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The enforced return of irregular migrants: rules and practices in Norway, France, Poland and Sweden

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The enforced return of irregular migrants: rules and practices in Norway, France, Poland and Sweden

Commissioned by
the Norwegian Directorate for Immigration (*UDI - Utlendingsdirektoratet*)

Notice

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Sammendrag og konklusjoner

Resymé

I rapporten gir vi en oversikt over regler og praksis for utvisning av tredjelandsborgere som har en ulovlig status i Norge, Sverige, Frankrike og Polen. Disse landene er en del av Schengenområdet, og er underlagt det samme juridiske rammeverket. Likevel er situasjonen forskjellig i de fire landene, så vel når det gjelder utfordringer, hvilke aktører som er involvert, innholdet i utvisningsbeslutning og bruken av innreiseforbud. Implementeringen av EUs "returdirektiv" vil i de nærmeste årene bidra til en tilnærming mellom lovgivningen i de ulike landene, også Norge. Denne situasjonen gir en god anledning for Norge til å gjennomgå egne regler og praksis, og for europeiske land generelt til å delta i gjensidig læring og samarbeid.

Bakgrunn

En utlending som bryter immigrasjonslovgivningen i et land, må vanligvis returnere til sitt hjemland, transittlandet eller et annet tredjeland. Personen kan returnere frivillig eller med bruk av tvang. En beslutning om utvisning kan innebære et forbud mot senere innreise for en periode av en bestemt varighet.

Nasjonal immigrasjonspolitikk har i økende grad blitt litt formet av europeiske og internasjonale rettigheter og standarder. Særlig har utviklingen mot en felles immigrasjonspolitikk i EU hatt betydning for nasjonal lovgivning og praksis. Når det gjelder returpolitikk, har man forøkt å få til et tettere samarbeid mellom landene, men det er fremdeles lite harmonisering av reglene, og de nasjonale ulikhetene i praksis har bestått.

Situasjonen vil trolig endre seg de nærmeste årene. I 2008 samlet EU seg om et nytt direktiv som omhandler en felles standard for retur av tredjelandsborgere som oppholder seg ulovlig i EU og Schengenområdet ("returdirektivet"). Landene må innarbeide direktivet i sin nasjonale lovgivning innen utgangen av 2010. Norge er forpliktet av direktivet gjennom deltakelse i Schengensamarbeidet.

Problemstilling

Målet med studien er å gi en oversikt over regler og praksis for utvisning ("enforced return") av tredjelandsborgere som har en ulovlig status i Norge, Sverige, Frankrike og Polen. De fire landene tilhører Schengenområdet, men har svært ulike erfaringer. Tredjelandsborgere er definert som personer som ikke er innbygger i EU eller et Schengenland. Definisjonen tilsvarer den som benyttes i returdirektivet.

Situasjonen i de fire landene er undersøkt ved hjelp av dokumentstudier og intervjuer av informanter i de fire landene, gjennomført høsten 2008 og vinteren 2009. Utlendingsdirektoratet (UDI) er oppdragsgiver for studien.

Hovedfunn

Det er relativt store forskjeller mellom regelverk, praksis og institusjonelt rammeverk i de fire landene. Begrepsbruken er også svært forskjellig. Noen av hovedtrekkene i de fire landene er:

- *Norge*: Begrepet *utvisning* refererer til et vedtak om retur som også innebærer et innreiseforbud mens *bortvisning* brukes om retur uten innreiseforbud. Vedtak om utvisning blir tatt administrativt, og Utlendingsdirektoratet er ansvarlig myndighet. Det er opprettet et eget administrativt ankeorgan (Utlendingsnemnda). Bestemmelsene om utvisning inneholder så vel objektive som subjektive kriterier, og varigheten av innreiseforbudet kan variere fra to år, fem år eller til et varig forbud. I et stort flertall av tilfellene blir utviste personer registrert i SIS ("Schengen Information System"), noe som hindrer innreise i hele Schengenområdet.
- *Sverige*: Det skilles mellom *avvisning* og *utvisning*, hvor myndighetene kan avvise en person dersom han eller hun ikke tidligere har hatt noen oppholdstillatelse, eller dersom personen har fått avslått sin søknad om opphold innen tre måneder. Avgjørelsene blir tatt administrativt (av politiet og Migrasjonsverket), men det er opprettet en domstol for ankesansker. Utvisningsbeslutningene inneholder ikke automatisk noe innreiseforbud, og eventuelle innreiseforbud har som hovedregel en varighet på to år. Bruken av innreiseforbud har avtatt etter at Sverige sluttet seg til Schengensamarbeidet, da det ble ansett at et forbud mot innreise i hele Schengenområdet bør brukes med forsiktighet.
- *Frankrike*: Det har vært hyppige endringer i immigrasjonslovgivningen. I dag har myndighetene et måltall for antall iverksatte utreiser. Beslutninger om retur blir tatt av et statlig organ på lokalt nivå ("*préfectures*"). Det er ulike typer returbeslutninger, hvor de to viktigste ikke innebærer noe innreiseforbud. Innreiseforbud er en beslutning som bare kan bli tatt av domstolen. Det blir tatt svært mange returbeslutninger årlig (mer enn 90.000), noe som delvis er et resultat av aktiv etterforskning. Imidlertid blir mange av disse beslutningene ikke iverksatt fordi de blir overgjort av retten.
- *Polen*: I perioden før Polens inntreden i EU ble immigrasjonslovgivningen endret flere ganger for å ivareta europeiske standarder. Det er i dag to typer returbeslutninger. "Plikt til å forlate landet" benyttes når man kan anta at personen vil reise frivillig. Beslutningen blir tatt av politiet, og innebærer ett års innreiseforbud til Polen. "Utvisningsbeslutning" benyttes når man kan anta at personen ikke vil reise frivillig, og innebærer tre eller fem års innreiseforbud til Schengenområdet. Beslutningen tas av et statlig organ på provinsnivå.

Konklusjoner

I undersøkelsen identifiserer vi flere særtrekk ved det norske systemet i forhold til de tre landene vi sammenlikner med.

- *Innreiseforbud*: Bruken av innreiseforbud i Norge skiller seg fra praksis i de andre landene, både med hensyn til at innreiseforbud automatisk følger med et vedtak om utvisning, og ved den lange varigheten av forbudene. Praksisen er trolig ikke på linje med de framtidige EU-kravene. Generelt synes det som at Norge er relativt "tøffere" i de relativt "færre" sakene som avdekkes. EUs nye returdirektiv angir i prinsippet en maksimal varighet for innreiseforbud på fem år, og beskriver tilfeller hvor det ikke bør besluttes automatisk. I Norge kan innreiseforbudet være

permanent, og personen vil bli registrert i SIS, noe som får vidtrekkende konsekvenser for personen. Vedkommende kan da ikke reise inn i noe Schengenland. Det er dessuten slik at norske myndigheter skal vurdere en del subjektive kriterier for å gjøre vedtak om utvisning og varigheten av innreiseforbudet. Det innebærer lang saksbehandlingstid. Dette forholdet må gis spesiell oppmerksomhet i Norges implementering av EU-direktivet.

- *Institutionsjonell organisering*: Det er fordeler og ulemper ved enhver institusjonell organisering, og det kan være en utfordring å sørge for at saksbehandlingen både er rettferdig og effektiv. I og med at man i Norge har et relativt sentralisert beslutningsansvar, kan det være at saksbehandlingen er mer enhetlig i Norge enn i de andre landene. I andre land er det flere ulike typer aktører som tar del i beslutningsprosessene, noe som har den fordelen at det kan sikre gjennomsiktighet og kontroll i forhold til administrasjonen: Juridiske og administrative domstoler er mer involvert i ankesaker, frivillig sektor og uavhengige eksperter synes å spille en større rolle ved å yte juridisk assistanse til innvandrere og ekspertise til myndighetene i saksbehandlingen.
- *Måling og evaluering*: Det er vanskelig å anslå antall ulovlige immigranter, men UDIs samarbeid med Statistisk Sentralbyrå i 2007/08 har ført til en målingsmetode som vil kunne vise til utvikling over tid. Gitt den sentraliserte organiseringen, kan man likevel forvente at Norge relativt effektivt kan samle og publisere informasjon om myndighetenes arbeid, samt evaluere iverksettingen og effekten av beslutninger om utvisning. Myndighetene har påpekt mangler ved denner oversikten og de har satt som mål å forbredre overvåking av utvisningssaker.
- *Fengsling*: For å tilfredsstille kravene i EUs returdirektiv, må Norge innføre en maksimal varighet for fengsling i effektueringsøyemed.
- *Legalisering og frivillig retur*: Vi observerer at praksis når det gjelder legalisering og frivillig retur er mindre utviklet i Norge enn i de andre landene.

EU- og Schengenlandene forbereder seg nå på å justere lovverket for å tilfredsstille kravene i returdirektivet. Denne situasjonen gir en god anledning for gjensidig læring og tettere samarbeid mellom de europeiske landene, og en anledning for å gjennomgå nasjonal lovgivning og praksis. Det finnes i dag lite komparativ informasjon. Det vil bli enda større behov for slik informasjon i framtida ettersom en felles returpolitikk utvikler seg på EU-nivå.

I lys av den pågående utviklingen er norske myndigheters ønske om å sammenlikne sine systemer med andres verdt å trekke fram. Norge er et aktivt medlem av Schengensamarbeidet, og migrasjon vil fortsette å ha innvirkning på landets demografi, økonomi og samfunn. Selv om det er ulike syn, synes Norge å ha både midlene og et ønske om å utvikle en pragmatisk og effektiv migrasjonspolitikk, basert på standardene innenfor internasjonal og europeisk menneskerettslovgivning.

Executive Summary

Abstract

This report provides an overview of the rules and practices for the enforced return of third-county nationals in an irregular situation in Norway, France, Poland and Sweden. These countries belong to the Schengen area and apply a similar body of law. Yet, situations differ, in particular as regards the scope of the challenges, the nature of the actors involved, the type of decisions and the use of re-entry bans. The adoption of the EU "Return Directive" will result in a greater approximation of national legislation in the coming years. This context creates opportunities for Norway to review its rules and practices, and for European countries to engage in mutual learning and cooperation.

Background

A third-country national - i.e. a person who is not a citizen of the European Union (EU) or of one of the countries belonging to the Schengen area - who breaches the immigration law of a country is usually required by the authorities to return to his or her country of origin, to a country of transit or to another third country ("forced" or "enforced" return). The person may decide to leave voluntarily or the process may be implemented by the administration. Return decisions may be accompanied by a prohibition to re-enter the country for a period of time ("re-entry ban").

Over the years, national migration policies have been increasingly framed as part of a wider set of European and international rights and standards. In particular, progress in the establishment of a common EU migration policy, as well as associated legislative and case-law developments, have increasingly impacted national rules and practices. In the field of return policy, efforts have been made to enhance cooperation between countries, but harmonisation of legislation has remained limited and national practices have continued to differ markedly.

This situation is likely to change in the coming years. Following discussion at EU level, a Directive setting out common standards for returning third-country nationals illegally staying in the EU and in the Schengen area (the "Return Directive") was adopted in December 2008. Countries concerned - including Norway - are required to adapt their national legal framework and apply a more similar set of rules by the end of 2010.

This study was commissioned by the Norwegian Directorate for Immigration (UDI - "*Utlendingsdirektoratet*"). It was conducted between September 2008 and March 2009.

Scope and methodology of the study

The aim of the study is to provide an overview of the rules and practices for the enforced return of third-country nationals in an irregular situation in Norway, Sweden, France and Poland, with a view to informing Norwegian authorities. These four countries belong to the Schengen area and offer a mix of experiences.

The situation in each country was analysed through desk research of relevant legislation and documents, as well as through targeted interviews carried out in autumn 2008 and winter 2009. To facilitate comparison, each country section was drafted according to the same template. Moreover, four illustrative individual cases were used as a test.

Main findings

The sample of countries illustrates the diversity of return policies in Europe. Migration patterns, terminology, rules and practices differ to a significant extent, but there are also common issues to overcome, and a wealth of experience to draw from.

Norway: a limited number of "utvisning" decisions with far-reaching consequences

In Norway, the term "expulsion" ("*utvisning*") refers to the decision to return a person and to subject him or her to a re-entry ban. "Expulsion" is to be distinguished from "rejection" ("*bortvisning*"), which refers to the decision to return a person without a re-entry ban, for instance when this person is refused entry at the border. The number of "*utvisning*" decisions resulting from a breach of the Immigration Act (about 800 cases in 2008) has increased in recent years but remains relatively limited in absolute terms in comparison to the other countries.

UDI - the Norwegian Directorate for Immigration - is responsible for processing all applications for permits and for issuing "*utvisning*" decisions. UDI's decisions may be appealed before another administrative body, the Immigration Appeals Board (UNE - "*Utlendingsnemnda*"). In 2004, a National Police Immigration Service (PU - "*Politiets utlendingsenhet*") was established to coordinate police activities in asylum cases.

The Norwegian Immigration Act contains both "objective" and "subjective" criteria, including absolute and relative limitations, for deciding over individual cases. For persons subject to an "*utvisning*" decision, the duration of the re-entry ban may be of two years, five years or permanent depending on the seriousness of the breach of law. In more than 90 per cent of the cases, "*utvisning*" decisions are accompanied by a registration of individual data in the Schengen Information System (SIS), which prohibits entry of the persons concerned to the Schengen area. Possibilities for having such decisions changed over time are limited.

France: the use of quantified targets as a guiding principle

In France, the importance of the migration issue on the political agenda has led to frequent changes in the legislative framework and to the definition of annual targets of returns (27 000 in 2009). A Ministry of Immigration was established in 2007 and annual reports on migration policy are presented to the Parliament. Return decisions are taken by "*préfectures*" representing the State at local level.

Several categories of return decisions exist. The two main types (APRF - "*arrêté préfectoral de reconduite à la frontière*" - and OQTF - "*obligation de quitter le territoire français*") are not coupled with re-entry bans. In France, re-entry bans are not administrative decisions but separate judicial decisions taken by Courts in penal/ criminal cases. Registration in SIS is not automatic. In addition to family links, several criteria related to the length of stay may limit possibilities to return a person.

The number of return decisions (about 93 000 in 2007) reflects in part migration patterns but also illustrates active investigation and arrest practices by the police. The recourse to administrative detention is also frequent. However, the vast majority of return decisions (about 80 per cent) are not enforced due to legal or practical reasons, such as cancellations by judicial and administrative Courts, or because the countries of origin refuse to issue certificates of re-entry for their nationals. "Voluntary return" schemes play an increasing role for achieving the Government's "removal targets".

Poland: a duality of return decisions requiring a close coordination between actors

In the period preceding Poland's accession to the EU and the Schengen area, the Polish immigration legislation was amended several times to meet European and international standards. The institutional capacity of the State in the field of migration was considerably upgraded, including through the help of external financial assistance. Two types of return decisions are currently in use.

"Obligations to leave the country" ("*decyzja ozobowiazaniu do opuszczenia terytorium Rzeczpospolitej Polskiej*") are issued in cases where the administration assumes that the person will leave the country voluntarily. These decisions (about 7 500 in 2007) are taken by police services or the Polish Border Guard and result in a ban from the Polish territory for one year. These bans are not registered in SIS.

