

OXFORD

EU Migration Law

Legal Complexities and Political Rationales



Edited by

Loïc Azoulay and Karin de Vries

THE COLLECTED COURSES OF THE ACADEMY
OF EUROPEAN LAW

Series Editors

PROFESSOR MARISE CREMONA,
PROFESSOR BRUNO DE WITTE,
PROFESSOR FRANCESCO FRANCONI
European University Institute, Florence

Assistant Editor

ANNY BREMNER
European University Institute, Florence

VOLUME XXI/2
EU Migration Law

THE COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW

Series Editors

Professor Marise Cremona,
Professor Bruno de Witte,
Professor Francesco Francioni
European University Institute, Florence

Assistant Editor

Anny Bremner

Each year the Academy of European Law in Florence, Italy, invites a group of outstanding lecturers to teach at its summer courses on Human Rights law and European Union law.

A 'general course' is given in each of the two fields by a distinguished scholar or practitioner, who examines the field as a whole through a particular thematic, conceptual, or philosophical lens, or looks at a theme in the context of the overall body of law. In addition, a series of 'specialized courses' brings together a group of highly qualified scholars to explore and analyse a specific theme in relation to Human Rights law and EU law.

The Academy's mission, to produce scholarly analyses which are at the cutting edge of these two fields, is achieved through the publication of this series, the Collected Courses of the Academy of European Law.

EU Migration Law

Legal Complexities and Political Rationales

Edited by
LOÏC AZOULAI
and
KARIN DE VRIES

OXFORD
UNIVERSITY PRESS

OXFORD

UNIVERSITY PRESS

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

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© The several contributors 2014

The moral rights of the authors have been asserted

First Edition published in 2014

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in
a retrieval system, or transmitted, in any form or by any means, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

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

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013950749

ISBN 978–0–19–870853–7

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

Links to third party websites are provided by Oxford in good faith and
for information only. Oxford disclaims any responsibility for the materials
contained in any third party website referenced in this work.

Contents

<i>Table of Cases</i>	vii
<i>Table of Legislation</i>	xi
<i>Notes on Contributors</i>	xvii
1. Introduction	1
<i>Loïc Azoulay and Karin de Vries</i>	
2. The Lisbon Treaty and the Future of European Immigration and Asylum Law	14
<i>Helen Toner</i>	
3. The Politics of Irregular Migration	41
<i>Christina Boswell</i>	
4. Migration Policy and EU External Relations	69
<i>Bernd Martenczuk</i>	
5. Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Borders Management	106
<i>Seline Trevisanut</i>	
6. Integration of Immigrants in EU Law and Policy: Challenges to Rule of Law, Exceptions to Inclusion	149
<i>Sergio Carrera</i>	
7. Analysing European Case-Law on Migration: Options for Critical Lawyers	188
<i>Thomas Spijkerboer</i>	
<i>Index</i>	219

