing the reception arrangements for persons deprived of liberty.

53 The two latest are at Steenokkerzee and centre 127 bis at Zaventem airport. The first was opened to replace Fort de Walem and the second designed to accommodate families and solve the much-criticized situations in which families are split up. There are plans to open a third centre early in 1995 at Biers, with a capacity of 200 places. Illegals will not be held in cells and will enjoy a certain amount of freedom of movement, and specialist personnel will be recruited to staff the centre.

be detained for more than two months.

From the government's standpoint, these *closed centres* - which are involved in so-called "*primary*" reception - are serving their purpose of deterrence satisfactorily. Nearly 70% of those transferred to them apparently abandoned their requests for asylum shortly after the decision, which the minister regards as evidence "*that their arrival was not motivated by the protection given by the right of asylum*". We shall return in due course to the controversy created by these "closed centres" in Belgium.

NEW RESTRICTIONS ON THE RIGHT OF ASYLUM

Whatever may be the case with decisions taken in other areas, the restrictions on the right of asylum have remained a priority throughout the EU. In some cases new legislation has been adopted (Spain), or legislation adopted last year has come into force (Netherlands), while elsewhere the reforms have been continued. The objectives, everywhere, are still the same: to speed up procedures, reduce the opportunities for appeal and enforce deportation. At the same time, the candidates for asylum, aware of the problems with gaining admission, are developing new techniques to delay or even prevent their deportation: loss of identity papers, false name and nationality, or refusal of photographic and finger-printing tests. And these practices, in their turn, serve to justify the adoption of further and even more restrictive provisions.

Asylum more difficult in Spain and the Netherlands

In Spain, the adoption of Law 9/1994 has brought a complete change in legislation on political asylum. The number of forms of protection available have now been reduced to one: asylum, within the meaning of the Geneva Convention of 1951. "*Asylum on humanitarian grounds*", provided for by the former legislation, has been abolished, and those formerly covered by this classification are now subject to the general legislation on foreigners. There were three major reasons which, in the view of the government, justified this reform: the inadequacies of the previous legislation (after ten years' experience); the need to adapt Spanish law with a view to future harmonization of the rules within the EU; and finally, the obligations imposed by the "Draft Law No.... of April 1991" which called for "*rapid individualized examination of requests for asylum*" in order to "*prevent the fraudulent use of the refugee protection system for reasons of economic immigration*". The three most important amendments were: the abolition of the dual concept of *asylum* and *refugee* status, the calling into question of the "privileges" granted to applicants whose application had been rejected,[54] and the expedition of the examination procedures and the procedure for rejecting "*unfounded*" applications or those lying within the jurisdiction of a different State.

The government has cited three other reasons to justify this last point: the misuse of the protection afforded to refugees by a growing number of "economic immigrants" (which, in its view, results in longer and longer periods for the processing of formalities); Conclusion 30 of the Executive Committee of the Office of the United Nations High Commissioner for Refugees (which requires more rapidity in the processing of unwar-

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[54] The Law of 1984 provided for the deportation of the applicant "*unless (for humanitarian or public-interest reasons) he is, by way of exception, permitted to remain*". For the government, these privileges were the prime cause of "*the attraction to economic immigrants of the asylum system*". Since refusal of the right of asylum did not give rise to the deportation of an immigrant who had entered Spain legally, he was allowed three months to regularize his situation through the ordinary channels and was exempt from the visa requirement. Moreover, the backlog in the examination of files - a year, on average - enabled him to benefit from the assistance and protection offered. He thus had sufficient time to stabilize his employment situation. Also, once his application had been finally rejected, the obtaining of the joint residence and work permit was virtually guaranteed.

ranted applications which increase the burden on host countries and damage the interests of legitimate applicants); and, finally, the need to comply with the rules of the Dublin and Schengen International Agreements, especially those relating to the concept of the "*competent State*".

In the Netherlands, the new *Law on Foreign Nationals*, which came into force on 1 January 1994, has also radically changed every aspect of the procedure: the reception of applicants, the assessment of their applications, the exclusion of "obviously unfounded applications", the deportation of rejected applicants, and the appeal procedure. In this context, particular mention should be made of the opening of two special registration centres on the German and Belgian borders where all asylum seekers arriving overland from those two countries are now required to report. In addition, opportunities for appeal have been limited. The possibility of appeal under the accelerated procedure has been abolished; any appeal against a deportation order now has to be lodged with the Foreign Nationals Chamber of the Court of The Hague.

Increasingly selective criteria: "zero-risk countries of origin" and "zero-risk third countries"

Despite the tougher attitudes of recent years, many pressures are still being brought to bear on governments to use even greater severity. The Netherlands provides an example of this. In May an intergovernmental committee complained of liberalism on the part of the authorities. Adopting a distinction between "genuine" and "bogus" asylum seekers, it suggested a reform of procedures and a redefining of ministerial responsibilities; among other things, it called for applications to be made to the Dutch diplomatic establishments abroad, and demanded the turning-back of displaced persons holding a VVTV permit when the situation in their own country permitted it. In the meantime, to encourage such persons to accept responsibility, the committee proposed that they should be offered free access to the job market.[55]

Against this background, the Dutch government proposed two amendments to the new Law on Foreign Nationals in 1994: one related to "*zero-risk countries of origin*" and the other to "*zero-risk third countries*", designed in both cases to reduce by "legal" means the number of "admissible" applications for asylum. The first of these texts, which was adopted in April, was accompanied by a list of "zero-risk countries of origin"[56] similar to that established by Germany for Eastern Europe. The second, relating to "*zero-risk third countries*" - which also corresponds to a German regulation - has the objective of preventing applications from being filed in countries where the regulations are most favourable. A foreigner whose application is rejected on this basis retains the right of appeal to the Foreign Nationals Chamber of the Court of Justice, but this appeal has no suspensive effect as regards possible deportation. A large majority in Parliament having

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[55] The government has partially adopted this last proposal again.

[56] Parliament, on this occasion, voted itself the power to monitor the drawing-up of this list against the recommendation of the Secretary of State responsible for the matter. In any case, persons originating from these countries can still present a case and, if rejected, lodge an appeal.

approved this text,[57] the government hoped to see it come into force early in 1995. In fact, it came up against determined opposition by the legal authorities and refugee organizations on the ground of violation of the principles of the United Nations Convention on Refugees.

Germany, as we have seen, served as a model in this instance. It is accepted that the application of the principles of "safe countries" and "safe third countries" associated with the entry into force of the new Law on Asylum (1 July 1993) would have contributed to a 50% fall in the number of asylum seekers. The argument is that these provisions deprive the candidate of the right to make an application if he arrives in Germany by air after a stopover in a third country regarded as safe.[58] The Federal Minister for the Interior, Mr Kanther, considers that this helps to keep the peace within the country and, in the view of many observers, it also facilitates deportation. According to a report by the Ministry of the Interior, published in March 1994, repatriations of persons whose applications have been finally rejected rose to 5 583 in 1990, 10 798 in 1992 and 35 915 in 1993.

The waiting list and distribution plan in Belgium

The pressures on the authorities to tighten up the rules on the control and admission of asylum seekers have been no less heavy in Belgium. Although it refrains from any attempt to impose *quotas*, the Belgian government claims that the fifty per cent fall in the number of applications registered is the result of its rigorous policy. In fact, considering the cumulative effect of the Law of 6 May 1993, the recent toughening of fines imposed on carriers, the restrictions on social assistance and the refusal of registration in town halls, there is no doubt that the desire of the authorities to make asylum in Belgium less "*attractive*" has been largely achieved.[59] The Inspector General for Refugees and Stateless Persons (CGRA) is no sluggard in this area.[60] His attitude is even considered by the MRAX (Movement Against Racism) to be contrary to the spirit of the Geneva Convention: "*Mr Bossuyt seems to confuse the role of a Inspector for Refugees with that of an anti-immigration authority: his role should be confined to applying the Geneva Conven-*

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57 Although insisting that the list of countries concerned should be subject to its approval.

58 All countries bordering Germany are regarded as safe.

59 The changes have been reflected in more rapid processing of applications, limitations on the right to work for asylum seekers, the installation of the fingerprint comparison system, and the start of operation of the closed centres. The Directorate of Refugees at the Foreign Nationals Office now processes all new requests for asylum in good time: 68.4% of requests are processed the same day, 25.2% of applicants are asked to return in a week, and 6.4% take longer.

60 The CGRA has numerous instruments for evaluating a request for asylum. His organization into geographical areas enables his officials, who specialize in particular nationalities, to master the objective data relating to each country. In addition, officials regularly question Belgian diplomatic establishments abroad and maintain constant contacts with reliable witnesses of the political situation in the countries concerned.

tion, not strangling immigration".[61]

Two new instruments introduced by the Foreign Nationals Law supplement what was already an elaborate mechanism: the *waiting list* and the *distribution plan*. This law requires that each local authority should keep a *waiting list* on which all foreigners applying for refugee status will be registered in the place where they have established their main residence; in the longer term, other categories of foreigners may also be registered.[62] This new system, which will be linked to the national register, serves a dual purpose: enabling all asylum seekers (and, consequently, all foreigners in dubious residence situations) to be recorded, and assisting the implementation of the *obligatory distribution plan* throughout Belgium.

For the authorities, *the distribution plan* meets the demand for equitable redistribution among the various local authorities in Belgium. Their stated objective is to spread the "*burden*" of the asylum seekers in a more equitable manner and to solve the problem of refusals to register them and accept social responsibility for them. The law provides for a financial system of incentives to ensure that, *as far as possible*, the place of compulsory registration coincides with the place of actual residence.[63] The government authorities thus hope to remedy the dysfunctions and illegal practices noted within the local authorities and CPASs and, in particular, to provide a counter to the upsurge of racism, especially in local authority areas with a high concentration of foreign residents. The system, which was to become operational in March 1995, is liable in practice to prove highly complex to administer. Nevertheless, much was expected of it by many senior politicians (especially at the Ministry of Justice) who showed signs of keen impatience at the delays in implementing it.[64]

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61 There are two other complaints regarded as serious by the NGOs. The first relates to the fact that the Inspector stood in the European elections in June as the candidate on the Flemish Liberal list, well-known for its hard line on immigration; this candidacy was considered somewhat incompatible with the "*apolitical*" nature of his job. The second relates to the internal CGRA directives which give credit for the "*productivity*" of officials and establish forms of nationality-based quota (for example, an internal memorandum reads "*too many Zairian cases are being accepted*"), thus contravening the principle of individual consideration required by the Geneva Convention.

62 The start of operation of the waiting list, scheduled for not later than 1 February 1995, was designed to provide access to all data relating to asylum seekers registered in the various communes, provinces and regions. This new list duplicates but does not replace the population registers in which Belgians and foreigners accepted for establishment or residence in the Kingdom are registered at their principal place of residence. By the provisions of the new law, "*the King may, by a decree adopted for discussion by the Council of Ministers, order the registration on the waiting list of other foreign nationals whose residence in Belgium is* ***administratively dubious*** *and not such as to allow them to be recorded or maintained in the population registers*". "*Registration on the waiting list shall take place at the initiative of the minister* [for the Interior] *as soon as* [the foreigners arrive] *in Belgium or as soon as their presence on Belgian territory has been established.*"

63 To encourage the communes to ensure that the place of actual residence is the same as the place of compulsory registration, the federal budget will reimburse the CPASs with only 50% of the social assistance granted to asylum seekers if the place of actual residence is not the same as the place of compulsory registration.

64 In Germany, the Länder of Brandenburg and Hesse have adopted an amendment on the distribution and internal allocation of asylum seekers.

An ill-defined category: "displaced" persons

Despite all the efforts, classification is not always a simple matter amid the uninterrupted flood of candidates for asylum. Between those eligible for refugee status and those whose applications will be rejected as "obviously unfounded", there is one category which is more difficult to pin down, and all the more difficult to administer as its numbers increase constantly - the *displaced persons*. They are fleeing from countries devastated by civil war, the danger they face is undeniable and, in many cases, they do not wish to become permanently resident. Their situation, then, is entirely comparable to that of refugees, though without complying with the criteria of the Geneva Convention. Depending on the individual case, they may be granted refugee status, or a "secondary" humanitarian status, or treated as impossible to deport to the countries they have left.[65] The case of nationals of the former Yugoslavia, which is encountered more or less everywhere in Europe, or the more specific situation of Algerians in France and Rwandans in Belgium, confirms how topical this question is.

As far as the Rwandans are concerned, a special procedure has been created in Belgium to allow "*flexible and rapid processing of visa applications made by Rwandan nationals*; [which] *does not mean that a visa is automatically granted to every Rwandan who may ask for one, since the Belgian government is endeavouring to retain control over access to its territory*". A circular addressed to Belgium's mayors (on 13 June 1994) instituted a residence document known as a "declaration of arrival", valid for 3 months, and intended for those who do not make an application for asylum but satisfy certain specifically defined criteria. At the end of this period they may, if they so wish, extend their stay; in that case they are entered in the register of foreigners and receive a certificate for "temporary residence" of six months on the basis of Article 13 of the Law of 15 December 1980. Their cases will be reviewed in the light of changing events in Rwanda. Finally, it has been decided that the Foreign Nationals Office would not, as things presently stand, repatriate any illegally resident Rwandan. If, in the meantime, some of them made applications for asylum, these will be examined on their merits.

This apparently favourable decision masks a very strict pragmatism. In actual fact, the number of applications for asylum by Rwandan nationals recorded since April 1994 has remained modest to say the least (667 out of a total of 14 340 applications for the entire year), because they lack the resources enabling them to reach Belgium in the first place and, above all, they lack visas issued by the Belgian authorities. To this can be added the difficulties caused by the Foreign Nationals Office at the time the applications are made.

In France, the Office for the Protection of Refugees (OFPRA) has rejected all applications made by Algerians on the ground that their government is fighting against the excesses of the extremists. To justify this attitude, the Office has cited the obligation imposed on applicants to prove that the persecution of which they complain is instigated by the authorities or tolerated by them. Conversely, the CRR (Refugee Appeal Commission)

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[65] In Belgium, acting within the scope of his prerogatives, the Inspector General for Refugees and Stateless Persons advises the Belgian authorities, in a number of cases, not to deport an unsuccessful would-be refugee to the country from which he has fled. These countries are not officially designated at present, and it is difficult to know whether the Belgian authorities follow these recommendations by the CGRA.

granted (on 22 July 1994) refugee status to a young Algerian woman compelled to flee her country by the violence directed against women. The Commission considered that "*the local authorities which were aware of the activities of which the complainant had been the victim must, in view of the calculated absence of any intervention on their part, be regarded as having voluntarily tolerated that action*". However, the Commission did not comply with the request by lawyers to make its decisions generally valid by recognizing Algerian women as a "social group" which is persecuted as such, within the meaning of the Geneva Convention.

Territorial asylum and the conditional residence permit

Rejected Algerians who, for obvious reasons of safety, cannot return to their country, or those who make no formal application for asylum, can be granted the "status" known as *territorial asylum*. This takes the specific form of the granting of a renewable temporary residence permit, and guarantees them the same rights as refugee status, in particular the right to work. On the other hand, this status is strictly *temporary* and may be withdrawn at any time. The official number of these new documents has not been made public, but was estimated by a national newspaper (Le Figaro) at 11 000 for the first 6 months of 1994.

Although geopolitical events put the main focus this year on Belgium and France, Luxembourg too provides a good example of the difficulty of processing those classified as "displaced persons", starting with nationals of the former Yugoslavia. Following a period of very liberal attitudes, when all applicants from that region were granted humanitarian status with free access to the employment market, this privilege was very rapidly (1 July 1992) reserved for nationals of Bosnia-Herzegovina alone, the others needing to obtain a visa to gain access to Benelux territory.

For a year, there was debate as to whether this status could be extended to non-Bosnians and whether it was to be extended for those who already enjoyed it. On 5 November 1993 the government decided to make this extension subject to two criteria: the obligation to obtain a job and the renting of accommodation not subsidized by the State. Failing these requirements, the residence permit was suspended and material assistance to the parties concerned was cancelled, while they were invited to arrange to leave the country before 15 July 1994 and to contact the government Foreign Nationals Inspectorate to discuss the possibility of material aid with repatriation. This tactic created great anxiety among the refugees, and led to a wave of demonstrations. On 24 March 1994 about thirty Albanians from Kosovo barricaded themselves in the crypt of the cathe-dral and threatened to go on hunger strike, not a common event in Luxembourg. The Minister for Justice then promised to give individual consideration to their applications, though without succeeding in concealing the confusion that dominated the handling of this matter: in May he referred

to four categories of beneficiary, while in July he mentioned seven.[66]

In October 1994, the government decided to create a single status of "temporary protection" (with work permit) and to extend residence in all cases until 15 July 1995. It also decided that these "temporary refugees" could, subject to certain conditions, be given foreigner's identity cards,[67] but it rejected the idea of a law establishing "humanitarian status", to be granted to all persons collectively fleeing situations in which their lives are in danger (war, civil war, famine). In very cautious terms, the government that emerged from the elections of June 1994 again mentioned this "*temporary humanitarian status*". A model similar to that adopted for refugees from the former Yugoslavia is under consideration. On the face of it, the debate in this matter is far from over. And that is not only true of Luxembourg.

In the Netherlands, the new Foreign Nationals Law imparts legislative status to the regulations for "tolerated" foreigners. A "*conditional residence permit*" (VVTV), valid for one year and renewable, can be issued to two categories of person: unsuccessful asylum seekers who cannot be deported for humanitarian reasons and "displaced persons". These two categories are thus the subject of a procedure of progressive integration: they are offered access to primary education in the first year, in the second year they have the right to vocational guidance and temporary employment, and in the third year they are accepted into the labour market. At the end of three years, they will be offered a residence permit.

In Germany, the Foreign Nationals Law also provides for protection for war refugees in the specific case where a person's life, physical safety or liberty are at risk. The Ministry of the Interior and the Ministry of Family Affairs are preparing new legislation granting "displaced persons" escaping from civil war the same rights as asylum seekers. In a recent decision, the Federal Administrative Court nevertheless held that political persecution is established only if the State has abused its powers and is persecuting its citizens, or if it has failed to prevent such persecution.[68] The court laid down that it was necessary to

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66 In the first year of acceptance there were only two: beneficiaries of humanitarian status and the rest. In the course of time, the number of categories has increased, with greater variation in the periods for which their permits are valid. There are in fact seven: 1) Bosnians who have jobs and accommodation and have acquired permanent residence status in the form of a foreigner's identity card, valid for 5 years. There are 504 people in this situation, and they are therefore definitively part of the population. 2) Bosnians who fail to satisfy either of the two conditions mentioned (employment or accommodation). 3) Non-Bosnians who satisfy only one of these conditions. 4) Non-Bosnian deserters and draft-dodgers. 5) Bosnians who satisfy only one of the conditions. 6) Non-Bosnians with a job and accommodation. 7) Children, elderly and handicapped persons, adults with children.

67 This decision partially satisfied one of the demands of the Refugees Collective, which considers that a person holding temporary status and applying for refugee status must not lose the rights (access to employment) attached to temporary status. It calls for the conditions of repatriation to be improved, where this is considered, and for an end to the legal and material insecurity of the groups concerned. It also proposes that humanitarian status should be defined, and should be retained for as long as the reasons that gave rise to it persist. Finally, it is also concerned by the difficulties with access to the procedure for recognition of refugee status under the Geneva Convention, especially for young people who have refused call-up into the Serbian army.

68 This decision was quoted in support of the refusal to grant asylum to those fleeing the civil war in Sri Lanka.

consider the circumstances in the country of origin, and very specifically the influence of official policy on legal practices. However, in civil war situations, no territory is genuinely under the control of the State, which must be seen as one of the parties involved in the war.

In Italy, the debate on this subject received a fresh impetus from the sharp increase in "de facto refugees" following the adoption of Law 390/1992 on refugees from the former Yugoslavia and the appearance of the Ministerial Decree of 8 January 1993. The CIR estimates that 38 000 temporary residence permits have been granted for humanitarian reasons,[69] plus 440 "*quota refugees*". However, the Assembly of the Italian Office of the High Commissioner's Office for Refugees (CIR) has been very concerned by the "*restrictive procedures adopted by the Italian police at the frontiers* [which] *contrast with the decisions taken by Parliament and the government*".

Two new directives have therefore been published on this subject. The first, signed by the Prime Minister (14 April 1994), lays down new admission criteria for nationals of the former Yugoslavia, defined as "*citizens [...] who, because of war or widespread public unrest or massive human rights violations, based on religious or ethnic grounds, are forced to leave their customary country of residence and their property*". The second, sent to all ministries, specifies the seven categories of persons eligible to be allowed onto Italian territory, explicitly excluding holders of Slovenian and Croatian passports living in Istria (Pisa) and in the coastal and mountainous districts of Fiume.

The problem of young asylum seekers

Another group which is as complex to define and evaluate as the *displaced persons*, comprising unaccompanied refugee children and young people, is an ever-increasing cause of concern to the States who are unsure how to categorize them. In Germany, they number some 6 500, and there are said to be hundreds in Belgium, some of whom have asked for asylum. Their situation raises a series of more than difficult problems. Can they or can they not claim refugee status? What procedure should be applied to them? Should they be given a specific status, and a guardian appointed for them? These are questions that certainly need answering, at both EU and national level, the cue probably being taken from the principles of the Convention on Children's Rights.

In Germany, at any rate, the Asylum Law, designed to cover adults, has made no provision for this problem. The Federal Commissioner for Foreign Nationals, Mrs Schmalz- Jacobsen, has several times referred to the position of these children and emphasized the need to protect them. In her view, not many of them satisfy the criteria laid down to cover cases of political persecution.[70] As an immediate step, she therefore recommends the establishment of "reception centres" designed to provide basic care and, pending a solution, the allocation of a status outside the asylum procedure.

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[69] In December 1993, a decree authorized war refugees to be eligible for employment.

[70] In Belgium the CGRA fears that an excessively broad interpretation of the Geneva Convention might encourage trafficking in children, but admits that it has no solution to the problem. Some of these children are channelled to reception centres, but many "*disappear*" in the course of their stay.

SUPRANATIONAL POLICIES

Renewed demand for coordination of asylum and immigration policies

The increased strictness of asylum policies and frontier controls has led the Parliamentary Assembly of the Council of Europe to recommend the Member States to give priority to the harmonization of procedures with a view to a better sharing of responsibilities, and to avoid bilateral agreements. Along the same lines, the Commission's Communication to the Council and the European Parliament on immigration and asylum policies, COM(94)23 final, of 23 February 1994, restates the need for an eventual common policy on migration. It recalls the central role of the K4 Committee[71] in respect of all matters of common interest relating to immigration policy, policy with regard to nationals of third countries, and the organization of a system of information exchange within a European police force (Europol).

In Germany, the Members of Parliament, who endorsed the Dublin Agreement on the jurisdiction of the Member States in asylum matters (Law of 27 June 1994), have repeatedly called on the Federal Government to pursue a more voluntaristic policy. The Bundestag Committee on Labour and Social Affairs has expressed the desire that the government should approach its partners regarding a firmer commitment to the coordination of immigration policies; and a motion signed by all parties called upon the government to give an opinion on the European Parliament's two recommendations on the Asylum Law.

The same concern for coordination between the Member States has been expressed in connection with employment, with a view to limiting the number of work permits granted. In Luxembourg, on 20 June 1994, the Interior and Justice Ministers of the EU adopted a resolution establishing a sort of "Community preference" in employment matters. This legislation, which is politically as well as economically motivated, stipulates that work permits will not be granted to third-country nationals except in cases where the job could not be filled by a citizen of one of the Member States[72]. The citizens of the EFTA countries and States which have concluded an agreement with the European Union on the right to work are not affected by this restriction.

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[71] This Committee is made up of senior officials and derives its title from Article K4 of Chapter VI of the Treaty on European Union which instituted it.

[72] This resolution was sharply criticized in Italy, by members of the government among others. In a personal statement, the Minister for Foreign Affairs found the decision "*morally egotistical and economically nonsensical*", observing that Italy had a duty to make its current immigration policy consistent with its past as an immigration country. The same idea was taken up by the Director of Caritas in Rome, who considered the resolution "*ineffective, immoral and an encouragement to racism*".

Standing by Schengen come what may

This universal restatement of the need for a common policy has not prevented a delay in the application of the Schengen Agreements, the "official" reason being the inadequate functioning of the computer system (SIS). A direct consequence of this latest adjournment is to delay the entry into force of the common list of those countries which are, and of those which are not, subjected to a compulsory visa requirement by the signatory States.

However, this disappointment has done nothing to reduce the partners' determination to satisfy the conditions for the operation of the SIS system by adapting their legislation on data protection and establishing ad hoc bodies.[73] This is what has happened this year in Portugal, and also in Germany and Belgium.

In Portugal, the various police forces and the Directorate General of Customs have been authorized to create, add, amend, update and delete information in the SIS. At the same time rights to access, amend and delete data may be exercised by those with a direct, personal and legitimate interest. A National SIRENE Cabinet (Decree-Law 292/94 of 16 November) has been set up and placed under the authority of the Ministry of Internal Administration. In accordance with Law 2/94, the CNPDTP[74] was appointed as the national authority with power to monitor that the use of these data involves no infringement of individual rights. The committee will pronounce on any application within a maximum of 15 days and will take the necessary steps to ensure enforcement of its decision, which is itself subject to appeal under the general law.

In Belgium, two new departments (SIRENE and VISION) have been established at the Foreign Nationals Office to meet the development needs of the SIS and the transmission of the data stored therein. In addition, and still in line with the application of the Schengen Agreements, the honorary consuls have lost their powers regarding the granting of visas, and Zaventem national airport has been reorganized to allow physical separation of the flows of passengers, with a view to eliminating border controls for those arriving from a Schengen State and tightening them for those arriving from elsewhere. The opening, in early 1995, of the new airport, entirely reserved for "external" traffic, will enable the old one to be used for "internal" Schengen traffic.

The delay in implementing Schengen has also done nothing to obstruct direct cooperation between certain partner States. Thus, Benelux and Germany are trying to harmonize their asylum policies "*in the spirit of Schengen*", especially with regard to deportations, the issuing of visas, the processing of asylum requests and the exchange of information.

The Netherlands has been very active in this area. Cooperation has been stepped up with

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[73] In Greece, the ratification of the Schengen Agreements is not unanimously approved. The Ministry of Justice has complained that the agreements limit the powers of the police and restrict civil liberties. Others, conversely, see them as an opportunity for better protection of frontiers, the agreement transferring to the EU as a whole what would otherwise remain an exclusively Greek problem.

[74] Comprising seven members, including three Members of Parliament, two judges appointed by the Higher Judiciary Council and the Higher Council of the Public Prosecutor's Office, and two persons nominated by Parliament.

