

EU Migration Law

Legal Complexities and Political Rationales

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

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First Edition published in 2014

Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013950749

ISBN 978-0-19-870853-7

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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Introduction

Loïc Azoulay and Karin de Vries

1. The European Union as an Area of Migration

Migration constitutes a physical and social reality within the European Union (EU). Millions of persons circulate within Europe every year and millions cross the EU's external borders and seek to access the European territory. More importantly, migration has become a special feature of the self-understanding of the EU: the constitution and the very existence of the EU depends upon a continuing flow of persons crossing the borders of the member states (establishing an activity in another member state, studying abroad, travelling, or residing in another member state) and upon the management of the flows of third-country nationals (TCNs) knocking at the doors of the EU. This feature clearly appears in paragraph 2 of Article 3 of the Treaty on European Union (TEU) which sets out: 'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. Noteworthy in this formulation is the dichotomy between citizens and persons: Union citizens are offered an area where both Union citizens and certain non-citizens are conferred facilities to move within an area where access is placed under constant surveillance¹. A European polity is made possible and tangible by the individual acts of migrants crossing the internal borders, developing a transnational life, and integrating into European societies. It is made tangible to the same extent by the individual or collective initiatives to cross the external borders and by the operations of control to which these initiatives are subject.

EU migration policy is the result of this definition and of these concrete actions. One might discern a double rationale at the basis of this policy. The first one is to be found in the first part of Article 3 of the TEU, which originates in a provision introduced by the Single European Act (now Article 26 of the Treaty on the Functioning of the European Union (TFEU)) which says: 'The internal market shall comprise an area without internal frontiers in which the free movement of goods and persons is ensured'. Legal guarantees have been created to ensure

¹ On the question of access, see P. Dumas, *L'accès des ressortissants des pays tiers au territoire des Etats membres de l'Union européenne* (2013).

freedom of movement, thus enabling intra-EU migration. In particular, Article 20 of the Schengen Borders Code provides: ‘Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out’.² In reality, this liberty is nothing but the mere consequence of the programme initiated in the 1980s to complete the establishment of the internal market through the abolition of internal borders. This programme was the trigger for the development of common controls at the external borders of the EU, as well as European cooperation in the fields of asylum and immigration.³ This rationale has been crudely put by the Commission in *Wijsenbeek*:

[A]bolition of [internal] controls concerns all persons, since the maintenance of controls for nationals of non-member countries at internal frontiers would mean that they would have to be distinguished from nationals of the Member States and that the latter would therefore also have to undergo controls. Consequently, special Community measures at the external borders would be necessary in order that no Member State has to deal with undesirable foreigners from non-member countries entering via another Member State.⁴

It is in this correlation between the abolition of internal borders and the loss of control over migration flows that the necessity originated to develop ‘flanking policies’ on migration (Amsterdam, Article 61(a) of the Treaty Establishing the European Community (TEC)), soon to become ‘common’ European migration policies (Lisbon, Articles 77, 78, and 79 of the TFEU). Alongside the establishment of a single European area without internal frontiers, the member states have increasingly sought to harmonize the conditions under which TCNs are granted access to their territories. Although Europeanization in the area of migration has been relatively recent, migration is today firmly established as part of the administrative and regulatory framework of the EU and there has been a gradual but certain growth of legislative and policy measures in this field.⁵

A second rationale driving the Europeanization of migration policies has emerged more recently. The Treaty of Amsterdam has introduced the EU objective of creating an ‘Area of Freedom, Security, and Justice’ (AFSJ) which is protective of TCNs. This was first expressed in Article 61(b) of the TEC: ‘In order to establish progressively an area of freedom, security and justice, the Council shall adopt ... other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries’. Now, Articles 67(2) and 79(1) of the TFEU provide that the common migration policies of the EU must be ‘fair’ towards TCNs and have the

² Regulation 562/2006, [2006] OJ L105/1. See also Cases C-188/10 and C-189/10, *Melki and Abdeli*, [2010] ECR I-5667. However, TCNs are only allowed to circulate freely for a maximum of three months within a period of six months.

³ Cp. Art. K.1 of the Treaty of Maastricht, stating that policies on asylum, external border controls, and immigration shall be regarded as matters of common interest ‘for the purposes of achieving the objectives of the Union, in particular the free movement of persons’.