Table of Cases

COURT OF JUSTICE OF THE EUROPEAN UNION

Case C-22/70, <i>ERTA</i> , [1971] ECR 263	84, 85–6, 92, 96, 99
Opinion 1/75, <i>OECD Local Cost Standard</i> , [1975] ECR 1355	81n
Opinion 1/76, <i>Laying-up Fund for Inland Waterway Vessels</i> , [1977] ECR 741	83–4
Case C-41/76, <i>Donckerwolcke</i> , [1976] ECR 1921	81–2
Case 53/81, <i>D.M. Levin v. Staatssecretaris van Justitie</i> , [1982] ECR 1035	198–200, 201, 204, 206
Case 12/86, <i>Demirel</i> , [1987] ECR 175	95n
Case C-192/89, <i>Sevince</i> , [1990] ECR I-3461	95n
Case 292/89, <i>R. v. Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen</i> , [1991] ECR I-00745	199n
Case C-18/90, <i>Kziber</i> , [1991] ECR I-199	95n
Case 370/90, <i>Surinder Singh</i> , [1992] ECR I-4265	199n, 200–1, 204
Opinion 2/91, <i>ILO Convention No. 170</i> , [1993] ECR I-1064	85n, 96n
Opinion 1/94, <i>Accession to the WTO</i> , [1994] ECR I-5267	83n, 102n
Case C-70/94, <i>Werner</i> , [1995] ECR I-3139	101n
Case C-83/94, <i>Leifer</i> , [1995] ECR I-3231	101n
Case C-268/94, <i>Portugal v. Council</i> , [1996] ECR I-6177	104n
Case C-351/95, <i>Kadiman</i> , [1997] ECR I-2133	95n
Case C-170/96, <i>Commission v. Council</i> , [1998] ECR I-2763	100n
Case C-378/97, <i>Wijsenbeek</i> , [1999] ECR I-6207	2
Case C-37/98, <i>Savas</i> , [2000] ECR I-2927	103n
Case C-376/98, <i>Germany v. Council and Parliament</i> , [2000] ECR I-08419	24n
Case C-467/98, <i>Commission v. Denmark (Open Skies)</i> , [2002] ECR I-9519	83n, 84
Case 109/01, <i>Akrich v. Secretary of State of the Home Department</i> , [2003] ECR I-9607 200–202	203–6
Cases C-317/01 and C-369/01, <i>Abatay and ors</i> , [2003] ECR I-12301	103n
Opinion 1/2003, <i>Lugano Convention</i> , [2006] ECR I-1145	83n, 85n, 93n
Case C-176/03, <i>Commission v. Council</i> , [2005] ECR I-7879	100n
Case C-265/03, <i>Simutenkov</i> , [2005] ECR I-2579	95n
Case C-380/03, <i>Germany v. Parliament and Council</i> , [2006] ECR I-11573	24n
Case C-540/03, <i>Parliament v. Council</i> , [2006] ECR I-5769	8n, 31, 39n, 178–9
Case 1/05, <i>Yunying Jia v. Migrationsverket</i> , [2007] ECR I-00001	203
Case C-91/05, <i>Commission v. Council</i> , [2008] ECR I-3651	104n
Case C-97/05, <i>Gattoussi</i> , [2006] ECR I-11917	95n
Case C-137/05, <i>United Kingdom v. Council</i>	22
Case 291/05, <i>Minister voor Vreemdelingenzaken en Integratie v. R. N. G. Eind</i> , [2007] ECR I	203
Case C-341/05, <i>Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet</i> , [2007] ECR I-11767	207n

C-403/05, <i>European Parliament v. Commission</i> , Case C-403/05, [2007] ECR I-9045	104n
Case C-438/05, <i>International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti</i> , [2007] ECR I-10779.	207n
Case C-228/06, <i>Soysal</i> , [2009] ECR I-1031.	102–3
Case C-465/07, <i>Elgafaji</i> , [2009] ECR I-921	8n, 39n
Case C-19/08, <i>Petrosian</i> , [2009] ECR I-495	39n
Cases C-22/08 and C-23/08, <i>Vatsouras and Koupatantze</i> , [2009] ECR I-04585	4n
Case 127/08, <i>Blaise Baheten Metock and ors v. Minister for Justice, Equality and Law Reform</i> , [2008] ECR I-6241	202–6, 207
Case C-175/08, <i>Abdulla</i> , [2010] ECR I-1493	39n
Case C-261/08, <i>Zurita García</i> , [2009] ECR I-10143.	39n
Case C-578/08, <i>Chakroun</i> , [2010] ECR I-1839.	7n, 8n, 39n
Case C-31/09, <i>Bolbol</i> , [2010] ECR I-5539.	39n
Cases C-57/09 and C-101/09, <i>B and D</i> , judgment of 9 November 2010, not yet published . . .	39n
Case C-357/09 PPU, <i>Kadzoev</i> , [2009] ECR I-11189	39n
Case C-69/10, <i>Diouf</i> , [2011] ECR I-7151	39n
Case C-105/10 PPU, <i>Gataev</i>	39n
Cases C-188/10 and C-189/10, <i>Melki and Abdeli</i> , [2010] ECR I-5667	2n, 39n
Cases C-411/10 and C-493/1, <i>N.S. and M.E. and others</i> , judgment (GC) of 21 December 2011, not yet published	8n, 27n, 30, 31, 32–4, 39
Case C-502/10, <i>Singh</i> , judgment of 18 October 2012, not yet published	39n
Case C-508/10, <i>Commission v. The Netherlands</i> , judgment of 26 April 2012, not yet published.	8n, 39n
Case C-571/10, <i>Kamberaj</i> , judgment (GC) of 24 April 2012, not yet published.	3n, 39n
Case C-4/11, <i>Puid</i> , (not yet published)	34n
Case C-61/11, <i>El Dridi</i> , [2011] ECR I-3015	7n
Case C-245/11, <i>K v. Bundesasylamt</i> , judgment of 6 November 2012, not yet published.	31n, 34n
Case C-329/11, <i>Achughbabian</i> , judgment (GC) of 6 December 2011, not yet published.	3n, 7n
Case C-430/11, <i>Md Sagor</i> , judgment of 6 December 2012, not yet published	7n
Case C-528/11, <i>Halaf</i> , judgment of 30 May 2013, not yet published	31n, 34n