"Decisions of expulsion" ("*decyzja o wydaleniu*") are issued in cases where it is assumed that the person will not leave voluntarily. These decisions (about 2 800 in 2007) are issued by a "*Voivode*", the authority representing the State at provincial level, either *ex officio* or following the request of other authorities, notably the Border Guard and the police. The decision is accompanied by a standard re-entry ban of five years. The re-entry ban is of three years if the costs of the return are covered by the migrant (or his or her employer in cases of irregular work). These bans are registered in SIS.

Persons who cannot be returned for practical and/or legal reasons, and still do not qualify for a refugee status, may receive a status of "tolerated stay".

Sweden: two types of return decisions and a cautious use of re-entry bans

In Sweden, all applications for permits and most return decisions are processed through the Swedish Migration Board ("*Migrationsverket*"). Since a new Aliens Act came into force in 2006, the former Aliens Appeal Board - a quasi-administrative body - was dismantled. Decisions of the Board may now be appealed before administrative Courts known as "Migration Courts". At the same time, possibilities of "political interferences" in the interpretation of the law were removed.

Two types of return decisions are currently in use: "refusals-of-entry" ("*avvisning*") and "expulsions" ("*utvisning*"). "*Avvisning*" decisions (about 1 250 cases in 2008) may be taken by the police and the Board in the following cases: a) if the person has not previously held a valid permit in Sweden; b) if the person has applied for a permit but the administration has rejected this application within three months. "*Utvisning*" decisions (about 1 400 decisions for non-asylum files in 2008) may be considered in all other cases, and may only be taken by the Board.

The recourse to re-entry bans is not automatic, neither for "*avvisning*", nor for "*utvisning*" decisions. If bans are pronounced by the Board (about 150 cases in 2008), the standard period of the prohibition to re-enter is of two years and cases are registered in SIS. The practice of issuing re-entry bans changed radically when Sweden joined the Schengen area: while the Board used to issue a large number of bans prohibiting entry to Sweden, it was considered that bans prohibiting access to the whole Schengen area should be used with greater care. The use of re-entry bans has been limited since then.

As part of the preparation for the implementation of the "Return Directive", Sweden has initiated a review of its rules and practices related to the detention of irregular migrants.

Conclusions

This study points at a number of specificities of the Norwegian system:

- Re-entry bans: The use of re-entry bans in Norway - both in terms of automaticity and of the length of the prohibition to re-enter - is not in line with practices in other countries, nor would it seem to correspond to future EU requirements. Overall, Norway would seem to be (comparatively) "tougher" for the (comparatively) "fewer" cases which are uncovered. The "Return Directive" refers to a ban of maximum five years as a rule and suggests cases where the ban may not be automatic. In Norway, bans may be permanent and are coupled with a registration in SIS, with far-reaching legal consequences for the persons concerned. Moreover, the need for the administration to weigh "proportionality considerations" in order to set the duration of the ban adds to the complexity and length of the case-handling process. The use of re-entry ban would deserve particular attention in the context of the transposition of the "Return Directive".
- Institutional set-up: There are pros and cons with every institutional set-up, and difficult - and sometimes contradictory - options to ensure simultaneously the fairness and the cost-effectiveness of the decision-making process. Case-handling may be more homogeneous and cost-effective in Norway given the central role played by UDI. On the other hand, a wider set of actors takes part in the process in the other countries, also as a way to provide control over the administration: judicial and administrative Courts are more directly involved for the appeal of decisions; civil society and non-administrative experts would also seem to play a more active role of legal assistance and expertise in the other systems.
- Monitoring and statistics: While it is difficult to estimate the number of irregular migrants, a collaborative effort between UDI and Statistics Norway in 2007/2008 led to the development of a methodology which will provide a picture of the relative numbers over time. Norway may thus be expected - perhaps more than other countries given the centralisation of information - to collect and publicise thorough data on the activities of the police and administration, as well as to assess the enforcement and impact of its return decisions. The lack of an informed overview has been identified as an issue by the authorities and efforts are being made to improve the monitoring of cases.
- Detention: in order to comply with the "Return Directive", Norway will have to introduce a maximum length of detention time for the purpose of removal.
- Regularisation and voluntary return: Although this goes beyond the scope of the study, it can be observed that practices related to "regularisation" and "voluntary return" are less developed in Norway.

EU and Schengen countries are preparing for the transposition of the "Return Directive" into national law. These developments create a potential for mutual learning and greater cooperation, as well as a window of opportunity to review national rules and practices. Comparative information is scarce but may prove even more enriching and necessary in future with the development of a common EU return policy.

In this context, the efforts of Norway to compare its system with others are worth underlining. Norway is an active member of the Schengen area and migration will continue to be a structuring feature of its demography, economy and society. Despite differences of opinion, Norway would seem to have the means, and the ambition, to develop a pragmatic and effective migration policy which can base itself on the highest standards of international and European human rights law.

1 Problem statement

1.1 Key objectives of the study

This study was commissioned by the Norwegian Directorate for Immigration: UDI ("*Utlendingsdirektoratet*")[1]. Its aim is to provide an overview of the rules and practices related to the enforced return of third-country nationals in an irregular situation in Norway, Sweden, France and Poland, with a view to informing Norwegian authorities.

1.1.1 Clarification of definitions and scope of the assignment

In addition to differences in legal and institutional frameworks, each country uses specific concepts in relation to migration policies. For instance, the European Commission notes that the understanding of the term "expulsion" differs widely among the Member States of the European Union (EU): "for some Member States, expulsion is an act which states the illegality of entry, stay or residence; for other Member States, expulsion is an act which terminates the legality of a previous lawful residence such as cases of criminal offences" (European Commission 2005a). In Norway, the concept of "expulsion" ("*utvisning*") is used to cover both types of cases, with this study focusing on the former type. This lack of a common terminology has often limited practical cooperation between countries, as well as cross-country analysis.

For the sake of comparison, this study refers to definitions used at EU level. Article 3 of the EU Directive reproduced in Annex 2 recalls key definitions. In this context, "return" means "the process of a third-country national going back - whether in voluntary compliance with an obligation to return, or enforced - to his or her country of origin, to a country of transit in accordance with Community bilateral readmission agreements or other arrangements, or to another third country to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted" (European Parliament and Council 2008). Foreigners illegally staying in a European country are required to return as "they do not, or no longer, fulfil the conditions for entry into, presence in, or residence in (this territory), whether they entered illegally, overstayed their visa or residence permit, or because their asylum claim has been finally rejected" (European Commission 2005a).

This study focuses on the enforced return of third-country nationals, defined as any person who is not a citizen of the EU (i.e. a citizen of one of its Member States) and who is not a person enjoying the Community right of free movement (such as Norwegian citizens), as defined in the Schengen Borders Code (European Parliament and Council 2008).

The study uses the Norwegian legislation as a reference point for comparison. There are several grounds for expulsion ("*utvisning*") of third-country nationals from Norway.

[1] Konkurransegrunnlag: Utredningsprosjekt "Komparativ studie av utvalgte Schengen-land: Utvisning på grunn av brudd på utlendingsloven" - Saksnummer: 08/2406.

This study concentrates on the following grounds:

- Expulsion for having grossly or repeatedly contravened one or more provisions of the Norwegian Immigration Act (e.g. illegal residence, illegal work, giving a false identity or providing false or incorrect identification documents to the authorities).
- Expulsion for having evaded the execution of any decision which means that one must leave the country (e.g. after having an asylum application rejected).

Other grounds for expulsion are foreseen in Norwegian law. For instance, the following cases are referred to as "*utvisning*" but are not covered in the present report:

- Expulsion for being considered a risk to national security.
- Expulsion for having committed a criminal act in Norway or abroad.

In Norway, "expulsion" decisions are administrative decisions taken by UDI. "Expulsion" is not to be confused with "rejection" ("*bortvisning*"), i.e. the decision to deny a foreign national entry into or residence in Norway[2].

1.1.2 Research questions

In line with its terms of reference, this study seeks to shed light on the following research questions:

- How are "expulsion" rules established and decided on in the various countries? What breaches of law are regulated?
- Are there absolute limitations in relation to the possibility to expel somebody?
- What breaches of law do authorities consider serious enough to justify an "expulsion"?
- What kind of evidence is required by law?
- Who bears the burden of proof?
- What means of sanctions are rooted in law? "Expulsion"? (Criminal/penal) sanction? Other instruments of sanction?
- To what extent do countries enforce immigration legislation in practice: are the rules implemented on the ground? In the same logic, to what extent do public authorities make an active effort to find out breaches of law?
- In the event of an "expulsion" decision, what are the criteria for defining the length of the prohibition to re-enter? How is the ban decided? To what extent is there a possibility to use discretion depending on the case?
- In the event of a breach of the immigration legislation and impossibility of resorting to "expulsion", what other reaction measures are used? What does each country consider as the most appropriate measures?
- To what extent do authorities react in the case of false information or a false identity? What sanctions are used?
- What consideration do countries give to family links with partners and children during an illegal stay?

[2] For more information about the Norwegian legislation, see Section 2 of this report or http://www.udi.no.

- What consideration do countries give to the length of children's stay after their asylum request has been rejected? Or because the time of processing of asylum requests are lengthened due to false information?
- To what extent is the practice of sanctioning illegal work influenced by labour market demand for additional workforce?
- To what extent do authorities react in the case where a person has given false information with the intention to obtain residence and work permits?
- Have the countries gone through changes over time when it comes to the definition of serious breaches of law? If so, what directions have been taken?
- What are the possibilities for having an expulsion decision altered at a later stage?
- What authorities have the formal expertise and resources to address breaches of the immigration law?
- What are the similarities and differences in terms of rules and practices for the registration of cases in the Schengen Information System (SIS) as a result of a breach of national immigration legislation?

1.2 The European context

Over the years, national migration policies have increasingly been framed as part of a wider set of European and international commitments: progress towards a common EU immigration policy, as well as associated legislative and case-law developments, have impacted national rules and practices; the enlargement of the Schengen area and the removal of internal border controls in the member countries have profoundly transformed national systems; the case-law of the European Court of Human Rights has shaped rules and practices at national and European level.

In the field of return policy, efforts have been made to enhance cooperation between European countries, but harmonisation of legislation has remained limited and national practices have continued to differ markedly. This situation is likely to change. Following years of discussion at EU level, an agreement was reached in December 2008 on a Directive - the so-called "Return Directive" - setting out common standards for returning third-country nationals illegally staying in the EU and in the Schengen area. (European Parliament and Council 2008). As a result, countries concerned - including Norway - are required to adapt their national legal frameworks and to apply a more similar set of rules by the end of 2010.

This context also creates a unique potential for exchange of experiences and mutual learning: as part of the transposition of the Directive into national law, every country will have an interest in understanding practices of others, and the EU institutions will seek to reinforce mutual trust and cooperation.

1.2.1 The scope of the phenomenon

Statistics on the stock and flow of irregular migrants are difficult to obtain by the very nature of the phenomenon. As rules, practices and reporting mechanisms on return policy vary across countries, it is also difficult to get a complete aggregate overview. Annex 1 provides more information on this aspect.

Based on available work from research institutes and international institutions, the European Commission estimates the total number of irregular migrants in the EU between two and eight million and the annual increase between 350 000 and 950 000 (European Commission 2008b)[3].

Data on refusals at the border, apprehensions in the territory, the number of return decisions and enforced removals also provide useful information on the scope of the phenomenon (European Commission 2009):

- There were 803 069 refusals at the EU border registered in 2007, a decrease by 20 per cent compared to 2004. Spain was the country issuing most refusals and Moroccan nationals were primarily concerned.
- There were 467 501 apprehensions of illegally staying third-country nationals in 2007, with this number varying between 400 000 and 500 000 per year over 2004-2007. Spain, France, Italy and Greece were the countries where more apprehensions took place. Albania, Morocco and Ukraine were the most important countries of origin of apprehended irregular migrants in 2007.
- There were about 500 000 return decisions issued every year over 2004-2007, with this figure declining slightly from 521 244 in 2004 to 488 475 in 2007.
- There were 226 179 enforced removals in 2007, a decrease by 10 per cent compared to 2004. Albanians, Moroccans and Ukrainians were nationals most often concerned in 2007.

The number of regularisations - the process of obtaining a regular status after having been in an irregular situation - also provides information on the population of irregular migrants. At least 3 752 565 persons have been regularised in five EU Member States (France, Spain, Italy, Portugal and Greece) since the early 1980s (European Commission 2008c).

1.2.2 Diversity of rules and practices

There are significant differences in return policies and practices across countries, including within Europe (European Migration Network 2007). In its 2004 review, the International Organization for Migration pointed at the following findings (IOM 2004):

- While rules and practices for enforced return vary, most countries are confronted with an issue of implementation: in all countries, only a share of return decisions is followed by a (recorded) departure. The European Commission estimates that on average in the EU, "only between a third and a half of return decisions are effectively carried out and end in the removal of the third-country national concerned" (European Commission 2009).
- In addition to enforced return, a number of countries have developed measures promoting voluntary return. Some countries - such as Belgium, France, Germany, the Netherlands and Switzerland - have been implementing assisted voluntary return programmes for quite a long time; other countries - such as Ireland, Norway, Spain and the United Kingdom - have begun to implement similar programmes since 2002. Voluntary return is widely seen as a less costly and

[3] Most estimates relate to the period prior to 2004 when 10 central and eastern European countries joined the EU, followed by Bulgaria and Roumania in 2007. Nationals from those countries were counted as third-country nationals until the date of accession of their respective countries to the EU.

damaging measure than enforced return (European Commission 2005d). The IOM is active in supporting the implementation of such programmes.

The European Committee on Migration (CDMG) of the Council of Europe is currently conducting a series of reports reviewing national policies towards irregular migrants (Council of Europe 2009). Several recent reports have also pointed at the diversity of practices related to regularisations (International Centre for Migration Policy Development 2009) and the detention of migrants (European Parliament 2007).

1.2.3 International human rights law

While situations differ, national rules must comply with international human rights law and with the minimum standards developed in this context (Phuong 2007). Several instruments of international law are directly applicable into national law. The "non-refoulement" principle, for instance, as codified in the 1951 Geneva Convention, foresees the protection of refugees by prohibiting their return to places where their lives or freedoms could be threatened. The United Nations' Convention on the Rights of the Child, which entered into force in 1990, also serves as a reference for the assessment of cases involving children.

In a European context, a reference point is given by the Convention for the Protection of Human Rights and Fundamental Freedoms established by the Council of Europe in 1950. Several aspects of the Convention have been used by the European Court of Human Rights over the years, which resulted in a comprehensive case-law[4]. The following provisions play a particular role:

- Article 3 prohibits torture or inhuman or degrading treatment or punishment. This provision can be invoked to protect against the removal of any individual to a country where there is a real risk of that individual suffering such treatment.
- Article 5 protects the right to liberty and security of the person and may be used as a reference to assess the proportionality of detention measures.
- Article 8 establishes the right to respect private and family life. This provision is particularly important in the case of removals or refusals of admission of a spouse, a parent or a relative of an individual who has a right of residence.

