



EU and US approaches to the management of immigration

Jan Niessen, Yongmi Schibel and
Raphaële Magoni (eds.)

Switzerland

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

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

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

All papers were presented and discussed at a transatlantic dialogue meeting preceding the official launch of the European Migration Dialogue attended by Commissioner António Vitorino (Brussels May 2003).

Brussels/Bern, May 2003

Preface

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

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

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

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

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

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

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

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

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

- The first chapter reviews the (emerging) debates on migration and pays particular attention to the terms of the debate. It examines whether migration is debated in terms of control, security and restriction, or rather in terms of migration management and the assessment of migration needs. It asks whether the terms of the debate are different for different types of migrants, for instance irregular migrants vs. highly qualified migrants. The chapter analyses whether immigration has been linked with and embedded in larger discussions about social and economic policies for the future. In particular, it looks at the debates around the labour market and demography and considers whether and how immigration has been considered as an option for meeting emerging challenges in these areas.
- The second chapter provides an inventory of stakeholders and an analysis of their activities. It gives a detailed account of who is responsible for which area of migration management in the different government departments. It also covers the activities of the various non-governmental organisations active in this field. The central question is which groups (within government, employers, trade unions, NGOs, academics and other experts) assess national migration needs, which instruments and mechanisms they use to make these assessments, and how they assert influence in the political decision-making process to translate these assessments into policies.
- The third chapter provides an analysis of migration management in the areas covered by three of the most important Directives proposed by the European Commission (on admission for employment, family reunification¹, and long-term residents). Rapporteurs compare the national legal framework with the proposed European measures, and assess the degree of convergence between the two. The chapter addresses each of the substantive points dealt with in the Commission's proposals and sets out the corresponding national provisions, if such provisions exist under the current system. Recent and impending changes of national law are also examined, with a view to assessing whether immigration management rules are moving closer to or further away from the proposed European legislation.
- The fourth chapter offers concluding remarks and evaluations by the rapporteurs. It addresses the Commission proposal for an Open Method of Co-ordination and considers whether such a mechanism would fit well with existing policy-making structures. Where appropriate, the chapter looks more closely at the proposed Guidelines and evaluates the degree to which they are already tackled in national policy. The impact of the European Employment Strategy on immigration management is also assessed. The fourth chapter also gives the rapporteurs an opportunity to make recommendations and to suggest alternative benchmarks for future debates and policy developments.

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

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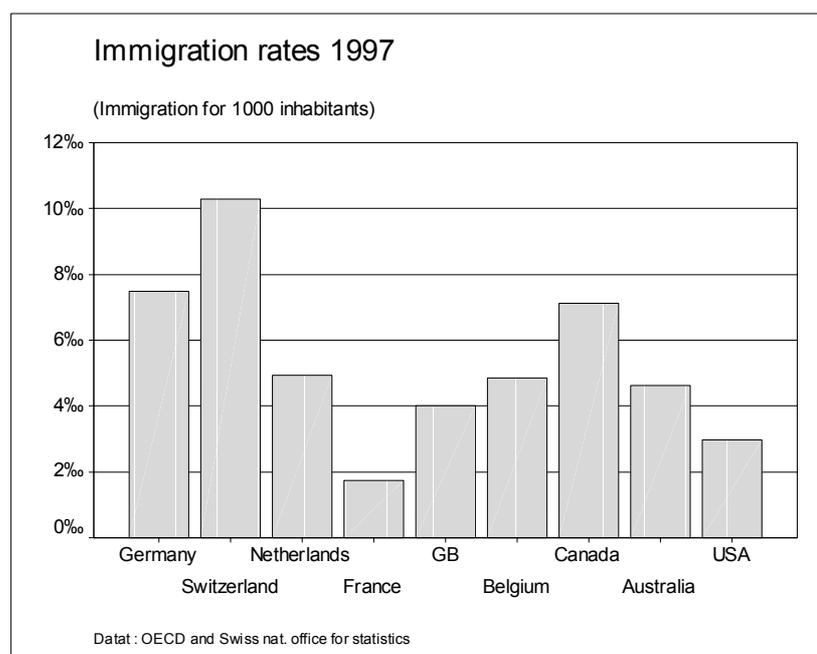
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Chapter 1: Terms of the debate

1.1. Preliminary remarks

The Swiss economy is highly dependent on the work of immigrants, who make up ca. 25% of the labour force (and 19.9% of the total population). Notwithstanding the halt of recruitment programmes in the 1970s, economic immigration has risen to significant levels again since 1980 and is generally recognised as an important factor in the economy. This explains a relatively high immigration rate (cf. graph below); however, Switzerland is also characterised by an important level of labour force rotation, i.e. many workers with residence permits leave the country after a few years (Piguet forthcoming²). In the early 1990s, the net immigration rate was comparable to that of Germany, Canada and Austria. Before that period, a very high proportion of immigrants came from EU-countries (Italy, Spain, Portugal, Germany, France, etc.) Currently, migrants from the different countries of former Yugoslavia are more numerous than Italians.

Graph 1: 1997 Immigration Rates (immigration for 1,000 inhabitants)



² Piguet, Etienne (forthcoming). *Immigration et intégration. La population étrangère en Suisse depuis 1948* in PNR 39: "Migrations et relations interculturelles". Zürich: Seismo

1.2. Immigration control vs. management and assessment of migration needs

Regarding regular immigration, there have been two major changes recently: firstly, in June 2002, the entry into force of the Bilateral Agreement on the Free Movement of Persons between Switzerland and the EU member states. Secondly, the admission policy applicable to third-country nationals will be more restrictive than the policy that Switzerland has pursued so far. 'Only urgently required qualified workers' will be admitted from outside the EU/EFTA area. Work permits are only issued to executives, specialists and other highly qualified workers from outside the EU/EFTA area if no Swiss or EU national meets the requirements.

When issuing residence permits, the authorities will further take into consideration the professional qualifications, the ability to adapt to professional requirements, the language skills and age of the candidate. If a person meets the criteria established in these fields, s/he should be able to achieve sustainable integration into the Swiss labour market and the social environment.

The draft for a new immigration law has been submitted to the consultation procedure and the Federal Council has issued a communication on the bill. The debates in Parliament will probably begin in the fall session of 2003. Apart from the shift in the direction of higher selectivity, no other decisive change of orientation has taken place. In quantitative terms, the new bill, just as the old law, lays the foundation for the authorities to pursue, if necessary, a more permissive or more restrictive admission policy. For the authorities, the decisive factors for determining the number of people to be admitted from outside the EU/EFTA are the economic situation in Switzerland and the need for labour of certain segments of the labour market. The authorities will continue to have the possibility to adopt a quota solution for nationals of third-countries (Kontingentierung).

The basic principle of the policy is that admission has to occur in the interest of the entire economy and not based on particular interests, whereas professional qualifications and the ability to integrate should play a decisive part. Additionally, admission has to take the social and demographic needs of Switzerland into consideration.

In contrast to today's regulation, a controlled opening of the market to self-employed people is foreseen in the law if the activity is 'desirable to stimulate competition'. Increased competition should promote the efficiency of the economy, and in the long run, guarantee the international competitiveness of Swiss companies.

Altogether, on the one hand, the new immigration law constitutes a higher barrier for nationals of non EU/EFTA states to enter Switzerland. On the other hand, the situation for foreigners who lawfully and permanently reside in Switzerland will be improved. For example, legal obstacles to changes of occupation, jobs and cantons are to be removed. The subsequent immigration of families of short-term residents and students is also to be permitted, provided that residential and financial requirements are satisfied. These measures facilitate integration, simplify procedures for employers and for the authorities, and ensure a uniform application of the law. In the above-mentioned areas, the law aims at harmonising the rules applicable to third-country nationals with those applicable to EU/EFTA nationals.

Some debates have taken place concerning the admission aspects of the immigration bill. While those supporting the admission of low-skilled workers object that the immigration bill does not meet the need of the economy for such workers, those opposing low-skilled migration claim that in the long run, their admission will constitute a burden for the welfare state. The Federal Council suggests that employers should hire recognised refugees and people who are temporarily admitted to do low-skilled work.

According to the principles of the Swiss alien policy, developed during the last decades, the integration of foreigners is a prerequisite for achieving a politically and socially sustainable immigration policy. 'Integration' stands for the participation of foreigners in the economic,

social and cultural life. The new immigration law, which is currently being discussed, foresees that immigration candidates have to fulfil certain criteria that should facilitate their integration. This restrictive component corresponds in its content to the criterion of 'qualitatively high standard immigration'. The level of education and the professional qualifications should improve the integration of foreigners and guarantee their vocational reintegration in the case of unemployment. The restriction aims at avoiding the errors that were committed in the past, i.e. granting seasonal work permits to low-qualified seasonal workers. The new immigration law abolishes the status of seasonal worker. Furthermore, it explicitly foresees that the immigrant has the duty to make every effort necessary to facilitate integration. Permanent residents and their families are required to integrate in their professional life as well as in the Swiss society.

The government should have a budget at its disposal to support measures with the goal of promoting integration. New instruments have been adopted to co-ordinate measures at the federal and cantonal levels. Cantons have had to establish integration offices and to launch projects that promote linguistic, professional and other forms of integration. A first round of projects to promote integration has already been implemented.