⁴ Case C-378/97, *Wijsenbeek*, [1999] ECR I-6207, Rec. 28.

⁵ Visa procedures; the granting and withdrawing of asylum and other protection statuses; the admission of family members and highly qualified workers; and the return of irregularly staying migrants are but several examples of areas where there has been at least partial harmonization of national rules through EU legislation. The scope of EU migration policy stretches even wider, including issues such as the integration of TCNs, extraterritorial protection, and migration and development.

purpose of ensuring the 'fair treatment' of TCNs legally residing in the territories of the member states. These treaties not only require that EU policies on migration comply with fundamental rights standards, but in addition provide the Union with a competence to *act* in order to safeguard TCNs' rights and fair treatment. It follows that the common European migration policy must provide standards for the entry and residence of TCNs in the member states that are adequate to meet the increasing demands deriving from fundamental rights norms in relation to immigration law. Although a definition of 'fair treatment' is not provided in the TFEU it can be assumed that this includes, at a minimum, compliance with the fundamental rights that are protected under the European Convention on Human Rights (ECHR).⁶ Whereas existing standards are most developed in relation to the fields of asylum and family reunification, there is growing evidence of the pertinence of fundamental rights norms to other topics of migration policy including, for example, access of TCNs to social security and other benefits and the treatment of irregular migrants.⁷

The 'fair treatment' or 'fundamental rights' rationale of EU migration law can be seen to have gained strength through the adoption of the Tampere Conclusions in 1999, which called, *inter alia*, for the approximation of the legal status and rights of long-term resident TCNs to those of nationals of the member states and for measures to combat discrimination. Ten years later, the objective of ensuring respect for the rights of TCNs was further strengthened through the entry into force of the Lisbon Treaty which granted legally binding force to the EU Charter of Fundamental Rights. It has not, however, obtained the same impetus as the internal objective of promoting the social integration of Union citizens. According to this objective, all the obstacles Union citizens may encounter when invoking their rights of free movement and residence within the territory of the member states should be lifted. Moreover, by virtue of their status of Union citizens conferred by the Treaty, which is deemed to be 'the fundamental status of the nationals of the Member States',⁸ Union citizens enjoy the right to equal treatment with the nationals of the host member state and a series of 'second-order rights' forged by the European Court of Justice (ECJ) followed by the EU legislator.⁹ In fact, Union citizens and their family members are granted a constitutional right to carry out a transnational life. There is no doubt that, in this respect, the situation of the

⁶ Relevant international norms also include the provisions of the 1951 Refugee Convention; compliance with this is expressly required in Art. 78(1) TFEU in relation to the EU policy on asylum.

⁷ See, eg Case C-329/11, *Achughbabian*, judgment (GC) of 6 December 2011, not yet published, Rec. 49 and Case C-571/10, *Kamberaj*, judgment (GC) of 24 April 2012, not yet published. The issue of non-discrimination of aliens as regards access to social benefits has been addressed in several recent judgments by the ECtHR, eg *Ponomaryovi v. Bulgaria*, ECHR (2011) Appl. No. 5335/05, 21 June 2011 and *Bah v. UK*, ECHR (2011) Appl. No. 56328/07, 27 September 2011.

⁸ Case C-184/99, *Grzelczyk*, [2001] ECR I-06193, Rec. 31.

⁹ The expression is from Dougan, 'Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship', in H.-W. Micklitz and B. De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (2012) 113. These rights cover fields as diverse as the language in which criminal proceedings are conducted, the individual's freedom of choice over her name, the right to benefit from an education grant, the right to welfare benefits and tax advantages, and the right to organize one's succession.

TCNs stands in sharp contrast. As stated by the Court, the fundamental principle of non-discrimination on the ground of nationality 'is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries'.¹⁰ Equal treatment and residence rules for TCNs, when they exist, are entirely governed by regimes of secondary law and the facilities conferred on TCNs are subject to strict conditions and limitations.¹¹ Moreover, member states are granted considerable discretionary powers. Many of the migration measures adopted at the European level provide for derogations and exceptions to the general rules and the common standards.¹² Examples include the Family Reunification Directive (2003/86), the Long-term Residents Directive (2003/109), and the Blue Card Directive on the admission and conditions of residence of highly qualified third-country workers (2009/50). Under the latter Directive, the discretionary power of the member states to decide on the admission of TCNs remains so extensive that it would seem difficult to qualify such admission in terms of an individual 'right'. Quite apart from secondary legislation, Carrera's contribution in this volume describes how the reluctance of member states to cede competence to the EU in the field of TCN integration has led to the creation of a set of soft law and policy tools with limited transparency and accountability (see further section 3).