1.2.4 The EU "acquis"

At EU level, several initiatives have led to a greater harmonisation of national migration law and policies, with a direct or indirect impact on return policies:

- The right to free movement for EU citizens within the territory of the EU has taken a concrete shape since 1985 when Germany, France and the Benelux countries (Belgium, the Netherlands and Luxembourg) signed the inter-governmental Schengen Agreement on the gradual abolition of checks at the common borders. This was followed in 1990 by the Schengen Convention, which came into force in 1995. The Convention was the first agreement in Europe to abolish checks on people at the internal borders of the signatories, to harmonise

[4] Examples of relevant Court decisions include: Nasri vs France (19465/92), Bouchelkia vs France (23078/93), Baghli vs France (23078/93), Boughanemi vs France (22070/93), Yildiz v. Austria (37295/97); Üner vs The Netherlands (46410/99), Rodrigues Da Silva and Hoogkamer vs The Netherlands (50435/99), Amrollahi vs Denmark (56811/00), Boultif vs Switzerland (54273/00), Omoregie vs Norway (265/07).

controls at the external frontiers of the Schengen area and to introduce a common policy on visas and other accompanying measures such as police and judicial cooperation. 24 European countries are currently members of the Schengen area[5]. The European Court of Justice has developed an important case-law related to the free movement of people, including the situation of third-country nationals legally or illegally residing in the EU[6].

- Since the entry into force of the Amsterdam Treaty in 1999, new responsibilities have been delegated to the European institutions in the wider area of freedom, security and justice. The development of a common European migration policy has been a policy priority of the EU in the context of the "Tampere Programme" (1999-2004) and "The Hague Programme" (2005-2010). The recent establishment of a European Agency for the Management of Operational Cooperation at the External Borders of EU (FRONTEX) is emblematic of practical steps taken to reinforce cooperation among Member States in the management of EU borders.
- In the field of asylum, several legal instruments have been developed since the 1990s to harmonise rules and practices. The "Dublin II Regulation" contains rules to determine the Member State responsible for assessing an application for asylum and seeks to prevent multiple demands by allowing the transfer of the person to the country responsible (such types of "transfers" between Member States are not covered in this study). The "Eurodac Regulation" establishes a system for comparing the fingerprints of asylum seekers and illegal immigrants in order to facilitate the application of the "Dublin II Regulation". The "Qualification Directive" contains a set of criteria for qualifying either for refugee or subsidiary protection status and sets out what rights are attached to each status. The "Reception Conditions Directive" guarantees standards for the reception of asylum-seekers in relation to housing, education and health. The "Asylum Procedures Directive" foresees standards for procedures at first instance.

In October 2008, EU Heads of State and Government adopted a "European Pact on Immigration and Asylum", in the form a political declaration setting broad priorities beyond 2010, including in the field of return policy: "illegal immigrants on Member States' territory must leave that territory (…). Each Member State undertakes to ensure that this principle is effectively applied with respect for the law and for the dignity of the persons involved, giving preference to voluntary return, and each Member State shall recognise the return decisions taken by another Member State". Member States are also invited to develop cooperation by using common arrangements such as "biometric identification" and "joint flights", as well as "to step up cooperation with the countries of origin and of transit (…) in order to control illegal immigration".

The Swedish Presidency of the EU will build upon this declaration in the second half of 2009 to propose a new 5-year list of priority actions at EU level in the field of migration and asylum, provisionally entitled "Stockholm Programme".

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[5] All EU Member States (except for Bulgaria, Cyprus, Ireland, Romania and the UK), as well as Norway and Iceland. Switzerland will lift border controls in March 2009 and Liechtenstein will do so in November 2009.

[6] For instance, the Court ruled that "a non-community spouse of a citizen of the Union can move and reside with that citizen in the Union without having previously been lawfully resident in a member state. The right of a national of a non-member country who is a family member of a Union citizen to accompany or join that citizen cannot be made conditional on prior lawful residence in another Member State" ("Metock Case" C-127/08).

1.2.5 First steps in the development of a common EU return policy

With the removal of internal borders and the move towards an EU migration policy, the lack of common rules for the return of third-country nationals has been increasingly recognised as a particular challenge (European Commission 2009 and 2005a):

- A European return policy is an indispensable component of a wider strategy to fight illegal migration and develop a multi-faceted migration policy at EU level.
- The fact that a third-country national illegally staying in a Member State may seek to move to another Member State may lead to uncontrolled movements among Member States and further illegal presence in another Member State.
- The enlargement of the Schengen area over time has contributed to facilitating the freedom of movement for individual citizens, but the removal of internal borders represents an extra challenge for public authorities to control the movement of irregular third-country nationals.
- The lack of harmonised procedural rules causes complex practical problems:
  - There is a need to ensure mutual trust and the recognition of decisions between institutions and authorities responsible for return policies. The Council of Ministers adopted a Directive on the mutual recognition of expulsion decisions in 2001 (Council of the European Union 2001), but the lack of a systematic exchange of information has limited mutual recognition in practice.
  - There is a danger of "legal remedy shopping". A third-country national illegally residing in one Member State may not be prevented from accessing all remedies available in that Member State even though he/she has already used all available remedies and absconded in another Member State.
  - There are varying national standards and practices of detention with regard to return, which may raise concerns about equality and fairness of treatment for the persons concerned.

In 2002, the European Commission consulted on possible initiatives at EU level and proposed a way forward (European Commission 2002a and 2002b). The Council of Ministers also adopted a European Return Action Programme to improve mutual learning and reinforce practical assistance, including through the organisation of joint return flights (Council of the European Union 2002).

In 2005, the Commission proposed a draft Directive establishing common standards (European Commission 2005b - see below), as well as the launch of a new European Return Fund from 2008 onwards, which is part of the wider Framework Programme on Solidarity and Management of Migration Flows for the period 2007-2013 (European Commission 2005c). The amount foreseen for the Return Fund is € 676 million for the period 2008-2013. The Fund is used to support national programmes and EU-level cooperation projects in the field of return[7].

In May 2007, the European Commission presented a related proposal for a Directive to sanction employers of illegally staying third-country nationals, the so-called "Sanctions Directive" (European Commission 2007a). A compromise was reached at the end of December 2008 and adoption by the EU institutions is likely in the first quarter of 2009.

[7] See information about the Fund at: http://ec.europa.eu/justice_home/funding/return/funding_return_en.htm and list of preparatory actions at: http://ec.europa.eu/justice_home/funding/2004_2007/return/funding_return_en.htm.

The Directive introduces minimum penalties at European level against employers of illegal immigrants. Employers could be fined, forced to pay wages in arrears at legal levels or even banned for up to five years from bidding for public sector contracts or from receiving state aid, whether national or European. Member States will have two years from the date of publication in the Official Journal of the European Union to incorporate these provisions into national law.

In parallel, the EU has increasingly sought to address the issue of illegal migration in the context of its external relations, both at multilateral and bilateral levels, including through the negotiations of readmission agreements. The EU also seeks to sustain political dialogue with its key partners: sixty countries and twenty international organisations took part in the second Euro-African Ministerial Conference on Migration and Development in Paris on 25 November 2008. The aim of the Conference was to define a multiannual programme of cooperation based on three points: legal migration, combating illegal migration, and synergies between migration and development policy.

1.2.6 The 2008 "Return Directive"

Following three years of negotiations between the European Parliament and the Council of Ministers, the "Return Directive" was adopted in December 2008 (European Parliament and Council 2008). The Directive was published in the Official Journal of the European Union (OJEU) on 24 December 2008. It must be transposed into national law by 24 December 2010. The full text of the Directive is reproduced in Annex 2.

The Directive sets out common rules and procedures to be applied in EU Member States[8] and related Schengen countries - including Norway - for returning illegally staying third-country nationals. In particular, it foresees minimum standards for:

- The termination of illegal stay through the use of a return decision (Art. 6).
- Voluntary departure (Art. 7).
- Removal and possibilities for postponement (Art. 8 and 9).
- The return and removal of unaccompanied minors (Art.10).
- Entry ban (Art. 11).
- Procedural safeguards related to the form of the return and entry ban decisions (Art. 12).
- Remedies including possibilities for legal assistance and appeals (Art. 13).
- Detention for the purpose of removal (Art. 15).
- Reporting mechanisms, with an obligation for the Commission to report every three years on the state of implementation (Art. 19).

The Directive does not address legal grounds for issuing a return decision, which remain to be defined at national level. This limitation has been criticised by observers calling for a greater harmonisation of national return policies. In spite of the approximation of procedural rules brought about by the "Return Directive", national return legislations will therefore continue to differ in the foreseeable future.

[8] With the exception of the UK, Ireland and Denmark. The UK and Ireland benefit from an opt-out from the related provisions of the EU Treaty and are not be covered by the Directive. Denmark also benefits from an opt-out but can decide on possible participation.

1.2.7 SIS and SIS II

To operate under common rules and reinforce cooperation in the Schengen area, the member countries have developed the Schengen Information System (SIS), which began its operations in the 1990s. SIS collects a wide range of information relating to immigration, policing and criminal law for the purpose of law enforcement and immigration control. This includes a list of third-country nationals who should in principle be denied entry to all the Schengen states, for instance following a re-entry ban accompanying a return decision. SIS processes data on more than one million persons (JSA 2005). In almost 90 per cent of cases, data concern alerts on third-country nationals who are refused entry to the Schengen area ("Art. 96" alerts).

The information contained in SIS is limited to aspects described in the corresponding EU regulation. Each Member State holds supplementary information on persons who are subject to a "SIS alert" in a national database known as SIRENE, an acronym for Supplementary Information Request at the National Entry. National SIRENE offices function as contact points for authorities in the other Schengen countries to obtain information about individual cases.

In order to match the increase in the number of countries and make use of new available technologies, such as biometric data, the EU agreed to move towards a second-generation system, known as SIS II (European Parliament and Council 2006). Following some delays, SIS II is now becoming technically available.

The use of SIS and of SIS II raises legal issues related to the balance between considerations of immigration control on the one hand, and the protection of civil liberties and of the right to private life on the other. It also raises practical issues as to the quality, proportionality and comparability of registered data. For the purpose of the study, the following issues are worth highlighting:

- The criteria for registering persons in SIS are defined in Article 96 of the original Schengen Convention. The Member States are encouraged to register "illegal aliens" who pose "a threat to public order or national security and safety" or who have "been the subject of a deportation, removal or expulsion measure (...) accompanied by a prohibition on entry or, where appropriate, residence". SIS alerts cannot be issued for EU citizens.
- The registration of data may prove controversial. In particular, legal remedies should be available for individuals to use their right to access and to withdraw registered data (Brouwer 2008). Moreover, there have been concerns about the registration in SIS of third-country nationals legally residing in the EU and benefiting from the Community right to free movement, but suspected "to pose a threat to public policy or security". SIS II regulation foresees the possibility for such registration "on the basis of an individual assessment", but many actors see it as an unjustified discrimination in comparison to EU citizens.
- A review of practices carried out by the Schengen Joint Surveillance Authority revealed wide differences among countries in the issuing of "SIS alerts" (JSA 2005). Two countries - Germany and Italy - were registering cases very extensively, for instance by issuing alerts for all failed asylum seekers, while other Member States did not operate such an automatic registration: Italy and Germany together accounted for 77 per cent of the total number of Article 96 alerts in SIS in 2003 (Statewatch 2005). The procedure leading to a registration also differed: in some Member States, "expulsion" decisions lead automatically to a SIS alert; in

others, a separate decision and thus a separate verification of the necessity of a SIS alert are needed (House of Lords 2007). Finally, while access is restricted in all countries, there are differences in the type of authorities allowed to operate SIS. For instance, in most countries, asylum authorities do not have access to SIS data (House of Lords 2007). The new SIS II, combined with the "Return Directive", is expected to bring about a greater degree of uniformity and consistency of SIS alerts. However, article 23(3) of the 2006 Regulation is still a "may" clause giving a wide discretion to the Member States for using SIS II.

1.3 The choice of case studies

The four countries under review in this study belong to the Schengen area. Their examination offers a mix of experiences between "old" and "new", "big" and "small" Schengen members:

- Along with Iceland, Norway concluded an agreement with the EU in 1999 and effectively joined the Schengen area in 2001. The new "Return Directive" will apply to Norway as it constitutes a development of the Schengen "acquis".
- France was a founding partner of the Schengen agreement in 1985 and has a long experience in applying Schengen rules. It is an "old" migration country and an important country of destination and transit for non-EU migrants, notably from Maghreb and sub-Saharan Africa.
- Poland joined the EU in 2004. Internal land border controls with Schengen States were lifted in December 2007 and passport controls at airports were abolished in March 2008, making Poland a full participant in the Schengen area. Poland is a country of destination for many migrants from Russia, Ukraine and Belarus.
- Sweden joined the Schengen area in the context of its accession to the EU in 1995. Sweden's migration challenges are somehow similar to the Norwegian case. Although this is not covered in this study, the issue of movement of migrants between Sweden and Norway is also important in the political debate.

1.4 Methodology

Based on the research questions mentioned above, this study seeks to highlight similarities and differences in the rules and practices for the enforced return of third-country nationals in the four selected countries, with a view to informing Norwegian authorities. This confronted us with five practical challenges:

- The need for a general understanding of relevant international and EU law. While national practices differ, the selected countries must comply with common minimum standards inherited from international and EU law. Although these are not strictly speaking part of the assignment, developments at international or European level, such as the implementation of the "Return Directive", have a structuring impact on national frameworks and require appropriate consideration.
- The need to clarify national concepts, terminology and statistical sources to enable comparison. As we have seen, concepts may differ significantly from one country to the other. Moreover, the dominant use of the English language at EU level may hide important practical differences, or be a source of misunderstandings for national actors.

- The need to map out relevant institutional, legal and administrative actors ("who does what and how?"). Although this is only one aspect of the assignment, the analysis of the institutional and administrative set-up behind return policies is essential for understanding how the law is applied in the various countries.
- The need to operationalise and prioritise research questions in each country. Some issues are more prominent or topical in some countries than in others. The relative importance of the issues at stake and corresponding ranking of priorities are also interesting indicators of the diversity of challenges and practices.
- The need to access information and data on practices. The amount and quality of information available on this topic are interesting research questions in themselves, and it was expected that these would vary depending on the country. Moreover, several questions imply qualitative judgements on daily practices, and we have sought to build our analysis on a diversity of sources of information and points of view. Statistical data have been used to the extent possible.

The study was conducted between September 2008 and May 2009. After having reviewed the Norwegian case, the same methodology was applied to the three countries of comparison.

Desk review of relevant literature

The situation of each country was analysed through a desk review of national official documents, as well as through the use of research papers and comparative publications. Reference lists are provided in each country section and at the end of the report.