Based on the new immigration law, the Confederation will be able to provide return assistance to rejected foreigners. The return assistance that is currently being granted to asylum seekers will serve as a model. The aid will apply to foreigners who have to return, but who do not have the necessary financial resources. The Federal Council also has the authority to adapt the admission requirements to provide protection for victims of human trafficking.

Although asylum seekers only constitute a minor part of the foreign population in Switzerland, their presence in the country has preoccupied politicians and the Swiss population more than that of any other category of foreigners³. This tendency is reflected by the number of requests, popular initiatives and referendums that have been launched on issues concerning asylum. Issues of debate include the determination procedures as well as the social and economic rights that asylum seekers enjoy during their stay in Switzerland. A partial revision of the asylum law will be discussed in Parliament in the fall session of 2003. The increased interest in the asylum issue was also fuelled by the fear of becoming an 'asylum island' in Europe, as Switzerland is not part of the Dublin Agreement⁴.

A recurring question in the asylum debate is whether to allow asylum seekers to work or not. Those in favour of a work prohibition claim that allowing asylum seekers to work would increase the attractiveness of Switzerland as a country of asylum. On the contrary, the opponents of a work prohibition say that encouraging them to work would constitute a relief for the welfare system and an effective means to fight clandestine employment and deviant behaviour. Additionally, it would fulfil the need of certain segments of the labour market.

New measures against human smuggling, clandestine employment and fictitious marriages are being adopted. A new disposition of the civil code foresees that in the case of an 'obviously' fictitious marriage, the civil marriage can be refused.

A legal basis will be adopted for installing technical surveillance at the airports. The new installations should improve the identification of people at the borders and the enforcement of the due diligence obligations that apply to airline carriers (carrier-sanctions).

³ NZZ 18 February 2003, Wo die Stimmbürger der Schuh drückt Sorgenbarometer-Umfrage 2002, S. 13.

⁴ NZZ am Sonntag, 12 January 2003, *Der asylpolitische Notstand steht der Schweiz noch bevor – die Isolation in Europa macht alle Anstrengungen zunichte*, Nr. 2, S. 17.

1.3. Different terms for different types of migrants

The changes in the admission policy in Switzerland will mainly benefit highly qualified Non EU/EFTA nationals. For low-skilled third-country nationals, it is basically impossible to seek employment in Switzerland (see chapter 3).

The '*sans papiers*' (undocumented immigrants) is a group of foreigners that attracted the attention of public opinion in the spring of 2001. This term applies to different persons: rejected asylum seekers that did not return, irregular immigrants, former seasonal workers, students and tourists that did not leave the country upon expiry of their visa.

The '*sans papiers*' occupied houses and churches to draw the attention of public opinion to their cause. During the winter session of 2001, the Parliament dealt with the '*sans papiers*' issue. Protagonists of the left-wing parties demanded 'amnesties' and wide scale regularisations, while most centrist parties insisted on the case-by-case hardship regulation⁵. Some members of parliament did, however, criticise the lack of transparency in the determination of 'hardship'. One of the reactions of the involved federal offices was the publication of a document enumerating the conditions leading to the determination of 'hardship'⁶.

A regularisation campaign of rejected asylum seekers took place recently. In 2000, the Federal Council launched a campaign called Humanitarian Action 2000 to deal with approximately 15,000 people living in Switzerland without legal status. The campaign was aimed at rejected asylum seekers who could not be expelled, and others still waiting for a final asylum decision. To obtain provisional admission, the following requirements had to be met: entry into Switzerland before 31 December 1992, willingness to integrate, no criminal record, the asylum seeker concerned should never have 'disappeared', and the delay in the asylum procedure should not have been self-inflicted. Mainly asylum seekers from Sri Lanka, who had been working and living in Switzerland for a long time, benefited from the action. During Humanitarian Action 2000, there was no automatic granting of provisional admission; on the contrary, the Federal Office for Refugees, FOR, reviewed the cases of the Sri Lankan citizens individually. In the case of citizens meeting the requirements enumerated above, but coming from other countries, the cantons could ask the FOR to re-examine their cases⁷.

The authorities have acknowledged that the existence of human smuggling is linked to possibilities of clandestine employment in the country of destination⁸. As a result, the Federal Council created a working group on clandestine employment composed of the involved departments of the federal administration. The working group debated different measures to combat the phenomenon of clandestine employment. The Federal Council adopted the working group's report and included its proposals in the draft law on 'measures to combat clandestine employment'⁹.

The terms are different for the different types of migrants. The authorities have agreed upon opening the immigration system to EU/EFTA nationals and highly skilled workers. For low-

⁵ NZZ 6 December 2001, Papierlose – Fronten und Differenzierungen - Vor Parlamentsdebatte über Legalisierung des Aufenthalts, S. 13.

⁶ Rundschreiben vom 21. Dezember 2001: Praxis der Bundesämter bei der Anwesenheitsregelung von Ausländerinnen und Ausländern in schwerwiegenden persönlichen Härtefällen

⁷ NZZ 2 March 2000, Aufnahme längst integrierter Asylsuchender – Humanitäre Aktion für rund 13'000 Personen, S. 13.

⁸ Botschaft zum Bundesgesetz über Massnahmen zur Bekämpfung der Schwarzarbeit vom 16. Januar 2002, S. 3642.

⁹ Botschaft zum Bundesgesetz über Massnahmen zur Bekämpfung der Schwarzarbeit vom 16. Januar 2002.

qualified Non EU/EFTA nationals and asylum seekers, the debate focuses on restricting access to the country.

1.4. Immigration and discussions about social and economic policies for the future

The governmental communication related to the new immigration law¹⁰ stresses the importance of pursuing an admission policy that is oriented towards satisfying the long-term interests of the economy as a whole. In particular, the government wants to promote a sustainable development of the economy. Immigration policy should not be used to maintain the obsolete structures of the labour market by importing low-qualified workers who accept jobs at low wages. Rather, it should have the goal of improving the structure of the labour market.

At the same time, the demographic structure should be 'normalised' and the burden on the social security system should be relieved. The last requirement was formulated on the basis of the observation that many foreigners have lost their jobs and consequently have lived in poverty. Such a process occurred during the unemployment crisis of the 1990s and it resulted in the creation of a higher basic rate of unemployment. The social security system had to cope with the consequences of this basic rate of unemployment.

The authorities acknowledge that the admission of asylum seekers will not lead to qualitative improvements in the structure of the labour market. Instead, they recognise that the asylum policy should pursue humanitarian goals.

The communication also recognises a potential conflict of interests between an immigration policy based on the admission of highly qualified people from Non EU/EFTA states, and the aims of development policy. Development agencies advocate the promotion of policies that hinder brain drain instead of promoting it. The document does not acknowledge the possibility that highly qualified immigrants could contribute to the development of their countries of origin by sending money back.

1.5. Links between demographic issues and immigration

Few demographic studies linking immigration with demographic issues have been carried out in Switzerland, and the ones that were conducted had a limited impact on the public. At the end of 2001, the Swiss Federal Statistics Office (SFSO) published a study which was conducted in the framework of the Council of Europe's activities on population¹¹ called "Immigration in Switzerland: situation and demographic consequences". It described the impact of post-war migration on the size of the resident population in Switzerland, and particularly on the ageing of the population. The study shows that between 1945 and 2000, the classic indices of population ageing (proportion of the population aged 60 and over, or old-age dependency ration) went up substantially: in 2000, the old-age dependency ratio was 25.2 persons aged 65 and over per 100 persons of 20-64, whereas it would have been 32.4 persons aged 65 and over without migration. This recent figure compares to 14.9% in 1945. Therefore, it can be said that immigration and population movements have reduced ageing by 7.2 points, or 40%.

¹⁰ Botschaft zum Bundesgesetz über die Ausländerinnen und Ausländer vom 8. März 2002.

¹¹ SFSO (2001), "Immigration en Suisse. Situation et conséquences démographiques", Neuchâtel, SFSO.

Every five years, the Swiss Federal Statistics Office publishes population prospects. The last demographic scenarios for the period 2000-2060 were published in 2002¹². These demographic prospects clearly emphasise the strong relationship between migration flows and population decline or ageing of the population. The Swiss population is characterised by a rather low fertility rate and high life expectancy. Three scenarios were formulated concerning the evolution of migration flows for the period 2000-2015. Without a positive net migration, the resident population will decrease by the end of the 2010's. A net migration of +20,000, which corresponds to the average net migration between 1950 and 2000, will, on the contrary, avoid this population decline, but not the decrease in the labour force. Due to naturalisation, the impact of migration is not only observable on the foreign population, but also on the Swiss population. A similar study was published by the private Foundation Avenir Suisse, which confirmed the relationship between immigration and demographic evolution¹³.

Though demographers consider immigration as one of the remedies against the decline and ageing of population, the demographic dimension of migration does not play a prominent part in political discussions. However, some political instances, such as the Political Institutions Committee (Staatspolitische Kommission), have discussed the impact of the immigration bill on the demographic and economic evolution of the next decades. A further illustration for the political use of the link migration/demography was the request Guisan (request Guisan 01.3493). This request demanded that the Federal Council reconsider the list of countries from which labour can be recruited so that recruitment policies would meet the Swiss economic and demographic requirements.