It must be noted that the combination of these two potentially conflicting rationales is likely to generate tensions within the structure of EU migration law. The complex interaction of protection against 'undesirable foreigners' with the objective to establish an internal area of prosperity, freedom, security, and justice has led to a structuration of the field which is very much organized around the distinction between legal and illegal migration. Whilst the fight against illegal migration has become a clear objective of the Union, legal migration is seen as an asset for Europe, taking into account in particular the fact that the EU population is growing older. In the long run, the integration of TCNs who are long-term residents in the member states is even said to be 'a key element in promoting economic and social cohesion' at the EU level.¹³ This dichotomy unquestioningly endorsed by the European institutions as well as by the member states seems to work as a correlation according to which fighting illegal migration would be the only way to facilitate legal migration. However, in practice the distinction between illegal and legal migrants is not as clear-cut as one would assume. First of all, the conditions of illegality as well as the ability to receive legal migrants still very much depend on the legal framework of each member state and vary from one to the other. Secondly, there are limbo situations in which individuals, whilst being regarded as illegal migrants, cannot be removed from the European territory for

¹⁰ Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, [2009] ECR I-04585, Rec. 52.

¹¹ See, eg the Long-term Residents Directive: Council Directive 2003/109, [2004] OJ L16, Arts. 5 (right to long-term resident status, but conditional) and 11 (equal treatment conferred for certain purposes).

¹² De Bruycker, 'L'émergence d'une politique européenne d'immigration', in P. De Bruycker (ed.), *L'émergence d'une politique européenne d'immigration* (2004) 351.

¹³ Long-term Residents Directive, *supra* n 11, Rec. 4.

some compelling legal reasons.¹⁴ Furthermore, despite the introduction of the ‘fundamental rights’ rationale, EU migration policy appears to be predominantly characterized by controls and obligations. A clear example of this can be found in the Return Directive where the language of obligations prevails. Obligations are imposed on member states to issue a return decision or to issue an entry-ban decision under certain circumstances. The obligation to return imposed on individuals is balanced by a few procedural rights. Also illustrative are the border control operations carried out by Frontex (see the chapter by Trevisanut) and the asylum regime, the latter granting a right to access to procedures but without a right to access the European territory. All of these drawbacks reflect constitutive tensions in the development of EU migration law.

2. The Structure of EU Migration Law and Policy

Compared to the broader body of EU law and policies, the field of migration has a number of specific characteristics. Since Toner further elaborates on some of these in her contribution to this volume, we will content ourselves with stating the most salient features.

First, migration law and policy fall under the EU competence to establish the AFSJ. Article 4(2)(j) of the TFEU specifies that, in establishing the AFSJ, the Union acts on the basis of a shared competence with the member states. Compared to the TEC, the Lisbon Treaty has slightly expanded the areas in which the EU is allowed to act within the migration field.¹⁵ However, the AFSJ is a very peculiar field of shared competence. First, it works on the premise that the member states enjoy a large discretion in relation to immigration control—in particular with regard to the conditions of admission to the national territory—and remain exclusively responsible with regard to the maintenance of law and order and the safeguarding of internal security (Article 72 of the TFEU). Moreover, it is a field of ‘differentiation’. The UK, Ireland, and Denmark do not fully participate in these common policies, while third countries are associated with the development of the AFSJ (namely Iceland, Norway, Switzerland, and Liechtenstein). It is also well known that the UK, Ireland, Bulgaria, Romania, and Cyprus are not parties to the Schengen agreements, hence intra-EU migration to these countries continues to be subject to border controls.

¹⁴ See European Commission, Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries, Home/2010/RFXX/PR/1001, March 2013.