A common country template and the recourse to test cases

To facilitate comparison, a common interview guide was developed and each country section was drafted according to the same template. Moreover, four hypothetical individual cases were discussed with UDI and used as a test. These cases are not necessarily representative of the situation in the various countries, but they proved informative to illustrate and compare national systems:

- Person A: A person who had a temporary residence permit of six months, has overstayed for an additional year, and has been employed without a working permit for the last 16 months of his/her stay. This person is apprehended during a labour inspection. His/her country of origin is known and considered safe. Case A-1: This person has residence permit in another Schengen country. Case A-2: The country of origin is not safe. Case A-3: The person would have fulfilled the conditions for a work permit if he/she had submitted an application.
- Person B: A person whose asylum request was finally rejected after two years of procedure and has been escaping the decision for another three years. The person speaks the language and has been employed on several occasions. The country of origin is known and considered safe. Case B-1: This person is in a relationship with a citizen of the country and the two gave birth to a child during his/her stay, who is now 3 year-old. Both share custody and financial responsibility for the child. Case B-2: The initial asylum request was filed in a neighbouring Schengen country. The person has moved to the second country after his/her asylum request was rejected and met his/her partner who holds the nationality of the second country.

- Person C: A person who had a temporary residence permit for the duration of his/her studies and contracted a "*pro forma*" marriage to obtain another residence permit. This person has now been regularly employed for one year. The fictitious nature of the marriage can be proven.
- Persons D: A married couple bringing one child comes to the country under a false identity and is granted residence permits. After eight years in the country, they apply for citizenship. The processing of their application reveals their true identity. At this time the oldest child is 12 years old. They have also given birth to another child who is now 7.

Interviews

Targeted interviews (about 8-10 persons in each country) were conducted to supplement available information. The research questions, the common interview guide and the above test cases were used to control findings from the desk research.

Interviewees included officials in the responsible national ministries or national immigration agencies, officials in the immigration services of relevant local or provincial authorities, police officers at national and local level, as well as non-governmental experts.

The persons contacted or interviewed cannot be held accountable for the content of the study. Unless otherwise stated, opinions expressed are the responsibility of Econ Pöyry.

Notice to the reader

This study seeks to provide an accurate and up-to-date description of national legislation and systems in order to inform decision-makers and the general public. It is not meant to be a "legal textbook" for practitioners. Moreover, given the complexity of national cases, we cannot exclude mistakes or inaccuracies. For precise questions related to national legislation, it is recommended that one consults national legal documents mentioned in the reference lists.

A word of caution is particularly necessary with regard to the four test cases used in this study. By definition, these hypothetical cases do not provide complete information about the situation of the persons concerned while, in practice, decisions are taken on a "case-by-case basis" reflecting "individual situations". Answers may also differ significantly from one interviewee to the other. The responses presented here therefore correspond to the dominant, but not always consensual, views among interviewees.

Finally, it is important to bear in mind that this study reflects the situation early in 2009, and that this situation is likely to change, for instance as a result of the transposition of the EU "Return Directive" into national law.

2 Norway

2.1 Legal and regulatory framework

In Norway, the term "expulsion" ("*utvisning*") refers to the decision to return a person and subject him or her to a re-entry ban. The focus of this study is on this concept.

There are several grounds for "expulsion" of third-country nationals from Norway. This study concentrates on the following grounds:

- Expulsion for having grossly or repeatedly contravened one or more provisions of the Norwegian Immigration Act (e.g. unlawful residence, unlawful work, giving a false identity or providing false or incorrect identification documents to the authorities).
- Expulsion for having evaded the execution of any decision which means that one must leave the country (e.g. after having an asylum application rejected).

Other grounds for "expulsion" are also foreseen in Norwegian law. In particular, the following two main grounds are not covered in the present report:

- Expulsion for being considered a risk to national security.
- Expulsion for having committed a criminal act in Norway or abroad.

"Expulsion" is to be distinguished from "rejection" ("*bortvisning*"), which refers to the decision to return a person without an entry ban, for instance when a person is told at the border that he or she is not allowed to enter, for example if the person doesn't have sufficient means to support oneself. "Rejection" is a milder reaction measure than "expulsion" as it does not imply a re-entry ban. "*Bortvisning*" decisions are also issued alongside refusals of asylum requests or in connection with a negative decision about an application for residence or work permits.

The Norwegian Immigration Act contains both "objective" and "subjective" criteria for deciding over "expulsion" cases. The "objective" criteria set out the breaches of law which can justify an "expulsion" decision ("grounds for expulsion"). The "subjective" criteria list the other concerns which must be taken into consideration to assess the specificities of the case ("proportionality considerations"). The assessment of the latter criteria is essential for the administration to decide:

- Whether or not to issue an "expulsion" decision: cases where there are serious breaches of law may still be dismissed on "subjective" grounds, for instance due to a seriouss illness affecting the foreigner or his/her norwegian spouse/children, or depending on the country of origin.
- If an "expulsion" decision is considered, how long the re-entry ban will be: for persons subject to an "expulsion" decision, the duration of the ban may be of two years, five years or permanent depending on the seriousness of the breach of law.

2.1.1 Background

The Norwegian Immigration Act was adopted in 1988. The main structure of the law has been maintained since then in spite of many amendments. As regards "expulsion", the following developments are of importance:

- Since Norway joined the EEA agreement in 1994, the aspects of the law concerning EU citizens are regulated in a separate chapter, and "expulsion" rules applicable to third-country nationals are not applicable to EU citizens anymore.
- New provisions regarding appeals were introduced following the establishment of an administrative Appeals Board in 1998.
- A new act was passed in 1999 to reflect Norway's agreement with the Schengen countries and introduce provisions related to use of SIS. Asylum legislation was also revised in subsequent years to reflect new legislative developments at EU level, notably the "EU "Dublin Regulation" and related legal texts.
- New changes to the law were introduced in 2002 and 2003, mainly dealing with breaches of the criminal law.

2.1.2 Objective criteria: grounds for expulsion

Grounds for expulsion

The Immigration Act provides that a third-country national can be expelled from Norway if he or she has (section 29, first paragraph, letter a):

- Grossly or repeatedly contravened the Immigration Act, or
- Evaded the execution of any decision implying that he/she should leave Norway.

The following breaches of the Immigration Act are envisaged:

- Illegal entry, i.e. entry without required travel documents or visas.
- Illegal residence, i.e. residence without required permits.
- Illegal work, i.e. work without required permits.
- Not providing correct information (identity, nationality, family ties, etc.).
- Providing false documents or a false ID card.

Absolute limitations

The Act foresees some absolute limitations to the possibility to expel a person as a result of a breach of the Immigration Act. A foreign national cannot be expelled on the above grounds if he/she:

- Is born in Norway and has resided there continuously (section 30, first paragraph).
- Fulfils the requirements to get a permit to stay (section 30, second paragraph).
- Have a permit to work or stay (section 29, third paragraph).
- Needs protection from persecution (section 15).

Guidelines related to the objective criteria

In order to interpret and apply the Act, the responsible Ministry and/or the Immigration Directorate (UDI) adopt written "guidelines" ("*rundskriv*").

The most important "guidelines" interpreting the Act are currently being revised (RS 2008 - 07). The changes do not involve a policy shift but will give a more global picture of procedures and practices relating to "expulsion" decisions, as well as examples of relevance for addressing recent developments in criminal offences.

The current "guidelines" provide that, in order to justify an expulsion, the contravention of the Act should be considered serious/gross: "contravention of the Immigration Act should not be trivial/minor".

"Expulsion" decisions entail a re-entry ban for a period of a minimum of two years. The prohibition to re-enter can be permanent. Registration in SIS is limited to 3 years but it is renewed accordingly if the re-entry ban exceeds three years (see below).

The "guidelines" also give more detailed guidance to assess the gravity of each breach of law, as well as to address cases where several breaches of law are combined.

The following examples illustrate the "guidelines" as they stand early in 2009.

Illegal entry and stay

- A short illegal stay may qualify for a "rejection" ("*bortvisning*").
- Illegal entry and illegal stay of up to one week or more should be considered for an "expulsion" coupled with a re-entry ban of a minimum period of two years.

Illegal stay

- An illegal stay of up to one month may qualify for a "rejection".
- An illegal stay of more than a month should be considered for an "expulsion" coupled with a re-entry ban of 2 years minimum, up to a permanent ban.

Illegal stay and work

- An illegal stay coupled with illegal work of up to one week may qualify for a "rejection".
- An illegal stay combined with an illegal work situation of more than a week should be considered for an "expulsion" coupled with a re-entry ban of two years minimum.

Legal stay, illegal work

- Cases involving short illegal work during a legal stay may qualify for a "rejection".
- Working illegally for a large part of a legal stay qualifies for an "expulsion" coupled with a re-entry ban of 2 years minimum.

False information about identity, nationality, false documents and others' situation

- The extent and repetition of false information are elements in the assessment of the seriousness of the breach of law.

- There must be a causal connection between the false information and what the person is seeking to achieve.
- Minor exaggerations or discrepancies in the presentation of a case are not considered serious.

Evading the execution of a decision that one should leave Norway

Such breaches of law are considered as a gross contravention after 4 weeks.

2.1.3 Subjective criteria: proportionality considerations

Once the objective grounds for "expulsion" are established, the proportionality of the envisaged measure must be assessed. The Immigration Act provides that "expulsion" "shall not be decided if this would be an excessive measure for the foreigner or the near family, considering the seriousness of the case, and the foreigner's connection with the realm" (section 29, second paragraph).

Guidelines related to the subjective criteria

Elements in the assessment of proportionality

Elements to be taken into account include the family situation, the duration of stay in Norway, the work situation, etc. Both the foreigner's and/or the family's connections to Norway *and* their connections to the country of origin are taken into consideration. The assessment of proportionality influences both the decision to expel/not expel, and the duration of the prohibition to re-enter if an expulsion is decided.

The memo IM-1995 concerning the proportionality of "expulsion" decisions lists examples of arguments for *not* considering "expulsion" as disproportionate. Several grounds are relevant for the purpose of this study such as:

- The seriousness of the contravention.
- Considerations about generally deterrent effect, such as the wider impact that such breaches of law may have on society's trust in the law.
- The foreign national has no family ties in Norway.
- The foreign national/the family came to Norway as adults.
- The foreign national/the family has lived here for a short period.
- The foreign national/the family does not speak Norwegian.
- The foreign national/the family follows strictly the culture of the country of origin.
- The foreign national/the family is not integrated in the Norwegian society.
- The family has the same nationality as the expelled person.
- The family has lived in the home country of the expelled person.
- It is reasonable to expect that the family can travel to the country of origin to join the expelled person.
- The foreign national has limited or no contact with his or her children.

The child's best interest

Considerations about the child's best interest are an important element in the proportionality assessment. Norway translated the requirements of the European Convention on Human Rights and the UN Convention on the Rights of the Child in national law in 1999. The Norwegian authorities consider that the provisions of the Immigration Act reflect adequately the corresponding requirements.

The memo IM 1999-036 contains guidelines for the "expulsion" of foreign nationals with children in Norway. It provides that, as a rule, foreign nationals with children in Norway and in regular contacts with them should *not* be *permanently* prohibited to re-enter. Moreover, "expulsion" on grounds of an illegal stay should be used less often if:

- The person lives with the other parent or has contacts with the child to a certain extent, or if
- It is assumed that the person will have such contacts if he or she is allowed to stay.

The child's best interest should also be taken into consideration in the event that the expelled person is seeking a permit to re-enter or requesting the withdrawal of the decision. If a family does not leave Norway after their asylum request has been finally rejected, or if the process is lengthened due to wrong or false information, the length of stay in Norway will be one of the elements taken into account for assessing the child's best interest.

Connections to Norway established under illegal stay

The Norwegian authorities consider that family ties should not be given substantial weight in the proportionality assessment if the foreigner has established family links with partners and children during an illegal stay or under a false identity. The reason is that the parties could not have had a justified expectation to have a family life in Norway. If children are involved, however, the case will be assessed by giving consideration to the child's best interest.

The European Court on Human Rights has stated that a family established during an illegal stay must be considered as a connection to the country, even if this would constitute an obstacle to expulsion only in extraordinary cases. UDI considers that Norwegian practices are in line with this ruling. Considerations about the family situation of the person(s) have now been made more explicit in the written decisions.

Burden of proof and expulsion decision

UDI decides over "expulsion" decisions and has the burden of proof. Every decision is motivated in the light of the "objective" and "subjective" criteria defined in the Immigration Act. Decisions are written in Norwegian or English.

The contravention of the Immigration Act must be "sufficiently verified": the Act requires that the probability that the person has breached the Immigration Act must be larger than the probability that he or she has not ("*sannsynlighetsovervekt*").

2.1.4 Expulsion procedures

"Expulsion" decisions taken by UDI are administrative decisions regulated by the Immigration Act and the Public Administration Act. It does not require the case to be processed before a Court.

Enforcing the "expulsion" decision

Once "expulsion" is considered, a prior notification is given to the person concerned. This prior notification is also an opportunity for the person to provide more explanations about his or her case. The police (or the Foreign Service if the person is not in Norway) inform the person about the decision and its implications. The notification will, as a rule, be written in Norwegian. However, the content must be communicated in a language that the person understands, usually with the help of an interpreter. The notification should be given as soon as possible, but it can be delayed due to practical problems such as difficulties to locate the person or the unavailability of interpreters. For instance, the prior notification can be dropped altogether if it proves impossible, or if it is far too troublesome. If the person is not found, the police can report the person as missing, both nationally and internationally.

Once the "expulsion" decision is pronounced and notified, the police sets a deadline for the person to leave the country. This deadline takes into consideration the need for the person to wind up hi or her situation (housing, belongings, friends, etc). The deadline ranges typically between 2 days and 4 weeks.

Temporary custody can be envisaged by the police if there is a suspicion that the person may escape, but this requires a prior authorization by a judicial Court. In practice, temporary custody is rare for non-criminal grounds, but frequent in criminal cases.

The police also notifies the receiving country and "controls the travel out of Schengen".

A proportion of persons concerned by an "expulsion" decision are already outside the country before the decisions can be notified to them. The decisions are therefore communicated through Norway's Foreign Service missions.

Remedies: legal assistance, appeal and review mechanisms

Legal assistance

There is a right to free legal assistance in the conditions set by the law.

Appeal

A person who is expelled on the grounds of a contravention to the Immigration Act has the right to appeal this decision according to the Public Administration Act. Appeals are handled by an appeal body: UNE (see below).

There is a 3-week deadline to appeal following the notification of the expulsion decision. It is also possible to apply separately for a postponed execution of the decision while the appeal is being considered, and this is common in practice. The removal is not possible during the appeal phase if a temporary suspension has been granted.

Persons who do not leave the country immediately usually appeal.

Review mechanisms

UDI's "expulsion" decisions can be "reconsidered" ("*omgjort*") by UDI or will be examined by UNE - the Immigration Appeals Board - if the person appeals. A decision can be reconsidered in particular because new elements have been added to the case.

Decisions can also be "altered" ("*opphevet*") at a later stage as a result of the person seeking, and being granted, a permit to stay. An "altered" decision is a decision to end the ban period earlier than originally decided. This does not happen often and only concerns unanticipated events, such as the need to ensure a child's custody following the death of the other parent, or cases where the same decision would not be taken today given changes in regulations, procedures or circumstances since the issuance of the ban.

Moreover, UDI can give permission to visit/enter temporarily Norway before the end of the prohibition period. This might happen on special occasions and for a short stay, such as the funeral of a relative.

Consequences of an expulsion

As mentioned above, "expulsion" on grounds of a breach of the Immigration Act implies a prohibition to re-enter Norway, which can be permanent or for a limited period, with a minimum of 2 years. The re-entry ban is part and parcel of the "expulsion" decision.