Belgium, as regards the exchange of fingerprints, and with the neighbouring States regarding the adoption of an agreement to take back asylum seekers suspected of having previously spent time in one of those States. Finally, the Dutch Justice Ministry has not despaired of finding a solution with regard to the swapping of data with Germany aimed at establishing the identity of asylum seekers, adopting informal channels if necessary to get round the privacy considerations which restrict progress in this area. As far as Portugal is concerned, it has signed new agreements with France and Spain designed to simplify the readmission formalities for third-country nationals in an illegal situation[75]. The agreement with France also applies to the readmission of nationals of the contracting States. Anticipating the impending elimination of controls at the internal borders, safety checks within the Schengen area have already been stepped up, following the example of the security searches on the TGV high-speed train (France/Belgium/United Kingdom).

Agreements with third countries

The main problem, if the section of the agreements dealing with removal of control policies is to be successful, is the identification of individuals who no longer have any identity or travel papers. A conviction is hardening among all Member States that, on this point, the cooperation of the countries of origin is essential.

Morocco undeniably occupies a key position in this new form of cooperation. In this respect, the agreement with the Netherlands seems to be entirely satisfactory, since deportations to Morocco have increased significantly (in 1993, 299 Moroccans felt the impact of the new arrangements). As indirect evidence of this effectiveness, an increasing number of Moroccan illegals in the Netherlands are passing themselves off as Algerians.[76] The agreement signed in December 1993 with Italy relates both to social matters and to immigration problems. The legislation, which was due to be ratified by the Italian Parliament, contains an annex relating to the identification of persons assumed to be Moroccan who are the subject of deportation orders. With Belgium, the only arrangement made has been the signing of a memorandum of intent (at Rabat on 21 October 1993) dealing with the problems of the legally resident Moroccan community in Belgium and the identification of Moroccan illegals who are to be deported. Since this mutual commitment came into force (on 1 December 1993), 48 Moroccans illegally resident on Belgian territory have been repatriated. Following the Netherlands, Belgium, Spain and Italy, it is now Portugal's turn to seek an accommodation with Morocco. The Portuguese authorities are concerned less with the Moroccan boat people than with the everyday arrival in the border regions of Moroccan small traders from Spain.

Germany, which played a pioneering role in this area, has continued its commitment along the same lines, and new readmission agreements have been signed with Switzerland, the

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[75] In addition, two agreements to eliminate visas have been signed with Poland and Cyprus, and a number of association agreements have been endorsed with Romania, The Czech Republic, Bulgaria and the Slovac Republic.

[76] The Dutch authorities promptly contacted their Algerian opposite numbers to negotiate a similar agreement.

Czech Republic and Bulgaria.[77] The agreement concluded with Switzerland, following the model of the agreement signed between the Schengen States and Poland, has applied since February 1994 to persons illegally entering the territory of one of the parties after first asking for asylum in the other. The critical condition is no longer the unlawful crossing of a frontier but prior residence in another country and the fact of not being authorized to reside in the country where the check is carried out.

The German-Czech compromise provides for the expulsion of asylum seekers who have not complied with the rules in force during the three days following the illegal crossing of a border. Bonn is also proposing financial aid to the Czech Republic to help reduce illegal immigration, and a spokesman for the Minister for the Interior in Saxony is arguing in favour of a German-Czech agreement on the independence of police forces working in frontier areas. The objective is to eliminate the legal obstacles to rapid reaction to cross-border crime. In the case of Bulgaria, the intention is that the two States should undertake to take back illegals, including their own nationals without currently valid passports, on condition that the nationalities of those concerned can be proved; the German Ministry of the Interior estimated that this agreement would result in some 12 000 Bulgarians being sent home from Germany.

In Belgium, the duties of "*Ambassador for Immigration Policy*", attached to the Ministry for Foreign Affairs, have been clarified. This new breed of diplomat is primarily responsible for negotiating agreements with the countries of origin on immigration control and the return of their nationals who are illegally resident in Belgium, including rejected asylum seekers. He is involved in visa policy, he helps to improve the information available to Belgian representatives abroad, he participates in the coordination of immigration and asylum policy, and he monitors its integration in the international context. In this capacity, he actively monitors the activities of the main competent international bodies (Benelux, European Community, IOM, Schengen Member States, and others), and notifies the national bodies and authorities of the results.

The prevention aspect comprises, in the countries concerned, a policy aimed at deterring emigration. Visits are arranged to target towns in order to inform the local authorities, the police, lawyers and the press of the guidelines of Belgian asylum policy and recent steps taken against clandestine immigration. This information should be passed on by the Belgian diplomatic and consular authorities. Experiments along these lines have been tried in India and Pakistan. Overall, this initiative has already enabled agreements on the rapid obtaining of travel and identity papers to be concluded with Romania, Poland and Morocco. Negotiations are under way with Pakistan, India, Sri Lanka, Ghana, Nigeria and Algeria. The Indian authorities have declared their willingness to cooperate on condition that they can verify that the illegal immigrants presented to them are indeed Indian nationals.[78] Negotiations on this point are continuing, and limited results have already been achieved: 64 Indian illegals who agreed to go home voluntarily have received travel

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[77] Parliament has also ratified the "Gastarbeiter" agreements with Lithuania (27 June 1994), and the agreement with Poland to relax customs controls (3 February 1994).

[78] This concern is shared by all States which agree to sign readmission agreements.

documents through the Indian Embassy.[79]

International cooperation on development

The idea - anything but a new one - that only a coordinated economic cooperation policy at EU level can, in the long term, restrain the desire and need to emigrate is attracting renewed interest among numerous Member States. However, there is universal recognition that the intricacy of the factors at issue is more complex now than it was twenty years ago. After all, how can distinctions be made between demographic growth, ecological deterioration, economic and social inequality, armed conflict and human rights violations? Where should the priority lie? The answers to these questions are far from obvious. The fact remains, as will readily be admitted, that the strengthening of police resources or even the militarization of the European area entails greater risks to the preservation of rule of law and personal freedoms than any real effectiveness in controlling immigration.

That, at all events, is the opinion of the Luxemburgish organizations for the defence of immigrants. As they see it, the first step towards controlling irregular immigration is the conclusion of cooperation agreements with third countries, based on development projects which meet the real needs of the populations and obtaining the assistance of the most active NGOs.[80] It was in this context that the Belgian presidency proposed to the ministers for development cooperation a debate on the relations between migration and cooperation. The Commission was called upon to continue along this path and draft proposals to be implemented by subsequent presidencies.

In Germany, the federal government regards financial aid to returning refugees as a major factor in cooperation with their countries of origin. For the minister responsible for economic cooperation and development, it is a preventive measure which calls for an appropriate political framework. Agreements have thus been concluded with Vietnam, Eritrea, Chile, Croatia and Slovenia. Bonn has earmarked DM 490 million for this policy, over and above the 100 million paid to the EU. In Vietnam, for example, 505 enterprises offering 6 000 job vacancies are receiving financial aid from the German government. Similarly, on 25 April 1994, an agreement was concluded with the Croatian government on the gradual return of Croatian war refugees, with priority going to those originating from the liberated regions of Croatia where peace has been restored. Those coming from occupied or devastated areas will not be repatriated before 1995.[81]

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79 In the case of Pakistan, the first discussions initiated by the "Ambassador" have been confined to better awareness of the problem on the part of the authorities, personal contacts with political leaders, the gathering of information and examination of various means of accelerating the identification procedure on the Pakistani side. Although no specific decision has been taken, there is still hope of achieving a higher number of actual repatriations. In 1993, 82 of the 93 repatriations of illegal Pakistani immigrants proposed by the Foreign Nationals Office failed for lack of travel documents. Pakistan ranks 5th among countries of origin for illegal immigrants in Belgium.

80 "Non-Community Nationals in Luxembourg", CLAE Colloquium, provisional document (15 December 1994).

81 The Croatian Vice-President has given an assurance that those who evaded their military call-up between August 1990 and September 1992 will be granted automatic amnesties. Pro-Asyl, a refugee aid association, has expressed regret that deserters and conscientious objectors cannot enjoy the same amnesty.

For its part, the Bundestag Committee on Labour and Social Affairs has adopted a joint motion by the CDU/CSU and the FDP on aid to developing countries, regarded as an effective means for persuading their populations to remain in their country of origin. This choice, according to the motion, would exempt Germany from having a migration policy of which it has no need because ... "*it is not an immigration country*". The SPD and the PDS voted against.

In June, the Netherlands concluded a comparable agreement with the Vietnamese government on the return of 350 asylum seekers who fled Czechoslovakia in 1989. Those who agree to return voluntarily could qualify for support from the International Migration Organization (IMO) and the HCR; the others will be turned back at the end of six months. Furthermore, the European Social Fund is supporting the action of three non-governmental organizations which are undertaking to encourage the reintegration into their own countries of a hundred or so unemployed West Indians. They will undergo a six-week in-service training course on their return. If they are unsuccessful, they will be able to return to the Netherlands. This operation will be monitored in Amsterdam and Curacao by the "Arbeisadviesdienst" service. The Belgian presidency of the European Community sent every Member State a questionnaire asking for a list of the measures in force intended to encourage voluntary departures of illegal residents on their territory.[82]

In this context, mention should be made of the voluntary repatriation initiatives sponsored by the IMO.[83] The Belgian government attaches great value to these. Under an agreement with the Organization, the Belgian government granted it a subsidy of 100 million francs in 1994 to implement a special programme of voluntary immigration or repatriation for foreign nationals.[84] A further subsidy of 24 million francs was voted in favour of the voluntary repatriation of Zairian students who have already received training or specialization (former holders of Zairian government scholarships, former students, etc.). A student who accepts voluntary repatriation is required to sign an undertaking to repay all expenses incurred by the IMO if he remains in Zaire for less than 2 years, or if the assistance was granted on the basis of false declarations.

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82 In Denmark, an amendment to the Foreign Nationals Law has extended to all categories the repatriation aid previously reserved for refugees. The difference is that refugees have a period of grace in which to review their decisions, whereas the others do not. The immigrants' organizations are highly critical of this new legislation (which has had little success with foreigners). They consider the amount of aid (dkr 15 000) too low, and call for an option of returning to Denmark, comparable to that offered to refugees.

83 In principle, the person concerned is required to organize his own departure. When he lacks the necessary financial resources, he can appeal to the IMO, which will accept responsibility for him.

84 During the first eight months of the year 1994, 1 255 people took advantage of this arrangement, giving a projected total of 1 884 for the full year. This represents a very significant increase compared with 1993, where the figure was only 1 222. However, that in itself represented a 50% increase over 1992, and a 350% increase over 1990 and 1991. The countries mainly concerned were Rumania (299 individuals), Canada (202), Ghana (102), Pakistan (68), Bulgaria (58) and India (57)

LABOUR MARKET, EMPLOYMENT AND ILLEGAL WORKING

The drift of foreign employment away from industry and towards the services sector now seems irreversible. All surveys confirm this point, in both the north and the south of the Union. In France, the Employment Survey of March 1993 shows that the tertiary sector now accounts for more than half of employed foreign workers, far ahead of the industrial and construction sectors. This dominance is increasing year by year, the more so since reductions in numbers are continuing in the other sectors, and especially in building and public works.

The same trend is apparent in Germany. The increase in numbers of foreign workers was more marked there than in France during the past year, and in Germany too it primarily benefited services and trade, whereas numbers in the construction industry declined. The same applies in Italy, where the majority of work permits granted in 1993 were for domestic service, and in Spain where nearly two-thirds of employed foreigners work in the services sector, especially in domestic service, restaurants, bars and cafes. Things are even clearer-cut in Luxembourg, where the trend extends into the public services. In this particular case, careful attention is being paid to the cumulative effects of the provisions governing freedom of movement, the principle of non-discrimination in public service jobs within the EU, and the majority presence of Community nationals among the foreign work force.

A different kind of attention has to be paid to Spain: there, the year was dominated by the effects of regularization, which, as expected, radically changed the characteristics of the Spanish employment market, and the effects of the quota policy, instituted to prevent the illegal flows of foreign labour.

With the drift towards the tertiary sector, the other notable feature of the foreign workforce situation is its severe vulnerability to unemployment. This explains why all the Member States are trying to exercise tighter control over labour flows, which may or may not be combined with an active employment policy and a campaign against illegal working. The three aspects of this logic are to be encountered in the Netherlands. Legislation there on the employment of foreigners has been totally revamped to adapt it to a labour market which, according to the Dutch authorities, no longer has to mitigate a shortage of labour. The new legislation therefore sets in motion a distinctly more restrictive policy based on the rule of "*Community preference*". But, at the same time, the government has adopted a law on "*equitable participation in the employment market for ethnic minorities*", which requires enterprises to ensure scrupulously fair employment and working conditions between all population groups.

Without going to these lengths, the Luxembourg government has also adopted new legislation on employment. One text relates to temporary working and the hiring-out of labour, and is designed to stop the proliferation of temporary-employment agencies operating outside any proper legal framework. More directly associated with the employment of foreigners, the Luxembourg authorities have adopted the principle of a bank guarantee where an employee is recruited from a third country and have created a special commission responsible for controlling labour-force movements. On the same basis, in Belgium, the Advisory Council on Foreign Labour and the Interministerial

Conference on Migration Policy have been designated as bodies responsible for harmonization between the three Regions to improve coordination of the granting of work permits.

The continuing rise in unemployment readily explains the growing interest shown everywhere in the campaign against illegal work and "social dumping", which is universally regarded as a crucial issue in the battle for employment. The subject has thus been the focus of substantial legislative and regulatory activity (Belgium, Netherlands, Spain and especially Luxembourg). Sanctions against employers have been further tightened and, in many cases, the decision has been taken to exclude offending enterprises from awards of public contracts. Furthermore, the staffing level of some of the inspectorates has been stepped up, and there is evidence of great vigilance on the international secondment of workers.

These general measures are supplemented in some cases by two more specific provisions: the introduction of a *social identity card*, issued by the employer to the worker who is required to keep it at his workplace (Belgium, Luxembourg), and the principle of joint liability on the part of all parties deriving benefit from an illegal working situation (France, Netherlands, Belgium). In addition, there is a concern for improved coordination of activities between the inspection services. This is the purpose served, in Belgium, by the protocol on cooperation between the various inspection services and, in Spain, the joint inquiry by the "Under-Secretariats for the Interior Labour and Social Security and Social Affairs". Finally, we should emphasize that, in a growing number of countries, the approach to illegal working is no longer confined, as in the past, to the question of the illegal employment of foreigners.

THE LABOUR MARKET

Increasing employment of foreigners in the services sector confirmed in France, Germany and Italy

In France, the latest employment survey by the INSEE (March 1993) confirms the irreversible change in the pattern of foreign employment. The tertiary sector now accounts for more than half of foreign employees (57%), far in front of the industrial sector (22%) and the construction industry (18%). This dominance of the services sector is confirmed year by year; all the others show a negative or virtually negative employment balance, the loss of foreign labour being particularly marked in building and public works (about 40 000 in one year, or -16.5%) and the intermediates industry (9 000 jobs lost, or -12.2%).[85] Overall, although this survey indicates a slight increase in the numbers of foreign workers between 1992 and 1993, this is attributable solely to unemployed and self-employed workers.

In Germany, the increase in the number of foreign workers has been more marked (+7.2%),[86] but, as in France, this has essentially benefited services and trade, while numbers in the construction industry have fallen. The Federal Labour Office offers two explanations for this decline in building and public works: the exceeding of the quotas offered to some countries,[87] which resulted in a freeze on admissions for their nationals and the application, for the first time, of the labour market protection clause. This measure makes it possible to refuse recruitment of workers in sectors where an economic downturn is accompanied by higher than average (partial or total) unemployment. The downward trend has also been apparent as regards recruitment of seasonal workers (-15%); they numbered no more than 181 000 in 1993, 79% of them Polish, the majority having for some years been involved in agricultural work. This being so, the foreign workers still occupy the least qualified jobs: only 23.5% are qualified, as against 48.5% of Germans, and their rate of unemployment increases more rapidly than that of nationals.

In Italy, 23 088 foreigners obtained permits in 1993 (27% fewer than in 1992), mainly for

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[85] On the other hand, if these results are analysed in terms of the proportion of employed workers - foreign employees/all employees - the above hierarchy is completely reversed: building (17%) comes ahead of industry (6%) and the tertiary sector.

[86] Or, in June 1993, 147 400 more than the previous year. Out of a total of 2.18 million workers, the Turks had the largest number in employment (631 800), despite a decline of -3% compared with 1992.

[87] Especially those of Poland and the Czech Republic in 1992, then Rumania in 1993. An agreement between Germany and Russia provides for an annual exchange of 2 000 building workers. Candidates must be under 40 years of age, have a minimum of 2 years' probationary experience, and speak German correctly, and their residence is limited to 12 or 18 months. In 1993, the Central Office for Labour Exchange in Frankfurt exchanged 5 800 foreign workers with nine other countries (especially the Czech Republic, Hungary and Poland), of whom more than 1/4 were in trade and catering.

unqualified work (domestic service in two thirds of cases), but with open-ended contracts for the majority (70.8%).[88] A study has shown that these servants were not the illiterates one might imagine arriving from the poorest regions of the southern countries, but people with a good level of education, usually single, and accepting this work in an attempt to escape from the chronic unemployment in their countries of origin.

This priority focus on domestic service explains the predominance of women (52%), although the authorities suspect that "domestic servant" is a euphemism for other "realities". Most of these women come from Latin America and the Caribbean (Peru, Colombia, El Salvador, Ecuador, Dominican Republic and Dominica), Africa (Cape Verde, Ethiopia) and Asia (Philippines). Men are in the majority of arrivals from the Islamic countries (Egypt, Algeria, Turkey, Tunisia and Morocco) and the developed countries (Austria and USA).

At the same time, the employment agencies were able to place 84 968 foreign workers in 1993, with a distinct emphasis on personalized contracts (76%) and increased predominance of men. In relative terms, job availability is increasing in agriculture, stable in the tertiary sector and declining in industry. A study by the INEA (National Institute for Economic and Agricultural Affairs) confirms this increase in the employment of foreigners in agriculture, all the more notable in that it contrasts with the falling employment of nationals there. The most significant example comes from Umbria, where the summer harvests were virtually the exclusive preserve of foreigners. In some regions (Latium) they receive annual contracts, while in others (Trentino, the north east) they are seasonal.

Foreigners and the public service question in Luxembourg

In Luxembourg, there is no longer any dispute about the decisive involvement of foreigners in economic life. The figures speak for themselves. As at 31 March 1994, 54% of employees in the Grand Duchy (excluding officials of international organizations and the self-employed) were of foreign nationality, as compared with 52% the previous year; cross-border commuters once again account for the majority of this increase. European Union nationals form the largest majority among this workforce, their numbers having increased by 5 000 units in one year, from 91 643 to 95 962.

This increasing takeover by foreigners affects all sectors, including the public services. Luxemburgers are in a majority only among communications workers and in transport.[89] In fact, if the "non-commodity services" of the public authorities,[90] traditionally reserved for nationals, are excluded, foreign employees seem to represent a large majority in the service sectors. In 1993, only 1/4 of personnel recruited in the health sector had obtained a qualification in Luxembourg. Since 1986, the number of foreign nurses obtaining work

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[88] The permits were divided as follows: agriculture 12.2%, industry 6.4%, tertiary sector 81.4%. Of the 18 821 granted in the tertiary sector, more than three-quarters were for domestic service. At the end of the year 1991 there were 35 740 foreign household servants, or 1/6th of the foreign workforce.

[89] Excluding the national railway company, the distribution in the transport sector seems more balanced: 48% of foreign employees as against 52% of Luxemburgers.

[90] These services (public hygiene, health education) numbered 23 170 nationals as compared with 1 936 foreigners in March 1993.

permits has increased constantly, although that of candidates in the last year of training has been declining.[91] This situation explains the recent adoption of two laws (one in 1992 and one in late 1994) upgrading the health occupations and organizing a campaign to promote them.

That said, it is impossible to disregard the problems arising from the increasing numbers of foreigners in Luxembourg, most of them being EU nationals and consequently enjoying freedom of movement and, in principle, non-discrimination in public employment. A witness to this is the complaint filed on 17 December 1993 by the Commission of the European Communities before the Court of Justice against Luxembourg for non-compliance with its obligations in respect of freedom of movement. This action targets the obstacles obstructing access by Community nationals to public positions in education, transport, the distribution of water, gas and electricity, research, post and telecommunications and public health.[92]

The Court action brought by the Commission is causing keen concern to the General Confederation of Public Service Workers. "*The implications of the threats presently being made to Luxembourg are such that it is no exaggeration to say that the future of the country is at stake*" (letter sent to its members on 1 March 1994). The Confederation sees a dual threat: gradual loss of Luxemburgish national identity and increased unemployment. In its view, "*the constitutional condition of nationality*" represents the "*only bastion against the infiltration of our governmental structures and therefore, ultimately, the erosion of our national identity. The way things are going, they can only raise the greatest anxiety regarding the destiny of our country, which is at risk of being squeezed to death between the larger cultures*".

Anticipating a probable adverse verdict by the European Court of Justice, the government adopted (on 8 June 1994) a law on the general status of civil servants, reviewing the administrative language system (Law of 24 February 1984). An adequate knowledge of the three administrative languages is now required before an applicant can even be admitted to training as a civil servant. The objective, according to the project rapporteur, is not to deny foreign nationals access to the civil service but to guarantee its quality.

Labour market situation still unfavourable

The overall situation of foreigners in the labour market has not changed much from year to year. Their structural vulnerability remains higher than that of nationals, as indicated by an unemployment rate which is always higher. In addition, they seem to take less

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91 The shortage has been partially remedied thanks to the cross-border commuters. The OGBL union believes the shortage of personnel is closely linked with the bad working and pay conditions prevalent in the health occupations.

92 Official Journal of the European Communities No. C59/5 of 26 February 1994. This complaint does not relate to jobs associated with the exercise of public authority. On 14 July 1992, the Commission had already sent reasoned opinion to Luxembourg on the same subject. It accused the country of violating Article 48 of the EEC Treaty and Articles 1 and 7 of Regulation EEC 1612/68, relating to the free movement of workers in the Community. This issue is comparable to that between the same parties regarding the obstacles to participation by Community nationals in the professional institutes (see Chapter X).

advantage than in the past of favourable periods of the economic cycle to improve their position among job seekers, as if their flexibility and capability for adjustment were less effective than usual. This year, foreigners resident in Portugal were the only exception to this.

In Luxembourg, the deterioration in the employment situation since June 1992 has affected foreigners more than nationals, to the extent that in December 1993 the former, who account for 38% of employees, were in a majority among job seekers. This deterioration continued during the following year, and by the end of November 1994 the unemployment rate had risen to 3%.[93] Here again, the Portuguese were by far the most affected. At the same time, the number receiving unemployment benefit also increased, from 40% of all unemployed people registered with the Employment Administration in 1991 to 50% in 1993.[94] Although no breakdown of this group by nationalities is available, it is known that the number of foreigners drawing benefit is lower than that of Luxemburgers.

In France, too, the recovery recorded during 1994 benefited foreigners less than nationals. In point of fact, over the last two years, the trends have fluctuated greatly. In 1993, the number of job seekers increased by 10% (from 3.1 to 3.4 million), twice the previous year's increase, but this unfavourable economic situation was not particularly damaging to third-country nationals: in fact, their situation tended to improve, unlike that of EU citizens and, especially, of the Portuguese, who accounted for a predominant share of the increase in foreign unemployment since 1991. These two opposing trends have resulted in a stabilization of the number of foreigners as a proportion of all job seekers (12%). The situation was different in 1994: the significant improvement recorded in the employment market at the time benefited the third-country nationals significantly less. Consequently, taking all nationalities together, the proportion of foreigners among all job seekers increased from 12 to 13.2%.

In Germany, the deterioration was even more marked, and the unemployment rate among foreigners increased significantly, from 12.4% in 1992 to 15.1% in 1993 - by which time it was twice the national average. Things were no better in Belgium which, in December 1994, recorded 32 283 non-EC foreigners unemployed (46% being Moroccan and 32% Turkish). Or in Spain, where nearly a quarter of legal third-country workers were registered as job seekers. In Belgium and Spain, as in France, the Moroccans seem to be the most vulnerable.

Italy, like France, saw a slight improvement (-1%) in the employment situation in 1994, but in this case it benefited foreigners as well as nationals. However, the situation varies significantly depending on the situation on the regional employment markets and the composition (age, sex, nationality and qualifications) of the foreign population to be found

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93 The calculation of the unemployment rate encompasses officials of the international institutions and cross-border commuters from Luxembourg working in a neighbouring country, but excludes young people holding temporary jobs or an apprenticeship and cross-border commuters into Luxembourg. The latter have to register as job seekers in their country of residence.

94 In order to draw full unemployment benefit in Luxembourg it is necessary to be unemployed involuntarily, capable of work, available and able to provide proof of paid employment for at least 26 weeks in the year preceding registration as a job seeker.

there. The Moroccans, once again, are the worst affected (22 784 or 29.8%), well ahead of the Tunisians (11.4%) and the Yugoslavs (11.2%).

The situation is difficult to assess in Portugal, where the official figures on job seekers are hotly disputed. In particular, they exclude those trying to find a first job and those registered with the employment centres who have been offered vocational training courses. Despite the unreliability of the data, it is believed that the deterioration in the labour market has increased and that nationals are suffering from it more than those from third countries, who are willing to accept less well-paid work and inferior working conditions.

The many explanations for unemployment among foreigners

These results, which are highly unfavourable to foreigners, do not necessary imply that their professional skills are less than those of nationals. In fact, their greater vulnerability in the employment market depends on a number of factors, sometimes cumulative, especially the bar on access to the civil service and a sort of "*assumed*" xenophobia ("*we can't employ you, our customers wouldn't like it*"). In Belgium, it is accepted that the weight of these factors is such that unemployment among foreigners might in fact have been expected to be even higher.

The "sector effect" also plays a part. In Spain, for example, agriculture and building (sectors favoured by Moroccans), cafes, restaurants and services to business (42% of job seekers), which employ the largest numbers of foreigners, are also the sectors primarily responsible for the deterioration in the labour market. Difficulties with keeping positions there often force foreigners to accept undeclared employment, so that many, though they are *administratively legal* (they have work permits) are *illegally employed* (they have no contract of employment). The situation is much less precarious in domestic service, where continuity of employment seems greater than in the abovementioned activities.

There are other factors, too, that may be disadvantageous to foreigners: their low level of qualifications and poor mastery of the language of the host country. Paradoxically, however, this can actually be an advantage. In Germany - though it is also true elsewhere - the Federal Labour Office emphasizes that the aversion of nationals to taking jobs offered to them in some sectors (the cleaning/maintenance industry and the textile industry) gives foreigners genuine opportunities of finding employment. This may explain why the downturn in employment observed in Germany has had much less effect on foreign women, who are much more often hired for such activities than their male counterparts.

Luxembourg: moves to combat unemployment and transparency of the labour market

In Luxembourg, as part of a global strategy to combat unemployment, the government has imposed a series of measures, some relating to the control of foreign labour flows and others to combating irregularities in the labour market. A broad consensus has been reached between the State and the social partners on the need to view the question of the employment of foreigners as a matter of "*improving transparency and function of the employment market*", under the general heading "*Combating unemployment*".