¹⁵ New competences include the adoption of measures for the establishment of an integrated management system for external borders (Art. 77(2)(e) TFEU); for defining the rights of TCNs other than the right to free movement (Art. 79(2)(b) TFEU); for combating trafficking in persons (Art. 79(2)(d) TFEU); and for supporting member state action to promote the integration of TCNs (Art. 79(4) TFEU). In the field of asylum, the TFEU now provides a legal basis for the establishment of a truly ‘Common’ European Asylum System, going beyond the enactment of minimum standards (Art. 78). Lastly, the expansion of the external dimension of the EU’s immigration policy is backed up by new competences to cooperate with third countries for the purpose of managing the inflows of people seeking protection (Art. 78(2)(g) TFEU) and to conclude readmission agreements (Art. 79(3) TFEU).

Secondly, as already mentioned, EU migration law is essentially a regime of secondary law. The position of individuals derives from EU secondary legislation and national law, rather than from the Treaties. There has not been a tendency towards constitutionalization comparable to that driving the law on the free movement of EU citizens. Following the Treaty of Amsterdam, decision-making procedures in the field of migration moreover reflected a high level of inter-governmentality. The point of departure was that the legislative measures required by Articles 62 and 63 of the TEC were to be adopted unanimously by the Council with only a consultative role for the European Parliament. It is here that the Lisbon Treaty has introduced some important and often-mentioned institutional changes. Subject to only a few limited exceptions,¹⁶ EU measures on immigration are now to be adopted by means of the ordinary legislative procedure, requiring agreement from the European Parliament and qualified majority voting in the Council. Nevertheless, Union legislation remains the product of programmes¹⁷ which lead to institutional battles.¹⁸ National parliaments have, moreover, emerged as new potentially important actors after Lisbon, as illustrated by the high number of reasoned opinions issued in relation to the proposed directive on seasonal employment.¹⁹

A third important feature of this field is the emergence of a body of global and European norms that may be classified as ‘international migration law’. This is the result of the growing movement of people across national borders that has occurred in the course of the past decades. The development of international norms generally predates the enactment of EU legislation in various fields of migration policy (including asylum, family reunification and labour migration) and thus serves as a source of reference for EU law. Importantly, the fact that certain aspects of migration policy are now also governed by EU law does not absolve the member states from the obligation to respect their commitments under international law. This means that the international treaties to which the member states are parties do not serve only as a source of inspiration, but also as a set of standards that they must adhere to including when implementing or acting in accordance with EU law.²⁰ The EU legal framework takes this into account most explicitly in Article 78(1) of the TFEU, which states that the measures constituting the Common European Asylum Policy must be in accordance with the 1951 Refugee Convention and its 1967 Protocol. Not surprisingly, EU migration regulations make frequent reference to international law.²¹ Additionally, as mentioned above, international

¹⁶ See Arts. 77(3) and 78(3) TFEU on measures concerning passports, identity cards, and similar documents and provisional measures to deal with sudden inflows of TCNs in emergency situations.

¹⁷ J.-Y. Carlier and F. Crépeau, ‘Le droit européen des migrations: exemple d’un droit en mouvement?’ 57 *Annuaire français de droit international* (2011) 674.

¹⁸ S. Carrera and E. Guild, ‘Does the Stockholm Programme Matter? The Struggles over Ownership of AFSJ Multiannual Programming’ (2012) CEPS Policy Paper 51.

¹⁹ COM (2010) 379. According to a report issued by the Commission itself, this proposal attracted the highest overall number of opinions from national parliaments, with as many as nine chambers claiming that it breached the principle of subsidiarity (COM (2011) 345 final, at 7).

²⁰ On the relationship between EU law and international law, see H. Battjes, *European Asylum Law and International Law* (2006).

²¹ See, eg Art. 1 of the Return Directive (EP and Council Directive 2008/115, [2008] OJ L348/98): ‘in accordance with’ and Art. 27 of the Procedures Directive (Council Directive 2005/85, [2008] OJ L239/6) on the application of the safe third country concept.

law norms on migration derive from the provisions of the ECHR which must be respected as part of the general principles of EU law (Article 6(3) of the TEU) and, in the not too distant future, as treaty obligations that are binding not only on the member states but also on the EU itself (Article 6(2) of the TEU).