In more than 90 per cent of cases, the data of the expelled person will be registered in SIS, which will prohibit him or her to re-enter the EU territory. Exceptions are possible for instance if the person has children living in another Schengen country. The decision to register a person in SIS is taken by UDI as a separate formal decision, but it is communicated in the same document as the "expulsion" decision. The decision follows the same considerations as the "expulsion" decision. If the person has a permit to stay in another Schengen country, the latter country will be requested to withdraw the permit before the person can be registered in SIS.

2.1.5 Alternative or complementary measures

"Expulsion" is seen as an appropriate measure in cases where the requirements set by the Act are met. Such measure demands fewer resources than legal proceedings and ensures faster implementation.

Other reaction measures are used alternatively or together with an "expulsion" decision:

- "Rejection": for less serious contraventions, for instance when the period of the irregularity is short (see above).
- Temporary custody: when there is a risk that the person will abscond, the police may ask the Court to authorise temporary custody pending the enforcement of the "expulsion" decision (see above).
- Legal proceedings leading to a "punishment" ("*straff*") in the form of a period of imprisonment and/or a fine: for gross contraventions, where an "expulsion" would normally be considered but is not possible (due to the absolute limitations/ restrictions set in the Act) or is considered disproportionate. The "punishment" (imprisonment and/or penalty/fine) can be used as the only sanction, or in addition to the "expulsion". Section 47 in the Immigration Act foresees "punishments" for

different kinds of cases. This Section also covers cases where people with a residence permit and/or Norwegian citizens breach the Act, for instance by employing people without a work permit or by giving false information about others' cases.

- Payment of the return: the Norwegian State will usually pre-pay the costs of the travel back to the country of destination, but this amount will be considered as a debt that the person is expected to reimburse, notably if he or she ever wishes to come back to Norway (unless the person is without any financial means).
- For cases where the outcome is obvious, such as persons without any connections to Norway, the authorities can recourse to a fast-track "expulsion" procedure ("*hastevakt*").

2.2 Institutional and administrative set-up

2.2.1 The local police

The Norwegian police is divided in 27 local districts, which may organise their internal work differently. Their role in "expulsion" cases is to find and investigate causes for suspicion, to collect facts and prepare cases, to report cases to UDI, as well as to assist in implementing "expulsion" decisions.

The police consider if there are "objective" grounds for "expulsion", but UDI will be in charge of reviewing both "objective" and "subjective" criteria. Firstly, the police consider whether the contravention is gross/repeated. In the case of less serious contraventions, the police can choose to "reject" the person. The decision to process the case further therefore involves some assessment by the police. The guidelines for the assessment of the seriousness of contraventions serve as a reference. Normally, the police can decide alone in "rejection" cases.

If an "expulsion" is envisaged, the police must assess whether the possibility to expel the person is restricted by the Act. This is for instance the case when the person has a permit to reside or to work. If this is the case, and an "expulsion" is still considered, the permit must first be withdrawn by UDI to the extent that this is legally possible, before the case can be processed further. In practice, there are several procedures and criteria to fulf to withdraw a permit, and UDI therefore dismisses a large number of breaches of the Immigration Act because the conditions for withdrawing permits are not fulfilled.

The possibility to expel the person is also restricted if the person is in need of protection from persecution, for instance if the person seeks asylum. If the person so requests, the possibility to grant a residence permit on this ground must first be assessed by UDI.

The police investigate and document the "objective" criteria listed above, and may also collect facts which can be used by UDI to assess the "subjective" criteria.

In cases where "expulsion" is considered because of the seriousness of the contravention, but is not possible because of a residence permit or other reasons, the police will initiate legal proceedings instead.

When the case is seen as a potential case for "expulsion", the police transfer it to UDI for assessment and decision.

2.2.2 The Norwegian Directorate of Immigration (UDI) and the Immigration Appeals Board (UNE)

UDI (*"Utlendingsdirektoratet*") is Norway's central executive body for immigration and refugees, under the responsibility of the Norwegian Ministry of Labour and Social Inclusion. UDI's role is to implement and contribute to the development of the Government's migration and refugees' policy. In addition to administering the refugee reception centers, UDI handles applications for student visas, visitors visas, residence and work permits on all grounds, as well as "expulsion" decisions.

Once "objective" criteria for "expulsion" are established by the police on the grounds of a contravention of the Immigration Act, UDI assesses the proportionality of the envisaged measure. The main question can be summarised as follows: is the envisaged measure reasonable in relation to the situation of the person and his or her family? The decision involves weighing the seriousness of the contravention against the personal ties to Norway, as described above.

The proportionality assessment determines both:

- The decision to expel or not to expel the person: "expulsion" is not decided if it is seen as a disproportionate measure.
- The duration of the prohibition to re-enter the country.

UDI also decides whether the case will be registered in SIS.

UNE ("*Utlendingsnemnda*") is a quasi-judicial Appeals Board which handles appeals of UDI decisions pursuant the Immigration Act, including cases linked to asylum requests, family reunification, residence permits, work permits, "rejections", "expulsions" and visas. Administratively, UNE sorts under the Ministry of Labour and Social Inclusion.

2.2.3 Ministry of Labour and Social Inclusion

The Ministry of Labour and Social Inclusion has responsibility for policies with regardsto employment and welfare, pensions, Sami and national minorities as well as integration and immigration and asylum policy. The Department of Migration in this Mministry has the overriding responsibility for formulating and coordinating the State's policies on refugees and immigration.

2.2.4 The National Police Immigration Service (PU)

The National Police Immigration Service is the Norwegian police's expertise centre and ancillary body in immigrant cases. PU ("Politiets utlendingsenhet") was established in 2004 as a coordinating police body responsible for registering and identifying asylum seekers arriving in Norway. The centralisation of police expertise and resources within PU was seen as a way to pool resources in order to address refugee and asylum cases which are often more complex than non-asylum cases. The role of PU is to register requests of asylum seekers, to establish the identity of the applicants, to process applications to UDI and to co-ordinate the repatriation of persons whose application has been rejected. In particular, PU is responsible for the transportation of foreign nationals who are to be removed or deported from Norway, as in "expulsion" cases.

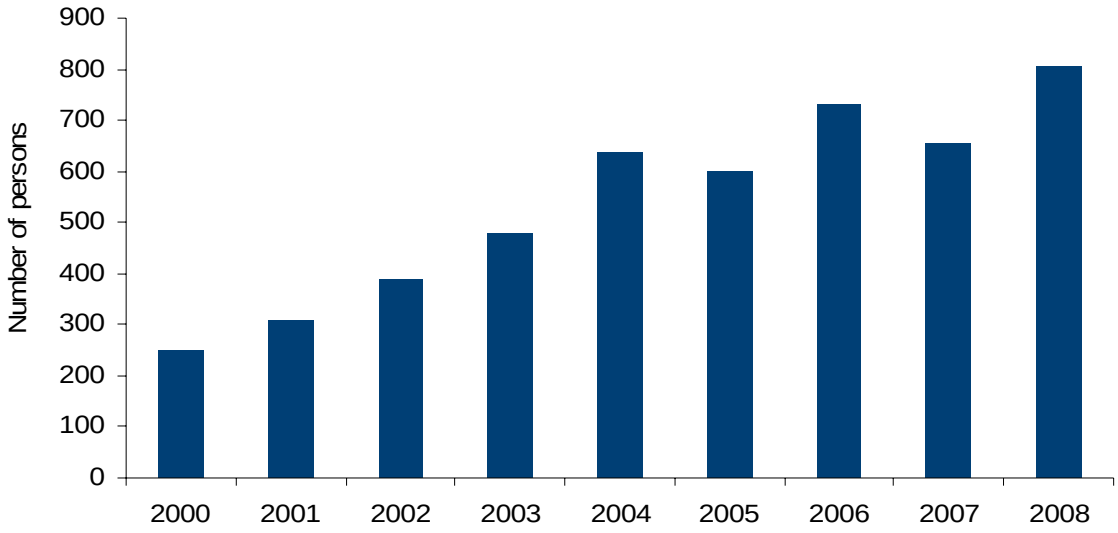
2.3 Implementation challenges

2.3.1 Key facts

Figure 2.1 shows the annual number of "expulsion" decisions issued by UDI on grounds of a (non-criminal) breach of the Immigration Act. There has been a continuous increase in the number of decisions during the period 2000 to 2004. This development should be seen in the light of Norway's accession to the Schengen area in 2001.

Since 2005, the number of decisions has varied from one year to the other, but it has increased over the period, with more than 800 decisions in 2008. For the record, an equivalent number of "rejections" (without re entry bans) were pronounced every year during that period (about 730 "*bortvisning*" decisions in 2006 and 630 in 2007).

Figure 2.1 Number of "expulsion" decisions resulting from breaches of the Immigration Act in Norway between 2000 and 2008*

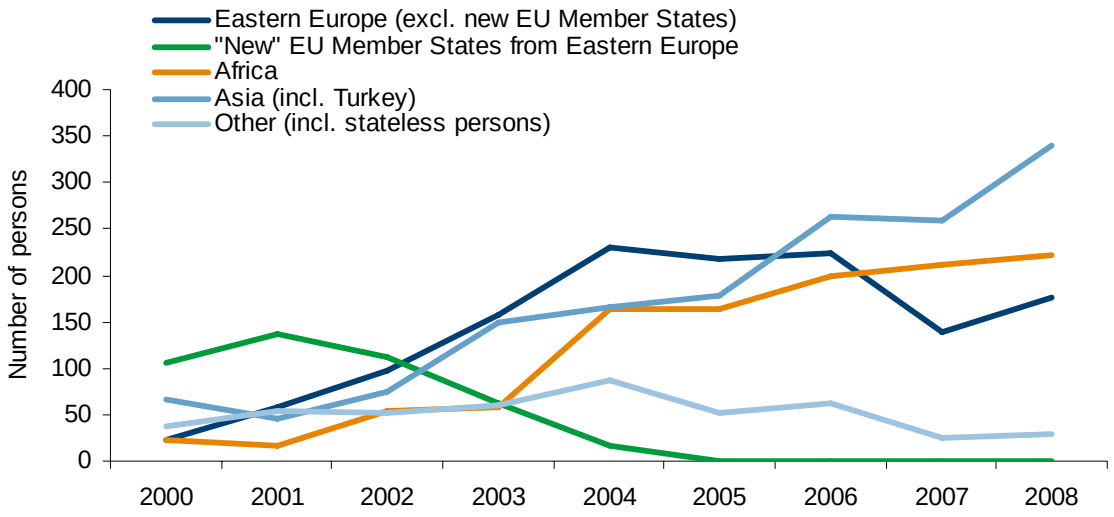


Source: UDI, Econ Pöyry. *: annual number of decisions with legal force by the end of the reference year.

When looking at these figures, it is important to note that "expulsion" decisions are not automatic, even if "objective grounds" for "expulsion" are fulfilled. A large number of cases are indeed dismissed by UDI on the basis of "subjective grounds".

The upward trend in the number of decisions would be even more pronounced if legal and statistical definitions had remained constant: since 2004, the number of cases has been reduced by the fact that citizens of central and eastern European countries which became member of the EU are no longer subject to the same procedures as third-country nationals, and therefore no longer counted. At the same time, the number of decisions concerning citizens from Africa and Asia has increased continuously (see Figure 2.2).

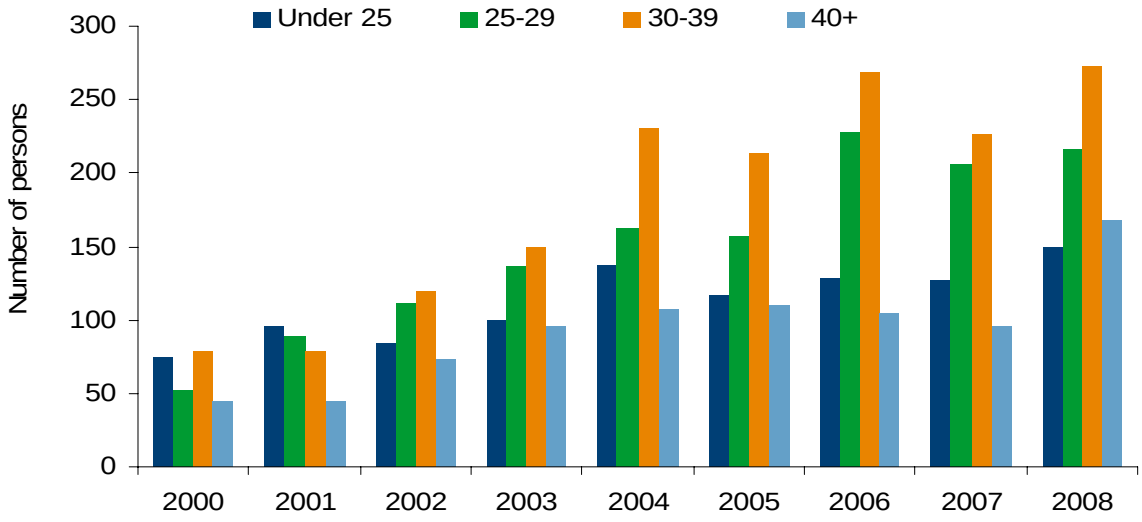
Figure 2.2 *Number of "expulsion" decisions* resulting from breaches of the Immigration Act, by nationality of the expelled persons*



Source: UDI, Econ Pöyry. *: annual number of decisions with legal force by the end of the reference year.

Figure 2.3 shows the age distribution of the persons subject to an "expulsion" decision. Half of them are below 30 and another third is between 30 and 39. About 80 per cent are men.

Figure 2.3 *Number of "expulsion" decisions* resulting from breaches of the Immigration Act, by age of the expelled persons*



Source: UDI, Econ Pöyry. *: annual number of decisions with legal force by the end of the reference year.

The vast majority of "expulsion" cases are registered in SIS. The proportion varies from 91 per cent to 98 per cent of the total number, and the rate has slightly increased over 2004-2008.

The proportion of decisions which are appealed has increased from under 40 per cent of the cases in 2004 to over 50 per cent in 2008.

2.3.2 Perceptions about daily practices

Uncovering cases

Contraventions of the Immigration Act are generally uncovered in the context of:

- UDI's assessment of applications for permits to reside, work, citizenship etc.
- The police's handling of such applications.
- Arrivals at the border.
- Criminal cases.
- Information from the public (for instance about "*pro forma*" marriage).
- Other persons' applications.
- Targeted initiatives by the police.
- The work of the tax authorities.

According to our informants, many cases concern asylum seekers who do not leave the country once their final application has been rejected. In the daily work of PU, for example, the two most common cases relate to the use of a false ID and the fact of not leaving the country once an application for asylum has been rejected. A large number of cases are a combination of false identity, illegal stay and work. There is a feeling among the police that "*pro forma*" marriages are frequent but this assertion is not documented. Only a few "*utvisning*" cases would seem to relate to illegal work only.

When found, the majority of persons staying illegally apply for asylum if they have not already done so.

Investigating cases

Breaches of law are discovered in different settings depending on the type of the contravention. The local police districts have different experiences. For instance, the police district responsible for the main airport in the Oslo region area (Romerike district) uncovers many cases of illegal entry at the border.