EUROPEAN COURT OF HUMAN RIGHTS

<i>A and others v. UK</i> , ECHR (2009) Appl. No. 3455/05	197n
<i>A. J. v. Sweden</i> , ECHR (2008) Appl. No. 13508/07	193n
<i>Avsar v. Turkey</i> , ECHR (2001), Appl. No. 25657/94.	191n
<i>Aktas v. Turkey</i> , ECHR (2003) RJ&D 2003-V	191n
<i>Bah v. UK</i> , ECHR (2011) Appl. No. 56328/07.	3n
<i>Bensaid v. UK</i> , ECHR (2001) RJ&D 2001-I.	192n, 194n, 195n, 210–11, 212, 214n
<i>Betson and Cockram v. UK</i> , ECHR (2002) Decision on Appl. No. 12710/04	191n
<i>Chahal v. UK</i> , ECHR (1996) RJ&D 1996-V, 96.	192n, 196n
<i>Chamaiev v. Georgia and Russia</i> , ECHR (2005) RJ&D 2005-III	192n
<i>Cruz Varas and ors v. Sweden</i> , ECHR (1991) Series A, No. 201	192, 193
<i>Cyprus v. Turkey</i> , ECHR (2001) RJ&D 2001-IV, 219	210n
<i>D v. UK (St Kitts)</i> , ECHR (1997) RJ&D 1997-III, 49.	192n, 208–10, 212
<i>Damla and ors v. Germany</i> , ECHR (2000) Decision Appl. No. 61479/00.	191–2n