Another feature of EU policy on migration is externalization. Immigration is, by definition, a topic that touches upon both the internal and the external policy of the EU and its member states. It is, therefore, not surprising that the extension of EU legislative and policy-making activity into new sectors of the migration field has been accompanied by the expansion of the external dimension of EU migration policy.²² This externalization has, first of all, a physical or territorial dimension: the operations carried out by Frontex take place at, but also beyond, the external borders of the EU, where immigrants are intercepted at sea. Another example concerns the introduction, by individual member states but within the confines of the EU migration directives, of integration tests and programmes in countries of origin. Externalization also has a legal and political dimension, which concerns the conclusion of agreements and cooperation between the EU and third countries. Since the Treaty of Amsterdam, the need for such cooperation, including in the field of immigration, has been consistently stressed by the European Council in its Tampere Conclusions and in the multi-national programmes adopted in The Hague and Stockholm. In the meantime, the scope of EU immigration policy has expanded beyond the regulation of visa policies and border controls and into the domains of long-term migration and the combating of irregular migration. As demonstrated by Martenczuk in this volume, in each of these fields cooperation with third countries can be instrumental to achieving the EU's immigration objectives. Examples include agreements on visa waivers and visa facilitation, on local border traffic, on the readmission of TCNs who are not entitled to residence within the EU, and on migrant smuggling and trafficking in persons. It follows that, at the EU level, the policy fields of migration and external relations are becoming increasingly intertwined.

Finally, a word must be said about the role of the ECJ. The Court is not absent from this field. However, its positioning does not seem to be clearly settled yet and varies according to the instrument at issue. On the one hand, it tends to rely strongly on the aim of the various migration directives, as formulated by the Union legislator, rather than on constitutional principles derived from the Treaties.²³ On the other hand, it relies on respect for fundamental rights and the principles of proportionality and effectiveness to impose obligations on the member states and circumscribe the amount of discretion left to them. Illustrations of this dynamic can be found in the field of family reunification, where the Court was asked to

²² On the broadening scope of this external dimension see F. Trauner and H. Carrapiço, 'The External Dimension of EU Justice and Home Affairs after the Lisbon Treaty: Analysing the Dynamics of Expansion and Diversification' 17 *European Foreign Affairs Review* (2012) Special Issue, at 1.

²³ See, eg Case C-578/08, *Chakroun*, [2010] ECR I-1839; Case C-61/11, *El Dridi*, [2011] ECR I-3015; Case C-329/11, *Achughbabian*, judgment (GC) of 6 December 2011, not yet published; and Case C-430/11, *Md Sagor*, judgment of 6 December 2012, not yet published.

interpret the Family Reunification Directive (2003/86), and where it was asked to rule on the conditions of residence for long-term resident TCNs under the Long-term Residents Directive (2003/109).²⁴

Arguably, the Court's role will be further strengthened in the future. One step in this direction is that, since the entry into force of the Lisbon Treaty, the possibility to refer preliminary questions is no longer limited to national courts of last instance. This change provides an important opening for increased judicial scrutiny at the European level. The post-Lisbon EU legal order is moreover characterized by a strengthened commitment to the protection of fundamental rights, as evidenced through the binding character attributed to the EU Charter of Fundamental Rights and the prospect of EU accession to the ECHR (Articles 6(1) and (2) of the TEU). The relevance of the fundamental rights framework to the area of immigration and asylum, which often involves human beings in very vulnerable situations, was already stated above. Case-law shows that the Court is under pressure from both NGOs and national courts to adopt a constitutional approach based on fundamental rights. Thus far the Court has shown a tendency to delegate the burden of 'constitutionality review' to the national courts, which are required to interpret EU legislation in conformity with EU fundamental rights.²⁵ This has allowed the ECJ to protect EU legislation from annulment, while at the same time acknowledging the importance of fundamental rights.²⁶ However, where national courts take their role in protecting fundamental rights seriously, there is a risk that the integrity of EU legislation will be undermined. Hence, the importance of the Court stepping in. The accession of the Union to the ECHR will probably trigger this development with the 'prior involvement' of the Court on questions relating to the validity of EU acts.

3. A Selection of Current Issues

The purpose of this volume is not to cover in its entirety the rapidly growing field of EU law and policy on migration in the post-Lisbon era. Instead, the six chapters included in this book focus on a number of current issues that together, nevertheless, address many of the developments outlined above.