The situation is somewhat different on the cantonal level, where internal and external migration may have a stronger impact on the demographic, economical and financial situation of cantons. Cantonal points of view concerning migration and population diverge. It is interesting to note that the canton of Jura, which is a small canton on the periphery of Switzerland, suggested to open a centre for demographic promotion.

Migration and labour market

Regarding the relationship between migration and the economy, Switzerland has for the last 50 years frequently used migration as a means of balancing the situation on the labour market. This was, for example, the case during the 1973 economic crisis when emigration was encouraged to reduce excessive labour force. More recently, a publication of the Secretariat of the Economy¹⁴, seco, presented migration as a means of stimulating economic growth and balancing the labour market. Economists frequently question the suitability of Swiss immigration law, taking into consideration the demographic trends and the characteristics of recent migration flows. The parliamentary answer to the request Rennwald (01.1057) states that falling back on labour migration to support the economic structures would neither result in an increase in productivity nor offset the effects of demographic ageing.

The public debates surrounding the issue of illegal migration and '*sans papiers*' have showed how important the presence of foreign labour force is to the Swiss economy, especially in sectors that recruit a large proportion of low-skilled workers.

¹² SFSO (2002), « Scénarios de l'évolution démographique de la Suisse 2000-2060 », Neuchâtel, SFSO.

¹³ Münz R., Ullrich R. (2001), „Bevölkerung: Alternative Prognosen für die Schweiz“, Zurich, Avenir Suisse.

¹⁴ La Vie Economique, 2002, 3

1.6. Use of the studies in the debate

The Federal Council's communication related to the immigration bill illustrates that the authorities are increasingly aware of the importance of immigration for maintaining the demographic structure and the social security system in Switzerland¹⁵. In this communication, the authorities explicitly quote the study of the Swiss Federal Statistics Office mentioned above. The communication refers to one of the three scenarios presented in the study, pointing out that the population will continue to increase for the next thirty years due to immigration. At a later date, the net migration rate will not offset the negative natural population growth rate (i.e. mortality higher than birth rate) and therefore the population in Switzerland will decrease. The working part of the population will begin to decrease from 2014, on, but the proportion of foreigners in that segment will increase. In the next few years the costs that the working population has to pay for the non-working population will increase. However, immigration contributes to reducing the costs that the working population has to pay. The government is using the study to support its argument for a more liberal immigration policy. It reinforces its position by referring to the difficulties that the social security system is currently facing. According to the government, additional relief for the social security system will occur when some of the retired immigrants return to their home countries. The communication omits the fact that Switzerland does not have to pay for the education and the upbringing of immigrants, especially highly skilled ones.

¹⁵ Botschaft zum Bundesgesetz über die Ausländerinnen und Ausländer vom 8. März 2002.

Chapter 2: The stakeholders

2.1 Ministries and non-governmental actors

Two federal offices in particular deal with 'foreigners' living in Switzerland: the *Federal Office for Refugees* (FOR) and the *Federal Office for Immigration, Integration and Emigration* (IMES). The FOR is responsible for the implementation of the Swiss asylum policy. IMES is the Swiss authority that simultaneously implements the Swiss admission policy, including the enforcement of laws regarding residence in Switzerland (immigration and residence section), and assesses the needs on the labour market (labour market section). For many years, these two entities of IMES were not part of the same office. Recently, a section on integration and naturalisation was added to the office. The changes within the organisational structure of the federal office reflect the will to implement a coherent policy on foreigners, comprising admission, stay and integration.

The *State Secretariat for Economic Affairs* (seco) is the government's agency responsible questions of economics and labour. Seco influences the Swiss labour migration policy, by determining the qualitative and quantitative needs on the labour market. Seco is part of the *Federal Department of Economic Affairs* (DEA).

At federal level, there are three important permanent commissions, namely the *Federal Commission for Foreigners* (FCF), the *Federal Commission against Racism*, and the *Federal Commission for Refugees* (EKF). FCF was set up as an expert commission of the *Federal Council* in 1970; it reports directly to the *Federal Department of Justice and Police*. The central concern of FCF is the integration of foreigners. Since 2001, funds have been available for projects promoting the integration of foreigners. At present, FCF is made up of 28 members; two of them have the status of observers. Members represent foreigners' organisations, municipalities, communities, cantons, employers and employees, and churches, or have a background in integration policy. FCF assists in the promotion of the creation of educational and vocational opportunities for foreigners and in the recognition of training in cooperation with the relevant cantonal authorities; it participates in the international exchange of views and experience; it mediates between the organisations that are active in the field of cooperation and the federal authorities, it publishes opinions and recommendations regarding general issues of migration and it consulted in legislative processes in the field of migration.

The *Federal Commission on Foreigners*, the *Federal Commission for Refugees* and the *Federal Commission against Racism* hold coordination meetings on a quarterly basis. They organise joint events, such as the national conference on the revision of the law on naturalisation. The *Federal Commission Against Racism* is part of the *Federal Department of Home Affairs* (DHA). Within the DHA, there is a Service for the fight against Racism that coordinates the activities of the various actors participating in the fight against racism. Amongst other activities, it administers a fund for anti-racism projects. The *Federal Commission for Refugees* is an advisory body to the government and to the ministries working on refugee issues.

At federal level, the most important political parties in Switzerland are the 'centrist block' composed of the *Christian-democrats*, the *Swiss People's Party* and the *Radical Party*, and the 'left wing parties', namely the *Social-democrats* and the *Green Party*. Except for the Green Party, all other parties are members of the government. The *Swiss People's Party* is an important stakeholder in the debates on migration and asylum policy. It supported a popular initiative aiming at reducing the number of residents legally residing Switzerland and was in charge of the initiative 'against the Abuse of Asylum' (cf. Example II). In the city of Zürich, the party has launched an initiative demanding that all requests for naturalisation should be subject to popular referendum.

The trade unions and the employer's representatives play a part in the formulation of the Swiss immigration policy. They exert their influence in a formal manner, such as the consultation procedure, and in an informal manner (e.g. during the determination procedure fixing the quota allowance for foreigners to be admitted in Switzerland).

Due to the federal structure of the Swiss state, the cantons are very influential actors in the formulation of governmental policies. The area of authority of the cantons concerning policies on foreigners comprises the alien police and the determination of the needs of the labour market. Furthermore, they are responsible for the implementation of integration measures. As the Confederation does not have a federal police, the cantons are responsible for maintaining public order and enforcing removal decisions. Due to their competence and experience in implementing measures concerning asylum seekers, they contribute prominently to the formulation of the Swiss policy in this area. The *Conference of Cantonal Ministers of Justice and Police* (CCMJP) is increasingly stating its position on questions of inner security (crimes committed by foreigners) and asylum.

Cooperation with the municipalities is important, as they are responsible for the accommodation of asylum seekers and refugees, and must pay for the costs associated with the social welfare of regular immigrants. They are convinced that their concerns are not taken enough into consideration in the formulation and implementation of asylum and immigration policies. Larger cities, mainly Zürich, have recently launched spontaneous initiatives on the asylum issue that have produced a major debate. Smaller municipalities have also been in the headlines recently – one municipality refused to accommodate the requested number of asylum seekers, others have restricted the freedom of movement of asylum seekers to prevent them to access public areas such as schools, playgrounds or soccer fields.

NGOs play a part in the implementation of the Swiss asylum policy. They offer social counselling and legal advice to asylum seekers. *The Swiss Refugee Aid*, an umbrella organisation of Swiss asylum organisations, seeks to exert influence on the political decision making by publishing position papers on various questions relating to asylum. Other NGOs in the asylum field include the charity organisations Caritas and HEKS, and the Swiss Red Cross.

In March 2001, the Swiss Forum for the integration of migrants (FIM) was created. FIM, which is composed of 330 representatives, is the umbrella organisation of foreigners' associations in Switzerland. FIM organises public debates on issues concerning foreigners in Switzerland (e.g. Schengen Agreements), collaborates with the federal authorities (IMES, FCF) and participates in the consultation procedure. It is partially financed by the Federal Commission on Foreigners.

2.2 Mechanisms of influence

The Swiss population does not elect the members of the Federal Council directly; this is within the competence of the parliament. The seven members of the Federal Council are elected for four years. In the Swiss political system, the parliament cannot request a vote of confidence. This gives the government a certain extent of autonomy with regard to the parliament. However, the autonomy of the government is restricted by the two instruments of the Swiss direct democracy, the referendum and the popular initiative. The popular initiative gives citizens the right to seek a decision on an amendment they want to make to the Constitution. For such an initiative to be organised, the signatures of 100,000 voters must be collected within 18 months. Federal laws are subject to an optional referendum: in this case, a popular ballot is held if 50,000 citizens request such an action. The signatures must be collected within 100 days of the publication of a decree. The referendum is similar to a veto. For such a plebiscite to pass, the majority of the votes of the population and of the

cantons is required. At cantonal and communal level, voters can also launch an initiative. Cantonal laws are subject to the optional referendum.