The extent to which the police districts uncover breaches of the Immigration Act depends on the volume of existing contraventions. The majority of cases are generally expected in police districts with most migrants such as Oslo.

The identification of cases depends also on the work of the police, and there are local variations in levels of activity. One factor relates to the internal organisation of the immigration work within the police district, and the influence that this may have on the allocation of resources between different tasks. In Oslo, a specific department has designated staff to patrol and to actively investigate cases, but this does not happen often as the staff is used for other tasks.

Differences in priority-setting and allocation of resources may prove cost-effective given differences in the objective situation between districts. Still, one of our informants expressed that "many other districts [than Romerike] represent a "potential" for cases, with direct access from countries outside Schengen, such as districts with harbours".

Example 1: police district A

This police district consists of a suburban area outside Oslo, with an income level well above the country's average and only a limited population of third-country migrants. The district has no physical borders with other countries, no major harbour and no commercial airport.

The local police have limited experience with expulsion cases on the grounds of a contravention of the Immigration Act. Most expulsions are made on the grounds of a conviction under the Criminal Act. This local police do not actively investigate contraventions of the Immigration Act.

Officers in charge of handling applications for residence and work permits discover cases now and then. Cases mostly relate to persons who have stayed in Norway for a while.

When a person applies for citizenship, the police check the identity thoroughly and may also discover irregularities. Some applicants admit that they have lived here under a false identity. They want "to get things straight".

Sometimes, the police get anonymous tips. According to our informant, this is rather common in cases of "pro forma" marriages. The police pay a visit to the couple and interview the partners. If the persons are not willing to cooperate, the case is referred to UDI.

This district most often sends cases regarding breaches of the Immigration Act to UDI. In some cases, they report the case as a criminal offence (section 47 in the Act). But this will result in more work for the police and "we do not actively seek work that we cannot carry out". This practice is in line with the official policy.

A specific type of cases relates to host families requesting that young foreign "*au pair"* work more than they are allowed to. In these cases, the Norwegian/host family may be exposed to some form of "punishment" ("*straff*") and a solution must be found for the young foreigner depending on his/her legal and personal situation.

Example 2: police district B

This district is a metropolitan urban district with a mixed population, including Norway's largest share of migrants from "non-western" countries. The district has no physical borders with other countries but it has ferry arrivals from abroad.

This police district has a separate department dealing with rejection and expulsion cases, with one section doing desk work and another section doing operative work related to immigration cases. The department is only dealing with administrative decisions.

Some people come to Norway and are arrested without the required travel documents. This will result in a rejection.

Concerning illegal immigrants living in the district, the police do not act on such cases without reliable information. This means that no one is stopped on the street and asked to show ID, unless they are under suspicion for criminal behaviours. The police state that their work is "*informasjonsstyrt*" - only guided by information - and targeted at

certain social settings. This is done following a suspicion about criminal activities, and not breaches of the Immigration Act alone. Most cases about breaches of the Immigration Act are uncovered during an investigation of such criminal cases.

This police district also gets tips from the public about false identity etc, but there has to be some substance to the information before the police take action: "people have many motives for informing us, and we do not act on grounds of airy information in an anonymous letter".

For the assessment of what is a serious breach of the Act, our informant considers that the guidelines provided by UDI are very detailed and therefore quite straightforward.

When people have forgotten to renew their permits, the police ask for a new application. If the person fulfilled the requirements the first time, they will normally get it the next time.

Instead of "going out in the streets" to find illegal immigrants ("this will not give much success"), the police now and then "tidy up" its administrative registries. They act on the assumption that people who have not renewed their permits have left the country. They notify all public instances to confirm that this is the case, so that the person will no longer receive any public services etc. "Then things will be put straight very soon".

When dealing with breaches of the Immigration Act alone, the police will normally not ask for temporary custody. They set a deadline for leaving the country (as in district A).

Investing identity from asylum-seekers

As described above, the police's special agency for immigration (PU) registers all asylum seekers when they arrive. Informants from PU claim that most asylum seekers come without ID documents, with false documents and/or claim false origin/false travel route. In legal terms, they violate the Act and this could be a ground for expulsion. At the same time, the persons claim to be in need of protection and they cannot be rejected or expelled before their case has been examined.

The work to investigate identity, travel routes, connections to Norway and to the country of origin is time- and resource-intensive, and often the case is not easily solved. In cases where the asylum-seeker does not cooperate, or where there is a suspicion of false information, PU uses different tools. The use of fingerprints and the existence of family ties in Norway can give a clue. Finding a person in SIS requires correct information about the name, which may be difficult to obtain.

Applying objective/subjective criteria

In accordance with the Immigration Act, a foreign national cannot be expelled if he/she was born and has continuously lived in Norway.

The restriction that people cannot be expelled if they are in need of protection is important: this can qualify them for asylum status, for a protection on other grounds or for humanitarian status.

False identity and "*pro forma*" marriages are seen as gross contraventions.

Forgetting to apply for a renewal of permit is not considered very serious. The decision will depend on the duration of the infringement.

Dealing with an increasing number of cases

The increase in the number of asylum cases has led to organisational changes in the Norwegian system, but practices have remained the same according to our informants.

Some types of cases or aspects of the work (e.g. to establish identity) requires more time and attention. Falsification of documents is more and more sophisticated and difficult to control. The establishment of PU and new technological possibilities such as the "Eurodac" system to identify fingerprints have played a role.

Professionals in the field consider that some refinements have been brought to the proportionality assessment in recent years:

- The various considerations are made more visible in the decisions.
- More attention is paid to the international set of rules in the written decisions.
- More political attention has been given to the interest of the child (see IM 1999-036) but this has not resulted in a change of practices as such, only in a better justification of the motives.

2.3.3 Test cases

Based on available information, Table 2.1 presents possible responses of the Norwegian authorities in the selected test cases.

Table 2.1 Test cases in Norway

Hypothetical cases	***Likely response in Norway***
Person A: A person who had a temporary residence permit for six months, has overstayed for an additional year, and has been employed without a working permit for the last 16 months of his/her stay. This person is apprehended during a labour inspection. His/her country of origin is known and considered safe.	The person has breached the Law. If the person does not have family links, he/she will be subject to an expulsion decision coupled with a permanent re-entry ban. The case will be registered in SIS.
Case A-1: This person has a residence permit in another Schengen country.	The country in question will be consulted and requested to remove the permit before the person can be registered in SIS. In practice, cooperation may prove difficult. The result may be that the person is expelled from Norway, but not from the Schengen area.
Case A-2: The country of origin is not safe.	The person cannot be expelled if he/she is in danger. UDI will notify the police. Other alternative means of "sanction" (penal or financial) may be envisaged.
Case A-3: The person would have fulfilled the conditions for a work permit if he/she had handed in an application.	The person will probably be subject to an expulsion decision but the re-entry ban may be of a shorter duration (possibly 2 or 5 years) if the absence of declaration was not deliberate.

Person B: A person whose asylum request was finally rejected after two years of procedure and has been escaping the decision for another three years. The person speaks the language and has been employed on several occasions. The country of origin is known and considered safe.	The person has breached the Law. He/she will be subject to an expulsion decision coupled with a permanent re-entry ban. The case will be registered in SIS.
Case B-1: This person is in a relationship with a citizen of the country and the two gave birth to a child during his/her stay, who is now 3 year-old. Both share custody and financial responsibility for the child.	While the case would qualify for an expulsion decision, special individual/family circumstances may militate against an expulsion or justify a shorter shorter re-entry ban (possibly 2 or 5 years).
Case B-2: The initial asylum request was filed in a neighbouring Schengen country. The person has moved to the second country after his/her asylum request was rejected and met his/her partner - who holds the nationality of the second country.	The person has breached the Law. He/she will be subject to an expulsion decision coupled with a permanent re-entry ban (or down to 5 years depending on the circumstances). The case will be registered in SIS.
Person C: A person who had a temporary residence permit for the purpose of his/her studies and contracted a "*pro forma*" marriage to obtain another residence permit. This person has been regularly employed for one year. The fictitious nature of the marriage can be proven.	The person has breached the Law. He/she will be subject to an expulsion decision coupled with a permanent re-entry ban. The case will be registered in SIS.
Persons D: A married couple bringing one child comes to the country under a false identity and is granted residence permits. After eight years in the country, they apply for citizenship. The processing of their application reveals their true identity. At this time the oldest child is 12 years old. They have also given birth to another child who is now 7.	There is no clear-cut answer and a more detailed analysis of the case is needed. The situation of the children may militate against an expulsion decision. Alternative means of "sanction" (penal or financial) may be envisaged.

Source: Econ Pöyry on the basis of interviews

2.4 Overview of legal and policy trends

Pressures for labour migration

Before the impact of the recent economic slowdown became more pronounced, Norway had been confronted with a very tight labour market and a shortage of labour in several industries. Demographic and labour market scenarios also show that labour migration is likely to play an important role for the Norwegian economy in the coming decades (Econ Pöyry 2008). In recent years, the Norwegian Government has on several occasions considered adjustments of legislation concerning labour migration. However, concerns about labour market needs are not taken into account in the assessment of individual "expulsion" cases.

Organisational and institutional challenges

Several challenges related to the management of the return of foreigners are recognised by the administration. Issues include the need for a better overview of persons who should be removed, the capacity to cooperate with the country of origin, the lack of bilateral agreements about return and transit with many relevant countries, the limited use of voluntary return and ways to improve cooperation between UDI and the police in

enforcing return decisions. Different projects and working groups have been established by the Ministry to address these questions.

Efforts at measuring the number of irregular migrants

The Norwegian Directorate of Immigration (UDI) presented last year the results of a study by Statistics Norway providing a methodological basis to estimate the number of people residing illegally in the country (UDI 2008). According to the model used, the expected total irregular residents population with non-EU origins is estimated at 18 196 by 1.1.2006 in Norway. Of these, 12 325 were previous asylum seekers, and the rest, 5 871, were persons that had never applied for asylum.

The model presented is meant to provide a means of estimating the precision (how valid the results are) of the results. This will in turn provide a basis for evaluating the direction in which this number is moving, i.e. whether it is increasing or decreasing over time. The report also makes clear that UDI will need to discuss how to improve the quality and timeliness of a number of data series used for these estimates, and action has been initiated to that effect.

Better consideration of the child's best interest

Over the last few years, the focus on the child's best interest has increased. This is notably due to the incorporation of the Convention on the Rights of the Child in the Norwegian Human Rights Act in 2003. The emphasis is most often relevant for asylum cases, but also applies to "expulsion" cases. As a result, several dozens of cases which would previously have resulted in an "expulsion" ended up in possibilities for the persons to stay (Sjeggestad 2007).

These developments also respond to the growing attention by international and national Courts about the child's best interest in "expulsion" cases. In at least two cases since 2005, Norwegian Courts have declared "expulsion" decisions by the administration invalid in the light of the UN Convention on the Rights of the Child and of Article 8 of the European Convention on Human Rights[9]. In its 2008 ruling, the Court stated that the recourse to "expulsion" was in strong conflict with the child's interest. A similar ruling of a Court of lower instance is currently being considered by the Supreme Court[10].

These rulings have played an important role in the on-going discussion on the revision of the Immigration Act. The Ministry has put forward proposals to strengthen and secure the legal situation of children in the new Immigration Act.

Further amendments to the legislative and regulatory context

The main "guidelines" related to "expulsion" cases are currently under revision. The "guidelines" will seek to give a better overall picture of procedures and practices related to "expulsion" decisions, as well as examples of relevance to assess new or developing cases involving criminal offences.

The Government has also proposed changes in the secondary legislation related to the Immigration Act. The proposals are currently being discussed in a public hearing and

[9] Høyesterett – Dom Rt 2005 s299 and Borgarting lagmansrett – Dom LB-2008-4153.

[10] Borgarting lagmansrett – Dom LB-2007-183772.

may come into force in 2010. This could result, for instance, in more precise instructions concerning considerations about the child's interest in "expulsion" cases, as well as for determining the length of re-entry bans where children are involved.

The Ministry has also initiated internal work to prepare for the transposition of the EU "Return Directive" into national law. One obvious ground for amending the Norwegian legislation relates to the requirement to set a time limit for the use of administrative detention. Other aspects may need to be considered to ensure conformity of the Norwegian law with the text.

2.5 References for Norway

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3 France

In recent years, frequent changes to the legislative framework and the introduction of quantified objectives for the number of returns have greatly influenced daily practices. By way of introduction, it is important to highlight some key features of the French case in comparison to the Norwegian case:

- The nature and scope of the challenges are much broader in France given the size and history of the country. In 2007, France took about 93 000 administrative decisions to return irregularly staying third-country nationals. The target of 26 000 effective returns was met and possibly exceeded in mainland France in 2008. About the same number of decisions was taken in the French overseas territories, in particular in the island of Mayotte. Due to their specificities, the case of the French overseas territories will not be discussed here[11].
- In France, the concept of "expulsion" is limited to cases of a threat to the public order. The term "expulsion" is therefore misleading when compared to "*utvisning*" decisions. Decisions to expel third-country nationals on the grounds of an irregular stay - the focus of the present report - are part of a wider set of measures known as "removal measures" ("*mesures d'éloignement*"). Decisions referred to below as "OQTF" and "APRF" are more directly comparable to "*utvisning*" decisions to the extent that they are administrative decisions requesting foreigners to leave the country. However, such decisions are not accompanied by a re-entry ban in the absence of other criminal offences, nor are they followed automatically by a registration in SIS.
- Decision-making is arguably less homogeneous in France than in Norway. There is no equivalent to UDI in France and decisions are taken at a local level by "*préfectures*" (about a hundred State offices at the level of "*départements*").
- As for other countries, practices can differ significantly from the letter of the law. One example relates to the possibility to issue a re-entry ban: while an irregular stay qualifies as a penal matter which may lead to a re-entry ban, this possibility is not used in practice when no other infringement is associated to the case.
- Courts play a greater role in France. This is true for decisions related to re-entry bans but also, given the practice of administrative detention, for decisions related to the detention of individuals, which remain under the scrutiny of, and are often cancelled by, judicial Courts. Appeals against administrative decisions are brought before independent administrative Courts ("*tribunaux administratifs")*. NGOs also seem to play a more direct institutional and advisory role in the French context.
- There are other important differences between France and Norway when it comes to implementing the law on a daily basis. Firstly, there is a more systematic recourse to interpellations and arrests in France through the use of planned or random ID checks. Such practice has developed as a result of the use of quantified objectives. Secondly, given the delays imposed by the procedures, decisions are taken much more rapidly in France compared to Norway. In Norway, the

[11] For more information about Mayotte and the situation in French overseas territorries, see reports from the French Interministerial Committee for Immigration Control (CICI 2008) and from the French Senate (Senate 2008b).

"seriousness" of the breach of law must be assessed, also as a way to determine the length of the re-entry ban. In France, the main criterion relates to the legal/illegal situation of the person and to its (family) connections to the territory. Thirdly, the latter criterion - connections to the country such as the length of stay or family links established during an irregular stay - would seem to have more weight in France in the decision not to return a person, as opposed to Norway where a longer spell of irregular stay increases the "seriousness" of the infringement, and where family links established during an irregular stay is not supposed to be taken into account. Fourthly, for persons subject to a return decision in France, there is a large recourse to administrative detention ("*rétention administrative*") as a way to enforce return. Fifthly, for a series of legal and practical reasons explained below, enforcement of decisions is limited in France.