It has been observed that the emergence of agencies at the European level illustrates the EU's moving away from 'a mere law-making community—with the European

²⁴ Case C-540/03, *Parliament v. Council*, [2006] ECR I-5769; Case C-578/08, *Chakroun*, [2010] ECR I-1839; Case C-571/10, judgment (GC) of 24 April 2012, not yet published; and Case C-508/10, *Commission v. The Netherlands*, judgment of 26 April 2012, not yet published. See also, in the field of asylum, Case C-465/07, *Elgafaji*, [2009] ECR I-921. For further analysis, see the case-law review by Steve Peers in 50 *Common Market Law Review* (2013) 529.

²⁵ See, eg Joined cases C-411/10 and C-493/1, *N.S. and M.E. and others*, judgment (GC) of 21 December 2011, not yet published; and Case C-540/03, *Parliament v. Council*, [2006] ECR I-5769.

²⁶ L. Azoulai, 'The Case of Fundamental Rights: a State of Ambivalence', in H.-W. Micklitz and B. De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (2012) 207, especially at 213.

institutions legislating and the Member States' authorities implementing'.²⁷ In the field of immigration policy, the clearest example of this development is the establishment of Frontex, the European agency responsible for the management of the EU's external borders. Frontex coordinates and supports the operational activities of the member states with regard to the management of the external borders of the EU. Like other regulatory agencies, Frontex acts as a specialized body providing technical expertise and assistance to aid the implementation of EU policy in a particular field. In the case of Frontex, however, such implementation includes the coordination of so-called Joint Operations, whereby migrants are intercepted at sea, and the deployment of Rapid Border Intervention Teams (RABITs) to deal with exceptional migrant inflows.²⁸ It follows that Frontex is closely involved with the physical protection of the EU's borders, which can include the use of force and have a direct impact on migrants' safety and well-being.

The legal and political settings of Frontex are examined in this volume by Trevisanut. The author notes that Frontex was created at a time when the control of irregular migration became part of a set of security concerns, also including terrorism and organized crime, in the aftermath of the terrorist attacks in New York, Madrid, and London. Although Trevisanut observes that the existence of these concerns facilitated European integration in the field of border management, she argues that Frontex has remained, in essence, a forum for intergovernmental cooperation. This follows, in particular, from the agency's composition, which guarantees a central role for the member states in the decision-making process, and from the fact that the means for operational activities are to be provided by the member states on a voluntary basis. Both factors are perceived as obstacles to the achievement of an effectively functioning system for integrated border management. While the Regulation establishing Frontex has recently been amended with the aim of strengthening the agency's independence, Trevisanut points out that the member states remain the primary actors to decide on its activities.

Another institutional complexity concerns the involvement of national border guards in Frontex operations. These operations engage national border guards from different member states and are governed by a complex legal framework, determining whether the guards' actions are subject to the law of the home or the host state. In addition to this, Frontex can conclude 'working arrangements' with third countries. Such arrangements are, however, not public or at least hard to find. The issue of transparency and the lack of operational procedures have been picked up by the European Commission and the Council, the latter having called, in the Stockholm Programme, for the enactment of 'clear rules of engagement'. Trevisanut asks, however, whether such rules, having a military connotation, could be established as part of the EU's policy on border controls rather than under the European Security and Defence Policy. It follows that Frontex is faced with a dual challenge of improving both its capacity for effective implementation of

²⁷ S. Griller and A. Orator, 'Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine' 35 *European Law Review* (2010) 3.

²⁸ See S. Trevisanut, in this volume, sections 7 and 11.

the management of the external borders, ensuring that its actions are sufficiently transparent and allowing for accountability in cases of human rights violations.

Lastly, the Joint Operations conducted by Frontex raise the question of compatibility with fundamental rights norms. As these operations entail physical restriction of the movement of migrants coming to the EU by sea, they affect migrants' rights to emigrate and to enjoy liberty and security of the person as well as the application of the principle of *non-refoulement*. Trevisanut argues that international asylum and fundamental rights norms contain sufficiently clear rules regarding the treatment of migrants who are intercepted or returned at sea. What is needed, however, is the consistent application of these norms by member states, in particular when cooperating through Frontex. Trevisanut observes that the need for Frontex operations to conform to fundamental rights standards has been recognized in the recently amended Frontex Regulation.²⁹ Nevertheless, as explained above, these operations remain subject to a lack of transparency that makes it hard to identify responsible actors where human rights violations do occur.