<i>García Ruiz v. Spain</i> , ECHR (1999) RJ&D 1999-I, 28	191n
<i>G.C. v. UK</i> , ECHR (2001) Appl. No. 43373/98	191n
<i>Herbst v. Germany</i> , ECHR (2007) Appl. No. 20027/02	191n
<i>Hilal v. UK</i> , ECHR (2001) RJ&D 2001-II	193, 195
<i>Hirsi and ors v. Italy</i> , ECHR (2012) Appl. No. 27765/09	108n, 135–6, 146, 147
<i>Jabari v. Turkey</i> , ECHR RJ&D 2000-VIII	191
<i>K-H. W. v. Germany</i> , ECHR (2001) Appl. No. 37201/97	191n
<i>K.R.S. v. UK</i> , ECHR (2008) Appl. No. 32733/08	30, 32–3
<i>Makuc and ors v. Slovenia</i> , ECHR (2007) Appl. No. 26828/06	210n
<i>Medvedyev and ors v. France</i> , ECHR (2010) Appl. No. 3394/03	135, 139n
<i>Mir Isfahani v. The Netherlands</i> , ECHR (2008) Appl. No. 31252/03 (struck out of the list)	196n
<i>M.S.S. v. Belgium and Greece</i> , ECHR (2011) Appl. No. 30696/09	27n, 30, 32–4, 38n
<i>N v. Finland</i> , ECHR (2005) Appl. No. 38885/02	193
<i>N v. UK</i> , ECHR (2008) Appl. No. 26565/05	211–17
<i>Nasimi v. Sweden</i> , ECHR (2004) Appl. No. 38865/02	193
<i>Nitecki v. Poland</i> , ECHR (2002) Appl. No. 65653/01	210n
<i>Pentiacova and ors v. Moldova</i> , ECHR (2005) RJ&D 2005-I	210n
<i>Ponomaryovi v. Bulgaria</i> , ECHR (2011) Appl. No. 5335/05	3n
<i>R.C. v. Sweden</i> , ECHR (2010) Appl. No. 41827/07	192n
<i>Ribitsch v. Austria</i> , ECHR (1995) Series A, No. 336	191n
<i>Saadi v. Italy</i> , ECHR (2008) Appl. No. 37201/06	191, 196, 213
<i>Said v. The Netherlands</i> , ECHR (2005) RJ&D 2005-VI	192n
<i>Salah Sheekh v. The Netherlands</i> , ECHR (2007), Appl. No. 1948/04	193, 213
<i>Snooks and Dowse v. UK</i> , ECHR (2002) Decision on Appl. No. 44305/98	191n
<i>Soering v. UK</i> , ECHR (1989) Series A, No. 11	209
<i>Tamminen v. Finland</i> , ECHR (2004) Appl. No. 40847/98	191n
<i>T.I. v. UK</i> , ECHR (2000) Appl. No. 43844/98	30, 32–3, 192n
<i>Vilvarajah and ors v. UK</i> , ECHR (1991) Series A, No. 215	191, 192, 193, 194
<i>Xhavara and ors v. Italy and Albania</i> , ECHR (2001) Decision on Appl. No. 39473/98	135, 138

Australia

<i>Ruddock and ors v. Vadarlis and ors</i> (2001) 66 A.L.J. 25 (V 1007 of 2001, FCA 1329), 18 September 2001	140n
<i>Vadarlis v. Minister for Immigration and Multicultural Affairs and ors</i> , V 900 of 2001 FCA 1297, 11 September 2001	139–40

Committee Against Torture

<i>J.H.A. v. Spain (Marine I)</i> , 41st session (3–21 November 2008), UN Doc CAT/C/41/D/323/2007, 21 November 2008	108n, 140–41
--	--------------

Table of Legislation

EUROPEAN UNION	
Treaties	
Amsterdam Treaty 1997	2, 7, 35, 62, 63, 69, 71, 72–4, 78, 81–2, 97, 110, 142, 149, 171
Art 62	82
Art 66(2)	110
Declaration No 16	101n
Protocol	72–3
Art 4a	35
Protocol No 2	110n
Charter of Fundamental Rights of the European Union 2000	3, 8, 29–31, 34, 39, 107
Art 18	31, 143
Art 19	143
Art 19(1)	133–4
Art 41(1)	133
Art 45	152n
Protocol on the Application of the Charter of Fundamental Rights to the UK and Poland	30
Cotonou Agreement 2000	97–8
Art 13	104n
Art 13(5)	97
Art 13(5)(c)	97
Dublin Convention 1990	30, 38, 109
EC-China ADS (Authorized Destination Status) Agreement 2003	
Art 1	90n
Art 3	90n
Art 4	90
Art 5	90
Art 6	90
Art 7	90n, 92n
Art 8(6)	90
EEA Agreement	95
Lisbon Treaty 2007	2, 3, 5, 6, 8, 10, 14, 16, 19–20, 24–5, 29, 36–40, 74–5, 77–8, 82, 85, 101, 102, 108, 113–14, 116, 123–4, 133, 143, 147–8, 182–5
Protocol No 36, Art 10(1)	114
Maastricht Treaty 1992	62, 70, 73, 109n
Art K1	2n, 71
Nice Treaty 2001	102
Rome Treaty 1957	109n
Schengen Agreement 1985	62, 71, 109, 110
Art 17	71
Art 20	71n
Schengen Implementing Convention 1990	71–2, 73–4, 109, 110
Art 12(3)	71n
Art 17	71n
Art 18	72
Art 19	76
Art 20(1)	76–7
Art 20(2)	89
Art 26	79
Art 96	100n
Single European Act (SEA) 1986	62
Treaty Establishing the European Community (TEC)	5, 177–8
Art 24	81
Art 48	199
Art 61	21
Art 61(a)	2
Art 61(b)	2
Art 62	6, 22, 73, 73, 75, 113
Art 62(1)	16
Art 62(2)	73
Art 62(2)(a)	73
Art 62(2)(b)	101n
Art 62(2)(b)(i)	93
Art 62(2)(b)(ii)	73, 91
Art 62(2)(b)(iv)	73, 91
Art 62(3)	16
Art 62(3)(b)	16, 79
Art 62(b)	16
Art 63	6, 62, 74, 142, 183
Art 63(1)	22
Art 63(2)(b)	24
Art 63(3)	24, 25, 26
Art 63(3)(a)	74, 78, 150, 153, 172
Art 63(3)(b)	74, 91
Art 63(4)	24, 153, 172