Example I, Popular Initiatives: 18% and 'against the abuse of asylum'

The popular initiative 'for a regulation of immigration' aimed at limiting the percentage of foreign nationals allowed to live in Switzerland to 18 % of the total population (this was the figure of 1993). To achieve this goal, many foreigners would have to leave Switzerland. The reduction should be the result of 'voluntary departures'. No new residence permits could be issued as long as the birth rate of foreigners living in Switzerland is higher than the number of voluntary departures.

Apart from this main goal, the initiative also requested that the laws applying to asylum seekers, victims of war, people seeking protection, temporarily admitted people, detainees and foreigners without a domicile be tightened: withdrawal of any financial assistance that could serve as an incentive to remain in Switzerland, and the introduction of detention pending removal for rejected asylum seekers. During the period of detention, foreigners should not be better off than if they had stayed in their countries of origin.

The Federal Council recommended the rejection of the initiative based on the following reasoning: major difficulties could arise during the implementation of the initiative, as some of the dispositions are in contradiction with norms of international economic and humanitarian law. The restrictions do not allow enough flexibility to adapt to changes in the economy. Altogether, the needs of the labour market and of the Swiss economy on the whole could no longer be met, in particular regarding the recruitment of highly skilled workers. Furthermore, such a limitation is in contradiction with the increasingly globalised economic markets. Globalised markets require a certain degree of flexibility in the recruitment of workers.

The acceptance of the initiative would have led Switzerland to withdraw from major international trade agreements (e.g. GATS/WTO). Such a move would have aggravated the isolation of Switzerland on the international scene and threatened the realisation of the three main goals concerning the policy on foreigners agreed upon at the beginning of the period of legislation. In contrast, the fourth goal – the reduction of the increase in the number of foreigners living in Switzerland – had already largely been achieved by the time of the ballot. A reduction from 5.2 to 0.5% was reached in the period between 1991-1995. The initiative was voted on in September 2000. 63.7% of the population and all of the cantons rejected it. As the initiative was clearly rejected, it did not exert a major influence on the further development of the Swiss policy on foreigners.

On the contrary, the initiative 'Against the Abuse of Asylum', which was launched in 1999 by the Swiss People's Party, has influenced the current debates on asylum and the ongoing revision of the asylum law. The initiative requested that all applications for asylum of people who had transited through a safe third-country be declared inadmissible, and the person be sent back to the country in question *automatically*. In addition, it requested the introduction of carrier sanctions, a reduction of social assistance to the absolute minimum and the reduction of costs in the asylum sector. All of these measures would reduce the 'attractiveness of Switzerland as an asylum country'¹⁶.

The Swiss authorities and organisations defending the rights of asylum seekers severely criticised the conception of safe-third country in the initiative. It would have led to the FOR declaring 98% of all demands inadmissible because the people had transited through third countries, and this would have meant the end of asylum in Switzerland. The initiative threatened to put a strain on the diplomatic relations with neighbouring countries. It was

¹⁶ NZZ 26 October 2002, Eidgenössische Abstimmung vom 24. November Anti-Asyl-Politik der SVP-eine Sackgasse, S. 13.

rejected by a narrow majority of the population and accepted by a majority of the cantons. The revised law foresees the introduction of a modified version of the 'safe third-country principle' and adaptations in the assistance granted to asylum seekers.

In the revised law on asylum, the 'safe third-country principle' will replace the law currently in force. At the moment, an asylum application can only be declared inadmissible if an asylum seeker has spent 20 days in the safe country through which he transited. The new safe third-country principle will enable Switzerland to remove an asylum seeker to the transit country on the condition that a readmission treaty exists between Switzerland and the country in question, and that the country will examine the merits of the case. Exceptions will be made if the person has close relatives in Switzerland, or if there is evidence that the person is in need of international protection¹⁷.

The **consultation procedure** is another important means to influence the political decision making process. This procedure is the phase in the preparation of legislation when draft legal acts of the Confederation are evaluated by the cantons, parties, associations and sometimes also by other interested circles throughout Switzerland, in order to ascertain the likelihood of their acceptance and implementation. Persons who are not invited to take part in the consultation procedure can also state their views on a proposal. All these views and possible objections of the cantons, parties and associations are evaluated. The Federal Council then passes the main points of its proposal on to the Parliament. The Federal Council debates the draft legal act in the light of the outcomes of this consultation.

Example II, Consultation procedure: Revision Aliens Law

The alterations included in the current version of the Aliens law reflect the influence that cantons (states) have on law making in Switzerland due to the consultation procedure. Cantons were unsatisfied with new rights to appeal granted to immigrants. Therefore, the government left the proposed modifications out.

Federal Office for Immigration, Integration and Emigration: www.bfa.admin.ch

Federal Commission for Foreigners FCF: www.auslaender.ch

Federal Commission against Racism: www.ekr-cfr.ch

Federal Office for Refugees (FOR): www.asyl.admin.ch/englisch/maine.htm

¹⁷ Botschaft zur Änderung des Asylgesetzes vom Mai 2002, Vorschlag neues Asylgesetz

Chapter 3: European legislative proposals

As indicated in the previous chapters, Swiss immigration law is currently under revision. The two main reasons for these reforms are the aim to define “a coherent and comprehensive migration policy” (Art. 3 of the Draft Aliens Law) on the one hand, and the need to account for the changed constellation after the entry into force of the Bilateral Agreement introducing the Free Movement of Persons with the countries of the European Union. At the time of writing this report, the Draft Aliens Law is being discussed in Parliament together with the revision of the Asylum Bill. If both proposals are accepted, the new Law could enter into force at the beginning of 2005.

Given the possible amendments resulting from the ongoing negotiations in parliament, we base our analysis on the current Aliens Law as well as its instruments of implementation. Nevertheless, the main changes included in the new draft will also be mentioned. Furthermore, references to the new draft will be included when these are relevant for judging the compatibility of Swiss legislation with the European proposals.

3.1. Preliminary remark: upcoming reforms

The new immigration law pursues four main goals vis-à-vis existing regulations:

Dual admission system: The admission of gainfully employed and not gainfully employed EU nationals is regulated by the bilateral Agreement on the Free Movement of Persons. The admission of people from other countries is clearly limited to urgently required qualified personnel. This policy, which has basically been pursued since 1991, is thus going to be fixed in law.

Improvement of the legal position: The situation of foreigners who are lawfully and permanently resident in Switzerland is to be generally improved. For instance, legal obstacles to changes of occupation, jobs and cantons are to be removed. As an innovation, the subsequent immigration of the families of short-term residents and students is also to be permitted, provided residential and financial requirements are satisfied.

Fight against abuse: The new law will introduce new measures, particularly against organised illegal immigration, illicit work and, in certain cases, against the subsequent immigration of families.

Greater legitimacy of immigration policy: While immigration policy has so far been determined by regulations issued by the Federal Council, its major principles - immigration, emigration, admission requirements, subsequent immigration of families, deportation and refusal of entry, as well as measures of security and constraint - will now be comprehensively regulated by law. This means that in the future, the parliament will be more involved in the formulation of immigration policy.

Compliance with international law: Given the reliance of immigration policy on administrative regulations, adaptation to international standards has until now occurred at the level of practices rather than laws. The new Aliens Law will reflect adaptation to basic human rights developments, especially with regard to family reunification and mobility rights, by giving them a clear basis in the law.

3.2. Admission for economic purposes

Admission for economic purposes in Switzerland is currently regulated by two main legal texts, the Decree on the Limitation of the Number of Aliens (OLE) of 1986, which is the main implementing instrument of the Law on the Entry and Stay of Foreigners (ANAG) of 1931, and the law implementing the Bilateral Agreement concluded with the EU introducing the free movement of persons. Given Switzerland's special status as an associated non-member state, two different admission procedures exist.

3.2.1. Rules applying to non-EU/EFTA nationals

In order to work, foreign citizens need a residence permit for work purposes, which entitles them to take up gainful employment. In case of stays of over four months, such permits can only be issued within the scope of the quota system established by the Federal Council (art. 12 Decree on the Limitation of the Number of Aliens, OLE). Under the current law, aliens without a residence permit are only allowed to take up self-employment by way of exception. Additionally, any change of jobs and profession, as well as a move to another canton, require an authorisation. Before issuing a permit, the labour market authorities have to decide whether the economic and labour market situation allows for admission and if the general conditions regarding taking up gainful employment are fulfilled (art. 42 et 43 OLE).

Permits may only be issued if the wage and employment conditions customary at the place and in the trade are met (art. 9 OLE) and if no domestic worker willing to work under those conditions can be found (art 7 OLE; priority of domestic workers). The domestic worker priority is not effective in the framework of international transfers of executives and highly qualified specialists, and in the case of persons who obtained a residence permit in connection with family reunification. Exceptions concerning the domestic worker priority can be made in case of training and further education purposes. The current Swiss legislation does not prescribe provisions regarding income thresholds and employers' contributions.

As a general rule, first time work permits can only be exceptionally issued to non EU/EFTA citizens if they are highly qualified or if special reasons justify an exception. In addition, applications for a work permit must be made outside the Swiss territory. Applications for work permits are made by employers, and not by workers. Special rules apply for asylum seekers.

Swiss law distinguishes between several residence permits which define different conditions with regard to the entitlement to work or family reunification (see below).