This consensus reflects the virtually unanimous desire in Luxembourg to combat social

dumping and illegal working.[95] As the authorities see it, "*regulating the flow of workers originating from third countries is not an end in itself [but] is designed to serve other purposes such as the campaign against social dumping, undeclared working, health and safety at work, etc.*"[96] The emphasis on this overall programme has relegated the restriction of migratory flows to a secondary level, although new provisions have been adopted on this point with the full approval of the professional-interest Chambers on which the various unions are represented. Three series of measures have been adopted, relating to the functioning of the placement system, the temporary posting of employees, and checks on the employment of foreigners.

The first aspect of the new legislation reaffirms the Employment Administration's monopoly on placement: every employer must, subject to penalty, declare to the Administration which job vacancies it has three days before advertising them in the press.[97] This reminder is backed up by two new texts: a law on temporary working and the temporary hiring of labour (of 19 May 1994), and a draft amendment to the law on involuntary unemployment resulting from bad weather (transposition of European directive).[98] The object of the first of these texts is to put a stop to the proliferation of new temporary-employment agencies which previously placed large numbers of employees with no legislation to regulate their activities. The second is an attack on, among other things, abuses by foreign firms which establish formal residence in Luxembourg solely in order to benefit from bad-weather unemployment for sites located abroad.[99] The government regards this project as primarily motivated by a desire to clean up the labour market; but because it relates mainly to the construction sector, the legislation will have a critical impact on the employment of foreigners.

The second part of the government's plan is to limit the temporary posting of workers, especially by subcontracting. It was decided to discontinue the issue of collective work permits, other than in exceptional cases subject to very stringent conditions.

Only the third part of the legislation directly relates to the employment of foreigners. We shall examine two essential provisions: the creation of a special committee on the workforce and the establishment of the principle of a bank guarantee where a worker is recruited from a third-country. The function of the new committee will be to become the

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95 The three-party coalition had expressed the desire to review legislation on employment and the campaign against unemployment. This resulted in the Regulation of 17 June 1994 setting criteria for the allocation of aid to geographical mobility, reemployment, the creation of enterprises, and the creation of jobs of socio-economic value.

96 Draft Law No. 3893.

97 This measure is designed to prevent direct recruitment of personnel through advertisements even if published in the daily newspapers of the frontier regions, without prior notification of vacancies. In the past, employers informed the Employment Administration only after the event, causing the latter to include occupied positions among vacancies.

98 Draft Law No. 3941, tabled on 19 May 1994.

99 This draft law specifies that the compensation payments envisaged will be reserved for enterprises legally based in Luxembourg and workers in good standing with the social security authorities and legislation on work permits.

real mechanism for controlling the flows of labour. Obtaining its opinion in advance will be compulsory[100] for any decision (granting, refusal or withdrawal) regarding work permits for nationals of third countries. It should allow objective processing of applications and reduce the pressure on the political authorities.[101] More broadly, it will give its opinion on the prospects of employment for foreign workers and their impact on the labour market.

The bank guarantee will be given by a duly approved financial institution; this has been set at a minimum of 60 000 francs. This sum is intended to cover any expense involved in repatriating the worker in the event that he is refused a work permit; and it is compulsory for all: new arrivals applying for an initial work permit (an "A" permit), those applying for a second permit (generally a "B" permit), and even candidates for a "C" permit of unlimited duration.[102] In this latter case, the Minister for Labour may grant a dispensation or reduction on condition that the employees are taken on with an open-ended contract and no probationary clause.[103]

The organizations for the defence of foreigners have sharply criticized this system. The CLAE (Foreign Nationals Liaison Action Committee) fears that employers may deduct the sum from their employees' wages. It also deplores the failure to consult the National Council on Immigration, which is supposed to be given added value by the new Law on the Integration of Foreign Nationals. The SESOPI Intercommunity Centre has also expressed its concern. "*We are worried that this guarantee may disadvantage persons who have been living in the country for some time and have been integrated into the employment market.*"[104] The CLAE deplores this refusal to regularize foreigners who "*are already to some extent integrated into the labour market*". It also cautions against arguments tending to hold non-Europeans responsible for unemployment and make scapegoats of them. Finally, the immigrants department of the OGBL has also adopted a resolution in favour of collective regularization of those who lack work permits although they are registered with Social Security.

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100 This opinion is supplementary to that of the Employment Administration. The Ministry of Labour specifies that these two opinions will compulsorily have to take account of the employment situation in Luxembourg and the priority to be given to hiring EU and EEA nationals. There are also other criteria which further limit the possibility of hiring new foreign workers.

101 This pressure was mentioned by the minister at the topical debate on employment in the Lower House. This committee will have another advantage of making it possible to draft general lines of conduct: all applicants will then be able to assess the state of their files, in law and in fact.

102 The "A" permit is valid for one year at the most, with a given employer in a predetermined sector. The "B" permit is valid for 4 years with any employer in a predetermined sector. The "C" permit, of unlimited duration, is valid for any employer in any sector. It should be noted that there are foreign workers who have been working for years under the cover of an nth "A" or "B" permit, although in principle the second work permit is a "B" permit and the third a "C" permit. However, legislation makes no provision for an automatic procedure in this area.

103 The government has retained this provision against the advice of the Council of State. The latter deplored the lack of any legal basis for this obligation: a regulation may only be adopted to implement a law and not in order to extend its scope of application.

104 This criticism was expressed on the occasion of the National Conference on Immigration, organized by the immigrants department of the OGBL on 1 October 1994.

Even tighter regulations in France

In France, although there has been no change to the basis of the existing legislation, new texts have clarified the regulations to be applied to the employment of foreigners. The first (Decree of 16 February 1994) lays down conditions for access to certain jobs in regional or local administration, continuing the opening-up of the French Civil Service to Community nationals. The second (circular dated 31 March 1994) lays down that a provisional work permit will be granted, without the employment situation being cited against it, to the foreign spouses of French citizens who cannot obtain a resident's card within one year of their marriage. The third (Decree of 7 November 1994 on family reunification) lays down that family members rejoining the holder of a temporary resident's card may receive, on request, a temporary resident's card bearing the word "employee" (instead of the words "family member"). Two other measures, specific to foreigners working in education,[105] rounded off this legislation. Finally, an interministerial circular (Labour/ Interior, dated 21 July 1994) sets out what residence and labour papers are required of foreigners intending to register as job seekers pursuant to the new Article L.311-5 of the Labour Code.

In Belgium, since the early 1980s, the Regions have had the power to grant work permits, but the State remains responsible for laying down "*standards relating to the employment of foreign workers*". This split left open the delicate question of who monitors compliance with these rules: in theory this is a matter for the federal authority, but breaches may also be identified by officials duly empowered for that purpose by the Regions. A joint agreement was therefore reached between the three Regions, within the Advisory Council of Foreign Labour and the Interministerial Conference on Migration Policy[106] to improve coordination of all aspects relating to the granting of work authorizations to foreigners and their monitoring. This agreement was also intended to make for more consistent application of the regulations on labour and residence.[107]

Netherlands: employment of foreigners, "Community preference" and positive discrimination policy

In the Netherlands, legislation on the employment of foreigners has been completely revamped. In December 1994, Parliament approved a new law, the WAV (Foreign Nationals Employment Act), which the authorities hope will be better adapted to the new

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105 The first (Social Affairs/Interior circular dated 30 March 1994) simplifies the arrangements for granting residence and work permits to foreign teachers/researchers. The second (Social Affairs/Interior/National Education/Labour interministerial circular dated 19 July 1994) lays down, conversely, stricter rules governing work as a supply teacher. Priority is granted to those who have already done such work, and in the case of students working hours are limited to 10 per week.

106 The new Article 92 bis (3) of the special law requires the federal authority and the Regions to improve coordination of the "*policies for granting work permits and residence permits, and rules relating to the employment of foreign workers*". They are to define the economic and social framework within which authorizations will be granted and (if appropriate) agree on a quota. They are also to ensure uniform application of the regulations throughout the territory.

107 This was to be the subject of an important reform in 1995 in order to remove administrative obstacles to labour market access for foreigners admitted for an indefinite period.

realities of immigration (increased importance of family immigration, asylum seekers and flows of EU origin) and the labour market, which is no longer beset with a shortage of labour. This law envisages three types of permit: one of limited duration (from a few days to three years), one granted conditionally for a maximum of one year and one short-term permit (24 weeks maximum) intended for temporary and seasonal labour, which cannot be extended. The new text therefore sets in motion a distinctly more restrictive admission policy, and at the same time is designed as an instrument to combat illegal working.

One of its bases is the "*Community preference*" rule, which requires that a work permit should be refused if a job seeker with the necessary qualifications is already in the country or in another Member State of the EU. Enterprises wishing to recruit a third-country national who holds no permanent residence permit or three-year temporary permit must, therefore, notify the job vacancy five weeks before filing an application for a hiring permit. If the enterprise is unable to prove that it has endeavoured to fill the vacancy with the available labour, the permit will be refused. The same will apply if the recruited foreigner receives payment below the minimum wage or if his working conditions contravene the regulations.[108] The Community preference rule also acts to the disadvantage of foreigners previously admitted. In the previous legislation, legal occupancy of a job for a year gave them a residence entitlement on condition that they remained in that job after the end of that period. This option has been abolished. Now, at the end of the initial contract, the employer has to look for another candidate within the EU and, if he is successful, the foreigner previously hired will have to return to his own country.[109] In Germany, a new regulation issued by the Federal Office on 5 March 1993 places foreigners with a limited permit for a specific job in a situation of comparable difficulty. Formerly, this permit was extended for as long as the job lasted, but now the labour authorities limit its extension in order to encourage the hiring of Germans or privileged foreigners (including European Union nationals). The priority attaching to the hiring of EEA nationals has also been reaffirmed in Luxembourg.

The greater strictness in external recruiting goes hand in hand, in the Netherlands, with greater attention to minorities already resident. The latest results of the employment survey in the Netherlands confirm their employment problems, emphasizing that their rate of unemployment is three times as high as that of natives. This greater vulnerability is particularly apparent in the case of the Turks (27%) and even more so in the case of the Moroccans (44%), whose situation deteriorated sharply in the year preceding the survey. These results cast a shadow over the ambition of the Central Office of Employment of achieving equality between minorities and natives in the labour market within four years. This objective, announced in 1990, was no longer possible unless 20 000 members of minorities were to be hired in the course of the year.

The results are no better as regards the agreement on ethnic minorities, which is also designed to ensure that they are appropriately represented among any hirings that take

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[108] By contrast, the obligation to apply for a hiring permit is now exclusively a matter for the employer, unlike the former legislation which required each party - employer and employee - to apply for a work permit.

[109] According to the SER [Dutch Socio-Economic Council], this is a breach of the treaty between Turkey and the EU.

place. The follow-up survey undertaken by the Ministry of Labour shows no progress from year to year: only 9% of enterprises have pursued a preferential recruitment policy, and only 3% have drawn up a plan to that end. A study by the Ministry of the Interior of business hiring practices confirms the difficulty, or even impossibility, of finding a job for members of minorities; given equal skills, they have far less chance than a Dutch national of being invited to an interview after replying to the same job advertisement.

Clearly, the good intentions of the Institutions are not sufficient to change the way the market works or the traditional processes of discrimination. The government has thus been led to continue along the lines of its draft law on "*equity in the involvement of ethnic minorities in the employment market*". Adopted by Parliament in June 1993 and ratified by the Senate early in 1994, this law came into force on 1 July this year. It requires enterprises with more than 35 workers to ensure that minorities are treated with complete equality as regards employment and working conditions for the various groups of people. A Council Decree defined the minorities in question: Turks, Surinamese, West Indians, Arubens and some groups of refugees.[110]

A comparable initiative by a private group has been a very considerable success. This was the "Samen Werken" [Working Together] project, launched in 1993 by four major Amsterdam firms with a view to helping members of minorities to gain professional experience. By mid-1994, 32 enterprises were involved in the project, and it looked as if it would be possible to place 500 trainees with them. A similar project has been launched in the Rijnmond region, and six more are planned in various cities. A third initiative, aiming to create 38 000 jobs for ethnic minorities in the social services, has been undertaken jointly by the Central Council for Employment, employer's organizations, unions and the Ministry of Social Affairs. The results here are less conclusive: many trainees left their host enterprises prematurely.

The same concern for specifically supporting population groups of foreign origin is found in Belgium. The Centre for Equality of Opportunity and the Joint Action Committee with Brussels Residents of Foreign Origin are encouraging the public services to make available to them contractual positions which are not under the authority of the State, as an exception from the provisions reserving these jobs for nationals only.[111] Draft Royal Decrees are in preparation on this point. For its part, the Flemish government has approved integration centres responsible for promoting the employment of immigrants, with qualified training staff.

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[110] The entry into force of this law further increased the need for good management of cultural diversity within enterprises, hence the training courses devoted to this topic. The Ministry of Health, Social Affairs and Sport encourages initiatives along these lines. The Trade Union Federation FNV, for its part, came up with a project entitled "Kleuurijk Personeelbeleid" (Policy regarding coloured personnel) aimed at gaining experience with intercultural cooperation in business.

[111] The government decision (1992) to open the civil service to natives of European Union Member States and to authorize contractual employment for others has produced virtually no results, for lack of a suitable legal framework.

New schemes to promote employment

Useful as they may be, these specific schemes are still inadequate against the background of a general employment crisis. In the view of the Dutch Economic and Social Council (SER), this crisis is the major question of the coming years, and it proposes dealing with it by reducing the burdens which obstruct the creation of low-paid jobs. Adopting this idea, the government is planning to make exceptions to the provisions of the law on the minimum wage, though these would be confined to particular sectors and a predetermined period. In November, the Minister for Social Affairs and Employment initiated, along these lines, a programme establishing (from 1995, and for four years) 40 000 jobs for the benefit of the long-term unemployed in the fields of security, public supervision, child-minding and geriatric care. For two years, pay should be 30% below the minimum wage, and employers would additionally enjoy provisional exemption from charges. According to the minister, members of minorities are most likely to be interested in this work.

In Belgium, similar methods to encourage hiring have been adopted for certain categories, in particular those under 26 with no educational qualifications and job seekers who have been unemployed for 6 months. The hiring-bonus system, established since 1991 in the Brussels-Capital Region, has been improved by a decree of May 1994. A vocational transition premium is offered by the Brussels Regional Office for Employment to enterprises which take on job seekers in difficulties. More generally, the provisions of Article 2 of the Law of 23 July 1993, relating to the promotion of employment within the framework of the hiring plan for young people, have been supplemented by a Royal Decree of (18 November 1994) which extends this benefit to those completing a vocational training project.

In France, the "sponsorship networks" for integrating disadvantaged young people into enterprises seem to be producing good results. The "sponsor" is required to introduce these young people, stand surety for them with their employers, and assist them to make their way in the working world. The experiment, launched in 1993, was confirmed the following year. A circular (DPM 94-25 of 29 July 1994) summarizes the target group (young people between 16 and 25, with a low level of education or qualifications, willing to take part in a vocational integration course, and specifically including young people of foreign origin) and extends this scheme to a larger number of regions (10) with a view to establishing about 60 networks.

Spain: the results of regularization...

In Spain, the main focus of attention was the result of the regularization operation.[112] Its first result was to increase the number of foreign workers holding work permits from 70 000 in 1989 to 117 000 in 1993. This quite modest increase of forty-seven thousand in five years actually conceals greater changes associated both with regularization and with the freedom of employment of EU nationals which has been in force since 1 January 1992. The first of these measures resulted in the number of foreigners legally allowed to work being doubled in one year, their numbers reaching 171 000 at the end of 1991 and nearly 200 000 by mid-1992. The second, conversely, caused a "strictly

[112] This was decided upon on 31 December 1991, on the basis of "Draft Law Number " on foreign nationals, approved by the "Congress of Deputies" on 9 April 1991.

statistical" reduction of 32 000 in the same figure by the end of 1992. This movement was followed by a further drop of 22 000 by the end of 1993, the result of the non-renewal of many of the 110 000 permits issued to those regularized in 1991.

All these fluctuations have, of course, radically changed the composition of the foreign working population in Spain. Over those five years (1989-1993), the proportion of men has increased constantly, from 63% to 72%,[113] this being the dual effect of the definitely male emphasis among the beneficiaries of regularization, and of the statistical "disappearance" in 1992 of Community System workers, among whom women occupied a significant place, which does not prevent them working. The abandonment of this form of counting merely means that the number of foreign workers in Spain (wage-earning or self-employed) is underestimated by at least 20 000. Since 1992, this female workforce has again been growing: the 1994 results will no doubt confirm this trend, combined with an increase in demand for female labour for domestic service.

The breakdown by continent of origin confirms these trends. The statistical "disappearance" of the EU nationals means that the percentage of Europeans falls from 47% in 1990 to 7.1% in 1992, at the expense of a sharp advance in nationals of third countries legally allowed to work, especially Africans (15% in 1990 and 48% in 1992) and Latin Americans (from 19% to 28%). Since 1992, variations have been relatively insignificant, except for a reduction in the number of Africans and an increase in the numbers originating from Asia and Latin America.

Year	Eur.EC	Africa	N. American	C/S Am.	Asia	Others
1992	7.1	48.0	2.5	27.5	14.6	0.3
1993	7.5	46.3	2.4	28.4	15.1	0.2

The breakdown of foreigners by sector[114] has also changed very extensively, but its new profile is more a reflection of the state of the grey economy which employed them illegally before 1991 than of the legal economy. This is the view that should be taken of the increase from 5% to 14% in the agricultural sector between 1989 and 1993,[115] evidence that, in this case, the irregular hiring of foreigners far exceeded their lawful

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113 The renewal of the permits did not change this distribution. On the other hand, the proportion of wage-earners increased further, from 85% at the time of regularization to 89% among the group of "renewals". The most likely explanation is that people who had described themselves as self-employed at the time of regularization were not so in fact. They had chosen this route for lack of a job, or a promise of one, enabling them to be counted as wage-earners.

114 Another effect of the measures referred to has been a sharp increase in the proportion of wage-earners at the expense of the self-employed. In 1993, the latter accounted for no more than 17% of the foreign workers associated with the General System.

115 Industry and services followed the opposite trend. Granted permits fell from 12% to 9.5% in industry between 1989 and 1993, and from 77% to 63% (-14 points) in the tertiary sector.

employment. The same explanation is true of the construction industry, where the scale of irregular hiring is evidenced by the number of permits granted on the occasion of regularization in 1991. The fall recorded since then is closely linked to the decline in activity and the investment crisis, which have had an impact on the legal employment of foreign wage-earners, making it more and more difficult to renew their work permits, especially in sectors where the black economy and irregular hiring are dominant. That being so, the vast majority (nearly two-thirds) of foreigners employed in Spain work in the enormous services sector and, especially, in domestic service and in bars, cafes and restaurants.

Year	Agriculture	Construction	Industry	Services	Unclassified
1992	12.5	13.3	8.8	64.7	0.7
1993	11.8	11.9	9.3	65.0	2.0

Before regularization, 23% of foreigners legally admitted were qualified professionals or technicians. By the end of 1991, this proportion had fallen to 17%, and then to 11% in 1992, once the Community system employees had been eliminated.[116] These results confirm both that qualified personnel are to be found primarily among the Community system workers and that Spain attracts few third-country nationals of the same level, even if it is accepted that the latter are often employed below their level of qualification; either because their academic qualifications are not officially recognized (lack of standardization) or because they fail to find a job suited to their capabilities and are forced to accept work below their skill levels.

The breakdown by type of work permit also shows a rapid stabilization of the foreign work force. Half of these authorizations are renewals of the "B" permits granted to employees who have been working legally for at least two years. These form a group of permanent workers reinforcing their lasting integration into the labour market. This process of stabilization is confirmed by the significant increase (+10% from 1992 to 1993) of five-year permits ("E" and "C", self-employed and wage-earning), at the expense of permits for periods of under one year ("A", "B initial" and "D"), which have fallen by more than half (39.8% to 15.6%).[117]

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[116] It should be recalled that the Community system applies only to workers born in, originating from or holding the citizenship of one of the Member States of the European Union. Being attached to the Community system does not mean being a citizen of the European Union. This can apply, for example, to workers who have married an EU citizen and qualified for the system on that basis.

[117] In 1993, 92 736 work permits were granted, 2 200 fewer than in 1992. In half of the cases, these permits were granted to people originating from Africa, and in another quarter of cases to Latin Americans; Moroccans were the primary beneficiaries, followed at some distance by Argentinians, Peruvians and Dominicans. We should emphasize the significant increase in permits granted to Chinese workers employed in restaurants.

... and the early results of the quota policy

The desire to clear the employment market of illegal practices has led the Spanish authorities, in the aftermath of regularization, to introduce a quota system conceived as an alternative to irregular employment and the clandestine networks. The first balance sheet showing the results of this experiment was drawn up at the end of 1994. The "Directorate General of Migration" thought it fairly positive. In accordance with the broad lines of the restrictive policy adopted by the government, this system has not encouraged an increase in the flows of foreign workers to Spain; it has enabled them to be channelled more effectively, in compliance with preference for nationals or foreign labour legally admitted into Spain.

The 1993 operation confirmed the existence, despite the high rate of unemployment, of unfilled job vacancies, including many in domestic service and seasonal work, where they were often occupied by foreigners employed on an irregular basis. The quota, therefore, excluded no one from the labour market; its main effect was to make it possible to regularize workers already within Spain. Eight times out of ten, the vacancies filled met a demand for domestic service for employees coming, primarily, from the Dominican Republic (31%), Peru (26%), Morocco (13%) and the Philippines (8%). The quotas were at a similar level (20 600) in 1993 and 94, and favoured domestic service (11 000), agriculture (5 000), construction (1 000) and other services (3 600). However, out of the quota laid down in 1993, only 6 000 named proposals were recorded and 5 220 were successful, a take-up rate of 25%. The deterioration in the economic crisis, the fall in economic activity and the increase in unemployment during 1993 seem to explain the difference between forecast and actual figures.

The Resolution of 21 September 1994, which lays down the general instructions for the year's quota, stresses compliance with the initial objectives. It specifies that authorizations granted within this framework "*will be used only if the national labour market is unable appropriately to satisfy demand from enterprises*". An additional provision states that "*a visa exemption may be granted to foreigners who apply to be added to the quota before 31 December 1994 and provide proof that they are on Spanish territory as persons temporarily displaced from countries where a state of war exists (former Yugoslavs), to foreigners deported at the time of the 1991 regularization who have lodged appeals, and to family members of non-EC foreigners legally resident in Spain for more than a year*".

Greece - a plan for regularization

In Greece, the Ministry of Labour officially admits the existence of a demand for foreign labour and hopes to find means of meeting it in a legal manner. With this end in view, the Deputy Minister for Labour has given notice of a dual programme involving, first, the regularization of "illegals", accompanied by an inventory of demand for labour,[118] and, secondly, intergovernmental agreements designed to improve control of labour flows. A draft law is in preparation on the first point, and should also deal with the problem of social benefits for foreigners without papers. It would have the dual objective of putting

[118] By way of example, the President of the Horticultural Federation has stressed his sector's need to bring in several hundred Indian employees. The OUED (Greek Employment Organization) has undertaken a general study of the need for foreign seasonal workers in various sectors and regions.

these workers on an equal footing with nationals and enabling the social security insurance funds to recover their subscriptions from employers who fail to declare their employees. The unions, who are supporting this initiative, are also calling for the creation of a new supervisory unit made up of Social Security officials (IKA), Ministry of Labour officials and representatives of the social partners.

Deregulation and instability in Portugal

The prevailing attitude in Portugal seems very different. There, this is a period of liberalization of the economy and continuing destabilization of employment status, with a proliferation of time-limited, temporary and service contracts, reflecting the government's desire to amend labour legislation. This movement is, of course, accompanied by a decline in social protection (social security and insurance covering accidents at work and occupational diseases). The government itself is setting the example. The prospect of restructuring of the apparatus of government has virtually closed access to the civil service, and those jobs which are nevertheless necessary are occupied by service providers. Confronted with these trends, the General Inspectorate of Labour is usually powerless, its workforce being too small and therefore not very effective,[119] in a context where increased recourse to subcontracting is making it more and more difficult to identify the real employers. This is particularly true for construction site workers and those in public works. The lower qualifications of third-country nationals seem not to penalize them in this environment. Paradoxically, they are less affected by unemployment than the Portuguese, because they are more likely to accept arduous and less well paid work.

More than half of the foreigners living in Portugal are economically active. As elsewhere, wage-earners are in the majority, but the proportion of self-employed people varies with their origin: from 17% among third-country nationals to 43% among those from the EU. It is among those originating from the African continent that the proportion of self-employed people is lowest: among the PALOPs for example, the percentage is no higher than 4.5%. Hence, the situation of the PALOP nationals, who are essentially industrial wage-earners, is totally opposite to that of nationals of Western Europe or North America, who are usually executives or self-employed workers. The trend becomes more marked year by year: the proportion of executives increases only among EU nationals, while it is decreasing among those originating from the African continent, other than North Africa. The proportion of wage-earners is falling on balance among EU nationals, and in fact is only increasing among nationals of other African countries.

The difficulties of employing asylum seekers and "displaced persons"

As a direct consequence of the migration pattern of recent years, asylum seekers and "displaced persons" form a new category which presents specific difficulties in the labour market. Their situation varies from one State to another, and even one period to another within the same state, depending on whether or not they are authorized to work.

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[119] The major projects to prepare for the 1998 celebration of Portugal's seafaring past probably explains the somewhat ambiguous lines followed by immigration policy. As everywhere, control of admissions has been nominally tightened, but no effective action seems to be taken to prevent the illegal employment of foreigners.

Thus, in Belgium, in order to make requests for asylum less attractive, a circular dated 26 April 1994 confirmed the abolition of provisional authorization of employment for asylum seekers who had been declared admissible. This authorization had previously been granted (by a decision of the Minster for Employment and Labour of October 1993), without reference to the state of the labour market or to an international agreement on labour, to all those who had a contract of employment; it was valid until such time as an order to leave Belgium had been served. The decision caused considerable problems to the fruit-growers of Limbourg; the wages they offer are so low that even the unemployed refuse to work there. In the particular case of seasonal horticultural working, another circular (1 July 1994) supplements the previous one. It lays down specific provisions for the contract of employment and a *picker's card* indicating the number of days of employment, following the rule of a maximum of 65 days per year. A decree sets the conditions under which this card is issued and the arrangements for keeping attendance records.

In Greece, on the other hand, the government is preparing a presidential decree designed to promote the access of refugees to the labour market. The President of the Greek Council for Refugees was to approve the measure; the mandate of this institution is to prevent social exclusion and offer those concerned the means to supply their own needs. The Netherlands have adopted the same approach. Since November, holders of VVTV permits are authorized, after six months, to hold temporary jobs for a period of 6 to 8 weeks. In the third year of their residence they have free access to the employment market.