Art 63(a)(c).....	26	Art 72	5
Art 63(d)	26	Art 74.....	120
Art 64(2)	22, 24	Art 77	2, 22, 104, 113–14, 120
Art 67.....	171–2	Art 77(1)	74–5
Art 67(2)	16n	Art 77(1)(b)	120
Art 67(3)	75	Art 77(1)(c)	120
Art 68	178	Art 77(2)	75
Art 100(c)	70	Art 77(2)(a)	91, 93, 101
Art 133(5)	102n	Art 77(2)(b)	84
Art 179.....	104n	Art 77(2)(e)	5n
Art 181.....	104n	Art 77(3)	6n
Art 300	93	Art 78	2, 5, 22, 24, 62, 143
Art 310.....	95	Art 78(1)	3n, 6, 22
Treaty on European Union (TEU) . . .	21, 110	Art 78(2)	143
Art 1(3)	124	Art 78(2)(a)	23
Art 3	1	Art 78(2)(b).....	23
Art 3(1)	81	Art 78(2)(c)	24
Art 3(2)	1, 99	Art 78(2)(g).....	5n, 24
Art 4(3)	99	Art 78(3)	6n, 24
Art 6	29, 133, 134	Art 79	2, 16, 21, 24, 25, 26, 62, 77, 184
Art 6(1)	8	Art 79(1)	2–3, 25, 77
Art 6(2)	7, 8, 107	Art 79(2)	77
Art 6(3)	7	Art 79(2)(a)	25, 101
Art 11.....	110	Art 79(2)(b)	5n, 25
Art 11(1).....	110	Art 79(2)(c)	26, 79, 91
Art 24	110	Art 79(2)(d)	5n, 79
Art 40	100	Art 79(3)	5n, 26, 79, 80, 97, 99
Art 42	122	Art 79(4)	5n, 10, 11, 25, 26, 183, 184
Art 43	122	Art 79(5)	25, 26, 77–8, 82, 96
Art 46	101n	Art 80	24, 27
Art 67(1).....	29	Art 83(1)	26, 79
Protocol No 31.....	110	Art 83(2)	26n
Treaty on the Functioning of the European Union (TFEU)	182–3	Art 153.....	25
Art 2(1)	84, 93	Art 207(1)	102n
Art 3	79	Art 208	103
Art 3(2)	83, 84, 85	Art 212.....	103
Art 4(2)(j)	5, 83	Art 215.....	100
Art 21.....	216	Art 215(1).....	101
Art 26	1	Art 216(1).....	79
Art 46	25	Art 216(2)	91
Art 67.....	21	Art 217.....	95
Art 67(1).....	21	Art 218.....	93
Art 67(2)	2–3, 21	Art 263	101, 114
Art 67(3)	21	Art 267	101
Art 67(4)	21	Art 275(2)	101
Art 68	21	Art 276.....	114
Art 70	16, 21	Art 288	180n
Art 71.....	115	Art 294	183