The institutional forms and modes of cooperation shaping EU law and policy on immigration also come to the fore in Carrera's contribution, which considers the domain of immigrant integration. As observed above, integration has only been added to the list of EU competences in the Treaty of Lisbon (Article 79(4) of the TFEU). Nevertheless, action had already been undertaken in this field, including through the adoption of the EU Framework on Integration (EFI). As Carrera notes, the Framework is in some ways similar to the Open Method of Coordination (OMC) but has its own specific features. It came into being after a proposal from the European Commission for an OMC on immigration proved too ambitious, due to the limited willingness of member states to coordinate their policies on the sensitive topic of integration. It is, therefore, perhaps not surprising that the EFI functions largely as an exchange platform for national policy-makers, with very little involvement from the EU institutions and a mostly coordinating role for the European Commission.

Emerging from Carrera's careful description of the EU Framework on Integration are not only the lack of Europeanization but also its strong technocratic character. The Framework is built on four pillars: the National Contact Points on Integration, the establishment of Common Basic Principles of Integration, financial support from the European Integration Fund, and the involvement of experts and civil society through the European Integration Forum and the European Website on Integration. Actors within these pillars include national policy-makers as well as academics and civil society. Important functions of the EFI are to facilitate the sharing of knowledge and best practices and to develop benchmarks for integration policies, resulting in outputs such as the *Handbook on Integration for Policy Makers and Practitioners*, the Migrant Integration Policy Index, and, more recently, the European Modules for Migrant Integration, which are to serve as 'building blocks' for national integration policies. As Carrera notes, these outputs promote

²⁹ Council Regulation 2007/2004, [2004] OJ L349/1, as amended by EP and Council Regulation 1168/2011 [2011] OJ L304/1.

certain strategies or best practices in the field of integration without, however, touching upon fundamental debates about the underlying values or objectives of integration policies, let alone about the contours of a European understanding of what integration means. It thus appears that the way to move forward with EU policy in the field of integration has been largely through depoliticization.³⁰

Although the EFI produces 'soft law and policy' tools which lack a legally binding nature, Carrera nevertheless warns against underestimating its effects on national integration policies and—directly or perhaps more indirectly—on the legal position of TCNs residing in the EU. He argues that the EFI has contributed to the spread of an integration paradigm focused on immigration and identity control rather than the inclusion of immigrants through the promotion of equality and security of residence. While the standards developed in the context of the CFI, such as the Common Basic Principles on Integration, are not legally binding, they are used by the Commission to allocate funding for national integration programmes under the European Integration Fund. Considering the potential impact of the EFI on the integration and legal position of immigrants, Carrera argues that the procedures and policy tools developed within the Framework lack transparency, democratic accountability, and the possibility of judicial control. He suggests that Article 79(4) of the TFEU may partly remedy this situation, as it provides a treaty basis for the EFI and specifies that measures to support national integration policies shall be adopted according to the ordinary legislative procedure. As the experiences in several member states show, the fact that integration laws are enacted through democratic and transparent procedures does not always correlate with an inclusive or rights-based approach to integration.³¹ Nevertheless, as Carrera stresses, such procedures will create a forum for critical and public reflection on the added value, necessity, and possible negative effects of particular integration measures.

The above examples illustrate how the expansion of EU immigration policy into new areas and the strengthening of its operative dimension have given rise to the establishment of new institutional actors and venues of cooperation. Despite the very different contexts and levels of harmonization, both Frontex and the EFI show how practical responses to events, such as the arrival and settlement of immigrants, often precede the formulation of adequate legislative and administrative frameworks to guarantee their legality and democratic control. As cooperation in the field of immigration moves forward, the development of such frameworks is one of the challenges facing both the EU and the member states.

The theme of externalization is picked up again in Martenczuk's contribution, this time from the perspective of legal competence. Besides showing how cooperation with third countries serves to meet the objectives of the EU migration policy, for example through visa waivers and readmission agreements, the author observes

³⁰ See also P. Scholten, *Framing Immigrant Integration: Dutch Research-Policy Dialogues in Comparative Perspective* (2011).