Short-time residence permits (L Permit) are restricted to a maximum period of 18 months for the purpose of vocational further education or for activities of limited duration.

Year-round residence permits (B Permit) are initially issued, as a rule, for the duration of one year and can be extended each year. Permits falling under the federal quota system are primarily granted to qualified specialists. For temporary activities, permits limited to a maximum of four years may be granted.

Permanent residence permits (C Permit) are usually granted after an uninterrupted 10-year stay in Switzerland. Nationals of the EU-/EFTA member states and USA citizens qualify for the permanent residence permit after a 5-year stay, according to specific bilateral agreements. This permit is not subject to any labour market restrictions and the holders

have practically the same rights and opportunities as native workers, except the right to vote and to be elected.

Border commuter permit (G Permit): Although applying mainly to EU/EFTA nationals, the border commuter permit is in principle open to third-country nationals who are legally established in a neighbouring country. Prior to the Bilateral Agreement with the EU, this authorisation could be issued free of quotas to persons who had been residing in the border area of a neighbouring country for at least six months. With the entry into force of the Agreement, this minimum residency requirement was abolished. The rule according to which border commuters could generally only work in the border area of the canton which issued the permit and had to return daily to their domicile was also abolished. According to the new regulations, border commuters have to return at least weekly to their domicile. Furthermore, persons residing in a neighbouring region are no longer required to work within the border region where they live but may also work in another canton (i.e. a German border commuter may also work in Geneva).

With the entry into force of the Bilateral Agreement with the EU, the Seasonal Worker Permit was abolished. This permit, which applied only to EU/EFTA nationals, has now been transformed in a short-term work permit. In addition, the rules relating to Border Commuters also had to be changed due to the entry into force of the Agreement (see below).

The following table shows the different types of permits, their maximum duration, the responsible labour market authority (cantonal or at the level of the Confederation) and the available quotas for the current year.

Table 1: Current work permits system and quotas in 2003

| Type of permit | Validity duration | Authority | quota 1.11.2002 -31.10.2003 |
|--------------------------------|---------------------------------|-----------|---|
| "4-month" permit | 120 days within a year | cantons | no quota |
| Short-Time Residents | 364 days | cantons | 5,000 in total |
| Trainee permits ("stagiaires") | 12 - 18 months | Confed. | approximately 4,000, agreements with about 30 countries |
| Year-Round Residents | 1 year, renewable free of quota | cantons | 4,000 in total |
| Border Commuters | 1 year, renewable | cantons | no quota |

The determination of *annual quotas* is based on economic and labour market requirements, as well as on the general priorities of the domestic economy. The implementing regulations of the Decree on the Limitation of the Number of Aliens (OLE) stipulate that the federal government may agree to extend cantonal quotas especially if this is in the interest of:

- several cantons;
- the settlement of an important new industry or a significant extension of existing ones;
- protected segments of the economy or the promotion of weak regions;
- large project of national interest;
- research;
- transfer of executives (e.g. in the framework of the GATS/WTO) or important transfers of know-how¹⁸.

¹⁸ Federal Office for Foreigners, *Weisungen und Erläuterungen über Einreise, Aufenthalt und Arbeitsmarkt (ANAG)* of February 2003, §434.2.

Other social criteria relating e.g. to the capacity for integration are not officially considered in the determination of quotas.

Occupational and geographical mobility of year-round residents or holders of a border commuter permit may be granted already within the first year of arrival (art. 29 OLE). Holders of temporary permits are usually not allowed to change jobs, profession, or to move to another canton.

Subcontract of labour force from abroad to Switzerland is in principle not allowed. Activities of temporary and interim employment agencies from abroad are not allowed.

Family members (spouse and unmarried children up to 18 years) of year-round residents may be admitted without waiting period if the stay and gainful activity appear to be secure. Family reunification of other permit holders is generally not allowed. Permits granted to family members are not submitted to quotas (admission of family, art. 38-39 OLE).

3.2.2. Main changes in the Draft Aliens Law

With regard to admission for economic purposes, the draft new aliens law maintains the principle of admission on the basis of administrative discretion according to quotas, domestic and EU/EFTA workers priority, control of work and wage conditions, but regulates these in the law rather than by decree, and specifies more clearly the necessary personal, and especially professional qualifications required. In the current proposal, a new provision was introduced according to which employers wishing to recruit third-country nationals may be requested to create new training posts for the indigenous population.

Apart from the abolition of the seasonal worker status, a main innovation consists of the recognition of the potential benefits from the admission of *self-employed persons* for the overall economy. While current law allows for their admission only as an exception, the new law gives the responsible authorities the discretionary power to admit self-employed persons within a certain quota if this is in the general economic interest of the country.

3.2.3. Rules applying to EU/EFTA nationals

The Bilateral Agreement on the Free Movement of Persons concluded with the EU, which entered into force on 1 July 2002, provides for the abolition of work permits for EU/EFTA citizens after a transitory period of five years. A formal work permit will then be issued without formalities by the cantonal aliens' police on the basis of a work contract.

For EU/EFTA citizens who desire to take up an occupation in Switzerland, a number of transitory phases are foreseen:

- During two years after the entry into force of the Bilateral Agreement, the admission of EU/EFTA workers will be regulated by annual quotas and existing labour market regulations;
- Between the second and the fifth year following the entry into force of the Agreement, only annual quotas must be observed. Salaries and working conditions are no longer controlled;
- Special provisions concerning the border zone apply for cross-border commuters during five years.

During the first 2 years, the existing regulations on the domestic worker priority are maintained. All EU/EFTA citizens who were living in Switzerland before the entry into force of the Bilateral Agreement obtained certain privileges. They were granted national treatment and may be joined by their families. In addition, professional and geographical mobility was granted, irrespective of the previous legal status (i.e. also for former seasonal workers).

The new regulations make provisions for two different types of residence permits for EU/EFTA nationals.

Long-term residence permits (5 years) (B-EG): EU/EFTA nationals who have a work contract of more than one year receive a long-term residence permit. This permit replaces the former B and L permits (over 12 months).

After five years, this permit is automatically renewed on the basis of a confirmation of employment by the employer. During the transitory period of 2 years after the entry into force of the Bilateral Agreement (i.e. until 1 July 2004), the competent authority may request a written work contract in order to check whether the wage and employment conditions customary at the place and in the trade are being observed.

EU/EFTA citizens with a former B-permit enjoy national treatment from the moment of the entry into force of the Bilateral Agreement and have full professional and geographical mobility in Switzerland. Persons who want to take up a self-employed activity are allowed to do so, but need a specific permit which will remain subject to an annual quota until 2004.

Short-term residence permits (up to one year) (L-EG): They are granted for stays which do not exceed 364 days. The duration of the permit corresponds to the duration of the work contract. Quotas are maintained during the first five years after the entry into force of the Bilateral Agreement (i.e. until 1 July 2007). In contrast to the old L-permit and the short-term permit for non-EU/EFTA nationals, holders of this permit must not leave Switzerland immediately after its expiration. The L-EG permit may be prolonged or, if the work contract covers more than one year, may be transformed into a long-term permit. During the transitory period of five years, the mobility of persons with an L-EG permit is limited. A change of occupation implies the renewal of the permit, however, it is no longer necessary to leave Switzerland between two jobs.

Apart from the amendment and extension of existing work permits, the implementation of the Bilateral Agreement also required the abolition of the restrictive *Seasonal permits* which were valid for a maximum period of 9 months per year and were only granted to citizens coming from EU and EFTA countries¹⁹. Seasonal workers who were employed in Switzerland at the moment of the entry into force of the Bilateral Agreement received a short-term permit. This conversion is independent from existing quotas.

In accordance with EC law, freedom of movement also applies to the non-economically active without transitory period. This category includes retired workers, pupils, students and other non-economically active persons and recipients of services according to Art. 23 Annex I of the Bilateral Agreement. These persons and their family members may reside in Switzerland provided that they have sufficient financial means and that they are insured against accidents and sickness. There are no quotas applying to these persons.

¹⁹ The holder of a seasonal permit, who spent in total 36 months within four consecutive years as a seasonal worker in Switzerland, and who is in possession of a long-term employment contract, could apply for a conversion of his seasonal permit into a year-round permit. This permit was not included in the quotas.

EU/EFTA nationals may enter the country for the purpose of seeking an occupation. No permit is needed for the first three months; if the search takes longer, a three-month short-term permit is issued. If the person has not found an occupation during these six months, the short-term permit may be prolonged for up to one year if s/he can demonstrate concrete attempts to find a job.

3.2.4. Compatibility with the draft Directive

This paragraph shortly summarises the main differences between Swiss legislation and the draft Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities.

Generally speaking, the five different work permits outlined above correspond with the categories of workers outlined in **Article 2 (d-i)** of the draft Directive. The main difference is the seasonal worker status contained in Art. 2(f), which no longer exists in Switzerland (and which was limited to EU-nationals). However, short-term permits (up to four months) may be seen as a compensation for the abolition of the seasonal worker status. Although not mentioned as a specific work permit above, the category of intra-corporate transferees (Art. 2(h)) does also exist in Switzerland. With the exception of seasonal workers, the Swiss regulations are, thus, compatible with Art.2 as well as Art. 12-15 of the Directive which refers to these different categories of permits.