Directives

Directive 2011/98 of the EP and the Council (Single Permit Directive)	20, 25, 78–9
Directive 2011/95 of the EP and the Council (Refugee Qualification Directive)	17, 19, 35
Directive 2009/52 of the EP and the Council (Sanctions Directive)	64–5, 80
Council Directive 2009/50 (Blue Card Directive)	4, 24, 25, 78–9, 96n
Directive 2008/115 of the EP and the Council (Return Directive)	5, 17–18, 19, 63, 65, 80
Art 1	6n
Art 36	42
Directive 2008/104/EC of the EP and the Council (Seasonal Workers Directive)	26, 27
Council Directive 2005/85 (Asylum Procedures Directive)	34, 36, 37–8, 39, 142–3
Art 3	143
Art 6(3)	143
Art 27	6n
Council Directive 2004/573/EC (Joint Return Flights Directive)	80
Council Directive 2004/83 (Refugee Qualification Directive)	23
Council Directive 2004/82/EC (Air Carriers Passenger Data Directive)	80
Directive 2004/38 of the EP and the Council (Free Movement of Persons Directive)	205–6, 216
Art 2(2)	205
Art 3(2)	205
Council Directive 2003/110/EC (Removal by Air Directive)	80
Council Directive 2003/109, as amended by Directive 2011/51 of the EP and the Council (Long-term Residents Directive)	4, 8, 17, 18–19, 25, 150, 151, 154, 155–7, 159, 169, 171, 172–3, 176–7, 185–6.
Art 5	4n, 155n, 156
Art 6	155n
Art 7	155n
Art 11	4n

Art 11(1)	155
Art 15(3)	156, 159
Council Directive 2003/86 (Family Reunification Directive)	4, 8, 31, 38n, 78, 150, 151, 154, 157–9, 169, 171, 172–3, 176–9, 185–6, 203
Art 4	158
Art 4(1)	158, 178
Art 7(2)	157–8, 159
Council Directive 2003/9 (Reception Conditions Directive)	34, 36, 37, 40n, 142, 143
Art 3	142
Council Directive 2002/90/EC (Illegal Immigration Directive)	79–80
Council Directive 2001/55 (Temporary Protection Directive)	142
Art 1	24n
Art 2	24n, 142
Art 4	142
Council Directive 2001/51/EC (Air Carriers Directive)	79
Council Directive 2001/40/EC (Mutual Recognition Of Expulsion Decisions Directive)	80
Directive 96/71/EC of the EP and the Council (Posted Workers Directive)	57

Regulations

Regulation 1091/2010 of the EP and the Council (Third Country Nationals)	92n
Council Regulation 1244/2009 (Visa Regulation)	92n
Regulation 987/2009 of the EP and the Council (Coordination of Social Security Systems)	184
Regulation (EC) 810/2009 of the EP and the Council (Visa Code)	73–4, 76
Art 1(1)	76
Regulation 863/2007 of the EP and the Council (Rapid Border Intervention Teams (RABITs))	63, 112, 119, 133
Art 2	133, 143
Art 7	119
Art 7(3)	119
Art 7(4)	119