³¹ E. Guild, K. Groenendijk, and S. Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (2009).

that the regulation of immigration may also be instrumental to the realization of foreign policy objectives. Examples of the latter include the refusal of entry to TCNs to implement sanctions against other countries or organizations (travel bans), or the facilitation of trade in services through free movement of service providers. Through an examination of the above measures, adopted both within and outside the context of the EU's immigration policy, Martenczuk sets out to demarcate the scope and the nature of the EU's external competence in immigration matters. As mentioned earlier, the Lisbon Treaty has introduced express competences for the EU to manage the inflows of asylum seekers in cooperation with third countries and to conclude readmission agreements. Nevertheless, a general and exclusive external competence to regulate immigration remains far off. Whereas a more or less exclusive competence pertains in the area of visas and border controls, member states retain room to act independently within the fields of long-term and irregular migration. The lack of exclusive competence in the latter domains is related to the lower levels of harmonization which, given the politically sensitive nature of the issues at stake, are likely to persist for a while. Lastly, where immigration measures are adopted for foreign policy purposes, the question of legal competence will depend on the prior identification of the correct legal basis for such measures.

Whereas the existence of legal competence is a necessary factor for the EU to act externally, it does not as such provide a motive. From a political perspective, it may be asked what the incentives and mechanisms are that drive the EU to cooperate with third countries. This question is explored by Boswell in relation to the control of irregular migration. Engaging with different theories that have been put forward to explain why irregular migration is a structural feature of liberal welfare states, Boswell analyses which of these theories is most helpful in explaining EU policy measures in this area. As she observes, the larger share of the policy measures adopted to combat irregular migration—including notably readmission clauses and agreements, but also development funding—belong to the external dimension of the EU immigration policy.

The three theories analysed by Boswell—the liberal constraint, political economy, and social systems theories—explain how, at both the national and the European level, policies to control irregular migration are impeded by liberal constraints (commitments to free movement and the abolition of EU internal border controls), by the demands of the business lobby, and by the existence of social and economic structures (such as welfare and education systems) that have internal dynamics favourable to irregular entry and residence. From the perspective of liberal constraint theory, EU external cooperation in the field of irregular migration has been explained as a way to avoid democratic and judicial scrutiny after the communitarization of EU immigration policy. This raises the question of what will happen in this area after the Lisbon Treaty, which has strengthened the role of the European Parliament and the ECJ, and whether the EU and the member states will tend towards those measures that are not subject to democratic or judicial scrutiny or where such scrutiny is hard to apply (eg in the case of Frontex operations involving both member states and third countries).

Alternatively, political economy theory could help to explain why member states choose to highlight European external cooperation against irregular migration, while at the same time internal policies tolerate such migrations so as not counteract the business sector's need for labour. Looking at systems theory, however, Boswell warns that the EU may have only a limited capacity to influence the actions and policies of third countries and to ensure their cooperation. Whereas irregular migration is, in itself, a highly complex process that is inherently difficult to regulate, the management of such migration through third country cooperation offers very few prospects for success.

Lastly, the legal dynamics of EU migration law and fundamental rights norms are examined, in this volume, by Spijkerboer. Spijkerboer starts his contribution from the premise that the content of legal norms, including fundamental rights norms on migration, is not fixed and that their interpretation by the courts can result in different outcomes. The possible variety of such outcomes can be classified through four ideal typical political positions on migration issues, resulting from the intersection between two axes: left/right and libertarian/statist. According to Spijkerboer, legal interpretations constructed by lawyers to criticize court decisions will mostly, if not always, reveal a preference for one of these positions and a desire to make the case-law correspond to that position. Nevertheless, many lawyers will be tempted to present a particular outcome of legal interpretation as 'legally correct' rather than just 'politically preferable', because this gives that outcome legal authority. Lawyers can, however, use different strategies within legal discourse to criticize judicial reasoning and to steer such reasoning into different directions.

Spijkerboer explores three ways in which critical lawyers can navigate the terrain between the 'freedom and constraint' that are both present in legal reasoning. They can demonstrate inconsistency in the case-law (and argue for consistency along a particular line), expose the legal choice available to judges (and challenge the choice that was made), or question an unspoken or seemingly evident rule or factual assumption starting at the basis of a judgment or line of case-law. These options are illustrated through analyses of case-law of the European Court of Human Rights (ECtHR) and the ECJ on the level of scrutiny to be applied in asylum cases, the right of European workers to family reunification with TCNs, and the expulsion of people suffering from HIV/AIDS. At the same time as 'adding to the arsenal of critical lawyers', as Spijkerboer aims to do, awareness of the above strategies also helps to understand how judges and other lawyers engage with the evolving legal framework of EU migration law.