In Luxembourg, the problems refugees experience with finding jobs are related to the indirect effects of the various administrative obstacles created by the new provisions on access to work for nationals of third countries. Several "displaced persons" from the former Yugoslavia who had found work were refused work permits on the grounds that the employment situation argued against it. Unofficially, responsible politicians and officials admit that these people should not be affected by the restrictions applied to non-Community nationals. Hence, several cases in which work permits were refused have been resolved as a result of contacts between the refugees' collective or other NGOs and the national authorities. Despite everything, against the background of high unemployment, this situation is causing acute concern to those whose status has been extended until 15 July 1995, after which they will not be able to claim a foreigner's identity card unless they can prove that they have held a legal job for six months without interruption and occupy accommodation which is not subsidized by the State.

In Germany, the SPD has been worried by the case of the foreign construction workers from the former East Germany who, since reunification, no longer have the certainty as to their residential status. These are usually Vietnamese who were recruited under an agreement between their government and that of East Germany. At the end of December 1993 there were 8 904 of them, of whom 6 396 held a "Aufenthaltsbefugnis" (residence permit) and 2 508 were "geduldet" (tolerated). As far as the federal government is concerned, the restrictions specific to work permits for "tolerated" foreigners (issued for a given Land) have no adverse consequences for job seeking, since an agreement concluded with the Länder provides that those workers in this category who find jobs in the other Länder will be given the status of resident. The fact remains that, despite everything, the authorities in Bonn are trying to persuade the Vietnamese government to take back its nationals.

ILLEGAL WORKING

In the context of increasing unemployment and lasting economic crisis, the campaign against illegal working and "social dumping" is regarded by all governments as a critical issue in their fight for employment. A report by the Dutch Economic Institute (NEI) has estimated that 0.5% of jobs are occupied by undeclared employees (about 30 000 men/year) in the Netherlands, most of them in agriculture (horticulture), the hotel trade, catering and cleaning. In Germany, the global loss to welfare contributions as a result of illegal working has been estimated, on the basis of 10 000 clandestine jobs, at DM 197 million (94 million in pension subscriptions, DM 64 million in national insurance, 32 million in unemployment insurance and about 7 million in accident insurance). Questioned on this point, the government stated that it had no precise figures as to the extent of the problem.

Be that as it may, a number of initiatives, as will be seen, bear witness to governments' determination to combat illegal working, which is considered a threat to the cohesion of the economic and social fabric. This determination, supported by many Members of Parliament, also lives up to the expectations of the social partners, more and more of whom are calling for severe penalties to be imposed both on providers of labour and on enterprises guilty of unfair competition. This is particularly the case in Belgium, the Netherlands and Spain, and even more so in Luxembourg.

In Belgium, the campaign against illegal working, social fraud, social dumping and the illegal employment of foreigners has been one of the priorities set by the Council of Ministers for the Minister for Employment and Labour. Equally vigorous steps have been taken in the Netherlands. In February 1994, the government addressed to Parliament a memorandum on "*the campaign against clandestine working*", in which it proposes, as a supplement to enforcement arrangements, preventive measures including, in particular, exemption from charges and insurance for seasonal workers to encourage legal hiring. In Spain, since 1993, the Directorate-General of Labour Inspection and Social Security has been pursuing a broadly conceived nationwide control campaign, aimed at the three forms of illegal employment: foreigners with no work permits, (national or foreign) employees unregistered with Social Security, and those drawing unemployment benefit. Finally, in Greece, a Commission of Inquiry appointed by the Minister for Labour has confirmed the part played by private (and illegal) agencies, of which there are apparently several dozen in Greece, in finding placements in enterprises for foreigners who lack work permits.

However, it is certainly in Luxembourg that the greatest concern has been shown. The subject appeared on the agenda for the employment debate in the Chamber of Deputies (19 January 1994), and was also considered during the examination of the country's

economic and social situation at the "tripartite meeting"[120] between the government and the social partners, and later during the negotiations conducted by this same body.[121] The subject once again occupied a prominent position in various electoral programmes and in the government declaration of 22 July 1994. On each occasion, it was emphasized that social dumping practices were a threat to all areas of activity and that its repression called for a joint effort by all concerned.

It was also in Luxembourg that the social partners moved most swiftly to cooperate with the government authorities. Thus, the Federation of Craftsmen is campaigning among its members to ensure compliance with current legislation and to make sure that their subcontractors do the same. In addition, by agreement with the OGBL union, it is calling for systematic checks on compliance with the rules on safety, health and working hours.

These two organizations are calling for it to be made compulsory for foreign enterprises operating in Luxembourg to have a tax officer on the spot to allow verification of the wages actually paid. Apart from desiring more frequent checks to discourage "*profiteers*", the Committee of the Building Union of the OGBL, for its part, is denouncing the activities of enterprises which dismiss some of their workforce for economic reasons while exceeding the statutory permitted working hours and requesting authorization for thousands of hours overtime or making use of temporary workers.

Not only foreigners are employed illegally

The other positive aspect of this increase in activity relates to the increasing number of countries where the approach to illegal working is no longer confined, as it was in the past, to the illegal employment of foreigners alone. In Germany, for example, the SPD has stressed that the employment of foreigners without work permits was not the reason for the sharp increase in illegal working in the construction industry, pointing out that illegality can be a matter of working conditions as well as of payments below the authorized minimum. In particular, it denounced the conditions under which the agreements signed with the Eastern and Central European States (Werkvertragsabkommen) were being applied in the sector. In this context, we should point out the action by the Portuguese government in favour of Portuguese nationals working in Germany with no social protection and sometimes without pay. Their case was the subject of an official communication and specific contacts with the German government.

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120 The subject of social dumping appeared on the agenda of a meeting (31 January 1994) between the Federation of Craftsmen, the Confederation of Commerce, the Minister for Small Firms and Traders, the Minister for Labour and the Secretary of State for Social Security. The 1994 report by the Building Commission on the economic situation in the construction industry also stresses the need to introduce effective and regular controls to prevent social dumping. Finally, a resolution by the 60th Congress of the National Federation of Railwaymen and Transport Workers also calls for stricter controls on road transport.

121 This negotiation, which was followed by a declaration by the Prime Minister to the Chamber of Deputies (16 March 1994) was intended to give rise to a package of proposals in favour of employment, business competitiveness and price stability. This initiative extends the recommendations of the Commission White Paper (on the medium-term strategy in favour of growth, competitiveness and employment), and the European Council's action plan (December 1993) to strengthen the competitiveness of the European economy and encourage employment.

In Italy, a comparison of work permit data with those held by the National Institute for Social Protection showed that only half (114 554) of the 228 229 foreign employees holding work permits in 1991 were insured with the INPS as required by the Civil Code and the regulations. Apart from emphasizing the scale of the problem, this result shows that in Italy illegal working is not confined to foreigners without papers. It applies equally to those who, while legally allowed to work, are forced, like nationals, to take jobs without social cover. This finding broadly confirms the experience of the labour inspectors on their visits to enterprises;[122] as well as the employment of foreigners without papers, which is declining anyway, the breaches of law most frequently encountered are non-appearance on the payrolls and/or non-payment of social security contributions.

Many questions remain unanswered, however, regarding the effectiveness of this action. Many people consider that the competent authorities have insufficient means to do their job properly, and also have doubts about the action taken to follow up their case reports. It was emphasized that the campaign against this multifarious unlawful activity (social fraud, social dumping, unlawful international posting of employees, etc.) would fail in its purpose unless the criminal penalties were severely applied, unless the checks carried out resulted in the recovery of social security contributions and tax debts, and unless the resources available to the authorities were equal to the problem. The strengthening of resources is also in the interests of the justice system, as the increase in reported offences would directly result in a build-up of court cases pending.

Results already encouraging

Although these criticisms and reservations are justified, it should also be emphasized that encouraging results have already been obtained. In Belgium, it is estimated that between 70 and 75% of the case reports drawn up by the Inspectorate of Social Law on illegal working have produced satisfactory results. In 1993, a significant increase was also recorded in the penalties imposed on employers for the repatriation of illegally hired foreigners. Sixty-five repatriations took place under this system (at a total of 1 509 129 francs), as against a mere three for the years 1990 to 1992. The same trend was noted in Germany, where the number of prosecutions and fines on employers of irregular workers increased from 46 000 to 75 000 in 1993.

The increase in activity by the inspectorates has also been seen in Spain. More than 130 000 workplace visits were scheduled during the year, aimed particularly at clandestine enterprises in the building industry. As well as administrative and disciplinary measures, these inspections often gave rise to regularizations of contracts of employment. Here again, a comparison between the results of this campaign and those for the past five years (1988-1993) shows a significant reduction in the illegal employment of foreign workers, in favour of other types of infringement. The total sums recovered for the illegal employment of foreigners have declined in inverse proportion to the number of checks carried out, falling from 1 766 million pesetas in 1989, for 4 868 operations carried out, to a little over 900 million for 15 404 operations in 1993, or a detected "fraud rate" (infringements/operations) of 8% in 1993 compared with 46% in 1989.

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[122] In 1993 they visited 29 822 enterprises employing foreigners, who accounted for 2.3% of their workforce.

Legislation on illegal working under review again

This increased activity to counter illegal working and social dumping has also been reflected in the adoption of new legislative and regulatory measures, and by greater vigilance towards the international posting of workers. Inspectorates' staffing levels have been increased in some cases but, more importantly, their activities have been better coordinated.

In Germany, an amendment to the Law on Illegal Working has been adopted (26 July 1994) with a view to making it easier for the authorities to act and to impose heavier penalties on those who employ foreigners without work papers. In addition, the Federal Ministry responsible for the building and land-use planning has published a decree (Erlass) excluding from public tenders those companies which employ illegally hired workers.

In Luxembourg, the same requirements have resulted in at least two draft regulatory instruments. One specifically relates to the illegal employment of foreigners, while the other forms part of a more ambitious legislative device aimed at maintaining employment and improving the competitiveness of enterprises. The first text explicitly relates to employers who breach the social regulations or exploit persons in irregular situations. It proposes amendments to the law governing the admission, residence and employment of foreigners, tabled in the cabinet in December 1993. It provides for heavier penalties for the illegal employment of labour[123] and institutes a compulsory bank guarantee for any recruitment of a third-country national, as mentioned earlier. The Minister for Labour has made his intentions very clear and has several times referred to the responsibility of employers. "*I am not organizing the persecution of people in an irregular situation, I am persecuting enterprises which employ such people in order to gain a more advantageous competitive position than those which operate legally. I am declaring war on those enterprises which pay wages lower than those which our laws and collective bargaining agreements lay down, because these people are undeclared workers. It is not undeclared employed people that are my target, but those who employ them without declaring them. The aim is to combat illegal practices and not the people who are the victims of such practices.*"[124] However, the way in which these people are to be treated is still vague. The minister has repeated his refusal to make any declaration in favour of their regularization, on the ground of not wishing to increase the inflow by making a public announcement of such measures.

The second part of the mechanism has been integrated into the *Law on the Maintenance of Employment, Price Stability and Competitiveness of Enterprises* (adopted on

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[123] The penalties are primarily aimed at employers who hire foreigners without work permits and at those who assist their illegal entry or residence or act as intermediaries in supplying them with illegal jobs. They are also aimed at foreigners who hold jobs in breach of the existing statutory provisions or fail to observe the limitations and conditions imposed by their work permits.

[124] Topical and urgent debate on employment, in Record of Proceedings of the Chamber of Deputies No. 5/1993-94.

17 June 1994).[125] Its object is to prevent the three most damaging consequences of illegal working and social dumping: unfair competition, which places at risk those firms which do comply with social legislation; the exploitation of workers in an irregular situation (working conditions and pay, health and safety); and the adverse influence on the labour market and employment policy.

The social identity card in Belgium and Luxembourg

Again with a view to eradicating illegal employment practices, two important texts have been adopted in Belgium. The first (June 1993) tightens the penalties against employers of foreign workers in an illegal situation and the penalties provided for assisting the illegal entry or residence of foreigners (Art. 77 of the Law of 15 December 1980). The second (March 1994), more general in scope, provides for, among other things, a substantial increase in the penalties imposed on employers for breaches of various social laws[126], an increase in the period of limitation (from 3 to 5 years), the exclusion of the offending enterprises from government contracts[127] and, above all, the institution of a social identity card. This provision, complying with the obligation imposed by EC Directive 91/533/EEC of 14 October 1991, is to replace the daybook in the construction industry. Apart from the verification of workers' identities and the legality of their employment (the card issued by the employer must be kept at the place of work), this system requires that advance payments against social security contributions be paid to a special account.

A Royal Decree of 1 July 1994 imposes severe penalties for infringements. It will enter into force from 1995 for building and public works, and will be extended progressively to other sectors between 1996 and 1998. A second Royal Decree (12 August 1994) urges the employers concerned to make their arrangements before the new legislation enters into force on 1 January 1995.

In Luxembourg, too, the social identity card is the main innovation. A Grand-Ducal Regulation was to clarify the information which will have to appear on the card and the industries in which carrying it will be compulsory. This measure had already been called for last year by the Building Commission. The authorities expect it to make for more effective verification both of the employment of foreigners and of compliance with social security legislation.

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125 This text takes its substance from the Opinion of the Tripartite Coordinating Committee of 8 March 1994 dealing with the campaign against unemployment and inflation and with the improvement of the competitiveness of enterprises.

126 The heaviest penalties are for the unlawful employment of foreign workers. The fines range from 150 000 to 750 000 Belgian francs per offence and per worker concerned.

127 The judge imposing the penalty for the illegal employment of a foreigner is required to supply a copy of the judgement to the Committee organizing the approval of enterprises, and to the committees set up by the King pursuant to Article 401 of the Income Tax Code. Since this approval is a condition of access to public and private construction contracts, this provision should be a deterrent against making use of illegal workers.

Coordination of official action

Effective control also calls for improved organization of the activities of the authorities in dealing with more and more complex offences. In this context, the protocol of cooperation between the various inspectorates in Belgium can be seen as symbolizing a deliberate political choice.[128] The extent of the illegal employment of foreigners in the Brussels-Capital Region has, moreover, prompted the government in Brussels to designate by decree those officers empowered to record this type of infringement. Eleven new inspectors were recruited from 1 January 1994, and the government authorized, on the occasion of the last budget exercise, a further increase in the personnel (20 inspectors, 50 assistant inspectors and 9 clerical officers) in charge of social fraud and the suppression of trafficking in human beings.

The coordination of the supervisory authorities, instituted in France a good many years ago, is also a desirable improvement in Spain, where, in February 1994, it was the subject of a joint investigation by the "Under-Secretariats of the Interior, Labour and Social Security and Social Affairs" specifying the conditions of the campaign against irregular employment. This text encourages the setting-up of interministerial provincial groups (Interior, Labour and Social Affairs) responsible for assisting the labour inspectorate in sectors believed to offer the greatest potential for irregular jobs (agriculture, clothing factories and nightclubs). It imposes penalties on employers and workers, and provides procedures for deporting foreign workers subjected to such penalties.

The need for coordinated controls has also been defended in Luxembourg by a number of advisory bodies (Council of State, Chamber of Commerce, Chamber of Craft Trades). They believe that the effectiveness of criminal law penalties is closely linked to this cooperation between the authorities in the field. The Prime Minister, too, referred to this in the government's declaration on the country's economic, social and financial situation in the Chamber of Deputies on 16 March 1994. *"Raids"* on sites have been regularly carried out by staff working for various authorities (the Employment Authority, the Inspectorate of Labour and Mines, the Joint Social Assurance Centre, national and local police forces and customs officers). These have established the involvement of a number of Luxemburgish enterprises in the organization of social dumping which is generally blamed on foreign enterprises.

This finding no doubt explains the Prime Minister's anger following a check carried out at one huge site where 11 foreign construction companies, lacking the necessary authorizations, were working as subcontractors to Luxemburgish enterprises. These operations have also made it possible to record offences relating to declarations by enterprises, health and safety legislation and social security legislation. Non-Community nationals without the requisite residence and work permits are said to have been deported on this occasion.

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[128] Responsibility for control of illegal working in Belgium lies with the Inspectorate of Social Laws, the National Office for Employment, the Direct Contributions Authority and other inspectorates attached to the Ministry of Social Affairs.

Heavier penalties for employers, including exclusion from government contracts

In the Netherlands, according to the provisions of the new Law on Foreign Nationals which came into force on 1 January 1994, the employment of illegal workers is an administrative offence, liable to penalties which have recently been increased. Furthermore, in order to avoid the deportation of foreigners who have been illegally hired without payment of their remuneration, employers are additionally forced to pay them six months' wages unless they can prove that they were employed for a shorter period. The government also has high hopes of two other provisions: the new regulations for the labour inspectorate, making it easier to carry out checks on employers, and the entry into force of the law on compulsory identification, which makes it possible to prohibit foreigners in an irregular situation from registering with the SOFI.

Penalties for illegal employment have also been stepped up in Luxembourg. This applies not only to the illegal employment of foreign nationals but also to social security fraud (especially regarding declarations to social security), the provisions of the labour law (working and pay conditions, for example) and legislation on health and safety at the workplace. Heavier penalties are imposed on employers who have taken on a worker with no work permit and foreigners who, in order to obtain a work permit, have deliberately produced forged or inaccurate documents. Fines (less severe) can also be imposed on a foreigner occupying a job outside the limitations and conditions imposed by his work permit. Finally, following a supplementary opinion by the Council of State, the fines laid down in the Social Insurance Code have also been raised. Others are envisaged for employers who fail to declare job vacancies to the Employment Authority.

The most important penalty, however, is temporary exclusion from government contracts. This can be imposed for a period of from 3 months to 3 years against enterprises employing personnel in an irregular situation,[129] or in breach of the workplace health and safety legislation. The Luxembourg government hopes that this will be more of a deterrent than administrative fines, or even criminal penalties, have been in the past.[130] Its plan was to have this penalty ordered by the executive. However, the Council of State considered that this was a supplementary penalty and a matter for the exclusive jurisdiction of the judicial authority; this adjustment considerably restricts the scope of the measure, bearing in mind the duration of legal proceedings in Luxembourg. In order not to delay the entry of the law into force, the Chamber of Deputies endorsed the opinion of the Council of State. The government also gave notice of its intention to amend this legislation shortly with a view to expediting its application.

Joint liability of all parties to illegal working

The principle of joint liability of all those deriving benefit from an illegal working situation represents another innovation in the campaign against illegal working. Having for

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[129] Foreign employees without work permits, employees not affiliated to Social Security bodies, and employees not complying with the applicable working and pay conditions.

[130] This penalty applies not only to public tenders (which represented 33% of State contracts in 1990) but also to restricted tenders, restricted tenders with preselection, contracts by direct agreement and negotiated contracts.

some years formed an integral part of French and Dutch legislation, it has more recently been adopted in Belgium, where it is at present confined to the single sector of building and public works.[131]

In the Netherlands, the Dutch government recalls, in its January memorandum to Parliament, the spirit and letter of the "*Law on Consequential Liability*", initially applied to the clothing industry and then extended to the principal purchasers, such as department stores. This law obliges enterprises to make payment themselves, to a blocked account, of the tax deductions and social security contributions associated with subcontracted work. Although no significant increase in contributions has been recorded since it came into force, there does seem to have been a very significant reduction in orders placed by customers of dubious factories, causing the disappearance of many of these but increased use of subcontractors based in Poland and Turkey. The action against the clothing industry has also, admittedly, been reflected in visits by a special squad of the Amsterdam police force to some 70 factories, leading to the arrests of 600 workers in irregular situations and the reporting of more than 300 offences against the law on the employment of foreigners.

Closer monitoring of seasonal working in Belgium and Italy

Another area which has received increased vigilance is seasonal working, especially in agriculture, where illegal working once again seems to be becoming widespread. In Belgium, for example, it was decided to place very strict limitations on the employment of asylum seekers as seasonal workers from October 1993. Only those declared to be acceptable can receive a temporary work permit. According to the Minister for the Interior, "*the question of asylum seekers can no longer be linked with that of the recruitment of workers in the fruit-growing sector*".[132] The local Liberal Party suggested that the asylum seekers, and especially the Sikhs,[133] should be replaced with European seasonal workers from Poland, Romania, Greece or Portugal, given that local labour and the unemployed reject the working conditions offered by the fruit-growers. The eventual decision was to hire unemployed Spaniards, supplemented by recruitment of Polish workers, but on condition of prior approval by the Ministry of Employment.[134] To reduce the gap between the statutory hourly wage (250 francs) and the rate paid to illegals (approx. 200 francs), the charges associated with the employment of seasonal fruit-growers have been reduced, at the same time as checks have been tightened.

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131 Initially applied to carcase work, this legislation has been generalized to include all activities taking place on sites. "*Having regard to the subordinate relationship of the subcontractor to the main contractor, it is ultimately the latter who derives substantial profits from the work done by the "slave drivers". He, therefore, should pay the bill.*"

132 These measures particularly affect the Sikh community. In 1993, serious clashes took place between the local population and this community, whose numbers increased considerably during the fruit harvest. This seasonal phenomenon was not to the taste of a number of nationals, or that of the local authorities.

133 The employers have clearly expressed their regret at this decision. "*The Sikhs*", explains the Secretary of the Flemish Fruit-Growing Federation, "*are quite happy to sleep on the refrigeration units. The Spaniards have to have a five-star hotel.*"

134 Ultimately, more than half of the workers hired were Turks, mostly women resident in Belgium.

It is hoped that all these measures, added to the dangers of heavier penalties, will make employers think twice before resorting to illegal hiring. In the past, virtually all employers on whom checks were run were not complying with the social regulations and the legislation on the employment of foreign workers. With the same aim of cleaning up working conditions in agriculture, a Ministerial Decree (24 June 1994) deals specifically with the hiring of workers in horticulture, laying down the terms on which a picker's card will be issued and the arrangements for validating attendance registers in the sector. We should make it clear that 17 000 workers are hired every year at the beginning of September, when the fruit harvest begins.

In Italy, the labour committees whose responsible ministry asked for a statement of needs for 1994 suggested that there were enough unemployed people to enable the demand to be met. They also emphasized that the national workforce seems more willing than in the past to take up this kind of work in some sectors. It would thus be unnecessary to recruit abroad. For the present, seasonal working employs 25 000 to 29 000 foreigners each year, the great majority (85%) already resident in the country and hired primarily in the agricultural sector.

International secondment of labour

The other, newer concern of EU officials responsible for labour concerns the growth of illegal working on the pretext of the international "posting" of workers. The procedure, used by foreign companies working in one Member State and having their headquarters in another, involves the temporary employment (for one year at the most) of a national of a third State of the Union without paying social security contributions either in the country of origin or in the country of employment. The view in Belgium is that "*in order to avoid these abuses, it would be necessary to verify that the enterprise posting the workers really is carrying on activities in its own country. The aim is to prevent Belgian firms, by creating an "accommodation address" abroad, from hiring foreign workers at cheap rates which they then employ in Belgium.*"

With this aim in mind, the obtaining of a social identity card in the construction sector could be made conditional on the actual payment of the social security contributions in the workers' country of origin. Currently, a secondment may not exceed 5 years and does not give subsequent entitlement to an unlimited "A" permit, and the renewal of the permit after one year is agreed to only on proof of payment of remuneration and of the social security contributions payment in the country of origin.

In Luxembourg, a decision was taken for the same reasons to discontinue granting collective work permits for temporary secondments of personnel, especially for sub-contracting purposes, other than in exceptional cases and on very strict conditions. These permits will be granted only to workers contracted to the enterprise arranging the assignment and on condition that they have an open-ended contract in force for at least six months before the assignment to Luxembourg.[135] The object is to prevent irregularities and

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[135] Copies of the open-ended contracts and the workers' qualifications must be enclosed with the application, and the function in which they were engaged by the original enterprise must be specified. Any change in the personnel for whom the permit has been applied for must be subject of a further permit.

social dumping by avoiding the entry of personnel employed in an insecure situation by subcontracting enterprises. "*It is out of the question to continue accepting, as happens now, the situation where the enterprise wanting to arrange this secondment hires workers specifically in order to send them to Luxembourg. This is one of the devices regularly employed by subcontractors to get round Luxembourg's regulations governing access to the labour market.*"[136]

The Vander Elst Judgment

On 9 August 1994 the Court of Justice of the European Communities (ECJ) handed down an important judgment regarding the employment of third-country nationals (Case C-43/93 Vander Elst/IOM, ECR I-3803). The case concerned a Belgian businessman who had provided a service in France with a team half of whom were Moroccans from Belgium, holding short-term French permits covering the period in which the work was done. The French authorities considered these permits insufficient for the performance of wage-earning work subject to prior employment authorization.[137] Finding against the French party, the ECJ confirmed that the employment, by an enterprise established in the EU, of third-country employees must not be a ground for restricting its freedom to provide services in another Member State. It pointed out that, unless the provisions guaranteeing this freedom were to be made effectively void, the performance of a *temporary service* could not be made conditional on all the requirements imposed for *an establishment.*

The Court's thinking was thus directed not to the question of controlling immigrant labour but to that of free competition in the Community area. In this connection, it held that the payment claimed for employees from third countries, or the applicable fines if any, constituted "*substantial charges*" obstructing freedom to provide services.

It emphasized that this freedom was enjoyed by the enterprise and not by the employees. The latter were regarded as "an integral part" of the means for providing the service, and their entry into the territory did not constitute any intention of long-term integration into the labour market. Consequently, according to the Court, their *temporary* posting in France was not contrary to the provisions of Article L.341-6 of the French Labour Code relating to the employment of foreigners.

In summary, the ECJ held that: "*Articles 59 and 60 of the EEC Treaty must be interpreted as precluding a Member State from requiring undertakings which are established in another Member State and enter the first Member State in order to provide services, and which lawfully and habitually employ nationals of non-member countries, to obtain work permits for those workers from a national immigration authority and to pay the attendant costs, with the imposition of an administrative fine as the penalty for infringement.*"

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136 Parliamentary Document of 21 April 1993, page 25.

137 In France, "*the opposing interest of the employment situation*" is an obligatory reference for any decision to grant a work permit. This device for controlling active immigration and the labour market is at odds with the system of freedom and non-discrimination proclaimed by the Treaty of Rome. Community law recognizes this freedom for every Community national and every enterprise established in the EU, whatever may be the nationality of the employer or his employees. The fact that they may be third-country nationals cannot restrict this freedom to provide services. This is the principle upheld by the Vander Elst judgement.

That being so, the Court's judgment does not prejudice the right of the Member State in which the service is provided to ensure that the service provider complies with the regulations in force relating to working conditions. In this context, the French authorities have since published a decree (11 July 1994) laying down the rules applicable in the event of the temporary posting of foreign employees to provide services on their territory (compliance with French social law and labour law and conventional measures).