Art 7(5)	119	Art 8	118, 119
Art 8	119	Art 8e(1)(b)(j).	122
Art 9	119	Art 10.	118
Regulation 1931/2006 of the EP and the Council (Local Border Traffic).	76, 94	Art 13.	117, 121
Art 13.	94	Art 14.	117–18
Art 13.	94	Art 14(2)	124
Regulation 1905/2006 of the EP and the Council (Development Cooperation Agreement)	104n	Art 21.	117
Regulation 1638/2006 of the EP and the Council (Neighbourhood and Partnership Programme)	104n	Art 25.	117
Regulation 562/2006 of the EP and the Council (Schengen Border Code).	2, 73–4, 77, 112, 124, 133	Art 26.	117
Art 3(b)	133	Art 26(a)(1)	120
Art 4(3)	145	Art 26a.	134
Art 5	42	Regulation 883/2004 of the EP and the Council (Coordination of Social Security Systems).	184
Art 6(1)	133	Regulation 491/2004 of the EP and the Council (AENEAS Programme)	104n, 111
Art 13(1)	145	Council Regulation (EC) 693/2003 (Facilitated Transit Document and Facilitated Rail Transit Documents).	76
Art 20	2	Council Regulation 343/2003 (Dublin Regulation)	30, 32–4, 36–7
Council Regulation 2007/2004 (as amended by EP and Council Regulation 1168/2011) (Frontex Regulation)	10, 107–8, 111–13, 114, 117–18, 120–2, 132, 134, 148	Art 3(1)	145n
Art 1	111	Art 3(2)	33
Art 1(1)	117	Council Regulation 539/2001 (Visa Waiver).	73, 75, 77, 86–7, 89, 93, 102–3
Art 1(2)	120	Art 1(2)	76
Art 2(1)	117	Art 1(4)	86
Art 2(1a).	121	Art 4	93
Art 2(2)	111, 117	Art 4(3)	76
Art 3	117	Council Regulation (EC) 574/1999 (Visa Regulation).	70
Art 3(1)	118	Council Regulation (EC) 1683/1995 (Uniform Format for Visas).	70, 76
Art 3(1)(a)	120	Council Regulation (EEC) 1612/68	205
Art 3(2)	118	Art 1	205
Art 3(3)	118	Art 10(1)	205
Art 3a.	122		
Art 3a(1)(a).	122		
Art 3a(1)(f).	122		
Art 3a(1)(j).	122		
Art 3(b)(1)–(2)	117		
Art 4	134		
Art 4(3)	113		
Art 5	134		
Art 5(1)	121		

INTERNATIONAL TREATIES AND CONVENTIONS

African Convention on the Protection of Human and Peoples' Rights 1981 Art 5	144
American Convention on Human Rights 1969 Art 22(8)	144

Brussels International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea 1910.	129n	Safety of Life at Sea (SOLAS) Convention 1974	129n, 130, 132
Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) 1984.	134	Search and Rescue Convention (SAR) 1979.	129–30, 131–2
Art 3	144	Art 3(1)(9)	130–1
Declaration on Territorial Asylum 1967.	145	United Nations Convention Against Organized Crime 2000	99
European Convention on Human Rights (ECHR) 1950	3, 7, 8, 30, 31, 32–4, 45, 134	Protocol Against Smuggling of Migrants (Palermo Protocol).	99, 126
Art 2	191, 196, 210n	Art 7	126
Art 3	30, 136, 144, 191, 192, 194, 195, 196, 209–13, 215	Art 8	126
Art 5	138–9, 197	Art 9	126
Art 6	191, 197	Protocol Against the Trafficking in Persons.	99
Art 8	201	United Nations Convention on the Law of the Sea (UNCLOS) 1982.	123, 127
Art 13.	136, 191, 194–5, 196, 197	Art 2	127
Protocol No 4 Art 2(2)	137	Art 17.	127
Art 4	136	Art 17ff.	128
Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 Art 45.	144	Art 86	124
Geneva Convention relating to the Status of Refugees 1951	3n, 6, 45, 142, 145, 146	Art 87	124
Art 31.	145	Art 89	124
Art 33.	143	Art 90	125n
Protocol 1967.	6	Art 92(1)	125, 128
ILO Convention No. 185 on the Seafarers' Identity Document	93, 96	Art 92(2)	125n
Art 6	93	Art 98	128–9, 130
International Covenant on Civil and Political Rights (ICCPR) 1966	134	Art 98(2)	130
Art 7	144	Art 100	125n
Art 12(2)	137	Art 105.	127n
International Law Commission Articles on the responsibility of states for internationally wrongful acts (ILC Articles)	141	Art 109.	127n
OAU Convention on Refugees 1967	145	Art 110.	125, 126, 127n
		Art 110(1).	125n
		Art 110(1)(d)	127
		Art 111.	125n
		Universal Declaration of Human Rights (UDHR) 1948.	137
		Art 13(2)	137
		Art 14.	138
		Vienna Convention on the Law of Treaties 1969 Art 31.	129n
		WTO Agreement on Trade in Services (GATS) Annex on Movement of Natural Persons Supplying Services, para 4.	102