- Depending on the criteria used, a country can be considered "tougher" or "softer" on irregular immigration. In rough terms, France would seem more pro-active at uncovering cases and at seeking to enforce them through coercive detention, but a high number of decisions are not enforced and the practice is less stringent when it comes to issuing (re-)entry bans. On the other hand, Norway could be said to be more considerate for the fewer cases it deals with (the length of investigation of individual cases is longer and detention is hardly used), but it is comparatively stricter once irregular stay is proven (less consideration given to the length of stay combined with a systematic use of re-entry bans and registration in SIS).

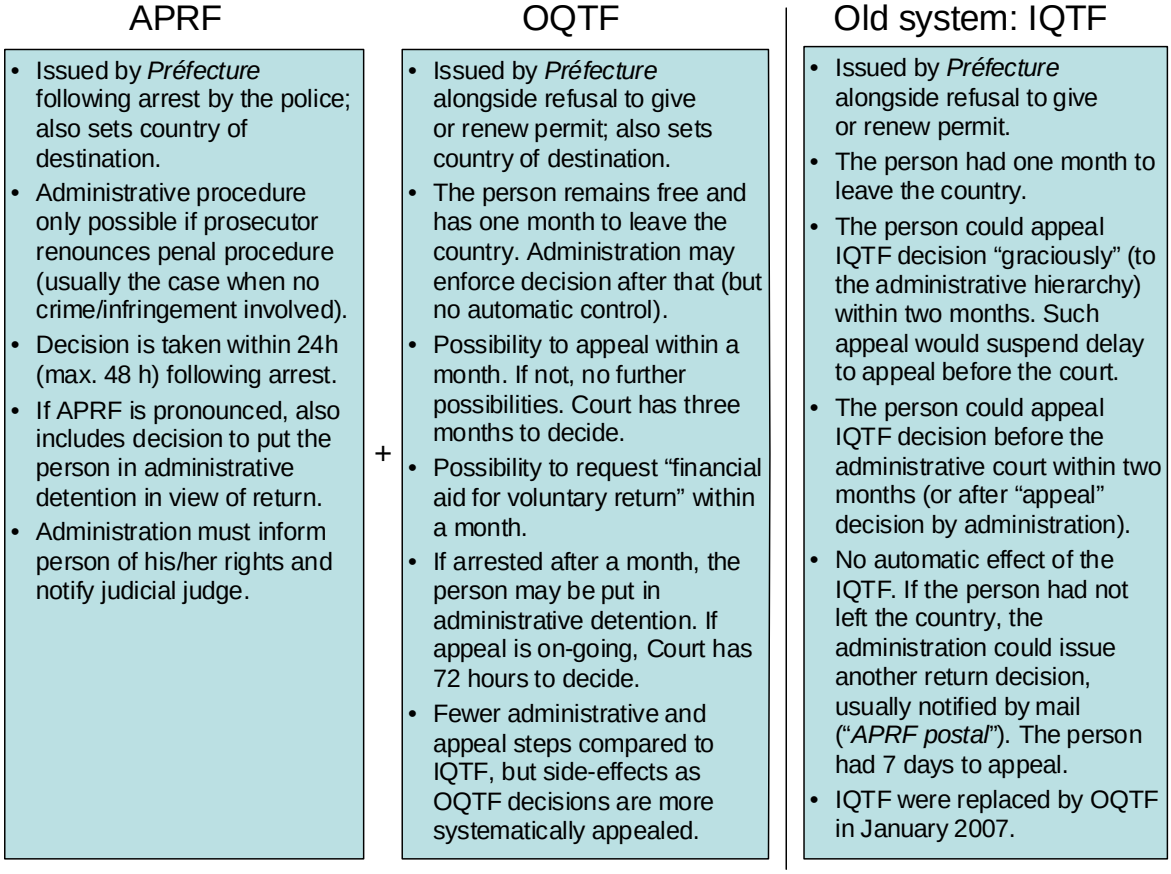
3.1 Legal and regulatory framework

In French law, "removal measures" include several types of measures/decisions:

- "Orders to leave the French territory" ("*obligation de quitter le territoire français*") - OQTF: such orders may accompany decisions by the administration to refuse to give or to renew a residence permit. The person is required to leave the country within the month which follows the notification. These decisions are usually delivered at the desk of the "*préfectures*" at the same time as the decision to refuse a residence permit. OQTF decisions have replaced the former IQTF decisions ("*invitation à quitter le territoire français*") since 2007 - see below.
- "Decisions to return to the border" ("*arrêté préfectoral de reconduite à la frontière*") - APRF: such decisions are taken by the administration in order to return third-country nationals present on the French territory but without a valid documentation. These cases are typically uncovered during ID controls.
- "Expulsion orders" ("*arrêté d'expulsion"*) - ARE: as mentioned above, "expulsion" cases refer to cases where foreigners represent a serious threat to the public order and are "expelled" from the French territory. In these cases, "expulsion" decisions can be taken by the "*préfets*" or by the ministry.
- "Ban from the French territory" ("*peine d'interdiction du territoire français*") - ITF: (re-)entry bans are judicial sanctions taken separately by judicial/penal Courts. Such decisions may be pronounced against third-country nationals proven guilty of a crime or an infringement, as defined in the French penal code.
- "Administrative detention" ("*décision de placement en rétention administrative*"): a person who has not executed an OQTF or who is subject to an APRF may be put in administrative detention pending his/her physical removal.

In the current system, OQTF and APRF decisions are combined to provide mechanisms and incentives for both voluntary and enforced return (Figure 3.1). OQTF decisions are typically issued in cases of foreigners whose request for a residence permit have been rejected by the administration, while APRF decisions are issued in cases where foreigners are unable to provide valid documentation following a police control.

Figure 3.1 Two main types of return decisions in France: APRF and OQTF (OQTF replacing IQTF since 2007)



Source: Econ Pöyry, on the basis of interviews and public information available at: www.service-public.fr

In addition, although this type of measures are not qualified as "*mesures d'éloignement*", third-country nationals can be refused entry into the French territory and transferred to the authorities of the country which have left them stay or transit on their territory. This type of "readmission decisions" ("*décision de réadmission*") typically applies to persons arriving at the main French airports without valid documentation and coming from, or through, countries with which France has signed readmission agreements or which belong to the "Dublin Regulation".

3.1.1 Background

The legal and regulatory framework for immigration policy has been frequently revised since 2002. As far as return policy is concerned, the following legislation provides important milestones:

- In 2003, a new law included a redefinition of categories of foreigners who cannot be subject to return decisions, expulsion decisions and re-entry bans. The law also extended the maximum length of detention from 16 to 32 days.

- In 2005, a revised Immigration Code ("*Code de l'entrée et du séjour des étrangers et du droit d'asile*" - CESEDA) entered into force.
- The Law of 24 July 2006 reformed significantly provisions for removal measures by creating the OQTF measure. OQTF have been in use since January 2007.

The introduction of the OQTF represents an important novelty. OQTF replaced a former type of measures known as "invitations to leave the French territory" ("*invitation à quitter le territoire francais*"- IQTF). The new mechanism was conceived as a way to reduce administrative and appeal steps before removals can take place: a foreigner who has not executed an OQTF within a month and has not appealed the decision can be returned immediately following his/her arrest. As will be explained below, a side-effect of the new system has been a surge in the number of appeals against OQTF decisions compared to ITQF decisions.

3.1.2 Grounds for a return decision

Grounds for issuing an OQTF or an APRF

The following persons may be subject to an OQTF (Art. L.511-1 CESEDA):

- Foreigners who have been refused the delivery or renewal of a residence permit.
- Foreigners whose residences permit have been withdrawn.
- Foreigners whose certifications of request for a residence card or temporary authorization to stay have been withdrawn (for another ground than public order).

The following persons may be subject to an APRF (Art. L.511-1 CESEDA):

- Foreigners who cannot justify to have entered France regularly, unless the person possesses a valid residence permit.
- Foreigners who have stayed in France beyond the duration of their visa or, if there are not subject to visa obligations, beyond the three months following their entry into France in the absence of a valid residence permit.
- Foreigners who have been the subject of an OQTF within the last year.
- Foreigners who have been condemned for absence, counterfeiting or falsification of documents, or for the acquisition of documents under a false identity.
- Foreigners whose residence permit has been withdrawn, or whose request for the delivery or renewal of a residence permit has been rejected on the grounds of a threat to public order.
- Foreigners who constitute a threat to public order or who have contravened to article L. 341-4 of Labour Code during the period of validity of their visa or, if there are not subject to visa obligations, during the period of three months following their entry.

Absolute limitations

Nine categories of foreigners shall not be subject to an OQTF or an APRF (Art. L.511-4 CESEDA):

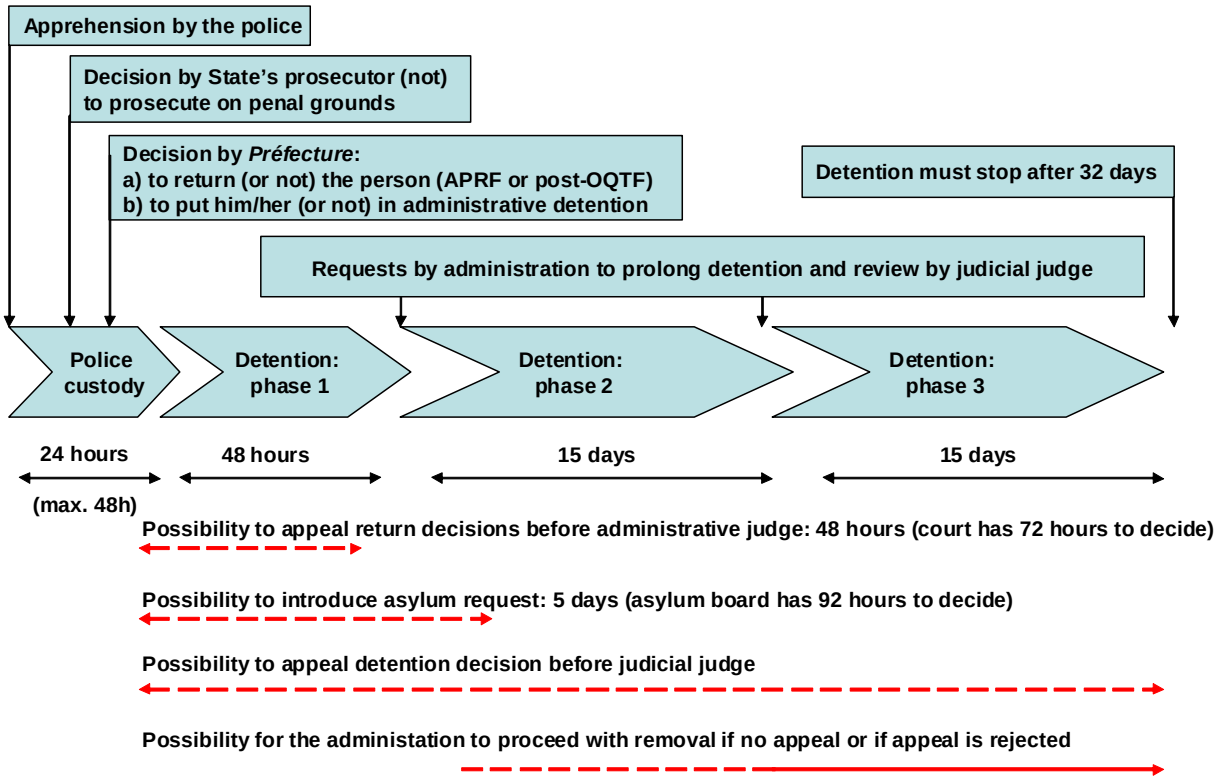
- Foreign children (under 18).
- A foreigner who can justify that he/she has lived in France since the age of 13.

- The spouse of this foreigner, who is not in a polygamic situation and who has been married for at least three years, provided that he/she has resided regularly (with a residence permit) for more than 10 years and that the "community of life" has not ceased since they got married.
- A foreigner who has resided regularly for more than ten years (with a residence permit other than a student permit).
- A foreigner who has resided regularly (with a residence permit) for more than 20 years.
- A foreigner who is not in a polygamic situation and who is the father or the mother of a French child residing in France, provided that he/she contributes effectively to the upbringing and education of the child since his/her birth or for at least two years.
- A foreigner who is married with a French spouse for at least three years, provided that their "community of life" has not ceased since they got married and that the French spouse has kept his/her French nationality.
- A foreigner who resides in France and whose state of health requires a medical treatment which cannot be provided in the country of return.
- A foreigner who has resided regularly for more than ten years, for at least four years or with a foreign national living in France since the age of 13, provided that their "community of life" has not ceased since they got married.
- A foreigner who receives benefits from a French institution following a work accident or an occupational disease and whose work-related disability is equal or above 20 per cent (national classification).
- A foreigner residing in France and whose state of health requires a medical treatment which cannot be provided in the country of return.

3.1.3 Main steps in the return process

If a person is subject to an OQTF decision which he/she has not executed within a month, or if a person has been notified an APRF after his/her arrest, he/she can be held in administrative detention as a way to facilitate the return process. Figure 3.2 describes the main administrative and appeal steps which follows an arrest. The maximum length in administrative detention is 32 days.

Figure 3.2 *Main steps in the process of enforced return in France: the case of an undocumented migrant arrested during a police check*



Source: Econ Pöyry, on the basis of interviews and information available at: www.service-public.fr

3.1.4 Detailed steps leading to the enforcement of a return decision

The following section reviews the various steps leading to the implementation of a return decision.

Notification and motivation of the obligation to leave the French territory (OQTF)

The OQTF is notified by the administration to the person at the same time as its refusal to give or to renew a residence permit (residence card, certification or temporary authorization to stay). A country of return is also indicated. These three decisions are usually contained in a single document ("*arrêté*"). The notification takes place either at the desk of the "*préfecture*" or through regular mail. The OQTF is not motivated.

Notification and motivation of the decision to return to the border (APRF)

As a rule, a foreigner must be able to prove his/her regular status at all times. During a police control, a foreigner who is unable to do so can be arrested and kept in police custody ("*garde à vue*") for 24 hours (maximum 48 hours).

If an APRF decision is taken by the administration, this will include a mention of the corresponding breach of law, the rights of the person and a country of destination. The APRF is notified to the person during the custody. An interpreter can be present during the notification.

If the APRF is accompanied by a decision of administrative detention, the person is transferred to a specialised centre (see below).

The person is set free after the police custody:

- if the judicial prosecutor (who represents the interest of the State in the French judicial system) renounces to engage a judicial procedure, and
- if the administration does not take an APRF, or if the APRF is not accompanied by a decision of administrative detention.

Obligation to leave the country

A foreigner which receives a decision of rejection or of withdrawal of a permit to stay together with an OQTF decision is required to leave the country within a month.

The foreigner subject to an OQTF can apply for financial support in the context of a voluntary return scheme. This is not possible anymore once the person is in detention.