INTEGRATION POLICY

Once again, integration seems to have suffered from the considerable increase in activity to control migration flows and the labour market. This unequal attention is found in such different contexts as France, where the High Council on Integration has remained inactive for a year, and Portugal, where none of the planned meetings between the Minister for Employment and various partners (including the immigrants' associations) for the implementation of the integration policy defined in 1993 have been held.

Things seem to be no better in Germany, to judge by the very critical report on the Law on Foreign Nationals by the Federal Commissioner for Foreign Nationals.[138] By comparison with the laws of other European countries, this law is regarded as much less favourable to integration. This assessment, according to the report, applies equally to naturalization, dual nationality, the bringing-in of children (Kindernachzug) and the independent residence permit for married women.

The increasing sophistication of the computer resources employed, the inevitable result of increasingly strict controls on population groups, has been a further cause for concern. Many people emphasize the risks this represents for personal freedoms and, more broadly, the rule of law.

In this context, then, the year was dominated by what could be called a defence of minimum rights, resulting in a major legal dispute on such various subjects as entry and residence, the right of asylum, the rules and practices of detention and deportation, and the challenging of social rights. This is what happened in Belgium, Germany, France, Portugal, Luxembourg and the Netherlands. On this occasion, it was notable that more frequent reference was made to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms to challenge decisions relating to foreigners' rights of residence and, even more so, their deportation from the national territory.

The other major stimulus to action has been the growth of intolerance and xenophobia. The doubt cast on integration by this aberration is all the stronger in that the involvement of members of the security forces in this kind of violence seems to be proven in several cases, reinforcing the suspicions of those concerned regarding the impartiality of the State. Equally serious have been the devices for legitimizing discrimination, which seem to be proliferating, including declarations by senior politicians and judgments handed down by the Courts. In the name of freedom of expression, the judiciary sometimes gives the impression of being unsure of itself, or at any rate of reluctance to prosecute, thus emphasizing the unsuitability of judicial procedure and the legislative machinery for

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[138] This report on the situation of foreigners in Germany in 1993 includes analysis of the structure of the foreign population. At the end of the year 1991, a quarter of these foreigners had been resident in Germany for more than 20 years. This population included 1.5 million young people under the age of 18, and another million aged between 18 and 25; the over-sixties accounted for only 2.1% of the set. This document also includes studies of education, employment and social aspect. It also deals with residence regulations and violent attacks on foreigners.

combating racism, xenophobia and neo-nazism.

Less fashionable than in previous years, urban policies in favour of integration have nevertheless been continued, and in some cases improved. From this standpoint, it is indisputably in the Netherlands that the commitment of the authorities has been most apparent. In a memorandum of April 1994 relating to a relaunch of the policy of social renewal under the title "Policy for the inner cities", the government summarizes its activities in favour of minorities, clarifies its definition of the concept of "minority" and defines the scope of its social policy.

Apart from the initiatives undertaken in the Netherlands, other notable features were the "Security contracts" and "Urban action and integration policy" in Belgium, and the "Urban policy" in France, although the latter seemed much more uncertain this year. In all cases, the authorities have tried, with varying success, to give priority to the traditional problems of the urban centres: unemployment, housing, school drop-outs and crime. The deterioration in the situation of the more worst-off households that is apparent to some extent throughout the EU, many of them being at risk of finding themselves in a condition of permanent poverty, confirms the need for a proactive approach in this area.

In the overall package offered to the relevant population groups, the question of the right of nationality, together with political rights, continues to occupy a central position. Both are disputed. As far as the right of nationality is concerned, the trend is also towards restriction. New selection criteria have been introduced into legislation to restrict access to this right, including the criterion of the subjective assessment of the *desire to integrate*. An example of this can be seen in France with the adoption of the latest reform and the institution of the *demonstration of intent*.

It is still in Germany that foreigners seem to have least access to naturalization. Neither the government nor the ruling coalition contemplates any early change in this area, and all proposals for reform have been rejected. In view of the lack of any firm parliamentary decision, the subject is also giving rise to significant case law by the administrative courts.

Even more than the acquisition of nationality, direct access to political rights remains the subject of heated controversy. The recognition of European citizenship, opening up limited political rights (local and European elections), has revived this issue by introducing a constitutional breach in the principle of nationality. It is in Luxembourg, because of the number of Union nationals of voting age, that the impact of the measure has been greatest. The sharpest reaction has come from the Chamber of Civil Servants and Public Employees, which denounces this reform as a threat to Luxemburgish identity, condemning both the actions of the Commission of the European Communities and those of the Luxembourg government which, in its view, undermine national sovereignty.

POLITICAL EVENTS OF THE YEAR

A proliferation of xenophobic acts, veiled or explicit tolerance of their perpetrators and electoral advances by the parties of the extreme right - these were the events that dominated political and social life in the Union in 1994, and they are more than worrying. Few Member States escaped these phenomena, although the explanations offered vary in each case.

Some hold that the reasons lie in the economic crisis (Spain), with the massive losses of jobs strengthening the feeling that social difficulties are going to go on getting worse. In other cases the reasons are said to be more political (Italy), associated with the impotence of the authorities (both government and parliament) to control economic and social trends, being more concerned with their own survival.

This harmful climate could only encourage racism and xenophobia. The asylum seekers are often the first targets. They are at the centre of the controversy between churches and government (Germany and Portugal), the former accusing the latter of arguments to justify immigration control which are apt to encourage xenophobic tendencies.

Against this background, the most significant event of 1994 was the electoral break-through by the extremist parties, more marked than in the past, even in countries which seemed to be the most tolerant. This development was seen at its most spectacular in Belgium, the success of the far-right Flemish and French-speaking parties having radically changed the Belgium political landscape in the course of the year.

Many representatives of the democratic parties and organizations for the defence of human rights see these results as a real danger, believing they call for a change in the approach to the question of freedom of the press and opinion and the right of political expression by the extremist parties.

The growth of intolerance in Italy, Spain and the Netherlands

Contrast, confusion and xenophobia. These were the dominant features of the political year in Italy. The contrast between hope of change and the fickleness of a political class incapable of bringing that change about is inevitably increasing the confusion of a general public left alone to deal with its problems. In this hostile climate, xenophobia and racism could only prosper, additionally feeding off campaigns to discredit foreigners. There were campaigns against prostitutes, when it was believed that the country had been invaded by women from the East, and against the Albanians, who were accused of responsibility for an outbreak of cholera in Bari and Brindisi, which was really caused by the defects in the municipal drainage system. Everything served as a pretext for intolerance, including the results of the Swiss referendum in early December which prompted the "Lega Nord" and "Alleanza nationale" to publicize their positions.

In Spain, the massive losses of jobs over the past two years and the feeling that social problems are going from bad to worse are helping to create a hardening of attitudes to immigration. The annual surveys by the CIRES (Social Reality Investigation Centre) fully bear out this trend. Two thirds of those questioned thought that there were "many" (40%) or "too many" (26%) foreigners in Spain; one Spaniard out of two held this opinion in 1991. More people, too, believe that foreigners are responsible for unemployment.

Logically enough, support for the "quota" policy is less marked (46%, as compared with 67% a year earlier) and a growing sector of opinion (54%, as against 37%) is calling for stricter control of migration flows. Obviously the economic crisis has left its mark.

Answers to questions on everyday neighbourhood life confirm this. In two years (1992-1994), the number of Spaniards saying they are not worried by the presence of foreigners has fallen significantly (48% to 40%), and more of them believe that foreigners' influence is negative (fighting, drugs and theft). Even so, the desire for universal equality is still gaining ground: in 1994, 44% rejected any discrimination based on origin, as compared with 33% in 1991. This may explain the interest shown in the "philosophy" of integration through the traditional debate between "specific policy" and "common law treatment". The answers to the inquiry clearly tend to favour a horizontal approach to problems (64%) rather than a policy of attending to "specifics" (25%).

In the Netherlands, in a survey conducted on the eve of the May general elections, half of those questioned placed the problem of minorities at the head of their list of concerns, in front of unemployment, social security and crime. Three out of four believed a stricter attitude to asylum was needed, and 18% called for all new applications to be rejected. One third of this sample favoured the total stoppage of admissions from third countries, and 16% wanted a stop to all immigration, including that of EU nationals. This advance in the negative perception of immigration was reflected by an electoral breakthrough by the far right which, in the March local-authority elections, won 88 council seats, the Centre Democrats (CD) alone gaining 77. This advance was most apparent in the major cities, where the far right received 14% of the votes cast. The results were less spectacular in the national elections, where the far right gained only three seats.

Reservations about foreigners confirmed in Germany, France and Portugal

Although France adopted three major laws in 1993 on the entry and residence of foreigners and the right of nationality, the debate is far from over. Controversy focused on foreigners' right to vote, the question of integration and the possibility of a mass exodus of Algerians fleeing from terrorist violence. The question of voting rights, giving rise to substantial legislative and regulatory activity (eight laws and six decrees), failed to arouse public enthusiasm. It was a very different matter with integration, where interest was once again stimulated by the return to centre stage of the so-called "Islamic headscarf" affair.

In the annual survey by the National Advisory Committee on Human Rights, three quarters of those questioned said they were in favour of the integration of foreigners or those of foreign origin. The majority (65%) considered this to be one of the criteria for the proper functioning of democracy, and even more (74%) consider that successful integration means adopting the French way of life.

This requirement has to be contrasted with the feeling that the immigrants do not want integration (56% of those questioned) and the conviction that they want to retain their own ways of life (74%). This assessment certainly explains why the majority of those questioned believe (or fear) that in the future "*the various groups (Europeans, blacks, Arabs etc.) will live together*", even though their number has fallen considerably in 4 years (52% as against 63% in February 1990).

Is it this fear of "separate development", resulting from excessive concentrations of immigrants in particular areas, which is recruiting so much support for the campaign against illegal immigration (91%)? The fact remains that these two requirements (control and dispersion of immigrant groups) are at the top of the list of what are felt to be effective means of combating racism, just ahead of the teaching of tolerance in schools. From this standpoint, the right to vote in the municipal elections still scores lowest (40% of replies in favour), although this is five points up on February 1990.

Among the instruments believed to encourage integration, schools (72%) and associations (69%) are considerably more highly thought of than local authorities, churches and unions. A new survey carried out in mid-January 1995 confirms public interest in the subject: 62% of those questioned felt that "*measures to be taken regarding immigration*" should occupy an essential or very important place in the next presidential campaign; more than half expected the next President of the Republic to improve matters in this area.

In Germany, the asylum seekers still provoke the most contradictory reactions. Thus, keen controversy has arisen between churches and government regarding the deportation of unsuccessful candidates. In this situation, two conflicting points of view are still argued regarding immigration: one, defended by the government, maintains that Germany is not an immigration country, come what may; the other, taking the opposite view, wants to face up to reality and recognize the presence of foreign communities as an integral fact of the new Germany. With this in mind, some lawyers are arguing in favour of a change of migration policy and the adoption of a law on immigration, and not just for foreigners.

In Portugal, Parliament has debated the topic several times during the year. All the legislation relating to the Schengen Agreements and the temporary accommodation centres were adopted; on the other hand, a draft law on identity checks, designed to help the campaign against illegal immigration, was ruled unconstitutional and the rightist majority rejected the proposal for a further round of exceptional regularization.

For the opposition, government policy is not encouraging a climate of tolerance within Portuguese society. The adoption of restrictive measures within the framework of the Schengen Agreements has been, according to them, the classic example of steering opinion without any real explanation of the contribution made by immigrants to Portuguese society. This is all the more so since, as in Spain, the economic recession seems to strengthen adverse reactions to immigration.

This criticism is shared by the Portuguese clergy, who have expressed their disagreement with the official argument justifying immigration controls. They too believe this argument is liable to encourage xenophobic movements. At the same time, they deplore the lack of reception structures, the difficulties in obtaining housing and the lack of legislative clarity on family reunification. They also denounce the apathetic attitude of the authorities towards clandestine immigration networks exclusively linked to prostitution and the exploitation of female labour. The Catholic church is preparing a pastoral letter on all these subjects.

The leftist parties which are not represented in Parliament and voluntary associations have been even keener critics of government policy, emphasizing the contradiction between the policy of immigration control and the declared intention of establishing special relationships with the Portuguese-speaking countries. The case of East Timor is an example of

this contradiction, with the treatment inflicted on refugees from that country who, like other would-be exiles, are having to survive on totally inadequate resources.

The electoral breakthrough by the far right in Belgium

It is in Belgium that the rise of intolerance, and above all the success of the extremist parties, have been most spectacular. The dominant feature of the changes in the Belgian political landscape in 1994 was, indisputably, the advances by the Flemish and French-speaking far right. The European elections in June enabled its three most representative parties - the Vlaams Blok, the Front national and Agir - to achieve a significant breakthrough in Wallonia and Brussels, a few years after Flanders, with nearly 700 000 electors casting their votes for these parties.[139]

In view of these successes, their results in the municipal and provincial elections of October might have suggested a slight reverse, but, based on the last elections of the same type, their results actually show that their arguments are continuing to gain ground (7% of votes in 1994 compared with 2% in 1991). Here again, the advance has been most notable in Wallonia and in Brussels.[140] In Antwerp, the Vlaams Blok has become the city's leading party; with 29% of the votes cast it has 18 councillors (+8) out of a total of 55, thus forcing the five traditional groups in Antwerp to form an alliance to prevent a takeover of power in the city.

As one commentator pointed out, the Flemish capital woke up with a "*hangover*" on the day after 9 October. The Jewish community has been most affected by this spectacular turn of events, but it is up to the whole population to try to understand how "*cosmopolitan*" Antwerp, which has long been a welcoming area, could have become a "*black spot*" on the map of Belgium.[141]

No sooner had they been elected than the Vlaams Blok members set out their demands, focusing their attack particularly on the "privileges" enjoyed by foreigners. They proposed that their children should be denied school support, that the creation of new mosques in Flanders should be forbidden and that they should be denied access to social security and subsidized housing, etc. In brief, "*The Blok wants a pure society without foreign elements*". Strongly established in Flanders, this ultra-nationalist party harks back, through tracts and slogans, to the symbols of the Rexist (Nazi) party of the inter-war period.

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[139] The Vlaams Blok (VB) was supported by 12% of the Flemish electorate (463 000 votes cast) and the Front National (FN) 7.9% of the French-speaking electorate (or 175 000 votes), giving it a seat in the European Parliament.

[140] The FN and "*Agir*" now have nearly 100 representatives on the municipal provincial councils.

[141] A study of voters for the far right shows that "*the majority of [its] 'customers' is made up of people with jobs, primarily members of the middle classes* [tradesmen, craftsmen and even executives]. *In other words, relatively educated people without too many social problems. The vote for the far right seems firmly associated with phenomena relating to the destructuring of society (family, institutional structure, enterprises). It would thus be a matter of searching for an identity. There is thus no suggestion that the far right will disappear automatically as a result of the economic recovery.*" According to other studies, "*The typical VB voter in Antwerp is a not very devout Catholic, a worker or unemployed, relatively young and, above all, with a low level of education. He is more likely to be a man than a woman.*"

According to its leaders, the principle of "*Eigen volk eerst*" ("*Our own people first*") is directly opposed to the letter and spirit of the Declaration on Human Rights, "*drawn up with people from Senegal and the Ivory Coast*". On this kind of basis, the "immigrant" is identified as the enemy, in so far as he represents the inferior or deviant beings threatening the integrity of "*our people*". In other words the "immigrant" - the enemy - can equally well be an African or a French-speaker or even a "*leftist*" Fleming.

The Front National (FN) is the most important far-right party among francophone Belgians. Summarizing the basis of the party's programme, its president declared that "*500 000 fewer people from the Maghreb would mean that much more work for Belgians*". "*Sending back the immigrants*" is therefore the most urgent political step: "*We would start by sending back the illegals, but immigrants who break the law and the unemployed would go next!*" This programme would be supported by a refusal by local authorities to register any new arrival from outside Europe, the abolition of grants and other social benefits, and non-renewal of work permits. More broadly, the Front rejects any idea of extending nationality and the franchise to foreigners. Consequently, the law relating to the automatic naturalization of the children of foreigners (2nd and 3rd generations) would have to be abolished. Along the same lines, "*Agir*" regards the integration of non-Europeans as an impossibility and also calls for their mass repatriation "*starting with the law-breakers, the illegals and the carriers of dangerous diseases*".

The Luxembourg exception: tolerance remains the rule

Paradoxically, it is in Luxembourg, where the proportion of foreigners is highest, that tolerance appears to be greatest. A study shows that the Luxemburgers regard immigration as a source of enrichment, believing that their country derives real benefit from it in terms of cultural identity, living standards, the Luxemburgish language and demographic change. On each of these points, a clear majority believes the presence of foreigners to be beneficial. For 68% of those questioned, it is a source of cultural enrichment rather than a threat to identity; 57% believe that it does more to encourage the learning of another language than to threaten the national language; 53% see it as a factor that contributes to maintaining living standards rather than a threat of unemployment; and 53% regard it as a contribution to demographic renewal rather than the threat of an excess of foreigners. A favourable view of the foreign presence is more likely among the better educated, and young people consistently take a more positive attitude than their elders, although the latter do not produce a majority adverse verdict on any single point.

As far as refugees are concerned, too, the feeling is highly positive. Eight people out of ten want Luxembourg to remain a country of refuge for those whose lives are in danger or are persecuted on political, religious or racist grounds. More than two-thirds of those surveyed (69%) also favour extending a welcome to those forced to leave their countries because of an intolerable economic situation. Young people between the ages of 15 and 24 are most receptive to this idea (75%).

Although the lasting presence of foreigners seems to be accepted, the question of their involvement in the country's political life is unresolved. Basing its view on a study by its experts in European citizenship, the government felt that making it easier to acquire Luxemburgish nationality was not an "*alternative*" solution to extending voting rights to Community nationals. The number of acquisitions of Luxemburgish nationality is, indeed, too low among Community nationals: "*the protection afforded by European citizenship*

(right of residence etc.) [making] *the acquisition of Luxemburgish nationality less necessary*".

Can we fight racism and extremism with the weapons of democracy?

The optimism which the situation in Luxembourg might suggest vanishes rapidly when we come to consider the realities of the overall picture: proliferation of xenophobic acts, vague or explicit support for their perpetrators, and electoral advances by the far-right parties. These trends are prompting the anti-racist militants to call for something more than mere adjustments to anti-racist legislation, in the belief that the rate of change represents a threat to democracy itself.

This attitude is to be found particularly in Belgium, following the shock of the electoral successes by the extreme right, which shook the entire political class. The debate automatically focuses around two questions: freedom of the press and opinion, and the right of political expression for extremist parties. The former, which relates to controlling racist propaganda while still respecting freedom of opinion and the press, can be summarized thus: *how can the enemies of democracy be combated with democratic means*? It amounts to wondering whether, when democracy is in danger, it does not become a matter of urgency to defend it by means that are contradictory (and so not very democratic as such) - restriction of freedoms and, especially, restriction of freedom of expression.[142] The beginnings of an answer to this question, encouraging though certainly not definitive, were given by the judgment of the Criminal Court of Mons (see above). The debate regarding the need for corrective action against the press for offences involving racist and xenophobic propaganda remains largely open. A different type of response would be to encourage opportunities for bringing legal action, and especially civil action for damages, with a view to the financial strangulation of groups espousing dubious ideologies.

The second question relates more specifically to the electoral advances of the extreme-right parties. Some stress the urgent need for developing a "*resolutely aggressive democratic strategy*". Others consider that *at present, political prohibition appears to be the worst strategy, not just in terms of the way the public would perceive it and the divisions it would create but also because of the terrible underlying admission of weaknesses it involves*". The same question can be put in many alternative forms.

In view of the ineffectiveness of "demonization", is the answer to enter into dialogue with the representatives of the far right, demonstrating the foolishness of their ideas, or should they be denied access to the media (see below: court order against Belgium's French-speaking broadcasting services for denying pre-electoral air time to the Front National)? Is it permissible to say anything and print anything during the run-up to elections, or should there be a "standards authority", as happens with advertising material? Should the pre-electoral meetings of the far-right parties be prohibited, or should they be authorized in the name of the constitutional principle of freedom of assembly (see above, prohibition in Mons but not Brussels)? Should a legal ban be placed on the financing of the extremist parties, or the form of ballot be changed? Or, going a step further, should they be outlawed for incitement to racial hatred?

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[142] See "Les paradoxes de la liberté d'expression", [The paradoxes of freedom of expression], op. cit.

In Belgium, these questions have gone beyond the realms of pure intellectual speculation. Even before the municipal elections, the traditional parties had committed themselves, by the charter of 8 May, not to enter into any alliances with the non-democratic parties.[143] Subsequently, the Prime Minister himself suggested that thought should be given to electoral reform capable of preventing the advance of the "*brown plague*". The right of the non-democratic parties to freedom of expression and their treatment by the media has also been very specifically dealt with. Opinions - and not only in Belgium - are still very divided. Although the Belgian media have tried to avoid contributing to the propaganda of the far right, the responses of the courts emphasize the difficulties in determining which attitude to adopt.

RTBF, the Belgian radio and television service, which has taken the decision to exclude the non-democratic parties from broadcasts during the European election campaign, was the subject of an appeal to a judge in chambers by the FN, which argued that its fundamental right to freedom of expression had been violated. The judgment went against RTBF, and the Court of Appeal upheld the initial verdict. It held that it was not apparent "*merely from the fact that the defendants in the appeal included in their programme the stoppage of non-European immigration, that the programme in question is contrary to the principles of democracy and that such a position constitutes incitement to discrimination or segregation ...*". The recitals of another judgment, at Saint Gilles, are also worthy of attention. Denying a joint action by the democratic parties against the Front National for unauthorized use of signature, the Court held that: "*in a democracy, the constitutional freedom of expression is even more important than electoral or criminal legality; and whereas to reverse this concept is to play into the hands of the enemies of democracy*". In Judge Rommel's view, "*The end (pluralistic democratic debate) justifies the means (in this case cheating, forgery and the usurpation of identity)*". The further appeal to the Council of State was declared inadmissible.

At the same time, a group of intellectuals, politicians, journalists and businessmen saw fit to conduct a provocative campaign against the "VB", reproducing in the suburbs of Antwerp posters measuring 20 square metres in size and representing Adolf Hitler and Rudolf Hess giving the Nazi salute, captioned: "*The last clean-up crew made lots of promises, too.*" Here again, the campaign failed to gain the unanimous support of the opponents of the far right and its effects were considered very ambivalent.

On the other hand, the Chairman of the French-speaking Christian Social Party agreed to take part in a televised debate with the Chairman of the FN because, in his view, "*The far right has to be fought with the weapons of democracy.*" He hoped that this confrontation would convince floating voters and force the FN to appear in its true colours, rather than as the unfairly demonized martyr of the "political and media world". This initiative, too, was much disputed. The liberal faction felt it helped to publicize a non-democratic party and provide a veneer of respectability for one of its leaders. The same disapproval was expressed by the Antifascist Front and the Free Examination Circle.

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[143] During the electoral campaign, the question several times arose of the prohibition of the Vlaams Blok meetings. One of its meetings was banned in Mons, unlike Brussels, where it provoked a demonstration by anti-fascist forces.

In the Netherlands, similar debate surrounded a proposal for legislation banning the far-right parties. The reason for this was the televised broadcast of confessions of violence against immigrants by a member of the extremist "Democrat Centre" party. In view of the broadcast, the National Office for Combating Racism and the Dutch Centre for Immigrants proposed to the Minister for Justice that he should examine the possibility of banning this party. As in Belgium, many feel that such a measure would not be sufficient to eliminate racist ideas.

RACISM AND INTEGRATION

As was stated at the outset, the past year was notable for a growing number of acts of hostility to population groups from immigrant backgrounds. Viewed through the electoral results of the extremist parties, and at an everyday level through the proliferation of racist or xenophobic incidents, this growing intolerance has undeniably added to the complexity and uncertainty of integration. Quite apart from the varying drama of individual events, the threat is the attack on the democratic character of the State itself. The only possible response is a renewed sense of civic responsibility. It was in Belgium, Germany and Luxembourg that this was most significant this year.

Extremist violence on the increase

In Belgium, although physical aggression has been the exception, certain taboos do seem to have been lifted. Witness, firstly, the incendiary attacks against institutions associated with foreigners or asylum seekers (the refugee reception centre at Haine-Saint-Pierre or the Turkish Muslim centre at Saint-Nicolas) or against the home of a Moroccan family at Turnhout, complete with the graffiti on one of its walls: "*Vuile Turken*" (*Dirty Turks*).[144] Concern is all the greater in that the neo-Nazi groups are increasingly coming out into the open[145] while the infiltration of the police by the far right seems beyond doubt.

The climate of tension was further heightened by clashes between foreign extremist groups, reminiscent of the violence that broke out in Brussels between Turkish and Kurdish nationals at the start of the year, on the occasion of a PKK meeting. A full-scale riot devastated a number of shops in Schaerbeek and Saint-Josse, leaving six police officers and about fifteen demonstrators seriously injured. Other incidents, less serious, occurred in the African quarter of Ixelle (Matongé). As well as being criticized for being too inactive in dealing with these groups, the authorities have been accused of "*thoughtless distribution*" of subsidies to associations allied to them.

The complaint lodged against the Centre for Equality of Opportunity and the Campaign against Racism clearly emphasizes how sour the climate has become. The Centre was accused of supporting a foreign association which incites its sympathizers "*not to make friends among Jews and Christians because a voice from heaven orders it*". The complainant made the point that if it had been the far right "VB" which had proposed this slogan, other people would have lodged complaints and added that the integration of Moslems is obstructed by far right movements in their countries of origin which prefer to keep them in a state of social and cultural isolation.

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144 To these can be added the arson attempt in February against premises used by numerous immigrants in Verviers, followed by another on the night of 22-23 June, and the violent clashes between young immigrants and Agir militants after the Belgium-Morocco match in June.

145 This is true of the group called "*L'Assaut*" and of the NSDAP-AO, an international neo-Nazi organization working to reassert the supremacy of the white race in all white nations through a revolution based on the National Socialist model. This is the first installation of this type in Wallonia.

Anxiety is equally keen in Luxembourg. Public opinion was outraged by the desecration of Jewish graves[146] and the incursions of neo-Nazis into the country. The Luxemburgish League of Political Prisoners and Deportees called on the authorities to put an end to the activities of these extremist factions, and the ASTI is asking what penalties can be imposed on the proliferation of racist and xenophobic slogans, the Hitler salute and wearing of Nazi emblems. The ASTI, which continues to claim that the associations can appear as civil parties in criminal proceedings, is also asking whether, apart from breaching public order, these groups are not violating other provisions of the law, for which they could be charged, found guilty and sentenced.