Notes on Contributors

Loïc Azoulay holds the Chair of European Union Law at the European University Institute in Florence, Italy. He is co-Director of the Academy of European Law and of the Centre for Judicial Cooperation, both hosted at the European University Institute. He is on leave from University of Panthéon-Assas Paris II, where he is a Professor of Public Law. From 2003 to 2006, he was a *référéndaire* at the European Court of Justice, working with Advocate General Poiares Maduro. He is a member of the Editorial Boards of various law journals, including *Common Market Law Review*, *Revue trimestrielle de droit européen*, and *European Journal of Legal Studies (EJLS)*. He has published on a wide range of questions of European Union Law.

Christina Boswell is Professor of Politics at the University of Edinburgh. Her research focuses on European immigration and asylum policy, theories of public policy, and the relationship between knowledge and policy.

Sergio Carrera is Senior Research Fellow and Head of the Justice and Home Affairs Research Programme at the Centre for European Policy Studies (CEPS) in Brussels. He regularly acts as an external expert for European institutions and has cooperated in various European research networks and projects dealing with the relation and tensions between human mobility, frontiers, and fundamental rights. He holds a PhD on immigration and citizenship law from the University of Maastricht, The Netherlands.

Karin de Vries is Assistant Professor of Constitutional and Administrative Law at the VU University, Amsterdam. In 2011–12 she was a Max Weber Fellow at the European University Institute in Florence. She is the author of various publications on international and European migration law and citizenship and integration policies. Her dissertation, *Integration at the Border. The Dutch Act on Integration Abroad and International Immigration Law*, was published in 2013.

Bernd Martenczuk holds a doctoral degree in law from Frankfurt University. He also holds a Master of Public Administration from the Kennedy School of Government (Harvard University). He has been a Member of the Legal Service of the European Commission since 1999, where he has worked in the areas of external relations, trade, state aid, and institutional matters. In the External Relations Team of the Legal Service, he has in particular been responsible for the external aspects of justice and home affairs. He is currently working in the institutional team of the Legal Service. Bernd Martenczuk has represented the Commission in numerous cases before the WTO, the General Court and the Court of Justice of the European Union, and the EFTA Court. He is also Professor in the LL.M. Program on International Legal Co-operation (PILC) of the Vrije Universiteit Brussels and has published widely on questions of European and public international law.

Thomas Spijkerboer is Professor of Migration Law at VU University Amsterdam. His research interests lie in the areas of gender and sexuality, women and immigration law, migrant deaths, and the role of courts in migration law. His publications include a monograph, *Women and Refugee Status* (2000), edited volumes, *Fleeing Homophobia* (2013), *Women and Immigration Law* (with Sarah van Walsum, 2007), and many articles and book chapters.

Helen Toner is Dean of Students at Warwick Law School. She has worked in the area of EU citizenship and migration law for a number of years, obtaining her DPhil in this area from Oxford in 2003. She is the author of *Partnership Rights, Free Movement and EU Law* (2004) and co-editor of *Whose Freedom, Security and Justice?* (2006) as well as a number of articles and chapters.

Seline Trevisanut is Marie Curie Fellow and Assistant Professor at the Netherlands Institute for the Law of the Sea of Utrecht University. Her publications include a monograph on *Irregular Migration by Sea in International Law and EU Law* (2012, in Italian), and several articles and contributions on migration control at sea.

1

Introduction

Loïc Azoulay and Karin de Vries

1. The European Union as an Area of Migration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The Structure of EU Migration Law and Policy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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