Like in the draft Directive (**Art. 3(2)**), the minimum stay of persons admitted for economic purposes is 3 months, although special provisions apply to trainees. The provisions relating to service providers are, however, less generous than in the draft Directive. These are admitted without work permit requirement for stays of up to eight days only, within three months, when this is in the general economic interest. Workers in the construction sector are not admitted. After the entry into force of the Bilateral Agreement on the free movement of persons with the EU and its member states, the law excludes the same groups of persons from the scope of its application as the draft Directive does (**Art. 3(3)**).

As far as conditions for admission are concerned, Swiss law also stipulates the domestic and EU/EFTA workers priority (**Art. 6**). In contrast to **Art. 6(2)** of the Directive, there exists no unified procedure to carry out labour market tests which would establish the domestic workers priority. Given the authority of the cantons in these matters, there is a large degree of divergence in the application of this rule. According to the Aliens Law²⁰, employers must transmit their offer to the regional labour offices and advertise the post in the relevant media. Recognising that a full evaluation of this procedure by the authorities is very difficult, the law argues that the employer needs to make these efforts credible. The European Employment System EURES is only mentioned with regard to the recruitment of EU/EFTA nationals. In accordance with **Art. 6(3)** of the Directive, certain professions are exempt from the domestic and EU/EFTA worker priority, or from labour market test. These are in particular senior executives and highly qualified persons occupied in leading positions in the economy and research as well as intra-corporate transferees (Art. 7(5) OLE).²¹

²⁰ Federal Office for Foreigners, *Weisungen und Erläuterungen über Einreise, Aufenthalt und Arbeitsmarkt (ANAG)* of February 2003.

²¹ See also the specification of these exceptions in the labour market instructions concerning the OLE, Federal Office for Foreigners, *Arbeitsmarktliche Weisungen und Erläuterungen des Bundesamtes für Ausländerfragen zur Verordnung des Bundesrates vom 6. Oktober 1986 über die Begrenzung der Zahl der Ausländer* of Mai 2002.

With its general limitation of the normal work permit to maximum one year (renewable), Swiss law is within the scope of discretion offered by the Directive to the member states under **Art. 7** which provides for a validity of a residence permit for worker of up to three years. An important difference exists, however, with regard to the conditions for granting long-term resident status: firstly, the categories of short-term residents are excluded, secondly, the current praxis grants permanent residence to citizens from outside the EU/EFTA as well as from the USA only after a stay of 10 years in contrast to the five years foreseen in the draft Directive concerning the status of third-country nationals who are long-term residents (see below).

Like **Art. 8** of the draft Directive, the current law also exempts workers without a permanent residence permits from geographical and professional mobility in Switzerland. However, the new law proposes a removal of this rule.

As mentioned above, the current law allows the entry of persons for the purpose of self-employment only on an exceptional basis. No detailed provisions for this admission are laid down in the law or the corresponding administrative instructions. The latter only stipulate that such exceptions may be granted if the self-employment is of "great public and economic interest" and has significant positive effects on the labour market²². As mentioned above, the new law will introduce the possibility of admission for the purpose of self-employment. The conditions are, however, not clear yet.

To conclude, there are several indications that the new draft law in Switzerland may be less compatible with the Directive (if adopted in its present form) than current legislation. Although opening up towards the self-employed, a major difference is found in the limitations for highly qualified workers, which is not the focus of the Commission proposal.

3.2.5. Undocumented migrants and regularisations

Until recently, the situation of persons without a regular residence permit in Switzerland was not perceived as a relevant problem. This is, perhaps, because the lack of documents was generally perceived as an indication of illegality or, in any case, as a self-inflicted problem of the alien. Thus, even if there were undocumented migrants, they could not count on much support from the local population or other actors to redress their legal situation. This changed slightly in 2001, when several groups of "*sans-papiers*" mobilised and caught the attention of the media by occupying churches in different parts of the country. Confronted with their call for regularisation (which was inspired by the parallel debates taking place in France at the time), the government, federal offices and the majority of cantons decided that these claims should not be handled on a collective basis. Instead, a letter of December 2001 of the Federal Department of Justice and Police laid down certain criteria for individual regularisations in cases of special hardship. On this basis, only 1,025 persons (including former asylum seekers) applied for a regularisation between September 2001 and January 2003. Among these applications, 43% had a positive outcome, 15% were rejected, 7% were refused on formal grounds, and 35% are still pending²³. Whereas these low numbers may be taken as an indication that the problem is not really that important in Switzerland, the whole manner in which the issue was dealt with politically also shows that Switzerland is

²² Federal Office for Foreigners, *Weisungen und Erläuterungen über Einreise, Aufenthalt und Arbeitsmarkt (ANAG)* of February 2003, p. 110.

²³ Numbers provided by Federal Offices. The numbers include both applications processed by the Federal Office for Foreigners and the Federal Office for Refugees.

cautious not to create precedents which could then be seen as attracting irregular immigrants²⁴.

3.3. Family reunification

Persons entering under the category of family reunification make up the largest group of immigrants in Switzerland. For EU/EFTA citizens, the right to family reunification is regulated in the Bilateral Agreement on the free movement of persons and corresponds to EU legislation relating to EU/EFTA nationals.

3.3.1. Current legislation

The right to family reunification of third-country nationals is regulated in the Law on the Entry and Stay of Foreigners (ANAG), as well as the Decree on the Limitation of the Number of Aliens (OLE). As a general rule, the right to immigrate under this category depends on the resident status of the person requesting family reunification. Swiss law does not entitle unmarried partners to family reunification (Art. 17 ANAG).

Spouses of Swiss citizens: Spouses of Swiss citizens have a right of residence provided the marriage is not fraudulent and the foreign spouse respects Swiss law. A right to permanent residence independent from the marital status is granted after five years of uninterrupted residence in Switzerland. Children of Swiss citizens who are residents in Switzerland are entitled to a facilitated naturalisation procedure. With the entry into force of the Bilateral Agreement with the EU, the rights of Swiss citizens were harmonised with those granted to EU/EFTA nationals. As a consequence, family reunification also covers relatives in the ascending line (grandparents) and dependent children over 21 years of age. These persons have the right to take up an economic activity within their canton of residence.

Spouses of permanent resident aliens: Spouses and single children (up to 18 years of age) of permanent resident aliens receive a residence permit provided the marriage is not fraudulent, the foreign spouse respects Swiss law and does not require sustained and considerable public assistance. The couple must live together. A right to permanent residence independent from the marital status is granted after five years of uninterrupted residence in Switzerland. The prolongation of a residence permit in case of separation/divorce for spouses who have been staying for less than five years in Switzerland occurs only on an exceptional basis, depending on the degree of integration in the country.

Spouses of aliens with limited permits: Spouses of aliens with limited permits are accepted on a discretionary basis. The law stipulates that the cantonal foreigners police *may* allow the reunification of the spouse and single children of foreigners with limited permits under the following conditions: the centre of family life must be in Switzerland, there must be appropriate housing, and the financial situation must be sound (no risk of protracted dependence on public assistance). Men and women have equal rights.

Foreigners staying only temporarily in Switzerland (Status L, Students etc.) have no right to family reunification (only visits for max. 3 months in a row and less than 6 months a year in total).

²⁴ A different measure was the 'humanitarian action 2000' carried out by the Federal Office for Refugees completed in April 2001 which regulated the status of some 15,000 former asylum seekers who had entered Switzerland prior to 31 January 1992 and who were well integrated in the society.

As a general principle, the reunification of children does not occur in stages (all children shall be brought to the country at the same time). If a foreigner has already been living in Switzerland for several years before s/he decides to bring the children over, there must be good reasons and tight relations that explain why the children should be brought in. The right to family reunification must be claimed within five years of entry into Switzerland, and later applications are admitted only on an exceptional basis.

Spouses and children of resident aliens have no automatic right to work but may be granted a work permit by the cantonal authorities according to the general rules on admission for economic purposes. In this case, these persons are excluded from the general quotas.

3.3.2. Main changes in the Draft Aliens Law

The new law will introduce both a widening and a hardening of family reunification rights. More generous provisions are planned for aliens with year-round and short-term permits. They will be entitled to family reunification in a similar manner as permanent residents. An innovation has been introduced: the possibility for holders of short-term permits to be granted this right. Spouses and children of Swiss citizens as well as permanent and year-round residents will have the right to work without geographical limitation in Switzerland. While the general exclusion grounds of the current law are maintained, the new law also introduces a number of new safeguards against fraudulent marriages. Firstly, families will be generally required to live together under one roof, and derogations will be accepted only on an exceptional basis if it is indispensable for the maintenance of family unity. Furthermore, in the case of permanent resident aliens, permanent residence status will be granted upon entry only to children under 14 years of age, and older children (until 18) will receive annual (renewable) permits. Under the current law, all children of permanent residents entering before their 18th birthday are granted permanent residence. Finally, new measures against fraudulent marriages are foreseen.

3.3.3. Compatibility with the draft Directive

At their Council meeting on February 27-28, the EU Justice and Home Affairs Ministers reached an agreement on the draft Directive on the right to family reunification for non-EU nationals legally living in the Union. This section summarises the main differences between this Directive and Swiss Aliens Law.