In Germany, things went no better than in previous years. The Federal Crime Agency (BKA) and the Federal Office for Internal Security (Bundesamt für Verfassungsschutz) confirmed that violence against foreigners has increased since the start of the decade. In the late 1980s, 200 to 300 offences of this type were recorded each year; in 1991 the figure was nearly 2 500, and by 1992 it had exceeded 6 000.[147]

During the first six months of 1994, the Federal Office for Internal Security recorded a total of 670 violent incidents caused by right-wing extremists and 2 429 other breaches of law "*with proven or suspected involvement of the extreme right*". According to the BKA, 162 xenophobic acts were committed in July 1994: 33 assaults, 4 cases of arson and 125 other offences. In Schleswig-Holstein, an arson attack was made on a synagogue at Lübeck. This was the first time since the Second World War that a synagogue had been burnt.

Police involvement and the unacceptable legitimation of xenophobia

A televised report on the Agir group in Verviers caused keen concern in Belgium. The programme showed a police station in the town where officers' lockers were covered in stickers printed by the far-right parties, which the Superintendent regarded as "*a bit of fun*", not to be equated with propaganda. It was subsequently established that a dozen police officers were members of Agir, including a notorious militant. The Minister for Justice called for a judicial inquiry. And, for the first time in its existence, the Centre to Combat Racism appeared as a civil party in a case involving "strong-arm" tactics by two police officers against six Moroccans who had committed no offence.

The Centre, calling for a code of police ethics, believes that "*too many complaints are received which refer to unacceptable conduct by certain representatives of the forces of order. Sometimes it even happens that members of national and local police forces, with the utmost discretion, express their anxiety about the growth of racism and extreme right-wing ideas among their colleagues. But the hierarchy does little or nothing to correct these aberrations.*" The European Committee for the Prevention of Torture has also produced a devastating report on the policing of Zaventem airport, disclosing that

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[146] On the weekend of 26-27 February 1994, swastikas were daubed on several graves in the Jewish cemetery at Esch-Lallange.

[147] According to the Land legal authorities, 7 076 legal actions were brought in the third quarter of 1993 for xenophobic or extreme right offences, 3 724 for offences against foreign nationals, 2 250 for acts of propaganda by banned organisations, 67 for arson and 217 for antisemitic acts.

foreigners have been insulted and molested in the transit area there.

In Germany, too, the attitude of the police is regarded as one of the causes of the xenophobic phenomenon. In this respect, the Vietnamese seem to be a favoured target, suffering both from attacks by racist groups and from police brutality. In Berlin and Bernau, several inquiries are proceeding against police officers, but the fear of increased repression by the police and the far right restricts the willingness of the Vietnamese victims to testify. We should emphasize that the involvement of the police in this kind of violence is not a particularly German or Belgian speciality.

Equally serious are the measures to legitimize discrimination, which once again seems to be proliferating, both through statements by political leaders and through certain judgments handed down by the Courts. In Germany, a taxi service in Essen has created a system of discrimination among its employees, on the ground that customers are more and more inclined to ask for a German driver. The director felt that this had nothing to do with xenophobia, but that he was simply doing what his customers wanted: a simple problem of communication and marketing. He was supported by the leader of the taxi-drivers' union, who referred to a 1984 judgment authorizing this kind of procedure. The Courts concluded that the only discrimination was being practised by the customers, not the taxi service.

Along the same lines, the Administrative Court of Munich has held that foreigners wishing to remain in Germany **must learn to live** with the hostility of some groups. According to the Court, there will always be groups which refuse to accept foreigners, and the Basic Law does not protect foreigners against criticisms by Germans, who have the right to express their opinions in public. This conclusion was accompanied by authorization for a demonstration by the extreme right NPD party against the proposed building of a mosque in Karlstadt. Finally, mention may be made of a decision by the Federal Court that a person who adopts racist arguments advanced by others is acting "*for base reasons*" (niedrige Beweggründe). In this case, the accused explained that he had tried to kill a Romanian asylum seeker "only" in order to impress a group of right-wing extremists.

Other judgments, happily, have been less understanding. The Labour Court of Siegburg accepted that xenophobic remarks could result in the dismissal of an individual. The duty of the employer is to intervene when a worker insults his colleagues, and depending on the "gravity" of the offence he can dismiss the offender without notice. In turn, the Berlin Public Prosecutor called for fines ranging from DM 10 500 to DM 14 400 to be imposed on police officers who had caused physical harm to Iranian students who a witness said had been treated like animals. In Hamburg, more than 20 police officers were suspended for racist behaviour. A judicial inquiry was to be opened to consider allegations of physical harm, deprivation of liberty and intimidation on racist grounds. Again, the Minister for the Interior for North Rhine-Westphalia declared himself satisfied with the results of the campaign against xenophobia. The Land gave DM 17.5 million to the local authorities after the Solingen attack. The money was spent by the authorities on 1 140 projects, three-quarters of them already existing.

Finally, in the context of revisionism, two opposing decisions have renewed the controversy in Germany. The first, handed down in March 1994 by the Federal Court of Appeal (Bundesgerichtshof) lays down that denial of the holocaust is not in itself

sufficient to substantiate a charge of incitement to racial hatred. The second, by the Federal Constitutional Court (B VerfG), on 26 April 1994, on the other hand, upheld the decision by a lower court to prohibit a meeting of revisionists on the ground that the denial of Auschwitz was too great an insult to Jews.

Apart from the ambiguity of certain Court decisions, some politicians have also expressed curious ideas. One such case concerns the former representative of the Federal Government Press Office who, by the government's own admission, is notable for his xenophobia. In a pamphlet on dual nationality, he writes that Germany is gradually becoming a different country - perhaps a Turkish province. The presence of a million Turks (and other foreigners), he adds, is helping to increase unemployment, the housing crisis and crime. Echoing his views, the Minister for Cooperation declared in an interview that foreigners brought in with them organized crime, illegal working, unemployment, social security fraud and housing shortages. Commenting on this view, the Federal Government considered it could do nothing about the fact that this Minister held outrageous ideas about foreigners, and confirmed that the increase in violence was partly associated with the recent rioting by Kurdish extremists in Germany.

On the other hand, President Weizsäcker and other German politicians expressed their indignation and shame after the anti-foreigner riots provoked by young right-wing extremists in Magdeburg on 12 May 1994. The rioting began at about 3.30 pm, and was not brought under control by the police until around midnight. According to many witnesses, not only did the police fail to intervene in the attack but they seemed more interested in arresting the foreigners. This was the second time (Rostock) that the police force of an eastern city had been accused of not intervening to protect foreigners who were the victims of extremist attacks. Despite statements to the effect that most of the attackers were known to the police, some of them for acts of violence, all the right-wing extremist suspects arrested were released the same day, with one exception. Three days later, the examining magistrate finally decided to charge the young leader of the group responsible for provoking the riots.

Anti-racist legislation in need of improvement despite advances in case law

In the light of the renewal of racism and xenophobia in various forms, it is impossible not to be struck by the problems of the legal authorities, who sometimes give the impression of reluctance to prosecute, emphasizing how in some Member States the judicial system and the legislative apparatus are inadequate to combat racism, xenophobia and neo-nazism.

This is particularly so in Belgium, where the Centre for Equality of Opportunity has called on the Minister for Justice and the Public Prosecutors to treat such offences as nothing less than criminal.[148] It proposes that a specialist judge be appointed in each judicial district, and also suggests that the law be reformed to give the Criminal Court exclusive jurisdiction in dealing with offences comprising the publishing of racist tracts and posters. The Centre considers that only the criminalization of these offences can put an end to the

[148] The Centre cannot accept, for example, the fact that the complaint lodged, with intervention by a civil party, after the arson attack on a centre for asylum seekers at Haine-Saint-Pierre was marked "no further action".

impunity enjoyed by their perpetrators, who feel "*protected*" by current procedure which, according to the Centre, makes Belgium a revisionist's paradise.

One case - involving the New Strength Party in Tubize - illustrated the difficulties mentioned, while at the same time marking a turning point in the handling of this question.[149] This case, which concerned the distribution of racist tracts, was subsequently referred to the Appeal Court of Nivelles, the Brussels Court of Criminal Appeal, the Court of Cassation and then the Mons Court of Criminal Appeal. It finally finished up with the Criminal Court of Hainaut which - on the basis of the law against racism - sentenced the accused to six months' imprisonment for membership of an organization which repeatedly incited racial discrimination. However, the charge of violation of press laws was dismissed.

Despite the difficulties, this case was later hailed as "*a victory for democracy*", as a trial "*of democracy against those who dare to advance other ideas*". It reassured those who feared that racist offences would forever go unpunished, being reclassified as offences against the press laws[150] without ever falling foul of the criminal law. The judgment by the Criminal Court of Hainaut of 28 June 1994 seems to many "*notable* (others call it historic), *in that it is the first judgment given by a Criminal Court on an offence against the press laws for more than half a century*".

The European Court of Human Rights, in its judgment in Jersild vs. Denmark of 23 September 1994, also pronounced in favour of restrictions on freedom of expression when the objective is to combat racism and xenophobia. And, in another case, the European Commission on Human Rights also held that the principle of freedom of expression must be subject to exceptions when it is cited in support of the spreading of racist, xenophobic and antisemitic ideas.

Taking all the above points in account, together with the recommendations by various pressure groups, the Belgian government proposed to amend the antiracist law of 30 July 1981: all the penalties have been increased, the scope of application has been extended to include discrimination with regard to housing and employment[151] and the financing of political parties is now reserved "*for those which adhere to the fundamental*

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149 A study was published on this subject by the Centre for Equality of Opportunity and the Combating of Racism (1994 Report). It contains an analysis of case law involving the application of the Law of 30 July 1981 relating to the campaign against racism and xenophobia.

150 In most cases, the plaintiffs did indeed produce publications as evidence of racist offences: tracts, electoral manifestos, newspapers. Out of more than 3 000 complaints, only 20 or so judgements have so far resulted, the other cases being classified "no further action".

151 A new Article 2bis has been included which provides that: "*Any person who, with regard to placement, vocational training, job offer, recruitment, performance of a contract of employment or dismissal of workers, commits discrimination towards an individual by virtue of his race, colour, antecedents, origin or nationality shall be liable to one of the penalties laid down in Article 2. An employer shall be liable in civil law for the payment of fines imposed upon his employees or representatives.*" The right to appear in all legal proceedings to which this new Article 2bis gives rise is granted through organizations representing workers and employers and representing professional organizations, provided they can prove that they have the consent of the victims.

principles of human rights."[152] In view of the fact that the rights recognized by the Constitution and those recognized by the European Convention are the same, the Council of State held the new text to be constitutional, and it was adopted on 12 April 1994 by 130 votes against 50 (liberals and Vlaams Blok) and 5 abstentions. At the same time, the extremist or neo-Nazi groups liable to provoke or commit incidents or outrages of a racist type are the subject of closer attention. The Police Law, for example, provides for the possibility of collecting information, processing personal data and establishing a file on individuals or groups of interest to the administrative and judicial police.

In Luxembourg, the United Nations Committee for the elimination of Racial Discrimination has produced a mixed report on Luxembourg's policy of racial non-discrimination. It underlined the weakness of the legislation and called for amendment of the Criminal Code to allow not only racist propaganda activities but also the groups which organize them to be declared illegal. The Minister for Foreign Affairs believes that "*this requirement is not without constitutional problems, freedom of association and opinion being subject to no restrictions in Luxembourg other than the punishment of offences committed in the course of exercising such freedoms (Art. 24 of the Constitution*". In fact, the Luxembourg Constitution contains no provision condemning racial discrimination or xenophobia, and the Criminal Code in no way prohibits organizations which propagate or incite racial discrimination.[153]

The publication of this report thus rekindled the debate on the feeble commitment of the authorities to the campaign against xenophobia; the more so when, in an answer to a parliamentary question, the Prime Minister stated that during the years 1991 to 1993 only three guilty verdicts had been brought in for the public wearing of Nazi insignia, while there were none under Articles 454 and 455 of the Criminal Code relating to racial discrimination.[154] The ASTI, the LICRA, CLAE and SOS-Racisme made a joint representation to the Ministry of Justice with a view to obtaining stricter antiracist legislation which would include the prohibition of revisionism and discrimination in employment. The politicians seem convinced of the need for this reform. The government has committed itself (declaration of 22 July 1994) to review, and if appropriate supplement, existing legislation, and the Minister for Justice has instructed the Commission for the Reform of the Criminal Code to prepare new legislative texts. The Socialist Workers Party and the Greens are asking that the associations should be authorized to appear as civil parties on this occasion.

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[152] The idea being that "*the defence of human rights is inseparable from parliamentary democracy*". This support will take the form "*of including a commitment to this effect* [to respect human rights] *in its statutes*".

[153] cf. "Exigences et risques du principe de la liberté d'association" [Requirements and risks of the principle of freedom of association] in Luxemburger Wort, 20 October 1994.

[154] Article 454 imposes a prison sentence of from 8 days to 6 months for discrimination on grounds of race, colour, antecedence or ethnic or national origin, and on any person who publicizes his intent to discriminate. Article 455 imposes the same penalties on any form of incitement to the acts referred to in Article 454, and on any person belonging to an organization whose objectives or activities comprise committing one of the acts referred to in Article 454.

In Germany, one sector of opinion has continued to agitate, and petitions calling for stricter penalties on perpetrators of xenophobic violence and against revisionists have proliferated.[155] On the basis of the finding established in his report, mentioned earlier, the Federal Commissioner for Foreign Nationals has submitted to the Federal authorities a draft of more effective legislation against racist violence. The CDU/CSU and the FDP have done the same, their proposal calling for a week's preventive detention and an increase from three to five years of the maximum prison sentence for bodily harm, with a possible extension to ten years for particularly serious cases of arson. This proposal also envisaged expediting criminal proceedings and increasing powers to deport foreigners found guilty of crimes. The Bundesrat, which is controlled by the Social Democrat opposition, voted against it on the ground that the some of the measures threatened to restrict civil liberties. A motion by the PDS/Left Party relating to material compensation for damage suffered by victims of racist attacks was also rejected. The Federal government then decided to defer all measures and proposals to combat violence and xenophobia (Offensive gegen Gewalt und Fremdenfeindlichkeit).

Repositioning racist violence in its socio-economic and cultural context

Although there can be no doubt that more suitable legislation, with more severe penalties on crimes and offences with racist and xenophobic overtones, is essential, it cannot in itself be sufficient to eliminate such violence. Nor, incidently, would a policy of prevention confined to the moral aspect of the phenomenon, taking no account of the socio-economic context which allows it to flourish.

A report recently published in Germany offers a timely reminder of this, noting that violence against foreigners will not be eliminated merely by programmes to educate the young, unless those programmes are supported by efforts to improve their living conditions and offer them new hopes for the future. Gaining self-confidence and shaping an ambition for the future are essential elements in education. Only this global approach can offer any hope of improving relations with foreigners. Thus, the entire integration policy, as a whole, has to be regarded as an instrument for preventing violence. The key points here are: improving living conditions for foreign women, a successful transition from school to work, encouraging the teaching of two languages in vocational training courses, improving knowledge of the German language, encouraging contacts between Germans and foreigners, and social aid.

That said, it must also be borne in mind that in Germany the campaign against xenophobic attacks is a matter not for the Federal authorities but for the Land, which has specialized units for this purpose. However, the Federal government has tried to improve prevention and suppression by creating a new category of offence ("xenophobic attack"), allowing the scale of racist crimes to be more accurately assessed.

Other initiatives, calling for greater commitment by the general public and all the institutional partners, have been adopted in certain Member States. This occurred in Belgium, with the demonstration of 27 March 1994 in favour of equality and against exclusion and racism, on the theme "*From my town to Europe: democracy*"; nearly

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[155] The Federal Office for Internal Security has reinforced the units responsible for monitoring the far-right groups and terrorist movements.

100 000 people, mainly from Flanders, marched through Brussels on that occasion. In the same spirit, in Germany, the last week in September has been declared "foreign nationals week". More than 3 000 events were held throughout the country.

Schools, like other institutions, are not immune to the phenomenon. In Belgium, during the electoral campaign of 1987, messages had been addressed to pupils by the Vlaams Blok party, urging them to denounce progressive and antiracist teachers. Since then, young people have created the slogan "*Racism-free school*", designed to banish all discrimination and promote difference in schools. Today, there are 120 "*racism-free schools*" in Belgium. The fact remains that the unsuitability of the syllabus and teaching aids plays a real part here, as witness school text books which convey obviously undesirable prejudices regarding foreign cultures.

Several other initiatives provided support for the above. Mention may be made of the so-called "objective 479 917" campaign against racism, which gathered nearly a million signatures; the tolerance campaign on television, using antiracist footage; and the study by the Belgian Association of Professional Journalists on the theme of "media and migrants". This study presents a series of "recommendations" to the profession: it suggests, for example, that ethnic origins should be mentioned only if the information is "relevant", generalizations and unwarranted over-simplifications avoided, etc.

A special structure in Belgium: the Centre for Equality of Opportunity and for Combating Racism

The Centre was born in 1993 out of a Federal political initiative, in agreement with the Royal Commission for Immigrant Policy. As a reference body for all those (public authorities, associations and individuals) who contribute or would like to contribute actively to the campaign against racism and discrimination, it is entirely independent in the exercise of its functions. Social workers and legal specialists provide information, collect complaints from victims of racist acts (a special helpline has been set up for this purpose), analyse discriminatory situations, direct inquiries to existing services, provide a mediation service and consult with applicants on possible legal remedies.

The Centre can also intervene as a civil party in criminal proceedings, but does so only if the Board of Administration considers the facts exemplary and flagrant. So far as possible, preference is given to information and conciliation. A prevention committee has been organized to form "relay watch" groups in sensitive areas, involving all the local actors (municipal authority, associations, residents' committees, etc.). The Centre takes a particular interest in the underprivileged districts of the major cities, and in analysing situations of poverty and instability and the way they interact with the expression of racist and xenophobic sentiments.

A specific anti-racism campaign was included in the security contracts of the five major cities for 1994, and further recruitment has taken place with a view to developing activities in cooperation with the Centre. Apart from acting as advisors to local authorities, these new assistants are intended to arrange the organizing and monitoring of cooperation between police and immigrants, and briefings for those who have regular contact with immigrants.

In this context, there are many who are anxious about the trend of administrative practices and political comments on the subject of asylum. In the words of a European official, "*applicants for refugee status have become scapegoats par excellence*", too often being held responsible for social problems and the feeling of insecurity perceived by the public. This tendency, if it is established, is an argument in favour of a genuine political debate on the right of asylum, because if things are allowed to continue along these lines the very concept of asylum tends to lose its meaning.

First, by virtue of the distinction established between "*genuine*" (political) refugees and "*false*" (economic) refugees, which often does not conform to reality as experienced by those concerned. Secondly, by reason of the increasing restrictions which, de facto, are tending to reserve refugee status "*for an elite*", for those who have the means to enter the territory of host countries and persuade the authorities, "intellectually" and "culturally", of their urgent need of protection. From this standpoint, asylum would merely be a process of selection, which favours the more prosperous while tending to soothe the conscience of wealthy countries.

The clash between church and State on the asylum question in Germany

In the criticisms made of the new government legislation, the two main concerns relate firstly to the limits of the police handling of asylum and secondly to the detention of rejected asylum seekers. On the first point, the issue relates to the actual efficiency of the measures adopted, leading one to wonder whether the fall in applications really does reflect a fall in arrivals. Because there are many who fear that the measures adopted may persuade a significant number of potential applicants not to come forward. "*Today, people no longer dare to ask for asylum. They go straight into illegal immigration,*" comments a Belgian lawyer.

An additional factor is the disapproval directed, both in principle and in practice, at the procedures for detaining rejected asylum seekers and, in addition to them, foreigners in irregular situations. The German Federal Commissioner for Foreign Nationals, Mrs Jacobsen, has said that she regards the possible "illegality" of a rejected applicant as less serious than the long-term imprisonment of innocent people. She has given personal attention to the matter and given instructions that detention should be decided on the merits and not raised to the status of a general principle.

In Belgium, the media have several times denounced shortcomings in terms of essential humanitarian rules in the special holding centres for foreign nationals. This negative assessment reappears in an internal report from the Ministry of Public Health, which confirms that rejected applicants are accommodated in poor conditions and ill treated. Mention is made in the report of serious defects in terms of safety and hygiene and the existence of solitary confinement cells for "*problem*" refugees. For their part, the NGOs are calling for a minimum of transparency in the administration of these centres. Some believe that they are almost indistinguishable from prisons surrounded by barbed wire, while others go so far as to talk about "*concentration camps*"! The Minister for the Interior retorts that "*anyone who wants to leave can, but not for Belgian territory. The gate is open ... to Zaventem airport*".

These matters of asylum, detention and deportation have given rise to a surge of activity by religious institutions in Germany. An informal network of two hundred catholic and protestant churches was set up last year to take in unsuccessful asylum seekers threatened with deportation. At the end of June 1994 Magdeburg Cathedral (Saxony-Anhalt) community publicly announced that it would grant sanctuary to war refugees, draft dodgers and deserters from the former Yugoslavia at risk of deportation. Its leaders considered it "inhuman" to send home those concerned before being sure that peace had returned to their homeland. The community thus decided to accept, without distinction as to origin, all asylum seekers who were threatened with deportation.

The German Minister for the Interior, Kanther (CDU), has been highly critical of the President of the German Roman Catholic Episcopate Conference, Monsignor Lehmann. Mr. Kanther refuses to recognize the right of churches to conceal asylum seekers if the legal authorities have decided that they should leave the country; so far, the police have proved reluctant to effect forcible entry into a church in order to enforce deportations.

It should be noted that, in Germany, neither secular nor canon law accepts the concept of sanctuary. The Council of the German Protestant Church (EKD) agrees that there is no reason to institutionalize the concept of sanctuaries; only the State can grant asylum and, consequently, this question should not give rise to any dispute on principle between the two institutions. On the other hand, assisting asylum seekers can be justified by reference to the Bible and must be regarded as a Christian duty. When Christians break the law by assisting asylum seekers they are responsible for their acts, and they can ask the help of the church. Bishop Engelhardt, President of the Council of Protestant Churches, considers that it is therefore the duty of the churches to point out to the authorities the errors they may be making; the decision to deport an asylum seeker should thus be reviewed when his life is at risk.

This position is little different from that adopted by Pro-Asyl. This organization, which denounces the entire procedure deriving from Germany's new Law on Asylum, considers that an asylum seeker must not be treated as a criminal. The law should guarantee him access to legal aid, provided by an independent expert and financed by the State, and he should be able to obtain a hearing not more than seven days after filing his application. The organization believes that these guarantees are all the more necessary given the many procedural errors committed by the authorities, and given that the time for obtaining legal remedy against the adverse decisions resulting from these errors has been reduced to the minimum.[156]

Pro-Asyl has therefore put forward a number of proposals aimed at amending, or even deleting, various articles of the Law on Foreign Nationals. For example, it calls for the revocation of Articles 53-6 and 55-4, which allow for the possibility of deportation even in the event of clear danger and even if that danger is a threat to the entire population. It is also calling for the amendment of Article 54 to enable the Länder to interrupt deportation proceedings without the need of confirmation by the Federal Ministry of the

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[156] Decisions served at a former address are regarded as effective, even if the envelope is returned to sender. Thus, asylum seekers are sometimes in a situation where the statutory period for appealing against deportation has expired although they are unaware that their case has been rejected. Furthermore, personal identities and reference dates are often wrong.

Interior. Finally, it supports the idea that refugees from civil war should be granted special status as legal residents, and the right to family unification.

Condemnation of the return to the "tolerance thresholds"

Equally sharp criticism has been directed at the Belgian arrangement combining the *distribution plan* and the *waiting list* which, as has been said, is intended to be extended to other categories of foreigners in unstable situations. Those responsible make no secret of their aim: "*proper control of immigration is possible only in so far as the authorities concerned have the use of an effective information system enabling them, wherever an individual case is submitted to them, to take the appropriate steps*". The real objective then is to improve administrative control so as to facilitate deportation procedures, this in itself being a way of preventing new foreign arrivals from joining the illegals.

The associations for the defence of asylum seekers could hardly fail to oppose this project, which, in their view, "*forms part of an abberation designed to strengthen the armoury of repression rather than to lay down positive measures for accommodating asylum seekers*". They particularly stress the challenge to the principles of freedom of movement and free choice of place of residence.

However, what seems most dubious to them is the actual philosophy behind the project and the part played by the concept of a "*tolerance threshold*" as the only indicator enabling "*saturated*" areas to be distinguished from others. This system does indeed have every prospect of increasing hostility among residents of local authority areas officially designated to accommodate new foreign arrivals. Adopting this logic, how can anyone believe that these population groups will delay their protests until they have reached a "saturation" threshold fixed by "outsiders"? They will act quickly to adopt the intrinsic logic of the system by refusing access to "their territory" for any foreigner from the outset, even before they have reached their "*quotas*", in other words their "*presumed*" tolerance threshold. The reactions provoked by the establishment of the new reception centres for asylum seekers, or by the plan to distribute non-native children within the Flemish education system bear witness to this.

Following the same logic of stricter control of population groups, the other cause for concern has been the ever-increasing sophistication of the available resources, with the computerization of personal information, the establishment of data bases and the networking of the information held by various public services. Many see this trend as a threat to individual liberties and, consequently to the rule of law.

This is particularly true of the German Commissioners responsible for data protection, who have sharply criticized the AFIS (automatic fingerprint recording system) intended to thwart dual asylum applications under different names. According to them, this indiscriminate recording of both honest and less honest applicants violates the asylum seeker's right to personal protection, the more so since the computerization of fingerprints is being used not only by the foreign nationals departments but also by the police[157]. These same Commissioners take a very dubious view of the extension of the field of action of the

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[157] A conference on the protection of data for foreigners was organized in June by the Commissioner responsible for this sector in the Land of Hesse.

AZR, which in their eyes represents a violation of the Constitution. According to the Commissioner for the Land of Saxony, this means that foreigners will be treated differently from Germans "*solely because they are foreigners. The constitutional requirement of separateness between the police and the government authorities responsible for ensuring compliance with the Constitution has, in fact, been done away with*".

Not so "safe" countries!

Another subject of controversy is the recent introduction into asylum legislation of two new selection criteria, with the concepts of "safe third countries" and "safe countries of origin". The Dutch refugee organization "Vluchtelingenwerk Nederland" considers that 40% of new applicants in the Netherlands would be turned back if the text on "zero-risk third countries" were to be applied. The HRC lodged a protest with Dutch Minister for Justice because it considers - on the basis of Article 13 of the Convention on Human Rights - that applicants rejected on this ground should retain their right of appeal in its entirety and not be sent back pending a decision. The sharpness of these criticisms has forced the government to defer applying the legislation, the more so because the Senate decided to postpone debate on this amendment until early 1995.

A comparable criticism has been advanced in Germany by Pro-Asyl, which believes that the countries so defined are not as "safe" as some might like to think, and that consequently the application of this concept distorts the equity of the procedure. It asks that the applicants in question should be authorized to enter Germany in the event of any serious doubts as to compliance by one of these countries with the minimum guarantees of the Geneva Convention. It also calls for authorization to remain in the country to be given in cases where a member of the applicant's family already holds a residence permit or temporary authorization of residence, even if he is entering via a "safe third country".

In Luxembourg the Council of State, asked to comment on the concept of "host third countries", laid down that countries could only be considered as such if applicants had a *genuine* possibility of applying for protection there. The word "**genuine**" has thus been added to the original text. The Council also opposed extending this definition by legislation[158] and has tried to clarify the vague situation surrounding decisions on the inadmissibility of applications when a "host third country" exists. In this case, it says, the application "*may*" be declared inadmissible but this is not an obligation.[159] It emphasizes, finally, that any applicant is entitled to the services of counsel and to be issued with a document certifying that his application has been recorded. The original text provided for this document to be issued only to those whose applications had been declared admissible.

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[158] It specifies that an asylum request may not, for example, be declared *inadmissible* on the sole ground that it is "*obvious* [that the applicant] *can be admitted by a third country*".

[159] The current practice of the Ministry of Foreign Affairs is to declare an application inadmissible solely on the ground that the applicant did not arrive in Luxembourg directly.

Administrative courts' jurisdiction over the asylum process

Apart from the criticisms mentioned above, the new legislation is also giving rise to a major administrative debate. This is the case in Belgium, Germany, France, Portugal, Luxembourg and the Netherlands.[160] In this connection, it is notable that more frequent reference is being made to Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms in order to challenge decisions concerning foreigners' right of residence and, even more so, their deportation. This is the case in France, where several rulings by the Council of State have contributed to a valuable body of case law on the merits of citing this article.

Still in France, substantial case law is developing regarding the wording of the decision to escort foreign nationals to the frontier, on the basis partly of a judgement of 6 November 1987 (the Buayi judgement) and partly of Articles 27(2) and 27(3) of the Law of 24 August 1993 amending the order of 2 November 1945, which require a clear distinction to be made between the decision to escort a foreigner to the border and the determination of the country of deportation. In recent cases, the court has specified that these are indeed two separate decisions, each of which may be the subject of an appeal. The administrative authority, therefore, is required to notify both decisions simultaneously to the party concerned in order to enable the judge to verify whether the provisions of Article 3 of the European Convention on the Protection of Human Rights have been violated. Two recent judgements have, on this basis, set aside deportation orders because of the absence of clarification as to the country of destination.

In Belgium, the Court of Arbitration has handed down an important judgement which, again, opens the way to a dual option of appeal - for cancellation and for suspension - to the Council of State from the decisions of the C.G.R.A. In this case, however, the Court's judgement (14 July 1994) resulted, more broadly, in partial revocation of the new Law on Asylum, on the ground of the discriminatory character of several of its provisions.[161]

The paradox is that this judgement has made the situation of unsuccessful applicants more difficult and favoured the enforcement of deportation orders. The Bar and the Council of State had agreed in finding the lodging of an appeal to be suspensory in itself, by virtue of the backlog created in procedures in chambers. The judgement of the Court of Arbitration resulted in the revocation of this agreement. Since a deportation order can be suspended only by an order of the Council of State, procedures in chambers therefore have to be brought as a matter of extreme urgency and before the end of the period allowed for departure. Consequently, the Council of State is once again overwhelmed by the proliferation of extremely urgent appeals and the backlog of cases is growing; lawyers are having to organize a veritable shift system in order to lodge appeals within the time

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[160] In Portugal, the Constitutional Court has ruled that the automatic expulsion of foreigners who are lawfully resident but have been found guilty of drug trafficking is unconstitutional. The argument is that the Constitution prohibits the automatic application of accessory sanction, which can only be imposed on condition that necessity and proportionality justify it.

[161] The provisions referred to are, inter alia, Article 69(2), paragraph 2, and 70, paragraph 2, which abolished the suspensory appeal to the Council of State for candidates whose applications had been deemed inadmissible by the Commissioner General for Refugees, who himself declared his own decision to be enforceable notwithstanding any appeal.

allowed, and the number of deportation orders actually enforced is continuing to increase. These problems account for the reconsideration of the Law of December 1980 as a whole; this is likely to result in a third legislative amendment in 1995, following those of 1991 and 1993.

At the same time, the Office of the United Nations High Commissioner for Refugees has given notice of its extreme reservations regarding the law on carriers. It considers this text to be contrary to the principle of non-return enshrined in the Geneva Convention, partly because responsibility for controls is transferred to the countries of departure, and partly because it is undertaken by a private enterprise (the carrying company), which is thus being given the powers of a government authority. As a result, access to the territory is no longer guaranteed to a refugee who lacks the requisite documents. For their part, the transport companies note that their task is to carry passengers, not to verify their administrative status.

In Luxembourg, in an opinion on a draft law relating to asylum seekers (22 November 1994), the Council of State has endeavoured to reconcile what are often seen as two contradictory requirements: the rights of individuals and the imperative of state control. Its objective was to uphold the rule of law, offering a minimum guarantee to any applicant, and at the same time to provide for different treatments depending on categories in order to prevent the influx of candidates who fail to comply with the criteria of the Geneva Convention. It has thus been suggested that the powers of the Ministry of Justice should be extended, enabling it both to examine and to rule upon applications for asylum.[162] It has also been proposed that the opinion of the Local Authorities Advisory Committee on Refugees should be sought on all applications for asylum, in order to ensure *"equal treatment of individuals who, a priori, are in comparable situations"*, including those whose applications are regarded as clearly unfounded. The initial draft law confined this power to applications examined on the merits.[163]

The Council also rejected the draft regulation which made it incumbent upon the applicant to prove that he was being persecuted.[164] It observes: *"that the burden of proof is*

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[162] On the same principle as the government declaration of 22 July 1994. In order to rationalize the asylum procedure, the government has laid down that it would *"in future be a matter for the Department of Justice"*. Previously, the Ministry of Foreign Affairs gave a ruling on the basis of an enquiry by the Ministry of Justice.

[163] This proposal is very important for those whose applications are "clearly unfounded" and whose rights are therefore restricted. Since the ministerial decision is immediately enforceable, the right of appeal to the Legal Affairs Committee of the Council of State was more theoretical than actual.

[164] The tabling of this Grand-Ducal draft regulation led the Council to fear that the government might take advantage of it to widen the interpretation of the term "clearly unfounded application". Their reason was that it states that *"when the applicant cites a fear of being persecuted in his own country but fails to produce any proof establishing that he might have reason to fear persecution or any other circumstantial or personal information, his fear is unfounded"*. The Council believes that it is not a matter either for the advisory committee or for the Minister for Justice to say that the applicant's fear of persecution is lacking in foundation. This is a subjective impression, incapable of being assessed by a third party. It may simply be admitted that, in the absence of sufficient proof, the application may be regarded as clearly unfounded. But the fact of persecution is the product of all the facts and information collected. There is no need, therefore, to specify that it is a matter for

extremely difficult in this matter [...] and it may happen that a person who is persecuted in his own country has been able to flee without equipping himself with valuable substantial evidence proving that he has been the subject of persecution".

The concept of "political persecution" clarified in Germany

In Germany, interest was aroused by a judgement of more general scope by the Federal Constitutional Court, which has endeavoured to form a more accurate assessment of the status of a refugee, specifying how the concept of *"political persecution"* was to be understood and to what it could be related. The Court thus held that the persecution of separatist activities - a form of political belief - may be regarded as political persecution. In this context, it finds that the actions by the Turkish government against the Kurds fall within the scope of asylum law (Article 16, paragraph 1).[165]

The Federal Administrative Court has reached the same finding, holding that persecution based on religion may be deemed to exist if the criminal law penalties imposed also result in religious sacrifices affecting private or community life. It is specified that, contrary to Article 16a (I) of the Basic Law, the term *"refugee"* in Article 1 A (2) of the Geneva Convention does not require political persecution in the sense adopted for asylum. A fear based on "sound reasons" of persecution in the country of origin is sufficient, having regard to the specific terms of the Geneva Convention. The rules of that Convention may be applied for each individual in Germany.

On the other hand, the same court held that the Turkish Kurds are entitled to asylum in Germany only if they cannot find a refuge in their own country. This decision contradicts that by the Administrative Court of Bavaria, which had previously granted asylum to six members of a Kurdish family. According to the Federal Administrative Court, the Bavarian court failed to conduct sufficient enquiries to determine whether the Kurdish family could or could not find a refuge on Turkish soil. The Federal Administrative Court also held that unsuccessful asylum seekers are not protected from deportation solely on the ground of civil war in their country of origin.

This point can be related to another controversial subject, this time involving a dispute between the German Federal Government and the Länder under socialist control, regarding the policy to be adopted towards the Kurds. Reacting to a motion by the PDS/Left List on the subject of human rights violations in Turkey and the connection between the Kurdish question in Turkey and the Kurdish question in Germany, the Federal Government confirmed that it supported the claim by the Kurds living in Turkey to establish an ethnic identity. It again expressed the desire for a democratic solution to the problem, though without deciding that it had any right to interfere in the matter.

It also confirmed that no discrimination existed against the Kurds in Germany, who have

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the applicant to furnish proof.

[165] The Administrative Court of Mannheim allowed the application for asylum by an Albanian family from Kosovo, although finding that there was no systematic political persecution by the Serb state against this population on the grounds of its ethnic origin. It nevertheless concedes that those who call for the creation of an independent republic and are at risk of being persecuted and accused by the Serbs of separatism have the right to asylum if they can furnish individual proof of persecution.

the same rights as other foreigners. However, it immediately indicated that it would not accept any breach of the law; no matter what the faction or what the reason, acts of violence cannot be justified by events in other countries. The parliamentary majority supports this position and calls for the expulsion of those members of the PKK which are guilty of such acts.

The Federal Minister for the Interior, Mr Kanther, therefore called for the Kurds to be more severely punished, and deported, in the event of a proven criminal offence. The Minister stressed that they had "safe" havens in Turkey (10 provinces in the south and south east of the country) where they could live without fear, and to which they could in that case be deported. During recent months, several Kurdish demonstrations have taken place in Germany, some of them ending with militants being imprisoned. In the same period, the Federal Government has decided to close the Kurdish cultural centres and various sources of aid to the PKK.

According to the PDS, the Federal Government, by deporting the Kurds from Germany, has acted as an accessory to the human rights violations against them in Turkey. The idea upheld by the opposition is that Kurds guilty of crimes in Germany should be punished but not expelled. The opposition, then, wishes to put a stop to this practice, emphasizing the risks of persecution the deportees run on their return to Turkey.

Consequently, with the exception of Bremen and Hamburg, the Länder controlled by the SPD have decided to stop deportations for at least six months. This decision has been approved both by the internal affairs spokesman for the liberal group (FDP) in the Bundestag and by the Deputy Chairman of the CDU/CSU in the Bundestag. The latter considers that, since Turkey respects neither human rights nor the law, it is *"absurd"* to make any distinction between safe and dangerous regions for the Kurds in Turkey.

Restrictions on the principle of entitlement to social benefits

In France, three new decrees have been published which make the entitlement to social aid more strictly dependent on lawful residence. The first, dated 15 April 1994, lays down the list of the credentials that will now be required from foreigners wishing to establish their entitlement (Article 186 of the Code on Family Affairs and Social Aid), subject to public health requirements and humanitarian considerations. The other two,[166] which appeared on 21 September 1994, amend the Social Security Code and specify the documents required for membership of an obligatory social security system and in order to qualify for benefits. The general rule is that the member and his dependants of legal age must be legally resident.

In Germany, the law on family allowances has been amended for the same reasons.[167] Only foreigners who hold a resident permit (Aufenthaltserlaubnis) or a right of residence (Aufenthaltsberechtigung) are entitled to it; on the other hand, employees temporarily working for an employer based abroad cannot claim it.[168] The Commissioner for Foreign Nationals in Hamburg has criticized this legislation which, in his view, introduces de facto discrimination in the matter of allowances by excluding foreigners who have a provisional residence authorization (Aufenthaltsbefugnis); there are apparently 110,000 people in this situation in Hamburg.

In Belgium, the rules that have been adopted relate to the granting of social aid to applicants for refugee status and illegal residents. The ground cited is the need to combat abuses and eliminate differences in social aid legislation as compared with neighbouring countries, in the context of the opening of borders.[169] A comparative study by the Office of the United Nations High Commissioner for Refugees emphasized the attraction which the aid system could have for candidates for refugee status.

The new legislation introduces, for the first time, an exception to what had previously

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166 One relates to foreigners from third countries (94-820) and the other is specific to Community nationals (94-821).

167 The Federal Office of Statistics found that, at the end of 1992, more than 2.3 million people were receiving aid from the social services, of whom 15.5 % were foreigners in the new Länder and more than one-third in the former West Germany. At the same time, 439,275 households with a total of 792,596 children were receiving social aid. In about one-third of these cases, the head of the household was a foreigner. Unemployment is the main cause of social aid for Germans, while "other reasons" (asylum applications, for example) predominate in the case of foreigners.

168 In the past, foreigners with no right of residence but not eligible for deportation (pursuant to Articles 51, 53 or 54 of the Law on Foreign Nationals) had the right to claim payment of family allowances.

169 The Law of 30 December 1992 on social and other provisions: restriction to the principle of entitlement to social aid (cf. Rimet report, 1993). This amendment to the law which organizes the public social aid centres was also intended to provide better monitoring of candidates for refugee status and avoid simultaneous payment of social aid by more than one of these centres.

been the unconditional principle *"of entitlement to social aid to allow living standards compatible with human dignity"*.[170] The Court of Arbitration denied the appeal for revocation lodged against this exception and upheld it in principle.[171] It holds that the right to social aid will no longer be enjoyed by refugee candidates rejected by the asylum procedure (or by other foreigners in irregular situations) once they have received a final order to leave the territory (Judgement No. 51/94 of 29 June 1994).[172] In the past, the only criterion for granting social aid was necessity, irrespective of the legal status of the person concerned. This approach is causing concern to some legal theorists.[173]

Family allowances for immigrants

A *"confidential"* report by the Belgian National Office for Family Allowances for Employed Workers has confirmed that foreigners are far from deriving as much improper profit from the social benefit system as they are accused of doing. Fewer than half of non-European recipients are being paid work-related allowances, as compared with the national average of three out of four. On the other hand, there are many of them among those drawing invalidity pensions, because of their large-scale involvement in the highest-risk jobs. In 1993, F 17,500 million in family allowances was paid to 94,441 foreigners, for 213,892 children (2.26 per applicant). The foreign beneficiaries accounted for 11.8 % of the total number of employees, and their entitled children (some of whom are Belgians) for 14.6 % of the corresponding total. Eight out of ten of these children originate from just five countries: Morocco (76,626), Italy (66,791), Turkey (40,890), France (17,475) and Spain (12,110).

When the family allowances are paid abroad for children brought up outside the country,

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170 Referring to the new Article 24(2) of the Constitution which establishes the right to a standard of living compatible with human dignity, and which includes in its second paragraph *"the entitlement to social security, health care and social, medical and legal aid [...]"*.

171 The Court's finding being that: *the article which is the subject of the appeals, by reducing social aid for two categories of foreigners upon whom deportation orders have been served, thus establishes a distinction between foreigners on the one hand, and between foreigners and Belgians on the other, but does not imply the existence of unconstitutional discrimination. The constitutional rules of equality and non-discrimination do not rule out the possibility of establishing different treatments for different categories of individuals, provided that the differentiation is based on an objective criterion and that it is reasonably justified. Now, when a State which intends to restrict immigration finds that the means which it is using for that purpose are not effective, it is not unreasonable for it to find that there is a difference in the duty it owes to meet the needs, firstly, of those who are lawfully resident on its territory (its own nationals and certain categories of foreigners) and, on the other hand, foreigners who are there after having been served with deportation orders. By arranging matters so that a person upon whom a definitive order to leave the territory before a particular date has been served knows that, if he has failed to comply, he will cease to receive any further aid from the public social aid centres one month after that date, with the exception of urgent medical aid, the legislator has adopted, in order to persuade the person concerned to comply with the order served upon him, a means whose effects will make it possible to achieve the desired objective"*, in other words restricting immigration.

172 Except for urgent medical aid and such aid provided within the time strictly necessary for the person concerned to leave the territory; this period may not in any circumstance exceed one month.

173 See article entitled: *"The entitlement to social aid and the definitive deportation order"*.

the largest proportion goes to France (F 403 million), followed by the Netherlands (163 million) and Italy (109 million). Only 56.7 million leaves Western Europe, most of it for Morocco (53 million), and the sum paid in Turkey is trivial (3.6 million). The average per child brought up in Morocco is 804 Belgian francs, as compared with 7,469 Belgian francs per child in Italy and 4,639 Belgian francs in France. So Belgium is not depleting its social budget by paying benefits outside Europe. *"When these statistics are seen in their context, this report does not reveal a single 'shameful truth'. It is the numerical confirmation of inequality of opportunity."*

The German Retired People's Union[174] reaches a similar conclusion regarding foreigners' pensions. It was calculated for 1989 (the most recent data) that they had paid a total of DM 12,800 million in contributions but had received only DM 3,700 million in pensions, the average sum being DM 960. In the same context of entitlements to social benefits, we should note an interesting judgement by the German Federal Court of Social Affairs (dated 7 June 1994). This related to a Jordanian woman living with her husband in Germany, where she has given birth to nine children (between 1972 and 1984). As her husband did not obtain his unrestricted right of residence until 1980, on the birth of the seventh child, the regional social security office[175] was willing to pay the allowances only for the last two. The court found that foreign women bringing up their children in Germany were entitled to a parental allowance (Erziehungszeiten or child-raising period), even if they only held temporary residence permits. The same court, on the other hand, opposed making family allowances retroactive in the event of the granting of a new status (asylum in this case), which creates an entitlement to allowances only for the period after it was granted.

Non-discrimination against third-country workers in social security matters

The European Court of Justice has been asked to give a ruling on a refusal to grant benefits to a Moroccan national, born in Belgium and the victim of an industrial accident in that country, on the ground that he was of Moroccan nationality, although he satisfied all the other conditions imposed on nationals. Belgium claimed that no reciprocity agreement on this subject existed between Belgium and Morocco. It added that, in contrast to the contributory social security system, e.g. for unemployment, allowances for the handicapped were financed by the public treasury for the purposes of assistance, irrespective of the existence of a contract of employment; they are thus not part of social security and are not covered by the substantive scope of application of Article 41 of the Cooperation Agreement between the EC and Morocco. The Court decided on 20 April (C-58/93 Yousfi vs Belgium) that, pursuant to the said Article 41, a Moroccan national is entitled to a handicapped allowance.[176] The European Court also confirmed that allowances paid to the handicapped are, in this case, part of social security. It specified that the

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174 Verband Deutscher Rentenversicherungsträger.

175 Landesversicherungsanstalt.

176 By the terms of Article 41, *"workers of Moroccan nationality and members of their families residing with them shall, in the field of social security, benefit from a system devoid of any discrimination based on nationality as compared with the nationals of the Member States in which they are employed"*. The same provision is to be found in the Cooperation Agreements which the EC has signed with Algeria, Tunisia and Turkey.

concept of social security referred to in Article 41 of the Cooperation Agreement cannot be different in content from that recognized by EC Regulation No. 1408/71 which expressly refers to invalidity benefits as one of the branches of social security; so that a Moroccan national who becomes unable to work following an industrial accident must be able to receive the allowance. This provision can be directly applied in all the Member States. It may be remembered that Belgium had already been found guilty of discrimination against a Moroccan national (the Kziber judgement) who, unlike Belgians and the nationals of a number of other countries, had no right to the unemployment allowances paid to young job-seekers ("waiting" allowances) on the ground of his nationality.

Unemployment benefits for third-country nationals working in border areas

The difficult economic situation in the labour market, which is inducing a growing number of third-country nationals residing in one Member State to become cross-border commuters working in another State, is more and more frequently raising the problem of entitlement to unemployment benefits. An example can be seen in Belgium, where legally established Moroccan workers commuting to the Netherlands consider themselves entitled to receive the same social benefits as nationals. As things stand, they seem to be very much disadvantaged by this situation. They cannot receive any unemployment allowance, lose all entitlement to family allowances, and, not being accepted by the insurance company, are not building up any pension.

The agreement concluded with Morocco (from 17 February 1964) regarding the employment of Moroccan workers in Belgium fails to cover this type of situation. It does not regulate or contemplate a situation where payments for work done in a foreign country, even a neighbouring country, are taken into account for the purposes of granting allowances in Belgium.[177] It should be pointed out that, conversely, Germany has agreed to include an amendment in the agreement concluded on 20 October 1992 with Switzerland on unemployment benefit. Cross-border commuters in the two countries who are nationals of third countries will in future be treated as citizens of states which have signed the Convention. They will thus be able to claim unemployment benefit in their country of residence if they have worked in another country and become unemployed again.

Another situation not covered by the regulations is that of candidates for refugee status applying for unemployment benefit on the basis of previous employment under a provisional work permit in Belgium. The official position (judgement of the Labour Court of Liège of 8 June 1994) is to refuse them such compensation, since the legislation lays down that unemployment benefit is payable only to those foreign workers whose situation conforms with the general regulations (Royal Decree No. 34 of 20 July 1967). Conversely, no provision is made for would-be refugees (a forthcoming regulatory amendment in 1995 should remedy this); however, if the applicant is granted refugee status, then his previous employment will be taken into account. This situation is all the more absurd in that the would-be refugee who is refused unemployment benefit is entitled to social aid.

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[177] Agreements of this type are based on cumulative periods of insurance or employment within the contracting states. This agreement provides that *"Moroccan workers permanently or temporarily established in Belgium shall enjoy equality of treatment with Belgian workers as regards social benefits and working conditions"*. But, according to its title, it relates to *"the employment of Moroccan workers in Belgium"*. The Benelux Union is dealing with this problem.

New urban policy requirements in the Netherlands

In a memorandum of April 1994, the Dutch government summarized its policy in favour of minorities. The general line adopted during the past year was confirmed, apart from a few adjustments reflecting current changes in the actual perception of minority status. Three clarifications were made, relating to the concept of minorities, the objective of government policy and the field of social policy.

Firstly, the government memorandum endeavoured to achieve a better definition of the actual concept of minority which, in future, will designate both ethnic groups from immigrant backgrounds and certain social categories, and then to clarify "the object" of the government approach, which is no longer defined as a policy *in favour* of minorities but as a policy for the *integration* of minorities.[178] The third aim was, at the same time, to redefine the policy of social renewal, to clarify the position in it of integration policy, and to achieve a better distribution of tasks between the state and the local authorities. To summarize, while it is a matter for government to define the broad lines of integration policy, it is the local authorities who are responsible for shaping it and ensuring that it is implemented. The policy of social renewal, whose first results have been relatively encouraging, was therefore relaunched under the title "*major cities policy*", the available appropriations being concentrated on a limited number of municipalities selected because their population included high proportions of ethnic minorities and low-income groups. Within this framework, priority is given to the traditional problems of the major conurbations: unemployment, housing, poor school performance and crime. While the schemes initiated by the authorities are required, more so than in the past, to be general in character, care is also taken not to compromise specific policies when the common law is inadequate to meet the needs of minorities[179]. And the ambition to achieve more active involvement by the minorities themselves is as strong as ever.

A specific aspect of integration policy concerns recently arrived foreigners. In some local authority areas, the so-called "*newcomer reception offices*" have for some years been responsible for registering them, steering them towards Dutch language courses and helping them find initial employment. The objective is to make them self-sufficient as soon as possible. In 1994, 32 million guilders were devoted to this programme, and the 1995 budget was to be 36 million. On this basis, the intention was that these "newcomers" would be required to sign an "integration contract" ("inburgerings-contract"), imposing upon them certain obligations designed as staging-posts along a three-year path of integration. Details of this programme are unknown as yet, nor is anything known about what sanctions, if any, might be imposed on those who fail to meet their obligations.

The need for a proactive policy of integration is amply justified in the results of a recent study on the financial situation of the poorest households. This indicates that from 10 to 15% of the population of the Netherlands - and more specifically elderly single women,

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178 The minorities primarily referred to are the Surinamese, West Indians, Arubans, Moroccans, Turks and recognized refugees. The populations of Southern Europe (Spaniards, Portuguese, Greeks, Italians and Yugoslavs) are no longer regarded as target groups.

179 This approach is close to that upheld by some sources in France. With regard to exclusion, they maintain that its handling requires a general approach (under the auspices of the Interministerial Committee on Cities) as much as specific measures directed at groups from immigrant backgrounds.

single parent families and young unemployed people from ethnic minority backgrounds - are in danger of finding themselves in a condition of permanent poverty. Another study by the Ministry of the Interior confirms that, despite substantial social advances by minorities in the last ten years, the gap separating them from native Dutchmen has in most cases widened. Between those most at risk, who have lost all hope for the future, and the better integrated, who fear for the loss of what they have gained, there is an increasing risk that new tensions, or even new conflicts, may jeopardize public order and social cohesion.

From this standpoint, young people from the minorities are the most at risk, and they are aware of the fact. An important study by the Office of Social and Cultural Planning shows them to be very pessimistic about their future. Indeed, they have the highest attempted suicide rate and the highest risk of turning to crime. This is particularly true of the young Surinamese and Moroccans, although preventive projects developed specifically for the latter are beginning to bear fruit.[180]

The security and prevention contracts in Belgium

In Belgium, the integration and urban action policies are largely based on the Fund for the Promotion of Immigration Policy (FIPI), set up in 1991 at the initiative of the Federal government to finance projects associated with immigration policy. Bodies empowered to submit such projects are: the Federal government, the communities, the regions and local authority areas and other public and private sponsors.

The sums allocated amounted to 320 million Belgian francs for 1995. As in previous years, three-quarters of this sum was reserved, for a limited period, for clearly defined projects originating from the five major Belgian cities (Brussels, Antwerp, Ghent, Liège and Charleroi). The fund provides no assistance with structural or recurrent financing. The schemes proposed must, as a matter of priority, fit into the framework of the objectives laid down by the Interministerial Conference on Immigration Policy (sports infrastructure for the young, campaign against absenteeism in schools, employment for young immigrants in difficulties, prevention of delinquency) and relate to priority areas defined by the Management Committee.

This apparatus is supplemented by the *Security Contracts* linking the State to certain local authority areas. These contracts were introduced in 1992 as part of an emergency government programme to deal with the increase in urban delinquency and the widespread sense of insecurity among the population.[181] The first contracts were concluded with five major cities (Antwerp, Brussels, Charleroi, Ghent and Liège) and seven municipalities in

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180 According to a report by the Ministry of the Interior ("Integrale Veiligheidsrapportage [Comprehensive Security Report] 1994"), the number of first offenders among the Moroccans has fallen by 20%, although it was continuing to increase in the other communities. The report thus emphasizes the value of developing similar projects for other groups.