The general scope of application of the Directive provided in **Article 3** corresponds with the scope of the Swiss Aliens Law with regard to family reunification.

The open formulation of the family members covered by the right of family reunification in **Article 4** of the Directive, which suggests a large degree of discretion for member states ("may"-provisions) is also compatible with Swiss law. Although the latter does not provide for an extended notion of family as proposed by Art. 4(2) of the Directive, it also exceeds the minimum standard stipulated by the EU. This relates i.e. to the possibility to subject children over the age of 12 to an integration test in order to be granted the right of residence (Art. 4(1)d); which is not foreseen in Swiss law; the stipulation of a minimum age of max. 21 for the sponsor and his/her spouse before the spouse is able to join (Art. 4(5)); the possibility to restrict the right to family reunification of children below the age of 15, and not 18 as in Swiss law; and the limitation of the period during which a foreigner is entitled to family reunification after his/her entry into country to two years (**Art. 8**), whereas Swiss law stipulates five years. One point on which current Swiss legislation is less generous than the Directive, however, is access to employment. The Directive grants in **Article 14** a right of access to employment and self-employed activity in the same way as the sponsor. While current proposals for the new Swiss Aliens Law also include a general opening up of the

labour market to immigrants entering through family reunification, current legislation still limits this right to permanent residents.

3.4. Long-term residence right

3.4.1. Current legislation

Under the current legislation, permanent residence permits (*C Permit*) are usually granted after an uninterrupted stay of 10 years in Switzerland. Nationals of the EU-/EFTA-member states and USA citizens qualify for a permanent residence permit after a stay of five years according to specific bilateral agreements. The five-year qualification also applies to recognised refugees as well as spouses of Swiss nationals and of permanent resident aliens. This permit is not subject to any labour market restrictions and the holders have practically the same rights and opportunities as native workers. However, a change of canton of residence and an economic activity in another canton are subject to official approval. Furthermore, permanent resident aliens are generally not granted the right to vote and elect. At local level, however, several communes recognise the right to vote and elect in local elections.

Permanent residence permits are not coupled to specific requirements and are not subject to economic considerations. Although unlimited, permits are issued for three years and are subject to a regular control procedure upon renewal.

Under the current law, an entitlement to permanent residence exists only if explicitly foreseen by the law (e.g. in the case of family reunification and recognised refugees) or when a corresponding intergovernmental agreement exists with the country of origin. An immediate access to permanent residence is usually granted to university professors by way of derogation. Facilitating circumstances may also be the expected economic contribution of an alien's presence e.g. when s/he contributes to the creation of new jobs, new enterprises, or significant tax payments.

Permanent residence permits expire through emigration or if the foreigner leaves the country for a period exceeding six months. The permit may be retained if the alien announces his or her departure prior to leaving the country and if the stay abroad does not exceed two years.

Permanent resident status may be withdrawn by the cantonal authorities if the foreigner has obtained it on the basis of intentional false or fraudulent information. This may also include cases in which the foreigner conceals his/her intention to divorce from a marriage on the basis of which the permit was granted²⁵.

Expulsions, including both the obligation to leave the country and the interdiction to re-enter, may be ordered by the responsible cantonal authorities either temporarily (for at least 2 years) or permanently. The law foresees the following reasons justifying expulsion (Art. 10 ANAG):

- If the person has been sentenced by court for a crime or an offence;
- If the person is not willing or capable to insert into the public order of the host country;
- If s/he threatens public order through mental disease;

²⁵ Federal Office for Foreigners, *Weisungen und Erläuterungen über Einreise, Aufenthalt und Arbeitsmarkt (ANAG)* of February 2003, §33.

- If s/he or another person in her/his custody repeatedly places an unbearable burden upon public funds (*‘öffentliche Wohltätigkeit’*)²⁶.

In any case, expulsion may only be decided if it seems fully adequate and does not result in unnecessary hardship for the foreigner in question. In evaluating the weight of the offence, the duration of the person’s stay in Switzerland as well as that of his/her family shall be taken into consideration (Art. 11 (3) ANAG).

3.4.2. Main changes in the Draft Aliens Law

The new Aliens Law will improve the situation of permanent resident aliens. The general 10-year period for granting permanent residence is maintained, but is transformed into an entitlement rather than administrative practice. Furthermore, the draft law provides that in case of good integration, it may be granted after five years only to all nationalities. The time limit for reviewing the permit is extended from currently three to five years. Finally, permanent resident aliens are entitled to live and work without geographical restrictions in Switzerland. It is not clear yet how far the grounds for expiry or withdrawal of this status will be amended.

3.4.3. Compatibility with the draft Directive

The main difference between the draft Directive concerning the status of third-country nationals who are long-term residents in a member state of the European Union and current Swiss legislation relates to the duration of stay necessary to qualify for permanent residence. While the Directive proposes five years of legal and continuous residence (**Article 5**), Swiss law requires ten years and, after the revision, will allow for a shorter period only on an exceptional basis.

Another important difference relates to the right of free movement of long-term resident third-country nationals in the Union. Although the Directive aims at extending free movement rights to these persons (**Chapter 3**), no corresponding provisions exist in the Swiss legislation so far, neither in the current or draft new Aliens Law, nor in the Bilateral Agreement on the free movement of persons with the EU and its member states.

Concerning equal treatment (**Article 12**) it can be said that current Swiss legislation is more restrictive than the draft Directive because of its limitations on geographical mobility. However, this will be amended with the new Aliens Law.

Finally, regarding the grounds for a withdrawal of status and the protection against expulsion, Swiss legislation contains similar regulations to those in the draft Directive, but offers a lower degree of protection to long-term resident aliens (**Articles 10-13**). Like Swiss law, the draft Directive stipulates a maximum period of absence of two years, extendable according to national legislation. It also includes the criteria of fraud. An additional ground for withdrawal included in the Directive applies if the person has obtained long-term status in a second member state. From the text of the Directive, it seems that it places more emphasis on the rights of the alien and the prevention of abuse by public authorities than Swiss law which gives a large degree of discretion to cantonal offices. This is also reflected in the provisions of **Article 11** of the Directive which provides that “At all stages of the procedure, from application to withdrawal, applicants must be kept properly informed so that they can defend their interests” and **Article 13** which imposes strict limits on the grounds and procedures for expelling long-term resident aliens.

²⁶ Federal Office for Foreigners, *Weisungen und Erläuterungen über Einreise, Aufenthalt und Arbeitsmarkt (ANAG)* of February 2003, §832.

Chapter 4: Recommendations and open method of co-ordination

This chapter discusses the Guidelines for an Open Method of Co-ordination proposed by the European Commission in the light of the existing legislation and the broader migration debate in Switzerland. Given the speculative character of this exercise and the fact that the migration debate has been discussed in depth in Chapters one and two, this chapter is kept deliberately short.

4.1. Guidelines

Guideline 1: *Developing a comprehensive and co-ordinated approach to migration management at national level*

This guideline reflects the intentions of the Swiss government behind the comprehensive revision of the Aliens Law which is currently under way. The new law shall provide a unified legal framework for the regulation of immigration into Switzerland for the purpose of economic activity and family reunification. In contrast to the prior regulation on the basis of administrative decrees, this shall give Swiss immigration policy a stronger formal basis and allow for greater legitimacy and transparency through stronger involvement of the Parliament.

In terms of subjects covered, the new law relates to immigration, emigration, admission requirements, subsequent immigration of families, deportation and refusal of entry, as well as measures of security and constraint – but does not include asylum and refugee policy. This is regulated in a separate law which is equally currently under revision. Although in the early 1990s, there were several proposals to unify asylum and immigration legislation in one common framework, several expert committees dealing with the revision of the law²⁷ and the Federal Council (the Swiss government) decided not to merge the two issues.

Beyond the legislative level, it may be said that the existence of two independent and strong Federal Offices dealing with economic migration and asylum seekers and refugees respectively, the Federal Aliens Office (FAO) and the Federal Office for Refugees (FOR), is not necessarily amenable to a more integrated view on these phenomena as proposed by the Commission in its explanations to this guideline.

A higher degree of co-ordination seems to exist with regard to the return and/or expulsion of unauthorised aliens, in particular temporary refugees whose status has expired, and rejected asylum seekers. This co-ordination, however, applies less to the two offices mentioned above than to the FOR and the Foreign Affairs Department, and here in particular the section dealing with development cooperation (DEZA).

The second aspect of the Guideline refers to member states' "support to improving the on-going work on the collection and analysis of statistics on migration". In this respect, it can be said that in international comparison, the Swiss aliens statistics reach a very high degree of precision²⁸.

²⁷ These were the expert Committee "migration" (*Kommission Hug*) set up in 1996 and the expert Committee dealing with the drafting of the new Aliens Law set up in 1998.

²⁸ This could also be confirmed in a comparison of European statistics carried out in the framework of a research project funded by the European Commission's Fifth Framework Programme on the Political Economy of Migration in an Integrating Europe, see the papers at <http://pemint.ces.uc.pt/>.

Guideline 2: *Improving information available on legal possibilities for admission to the EU and on the consequences of using illegal channels*

This guideline proposes the development of information services in third countries on legal ways of obtaining admission to the EU for nationals of those third countries as well as promoting co-operation and exchange of information between consular services of Member States in countries of origin, in particular with respect to visa policy.