181 In principle, these contracts are concluded for 5 years, but their content is reviewed annually. The contracting authorities undertake to implement, with the financial assistance of the State, measures to make a specific contribution to public security. There are three broad lines of action: closer relations between the police and the public, increased presence of better equipped police in the field, and better integration of at-risk groups through the organization of preventive activities.

the Brussels region (Anderlecht, Ixelles, Molenbeek, Schaerbeek, Saint-Josse, Saint-Gilles and Forest). In 1994 these contracts were renewed and additional ones were concluded with two more Brussels municipalities (Etterbeek and Koekelberg) and 15 more cities.[182] The total sum allocated for 1994 amounted to 1 410 000 000 Belgian francs, plus the sums made available by the regional authorities. An identical budget is planned for future years. However, although the projects subsidized have been very varied (recruitment of police auxiliaries and neighbourhood educators, installation of security cameras, opening of youth clubs, etc.), many observers complain of a progressive slide from social prevention into law enforcement. In the absence of a clear distinction between the two, the social workers, finding themselves acting as intermediaries for the police, feel as ill at ease as the police officers themselves. Many regret the fact that this question was not dealt with at the time the new contracts were drawn up.

In the spring of 1994, professionals in the psychomedico-social sector publicly questioned (debate, press conference) the impact, utility and purpose of the security contracts. Their initiative resulted in a "*joint declaration on the security contracts*". The Community bodies, who from the outset had objected to a security apparatus designed primarily to increase police manpower, argue in favour of a clear distinction of tasks, and a strict demarcation between social and legal matters, between community and clean-up operations. The main criticism relates not to the existence of these contracts but to the absence of prior consultation with Community bodies, whose long experience in prevention has been overlooked. The apparatus is too exclusively geared to the "feeling of insecurity", which sometimes results in organized informing.

Progress by the Länder in Germany

In Germany, the lack of progress at Federal level on certain key subjects in integration policy has been partly offset by a number of encouraging advances by the Länder, especially the establishment of structures to represent immigrants. The governing coalition in the Land of Bremen adopted the idea of an advisory body made up of elected members, while others developed different models such as specific advice to each community as favoured by the Land of Hesse. Other initiatives again supplement the legal apparatus for the integration of foreigners. A number of new items of legislation have been adopted: the appointment of a Commissioner for Foreign Nationals at regional level in Saxony, and amendments of the Law on Local Authorities and the creation of a Foreign Nationals Advisory Office in local authority areas with more than 5 000 foreign residents in North Rhine Westphalia, and schemes to promote the integration of "AussiedlerInnen" [ethnic German immigrants from eastern Europe] in Saxony.

Again with a view to encouraging integration, the authorities in the Land of Lower Saxony are trying to improve cooperation between foreigners and the police. The Minister of the Interior has instructed police officers to encourage such exchanges in order to give the police better knowledge of particular features of foreign cultures. Finally, the Senator responsible for culture and the integration of foreigners in Bremen has tabled a draft law allowing foreign seamen who have long been serving on German vessels to obtain a more secure resident's status under Article 27 of the Law on Foreign Nationals. At present their treatment varies greatly, some having residence permits and others mere authorization.

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[182] Namur, Mons, Ostend, Brugge, Louvain, La Louvière, Malines, Seraing, Verviers, Courtrai, Tournai, Alost, Genk, Hasselt and Saint-Nicolas

THE RIGHT OF NATIONALITY

Desire for control versus concern for integration

As in previous years, the right of nationality remains the focus of debate, but here again the dominant theme is restriction. New criteria for restricting access to this right are being proposed, or prepared, everywhere. For example, the Danish parliament has adopted an amendment to the Law on Naturalization imposing a fee for every application made and allowing the Naturalization Office at the Ministry of Justice to have access to the data recorded by the Finance Ministry's computers on the applicant's tax status.

The new Portuguese legislation (Law 25/94 of 19 August 1994, followed by Decree-Law 253/94 of 20 October 1994) fits in with this somewhat restrictive majority trend. It sets the duration of the legal residence period for the voluntary naturalization procedure at a minimum of 6 years for nationals of countries whose official language is Portuguese and 10 years for others.[183] It also proposes to deny naturalization to any person who has committed a crime resulting in a prison sentence of more than 3 years; previously, it was sufficient not to have committed a crime punishable by *a heavy penalty*. However, the new text does recognize dual nationality, conditionally and subject to a declaration.

In Germany, despite acerbic debate, neither the government nor the parliamentary majority regards the amendment of the Law on Nationality as a priority, and all proposed reforms to this effect have been rejected. This is what happened, for example, with the text submitted by the SPD in favour of dual nationality, and another draft which added to the previous proposal the possibility of automatic acquisition of nationality (*jus soli*) for children born in Germany of foreign parents (including the children of unmarried parents. This text also provided for a naturalization option for certain categories: foreigners with a minimum of 8 years' residence, recognized asylum seekers and refugees able to prove at least 5 years' residence, husbands and wives of German nationals, foreign children born abroad but permanently resident in the country. The Federal Commissioner for Foreign Nationals, too, proposed broadening the naturalization criteria and authorizing recognition of dual nationality.

There seems no immediate likelihood of change in this area. The Bundestag rejected every amendment to the naturalization rules (April 1994), and the CDU is determined to avoid at any price opening the way to recognition of dual nationality. To protest at this decision, the "*dual nationality referendum*" group erected a monument outside the Reichstag (Parliament building) in Berlin bearing the signatures of well-known figures claiming dual nationality. This initiative was also a form of protest against Mr Herzog, a candidate for the Federal Presidency, who has declared on several occasions that dual nationality must only ever be granted in very exceptional cases.[184]

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[183] The period was previously 6 years in all cases, with no requirement for a valid residence permit.

[184] The large number of foreigners in Germany is to a large extent related to the restrictive policy on naturalization. Taking this circumstance into account, the representative of the Evangelical Church has argued in favour of foreigners' right to vote in local elections.

In the absence of any solution at parliamentary level, the subject has given rise to a substantial body of case law by the administrative courts. Since July 1993, the law has provided that naturalization may be refused on the ground of a threat to the security of the German nation. Giving judgement on an appeal against the rejection of an application for naturalization made by a Palestinian working for the FDLP (Democratic Front for the Liberation of Palestine), the Federal Administrative Court found that this "threat" situation existed when terrorist organizations were committing acts of violence in Germany. Since the FDLP confines it hostilities to the Middle East, it does not fall within this category; moreover, since it had not been proved that the applicant had been involved in acts of violence, his appeal was allowed.

Another decision in favour of the appellant related to the children of former German nationals who had been deprived of citizenship for political, racial or religious reasons between 31 January 1933 and 8 May 1945. According to Article 116 (II(1)) Basic Law, not only were all their descendants (including grandchildren) entitled to claim naturalization but the Court accepted that the measure was covered by compensation for the unlawful measures adopted by National Socialism. On the other hand, the Administrative Court of Bremen held that a child born in 1992, in other words before the entry into force of Article 4 (I) RuStAG [German Reich and State Nationality Act], cannot claim the rights granted by that article ("a child having a German parent shall obtain German nationality from birth when the parents are married, and a child of an unmarried couple where the father is German shall obtain German nationality when legal paternity is established").

For all that, there is continuing support for the idea that making the nationality code more flexible would make a decisive contribution to integration and equal rights. In Belgium, for example, the results achieved by the far right in the last elections have strengthened the conviction of those in charge of the Centre for Equality of Opportunity that this approach should be the central theme of a genuine integration policy, much more so than granting foreigners the right to vote. It therefore suggests improving coordination between the competent authorities to avoid, for example, pointless duplication of checks and unequal treatment of applications between different legal districts.[185] Despite the quite considerable number of successful applications,[186] the slowness of the proceedings is in fact a major problem, especially for those who cannot aspire to the most favourable methods of acquiring nationality. Other movements go farther and argue for automatic acquisition of nationality on the basis of a minimum period (5 years) of regular residence, which would have the merit of eliminating all the statutory distinctions between various categories (Belgians and foreigners, EU nationals or otherwise, first, second and third

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185 Some applications made in 1989 have not yet reached the Chamber of Representatives, thus adding to the backlog. This is particularly true in the Brussels legal district.

186 In 1994, 20 263 foreigners acquired Belgian nationality, considering all procedures jointly: automatic acquisition by simple *declaration* for the "third generation" (12 162), virtually automatic acquisition by *option* for the "second generation" or by *option after marriage* to a Belgian of either sex (3 070), and acquisition by *naturalization* for the "first generation" (4 028). This last-named figure represents a significant increase over previous years. There were only 1 430 in 1993 and 2 049 in 1990. Persons originating from Morocco (30% and Turkey 21.5%) accounted for more than half of those naturalized in 1994. Together, the States of the European Union account for less than 6% of the total.

generations). A petition on this theme collected more than 600 000 signatures.

Special arrangements for historic reasons

In Portugal, Brazilian nationals, who can benefit from the general status of equality or the special status of equality of political rights[187] enjoy a more favourable situation which no doubt plays its part in the net increase in their numbers in the country. Holders of the general status of equality enjoy, in fact, the same rights as native Portuguese in respect of economic activities: they are automatically granted the right to employment, they are exempt form any form of prior administrative authorization, and they are not the subject of any restrictive quota. The holders of the special status of equality of political rights also enjoy certain additional rights. Negotiations are in progress on this matter with China regarding Macao, the results of which will not all be equally favourable to those concerned. Although it is envisaged that the half-castes (about 10 000 in number) will retain their Portuguese nationality after the handover, the 80 000 Chinese who hold Portuguese passports will be regarded as Chinese in order to prevent their possible emigration to Portugal or other EU countries. The Portuguese authorities have also been closely following the political change in South Africa because of the hundreds of thousands of Portuguese living there.

In Spain, the option of resuming Spanish nationality has in the past three years resulted in a doubling of the number of applications (from 9 107 to 18 502) made by emigrants of Spanish origin wishing to qualify for pensions and other State social aid. This trend is highly dependent on cyclical factors, and should rapidly shift, and fall. Conversely, acquisitions of nationality by foreign immigrants are in the ascendance, as they become permanently established in Spain and so put down roots there. The results for the year 1993 already reflect this trend. An important factor from the point of view of the integration of foreigners is that there were 4 000 more favourable decisions than in 1992, three-quarters of them resulting in naturalization by the residence criterion.[188]

In Germany, at the same time as the nationality law, the other main subject of debate during the past year has been the incorporation of the rights and protection of various minorities in the Basic Law. The project originates with the Länder - more specifically, those of the former West Germany which have already incorporated this principle into their Basic Law for the Wends, Danes and Frisians. The call is for the protection to be strengthened by being incorporated into the Basic Law. This desire is shared by the gypsies who have been living in Germany for 600 years and has been adopted by the Joint Bundestag and Bundesrat Constitutional Committee, which regards this approach as a possible way of compelling the State to respect the ethnic, cultural and linguistic identity of minorities. The SPD, FDP, PDS and Greens are recommending that the opinion of the

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[187] Provided for by the Convention on Equal Rights and Duties between Brazilians and Portuguese, laid down by Decree-Law 126/72. The general status of equality can be granted to those who have civil capacity and are lawfully resident in Portugal. The special status of political rights can be granted to those who have been lawfully resident in Portugal for at least 5 years and are not deprived of political rights in Brazil. Only those who have entered Portugal legally can benefit from it.

[188] Most of the beneficiaries (53%) come from South America, a fact related to the historical links between the Latin American countries and Spain and the more flexible criteria for acquiring nationality.

Constitutional Committee be adopted. Here again, the project is encountering strong opposition from the federal coalition parties, which fear it will open the way to a claim by non-Germans for recognition of their civil rights; their refusal is making it impossible to secure the two-thirds majority needed to amend the Basic Law.

Desire for integration and conflicting norms

On the borderline between the call for a more flexible nationality law and the desire for recognition of minority rights, another equally animated controversy is developing regarding the subjective assessment of the *desire to integrate*. This subject has inspired much heated argument in France, Portugal and Belgium during recent years.

In Belgium, as the nationality law stands at present, a foreigner is not required to prove his desire to integrate - if appropriate, it is a matter for the authorities to furnish proof that he lacks this desire. The same applied under the former Portuguese legislation, which required the Public Prosecutor's Office to prove lack of attachment to the national community in order to oppose naturalization. Law 25/94, which amended Portuguese nationality law, reversed the burden of proof, which now has to be provided by the applicant, an additional obstacle to naturalization.

Things also changed in France with the adoption of the Law of 22 July 1993, reforming the nationality law, and the publication of the Decree of 30 December 1993 instituting the procedure of *demonstration of intent*, followed by implementing legislation published in 1994. This new procedure, laid down by the new Article 27-1 of the Civil Code, gave rise to a massive information campaign during the second half of the year, very specifically targeted on those young people to whom the text applies. In 1993, 95 500 new applications for nationality were granted (in total), a similar figure to that for the previous two years (95 300 in 1992 and 95 500 in 1991).[189] The majority (73 164) acquired nationality by decree or declaration; the so-called "*informal*" acquisitions of nationality, in most cases open to young people born in France of two foreign parents, rose to 22 500. It is this latter "automatic" procedure which is now replaced by the demonstration of intent.

The other issue directly affecting the nationality law is the significant increase in clashes between regulations on such varied matters as repudiation of marriage, recognition of dual nationality by the two states concerned, national service, the wearing of the veil on identity photographs used for official documents and the right of access to reserved occupations. As far as repudiation is concerned, its increased frequency is evidently associated with the increase in acquisitions of nationality by foreigners originating in the Maghreb. In Belgium, for example, a circular put out by the Minister of Justice (27 April 1994) endeavoured to clarify the ambiguous situations arising with unilateral repudiation at the initiative of a spouse holding both Belgian nationality and that of a state where repudiation is recognized. In this event, the spouse with dual nationality has to be regarded as Belgian in Belgium; the repudiation will not be recognized there even if that spouse is also regarded as a national by a state which accepts this practice. This applies whenever a husband repudiates his wife, whichever party has the dual nationality.

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[189] Most of the former foreigners who have been naturalized as French (three out of five) are of African origin (from both north and south of the Sahara). The others are equally divided between European and Asian origin (one out of five in each case).

With regard to the right of access to reserved occupations (the police force, for example), this of course applies equally to all, without discrimination as to origin. In Belgium, the recruitment of police officers of foreign origin in immigrant areas is actually encouraged because of their knowledge of the language, customs and culture. The Brussels district has set a target of 50 officers, as a way of improving adaptation to the multicultural character of the Brussels population.

Political rights and the principle of citizenship

The choice between acquisition of nationality and direct access to political rights continues to divide political opinion. Even among the supporters of socio-political equality, there is no unanimous support for the automatic acquisition of nationality on the criterion of residence alone. Many still prefer direct access to citizenship, meaning the granting of political rights without any obligation to naturalization. Disagreements also exist among those who support giving the franchise to foreigners but clash as to the level at which that right should be exercised: whether in all elections or, more restrictively, in European and local elections only.

The recognition of European citizenship, conferring limited political rights (local and European elections), has revived this issue by creating a constitutional breach in the principle of nationality. For those who support extending the franchise to third-country nationals, this is a democratic advance which, ultimately, could be extended to all residents, as already happens in five countries out of twelve in the European Union. Conversely, those who oppose this line regard it as nothing less than a threat to national cohesion. Some Belgian Members of Parliament, for example, have appealed to the Court of Arbitration for annulment of the law approving the Treaty on European Union, with particular reference to the provisions relating to Union citizenship, the right to vote and the right to stand at elections: Article 8b(2) (elections to the European Parliament) and Article 8b(1) (for municipal elections). The Court has declared this appeal inadmissible[190].

In France,[191] the progress in entitling EU citizens to vote in European elections was not upheld by the local elections of 1995. The debates held in the Senate on 4 July, then in the National Assembly on 24 October 1994, resulted in the rejection of this participation.[192] Moreover, a resolution adopted by the majority in the National Assembly emphasizes the inadequacies of the European Directive: in particular, it criticizes the absence of provisions prohibiting double voting and the absence of any mechanism for

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190 To justify their interest in the appeal, the complainants had stated "*that the application of the rule is such as to interfere with the scope of their rights as voters, in so far as it denies them the privilege deriving from their basic right of nationality which reserves the franchise to Belgians alone, and because the extending of the franchise in local elections to new categories of voter amounts to reducing the significance of their votes*".

191 The law governing voting conditions and the right to stand at elections for EU nationals was promulgated on 5 February 1994, and its implementing decree appeared in the Official Gazette of 10 March.

192 Article 88-3 of the Constitution, supplemented by a constitutional law of June 1992, provides that citizens of the European Union "*may not serve as Mayor or Deputy Mayor or participate in the nomination of members of the electoral college or in the election of senators*".

verifying ineligibility to vote or stand. The Members of Parliament called for derogations to be implemented in cases where the proportion of Community residents substantially exceeded the national percentage; finally they stressed the inapplicability of the Directive to the City of Paris, which has dual status as a municipality and a department, the Municipal Council and the General Council being one and the same.

The government has given its consent to restricting the number of elected representatives who are nationals of Member States in those areas where the number of Community voters represents more than 20% of the total of national voters (especially certain frontier areas). On the other hand, it has not accepted the argument of the Members of Parliament regarding Paris, for which a special solution will have to be found. Finally, it has accepted that the need for both Houses to adopt an organic law transposing the European Directive into national law would result in the right to vote and the right to stand in elections being valid from 1 January 1996, in other words applying to the municipal elections of 2001.

Constitutional changes and the right to vote in local elections: the Luxembourg experience

The numbers of Union nationals of voting age meant that Luxembourg, more than other State, was justified in introducing into its legislation the three exceptional conditions provided for by the Directive on European Citizenship: proof of 5 years' residence in order to qualify as a voter, proof of 10 years' residence to stand as a candidate, and the prohibition of lists on which a majority of candidates are non-Luxemburgers. The draft law introduced to cover these points also provides for voting to be compulsory for those registered on the electoral rolls. The most dubious derogation in legal terms is certainly the one allowing Luxemburgers to compile national lists, rejecting foreigners. This, however, covers the only one to receive unanimous support and, as the ASTI comments: "*from a political standpoint, no doubt, these national lists are not very desirable, but what better integration is there than to be integrated into Luxembourg's political parties*".

The main criticisms have been directed at the extremely short period allowed for the establishment of the new system for the European elections and the lack of safeguards against double voting or double deletion. Having drawn attention to this latter point, the Chamber of Civil Servants and Public Employees, echoing the Council of State and the National Immigration Council, were particularly critical of the different system established by the draft law for nationals and non-nationals regarding the "proof" to be provided for access to the electoral rolls. Non-nationals would have no obligation other than declaring their nationality, whereas Luxemburgers would have to prove it with a certificate of nationality issued by the Ministry of Justice.

The Commission on Institutions and Institutional Review, for its part, criticized the directive imposing a residence condition on Community nationals who, outside their State of origin, are automatically deprived of the franchise. It suggests to the Luxembourg negotiators that this anomaly in the list of conditions to be satisfied by Community nationals in order to participate in local elections should be corrected.

On 23 December 1994, Articles 9 and 107 of Luxembourg's Constitution were amended to accommodate the right of European citizens to vote in local elections as laid down in Article 8b(1) of the Treaty on European Union. With regard to Article 9, the proposal by the Chamber's Institutional Commission that the nationality condition for the exercise of

political rights be deleted has been rejected by the Council of State. According to the latter, the exercise of political rights must, as a matter of principle, be reserved for nationals; they will be granted to non-Luxemburgers only in exceptional circumstances.

The Council emphasizes that its opinion is consistent with the constitutional changes that have taken place in France and the Federal Republic of Germany, which have not placed nationals and non-nationals on an equal footing. This approach is significant. Its effect is to establish as part of basic law that there will always be an essential difference between foreigners and nationals: the former can only enjoy the same rights as the latter **in exceptional cases**. Parliament has eventually adopted this opinion.[193]

On the other hand, it rejected the proposal by the Council of State that conditions limiting the right to stand as a candidate should be incorporated into the Constitution: being of Luxemburgish nationality or a citizen of the European Union. The Council's intent was to prevent a simple majority extending the right to vote in local elections to third-country nationals. Here again, its argument was that in France and Germany the members of the Constituent Assembly introduced this limitation on the active and passive franchise only for citizens of an EU Member State.

The unanimous support by the Parliamentary parties for the principle of European and Community citizenship certainly reflects a change of heart among Luxembourg's politicians. It is a change, moreover, favoured by public opinion. According to a survey by the Luxembourg Institute for Social Research, only 15% of nationals oppose the active right to vote, with 83% in favour; 21% oppose the right to stand as a candidate, 76% are in favour. Two years earlier, the same survey had shown more resistance to the actual principle of such voting rights. This increase in support would probably have been even more significant if it had enjoyed a firmer commitment from the political parties.

At all events, the CLAE is denouncing the reluctance of the parties to speed up this democratic advance. It considers that reserving the posts of mayor and aldermen to nationals amounts to reducing the democratic rights of electors and political parties. The mayor or his deputy should be chosen on merit and not on the basis of nationality. Similarly, the prohibition of lists comprising a majority of foreigners, on the ground that the practice is contrary to integration, is tenable only if accompanied by much greater receptiveness towards foreign nationals on the part of the country's political parties. The CLAE recalls that there were, in the past, lists consisting entirely of Luxemburgers whose political programme was ... the exclusion of foreigners.

The only real criticism from political circles has come from the ADR, which has long opposed giving the vote to foreigners and did not revise this position until its party conference on 2 October 1994.[194] On this occasion, the party regarded the residence clause

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[193] Two laws are to complete the revision of the constitution between now and 1 January 1996.

[194] Other nationalist groups of less importance have taken over. One is the Group for the Sovereignty of Luxembourg (GLS) which is campaigning on the theme of the threat to national identity and denouncing the Eurocrats as a threat to the country's sovereignty, identity and existence. It accuses the other parties of violating the Constitution and argues for the direct exercise of sovereignty through referendum.

(6 years in order to vote and 12 in order to stand)[195] to be discriminatory, and held that the exclusion of non-nationals from the post of mayor or alderman was also contrary to the policy of integration. It therefore came out against all the derogations, while proposing that the Constitution should incorporate a requirement that local council business should be conducted in Luxemburgish.

The local elections of 1999 will be the first to be open to non-national European citizens. The association "Ensemble" has asked each political party what view it takes of this event. The Democratic Party has pointed out that membership for non-Luxemburgish citizens has been allowed by its statute since 1990. It concedes, however, that it has not yet decided in favour of extending voting and candidacy rights to third-country nationals. The Greens, for their part, are committed to opening their electoral lists to foreigners. They declare their opposition to the derogations and support the granting of the franchise and right to stand to all foreigners resident in Luxembourg.[196] The Christian Social Party considers that the exercise of the franchise cannot be decreed or imposed; in its view, the low turnouts by foreign nationals in elections for the representative occupational chambers and in European elections are evidence of this fact. At all events, this finding underlines the value of a large-scale campaign to inform non-Luxemburgers of their new rights.[197]

Opposition by civil servants

The Chamber of Civil Servants and Public Employees, at odds with the unanimous view of the politicians, continues to denounce what it regards as an infringement of national sovereignty and a threat to Luxemburgish identity.[198] This institutional trend raises, in its view, the basic question "*of the prerogatives attaching to the status of a Luxemburger*", or in other words the criteria that constitute national identity. Only Luxemburgish nationality, it believes, can guarantee the cohesion of the national identity. It has also found indirect support in the opinion adopted by a minority of members of the National Immigration Council which believed there was a need for prior amendment of the Luxembourg constitution on the ground that "*the right to participate in elections to the European Parliament will have the further logical consequence of participation in national legislative elections*".

The opposition by the Chamber has its origin in the conflict between it and the Commission of the European Communities regarding the right of foreigners to vote and stand as candidates in representative occupational elections. The Commission has maintained its action for default against Luxembourg; in its view, this right cannot be confined to

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[195] A national moving to a different local authority area can stand for election to the local council after only one year's residence.

[196] By virtue of the principle of equality, the Community groups call for the right to vote and stand at elections to be granted to non-Community nationals on the same terms as for Community nationals.

[197] The National Immigration Council has considered this campaign essential in order to mobilize as many Union nationals as possible on the occasion of the elections.

[198] The Chamber does not approve the transitional nature of the derogations introduced for Luxembourg; it believes that the number of foreigners in the country calls for a general exception clause.

persons in paid employment, as laid down by a law to this effect recently adopted in Luxembourg, but must be extended to all the occupational chambers. A new draft law has therefore been tabled along these lines (11 March 1994), extending the right of foreigners to vote and stand as candidates to all the private and public occupational chambers. The government cites two grounds which it believes justify not resisting the Commission: the undesirability of a virtually certain further adverse verdict by the European Court of Justice, and the impossibility of reserving one category of chamber the justifications cited in support of the 1993 introduction of the right to vote and stand for Community nationals. Since the nature and object of these chambers are identical, no difference in system can be established between them.

The Chamber of Civil Servants and Public Employees continues to take a firm stand against this view. It emphasizes its special status, characterized in its view by a specific link of loyalty and solidarity to the public authority, and claims that one of its functions - organizing and improving the public services - is specifically a matter of public interest. Broadening the basis of its complaints, it charges the Commission in particular with "*undermining the right of nations to decide on their own internal affairs*", and the government with neglecting its primary duty of defending the national interest[199]. The grounds cited by the latter seem to it to be not very convincing[200]. In other words, the Chamber aims its criticisms both at the Commission and at the attitude of the government, both of which are gradually eroding the concept of national sovereignty[201]. It is therefore simply calling for the draft law to be revoked, and says it is willing to defend the principle of national sovereignty before the Court of Justice[202].

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199 Denouncing what it calls the permanent attempts "*to super-standardize the Commission's services*", the Chamber "*is of the opinion that nationality must remain and be maintained as an expression of these different cultures, customs and languages* [within Europe] [...] *The non-national who wishes to integrate with nationals and participate in national institutions has, in any case, substantial opportunities to acquire Luxemburgish nationality and participate fully in shaping the general will of the society into which he has elected to integrate. But the Luxemburgers, a tiny group within a united Europe, are as attached as people in larger nations to their special features, their language, their traditions and their institutions*".

200 It advances three arguments in support of its thesis: what it sees as the desire by the great majority of Luxemburgers for a union of Sovereign States pursuing common objectives, rather than a centralized federation replacing the present States, the counter-productive nature of extending the right to vote and stand at elections for the integration of foreigners, and the difference in system between the professional institutes.

201 It quotes as evidence of this both the draft laws on the election of the Grand-Duchy's representatives to the European Parliament and on the right to vote and stand at elections for the professional institutes, and the action brought by the Commission before the European Court of Justice regarding access to the Civil Service by other EU nationals.

202 The draft law was adopted on 27 January 1994 by 49 votes to 4 (the latter by the ADR members).

European Commission

The Member States of the EU and immigration in 1994 — Less tolerance and tighter control policies — RIMET

Claude-Valentin Marie

Luxembourg: Office for Official Publications of the European Communities

1997 — 178 pp. — 21 x 29.7 cm

ISBN 92-827-9731-7

Price (excluding VAT) in Luxembourg: ECU 15