With regard to the first point, the website of the FAO offers an accessible presentation of the existing regulations on entry and stay in Switzerland (www.bfa.admin.ch). This site operates in four languages, French, German, Italian and English. The FOR also maintains a professional website which explains the proceedings of the asylum law, also in these four languages (www.bff.admin.ch). In addition, the FAO supports a special recruitment agency in Spain and Portugal (the so-called "Büro Sieber") which has traditionally managed the intake of seasonal workers to Switzerland. This office, which is based on the original bilateral intergovernmental agreement between Switzerland and Spain for the recruitment of workers, was established under the lead of the main employers' associations of the sectors relying on seasonal work and is, according to interviews conducted with both the associations and the FAO, generally regarded as an efficient model for regulating labour migration for both the country of origin and the host country. No similar office exists, however, in other countries.

With regard to the development of awareness on the risks of being a victim of smuggling and trafficking, some activities have been carried out in the framework of the co-operation programme with the office of the International Organization for Migration (IOM) in Bern. This co-operation focuses, however, on return programs.

Guideline 3: *Reinforcing the fight against illegal immigration, smuggling and trafficking*

As mentioned in the previous chapters, the fight against illegal immigration is a constant feature of Swiss immigration law and of the political debate on this issue. With respect to concrete measures, the most important is probably the creation, in the federal police office, of a task force on human trafficking and smuggling. Switzerland has also intensified its efforts to sign readmission agreements with countries of origin and transit of asylum seekers and illegal immigrants. The attempt in early 2003 to conclude a transit agreement with Senegal, which would have provided for the return of unauthorised migrants as well as rejected asylum seekers regardless of their country of origin and, what is more, also in the absence of secured knowledge about the identity and citizenship of the person in question, failed at the last minute. The idea was that the identification procedure should take place at Dakar airport in co-operation between Swiss and Senegalese officials before a person is returned to his/her country of origin or to a third country willing to admit him/her. If the identity of the person could not be established within a couple of weeks, s/he would be returned to Switzerland²⁹. If it had succeeded, Switzerland would have been the first European country to conclude such a far-reaching readmission and transit agreement with an African country. Senegal rejected the agreement due to humanitarian grounds and domestic opposition.

According to both official discourse and these measures as well as Switzerland's involvement in other intergovernmental fora such as the Budapest Group, there is no doubt that the government would be very open to join the EU in an effort to mobilise support from both sending and transit countries in the attempt to fight undesired migration flows. In this

²⁹ The text of the Agreement can be downloaded on the website of the Federal Office for Refugees at <http://www.bff.admin.ch/deutsch/newsd.htm>.

respect, it is feared that without the economic and political weight of the EU acting in unity, Switzerland might be severely handicapped in its attempt to influence third countries.

Guideline 4: *Establishing a coherent and transparent policy and procedures for opening the labour market to third country nationals within the framework of the European employment strategy.*

Switzerland, as a non-member state, does not participate in the European employment strategy. However, it does have a strong economic, labour-orientated approach to immigration (see Chapter 1).

While consensus exists on the general need for foreign workers, there is a considerable level of disagreement concerning what kind of immigrants is needed. Whereas the government's legislative proposals seek to abolish the admission of manual or non-specialised workers from outside the EU and EFTA, stakeholders in labour-intensive industries insist on regulations which allow not only for the admission of highly skilled professionals, but also for that of non-skilled workers.

A further stipulation of this guideline is the need for greater involvement of civil society in the conduct of immigration policy. It can be said that already today, NGOs and religious associations play an important role in caring for asylum seekers and other migrants. However, social partners and in particular employers' associations and trade unions are a very influential set of actors who play an important role in the implementation of the Aliens' Law, especially at cantonal level (see Chapters 1 and 2).

In spite of the role of private actors, it must be said that the current immigration system does not really amount to "clear and transparent procedures for the selection of applications from third country nationals to enter the labour market" as stipulated by the Commission under this guideline. On the contrary, coupled with the strong degree of federalism prevailing in this field of policy, the involvement of private actors and in particular of social partners contributes to a fragmentation of the system and has led to corporatist structures which intensify, rather than attenuate, problems of transparency and accountability³⁰. A points-based system such as those existing in Canada or Australia has been proposed as an alternative but rejected.

Guideline 5: *Integrating migration issues into relations with third countries*

The Agency for Development Co-operation (DEZA) of the Foreign Affairs Department has become increasingly interested in migration issues and often refers to migration-related goals when justifying its development policy. The systematic coupling of immigration goals with development aid and the introduction of conditionality measures in relations with countries of origin have been discussed but have not yet been endorsed.

The clearest action towards third countries in relation to immigration so far relates to the fight against illegal immigration and the conclusion of readmission agreements mentioned above.

³⁰ On this, see Cattacin, Sandro (1987) *Neokorporatismus in der Schweiz : die Fremdarbeiterpolitik*, Zürich: Forschungsstelle für Politische Wissenschaft and Dhima, Giorgio (1991) *Politische Ökonomie der schweizerischen Ausländerregelung. Eine empirische Untersuchung über die schweizerische Migrationspolitik und Vorschläge für ihre künftige Gestaltung*, Chur/Zürich: Rüegger.

However, the FOR has taken a remarkable initiative in attempting to promote a comprehensive approach towards migration which would be rooted in an international migration regime. This initiative, which is known as the "Bern Initiative", seeks to join countries of origin and host countries in a common co-operation framework for the regulation of migration, which would be based on the principle of maximisation of the mutual gains of regulated migration.

Guideline 6: *Ensuring the development of integration policies for third country nationals residing legally on the territories of the Member States*

Awareness of the need for proactive integration policies for foreigners living in Switzerland is a relatively new development. In accordance with the guest worker policy, the traditional understanding of immigrants has been one of temporary workers rather than permanent settlers with a right (and duty) of integration. Until the mid-1990s, the law did not provide a federal mandate for the integration of immigrants. Rather, integration projects were the responsibility of communes and cantons³¹.

Apart from the inclusion of a new article in the Aliens Law which provides for the competence of the Federal Government to support integration measures carried out by the cantons or private organisations with financial means, the establishment in 1995 of the Federal Commission against Racism (*Eidgenössische Kommission gegen Rassismus*), one year after the ratification of the 1965 UN Convention on the Elimination of Racial Discrimination, was an important development. Although still in its early stage, the realisation of a need for enhanced integration has already led to a number of proactive projects concentrating on language courses, cultural exchange, and participation in associations, schools and local governments. The latest project is a reform of the law on naturalisation which allows for automatic granting of Swiss citizenship to third-generation immigrants born in Switzerland (*jus soli*) and facilitated naturalisation for persons who have spent most of their school time in Switzerland and who are well integrated, abide by the law and do not endanger public security. One reason for this reform was the assertion that more than half of the total foreign population (annual permits and permanent residents) were born in Switzerland or had been living there for more than ten years. Although the draft law does not impede the popular sovereignty of the communes over the granting of citizenship, it provides legal remedies against discrimination and arbitrariness.

4.2. Conclusion

Since the 1990s, but already before that, the main influence which has shaped Swiss immigration policy is the external development of international legal norms and standards, rather than domestic prerogatives. These were influential in the improvement of the legal status of Italian, Spanish, Portuguese and later Greek seasonal workers in Switzerland from the 1960s onwards, allowing for the transformation of seasonal work permits into year-round and then settlement permits. At the end of the 1990s, the conclusion of the Bilateral Agreement on the free Movement of Persons with the EU and its member states induced a major reform of immigration law and favoured the abolition of geographical and professional barriers to mobility for foreigners living in Switzerland. Given the political sensitivity of the immigration issue and the channels of influence opened by the institutions of direct democracy, the situation today is that the opening of the labour market towards the EU and

³¹ On this, see Niederberger, Josef Martin (2001) 'Von der "Wiederentfernung" zur Integration - der Entwurf zu einem neuen Ausländergesetz', *Swiss Political Science Review*, 7 (1) and Eidgenössische Ausländerkommission (1999) *Die Integration der Migrantinnen und Migranten in der Schweiz. Fakten, Handlungsbereiche, Postulate*, Bern: Eidgenössische Ausländerkommission.

EFTA will be compensated by a greater restriction of immigration provisions for persons coming from so-called "third countries". It is, therefore, not very clear to what extent the draft European directives on immigration for economic purposes and family reunification would win the support of Switzerland. Yet, if adopted, these directives will inevitably have an impact on Swiss immigration policy – even if Switzerland is not a member state and, hence, will not participate in their development.

The **Swiss Forum for Migration and Population Studies** is an independent research institute affiliated to the University of Neuchâtel. It conducts scientific research in the fields of migration and demographic issues with the aim of contributing towards a pragmatic discussion on topics associated with migration. Since it is positioned at national level, the SFM plays a key role in the coordination and networking of research in Switzerland. This also makes it into a preferred partner for numerous foreign bodies. The SFM comprises a multilingual and interdisciplinary team. Since it was founded in 1995, the Forum has been conducting political research, appraisals and consultancy work, which are either commissioned from it or carried out as part of the furtherance of scientific research both in Switzerland and internationally.

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