In the case of an APRF not accompanied by administrative detention, the person is also legally bound to leave the country at once.

Administrative detention and enforced removal

Once the delay of one month following the OQTF elapses, or in the case of an APRF, the administration can enforce the decision by force and the person can be held in administrative detention pending his/her physical removal.

OQTF and APRF decisions are valid for an indefinite period of time but they have limited implications in terms of detention: a person can only be retained twice (in the event that the first return procedure aborted) within a year on the basis of the same decision.

The "detention decision" ("*décision de placement*") is taken by the "*préfet*". It is written and motivated in similar ways as the APRF. The person put in detention can request that the procedure takes place in a language that he/she understands. Free legal assistance ("*aide juridictionnelle*") is possible in cases defined in the law.

Once the person is put in detention:

- He/she has a maximum of five days after notification of his/her rights to enter an asylum request and the relevant body has 92 hours to consider the request. The person cannot be expelled as long as the asylum request is not settled.
- Since 2003, the maximum length of detention is 32 days. The "detention decision" is valid initially for a period of 48 hours. After review by a judicial judge ("*juge des libertés*"), this period can be extended to a second period of 15 days and a third period of 5 to 15 days depending on the motivation of the administration.

The detention stops:

- If/when the person is returned.
- Following a decision of the judicial judge not to prolong the detention.
- Once the maximal length of detention is reached and the administration has not carried out the removal.
- Following a cancellation of the "removal measure" by the administrative judge.

3.1.5 Remedies

Appeal of OQTF decisions to the administrative hierarchy

A foreigner subject to an OQTF can appeal "graciously" to the "*préfet*" or to the ministry. These appeals do not prolong the deadline for appeals before administrative Courts. They do not suspend the obligation to leave the country either.

Appeal of OQTF decisions before administrative Courts

In cases implying an OQTF decision, the person has the possibility to lodge an appeal against the refusal to stay, the OQTF decision as such and the choice of country of return within a month. The deadline of one month cannot be extended. The administrative court has three months to decide on the appeal case.

The appeal does not prevent the possibility for the administration to put the person in detention after the expiration of the delay of one month following the OQTF, but before the appeal period of three months is over. In this case, the administrative Court has 72 hours to decide on the appeal.

If the administrative decision is cancelled, detention must stop and the person is provided with a "temporary authorization to stay" ("*autorisation provisoire de séjour*") before his/her case is reviewed again by the administration.

If the appeal is rejected by the Court, this rejection can be appealed within a month to an "appeal administrative Court" ("*cour administrative d'appel*"). This new appeal is not suspensive and the person can be expelled before the second Court has decided on the case.

If the person has not appealed within the month following the notification of the OQTF decision, no other forms of administrative appeals can be used at a later stage.

Appeal of APRF decisions before administrative Courts

In the case of an APRF decision, the person has 48 hours to lodge an appeal following the notification of the decision. The return decision cannot be enforced within these first 48 hours. If the person lodges an appeal, the administrative Court has 72 hours to decide on the case, and the administration cannot return the person before the Court's decision.

If the Court cancels the APRF during the detention, the person is immediately set free and given a "temporary authorization to stay" ("*autorisation provisoire de séjour*") before his/her case is reviewed again by the administration.

If the appeal is rejected by the Court, this rejection can be appealed within a month to an "appeal administrative Court" ("*cour administrative d'appel*"). This new appeal is not suspensive and the person can be expelled before the second Court has decided on the case.

Appeal of detention decisions before judicial Courts

A person put in detention by the administration can appeal this decision to the judge ("*juge des libertés*") within 24 hours of notification of the decision, and the judge have

then 48h to decide on the appeal, but appeals are not suspensive. The person may also appeal other judicial decisions while held in custody (for instance an ITF decision).

3.1.6 Prohibition to re-enter

Prohibitions to (re-)enter the French territory ("*interdiction du territoire francais"* - ITF) are penal sanctions pronounced by judicial authorities. Contrary to Norway, these bans are not part of the return decision taken by the administration. They are the outcome of a judicial procedure.

ITF are pronounced as the main sanction or as an accessory sanction in cases of crimes and infringements. GISTI has listed 270 potential legal grounds for being subject to an ITF in combination with a penal sanction (GISTI 2008a). The practice, however, is that a foreigner only found guilty of an irregular stay will not be prosecuted by the judge, and will therefore not be subject to an ITF.

On the other hand, prosecution and recourse to ITF are frequent when other breaches of the law are found, including cases of non-cooperation during the procedure: although this varies depending on the circumstances, a refusal to embark in a return flight is typically sanctioned with a jail sentence of 3-4 months and a re-entry ban of 3 years.

Re-entry bans do not only concern migrants without documentation; they can also concern migrants who so far have had a valid residence permit, but have been found guilty of a crime or an infringement.

Several categories of foreigners cannot be subject to an ITF. These categories are the same as the ones who cannot be subject to "expulsion orders" on the grounds of a threat to public order ("*arrêté d'expulsion*"). In addition to the categories mentioned below, children (under 18) cannot be subject to an ITF.

Various lengths of bans foreseen in the law

The ban can be temporary or definitive. A temporary ban is of a maximum of ten years. The following are examples foreseen in the French immigration code (CESEDA):

- A foreigner who has entered or (over)stayed irregularly in France is liable to a (re-)entry ban of up to 3 years.
- A foreigner who has facilitated or helped an irregular entry or stay of another foreigner is liable to a (re-)entry ban of up to 10 years, with possibilities for a permanent ban.
- A foreigner who got married or claimed custody of a child with the only purpose of obtaining a permit to stay is liable to a (re-)entry ban of up to 10 years, with possibilities for a permanent ban.
- A foreigner who has sought to escape a decision of rejection of a permit to stay, a "removal measure" or who comes back illegally to France after having been returned is liable to a (re-)entry ban of up to 10 years.

ITF decisions can be appealed before the penal jurisdiction ("*demande de relèvement"*) after a delay of six months and provided that the person resides outside France (unless he/she is maintained in custody in France).

Relative protection against a re-entry ban

Four categories of foreigners enjoy a relative protection against a re-entry ban:

- A foreigner, who is not in a polygamic situation, and who is the father or the mother of a French child residing in France, provided that he/she contributes effectively to the upbringing and education of the child since his/her birth or for at least a year.
- A foreigner who is married for at least three years with a French spouse, provided that their "community of life" has not ceased since they got married and that the French spouse has kept his/her French nationality.
- A foreigner who has resided regularly for more than ten years (with a residence permit other than a student permit).
- A foreigner who receives benefits from a French institution following a work accident or an occupational disease and whose work-related disability is equal or above 20 per cent according to the national classification.

In addition, foreigners who have resided continuously for 15 years in France enjoy a relative protection against re-entry bans.

For the above categories, an ITF is possible but it must be duly justified by the seriousness of the crime or infringements.

Absolute protection against a re-entry ban

In addition to children, five categories of foreigners enjoy a (*quasi*) absolute protection against re-entry bans:

- A foreigner who can justify that he/she has lived in France since the age of 13.
- A foreigner who has resided regularly (with a residence permit) for more than 20 years.
- A foreigner residing in France and whose state of health requires a medical treatment which cannot be provided in the country of return.
- A foreigner who has resided regularly for more than ten years, who is not in a polygamic situation, and who is married with a French spouse for at least four years or with a foreign national living in France since the age of 13, provided that their "community of life" has not ceased since they got married.
- A foreigner who has resided regularly for more than ten years, who is not in a polygamic situation, and who is the father or the mother of a French child residing in France, provided that he/she contributes effectively to the upbringing and education of the child since his/her birth or for at least a year.

3.1.7 Registration in SIS

Given the plurality of actors involved, it is difficult to give an overview of practices leading to the registration of cases in SIS.

The registration process is not automatic: immigration services from the "*préfectures*" are expected to transfer information on relevant cases to the judicial police, who manages a central criminal registry of "persons under investigation" ("*fichier des personnes recherchées*" - FPR). In practice, OQTF decisions are not transferred, as

there is no legal requirement to do so, but APRF decisions are often transmitted. The judicial police decides over the registration of cases, both in the FPR and in SIS.

Information about Court rulings implying re-entry bans (ITF) are managed by the Ministry of Justice, which liaises with the judicial police for registration in the FPR/SIS.

3.1.8 Alternative or complementary measures

In addition, or as a complement, to return decisions, other measures exist to provide positive and negative incentives for irregular migrants to return.

Financial aid for voluntary return

Migrant or migrant families willing to return voluntarily to their country of origin can benefit from "voluntary aid for return" ("*aide volontaire au retour*" - AVR) distributed by the ANAEM. This aid amounts to € 2 000 for an individual, € 3 500 for a married couple and € 1 000 for a child. Another type of aid ("*aide humanitaire au retour*" - AHR) has been put in place for migrants who are citizens of the EU, equivalent to € 300 per person and € 150 per child.

Additional sanctions

Additional sanctions in the form of financial fees and of jail sentences are foreseen in the law (Art. L.621-1 CESEDA). For instance:

- A foreigner who has entered or (over)stayed irregularly in France is liable to a jail sentence of one year and to a fine of € 3750, in addition to a (re-)entry ban (ITF) of up to 3 years. The legal effect of the ITF starts after the detention period.
- A foreigner who has facilitated or helped an irregular entry or stay of another foreigner is liable to a jail sentence of 5 years and to a fine of € 30 000, in addition to a (re-)entry ban of up to 10 years (with possibilities for a permanent ban).
- A foreigner who tries to escape or absconds a "removal measure", for instance by refusing to embark in a plane, can be sanctioned with a three-year jail sentence (in addition to an ITF).
- The same sanctions is applicable for people who, voluntarily, have not provided their travel documents or provided the necessary information, or who have provided false information to the administration (in addition to an ITF).

Designated residence

Although they are subject to an OQTF or to an APRF, some persons cannot be returned to their country of origin or to the designated country of destination due to practical reasons, such as logistical constraints or poor health conditions. The administration can request these persons to stay in a designated residence ("*assignation à résidence*") and to report regularly to the police (Art. L.514-4 CESEDA).

Re-admission and cooperation agreements

As will be shown below, France seeks to promote readmission agreements with countries of origin as a way to facilitate their cooperation for the return of their nationals. Re-admission agreements cover a wide range of topics of common interest to both countries: residence permits, police cooperation, development aid, etc.

Regularisation

In spite of a more stringent regime and of the Government's rejection of "massive regularisation schemes" experimented in neighbouring countries, regularisation is still used by "*préfectures*" on a day-to-day basis, both for individual cases and in response to public demonstrations of undocumented migrants. The intervention of employers, trade unions, NGOs and locally elected officials can often play a role.

3.2 Institutional and administrative set-up

The following actors play an important role in the law and practice of return policy.

3.2.1 "Préfectures"

"*Préfectures*" - about a hundred State offices at the level of "*départements*" - play a central role in the processing of residence permits and return decisions, as these are the services responsible for issuing OQTF and APRF. It also has the power to interrupt the return procedure at all times. While the law is identical throughout the territory, practices often differ (Spire 2008; CNCDH 2006).

In the late 1990s, about 2 000 officials were employed in the immigration services of the "*préfectures*", including 400 only for Paris (Spire 2008). The "*préfets*" - the highest representatives of the State at local level - work under the responsibility of the various Ministries. Since 2003, they receive annual "return targets" for their "*départements*".

The capital city has a specific institutional status, which gives the State a more direct role in local police activities. The "*Préfecture de Police de Paris*" possesses both immigration services, as a normal "*préfecture*", and police services, which is not the case of other municipalities. This double competence facilitates the coordination of removal activities between the administration and the police on a daily basis.

Over the last five years, most "*préfectures*" have established local "removal offices" ("*pôles départementaux d'éloignement*") to facilitate cooperation between immigration services, police services and centres of administrative detention.

3.2.2 Ministry of immigration, integration, national identity and solidarity co-development

This new Ministry was created in June 2007 and inherited responsibility from the Ministry of Interior, the Ministry of Foreign Affairs and the Ministry of Employment. The creation of a dedicated Ministry was conceived as way to promote a more joined-up immigration policy.

The Ministry coordinates policy developments related to immigration policy. It has responsibility over a number of administrative services, notably:

- The "immigration" and "foreign labour" services of the "*préfectures*".
- The "borders police" ("*police aux frontières*" - PAF) in charge of border checks, controls and re-admission/return operations.
- The "visas services" of the French consulates across the world.

3.2.3 Police services

Several police services are involved in uncovering and processing return cases:

- The "*gendarmerie*" depends on the Ministry of Defence.
- The "national police" operate under the responsibility of the Ministry of Interior.
- The "judicial police" process criminal cases in cooperation with judicial Courts.
- The "borders police" operate police activities at the borders.
- The "municipal police" is organised by municipalities.

3.2.4 Administrative and judicial Courts

The French judicial system is based on two pillars: civil and penal jurisdictions on the one hand, with judicial Courts acting as penal Courts in cases of crimes or infringements; and administrative jurisdictions on the other. Each pillar is based on three levels of jurisdictions: first instance, appeal and "*cassation*".

In January 2008, the Immigration Minister commissioned an independent committee to study the possibility to bring jurisdictions together when it comes to immigration issues, with a view to create a new single "immigration jurisdiction". The committee concluded against the idea for both practical and constitutional reasons, but it suggested ways to improve the current system (Commission "Mazeaud" 2008 - see below).

3.2.5 French Office for the Protection of Refugees and Apatrids (OFPRA)

This office is in charge of processing all asylum requests. About 850 officials worked for the OFPRA in 2005 (Spire 2008). OFPRA decisions can be appealed to the "national Court for asylum right" ("*cour nationale du droit d'asile*" - CNDA).

3.2.6 National Agency for the Integration of Immigrants and Migrations (ANAEM)

This agency is essentially in charge of promoting integration of regularly staying migrants and of co-signing so-called "integration contracts" with the migrants. It is also responsible for providing financial aid for voluntary return. The agency is expected to be replaced by a new office, the French Office for Immigration and Integration. It is co-funded by the administrative fees paid by foreigners when requesting permits.

3.2.7 Centres of administrative detention

Centres of administrative detention are conceived as specific facilities to maintain foreigners in administrative custody pending their return, different from prisons. There are about 20 centres in France, and more are under development.

According to the French Senate, € 28.8 millions are spent for the functioning of these centres on a yearly basis, corresponding to 1 410 places and the activity of 620 police officials (French Senate 2008a).

Until recently, only one NGO (CIMADE - "*service d'entraide oecuménique*") could have access to the centres in order to provide legal assistance to the persons put in

detention. In 2008, CIMADE provided the equivalent of 79 full-time positions, for a total budget of about € 5 millions (French Senate 2008a).

3.2.8 Civil society and NGOs

In addition to CIMADE, a number of NGOs are particularly active in monitoring policy and case-law developments, providing legal advice and initiating legal and policy actions in support of migrants' rights. For instance:

- The GISTI ("*groupement d'information et de soutien pour les immigrés*") has prepared a legal template to appeal administrative decisions, which is often used as a check-list by lawyers.
- The ANAFE ("*association nationale d'assistrance aux frontières pour les étrangers*") plays a particular role of legal and humanitarian assistance to persons maintained in "waiting zones" at the main airports.

3.3 Implementation challenges

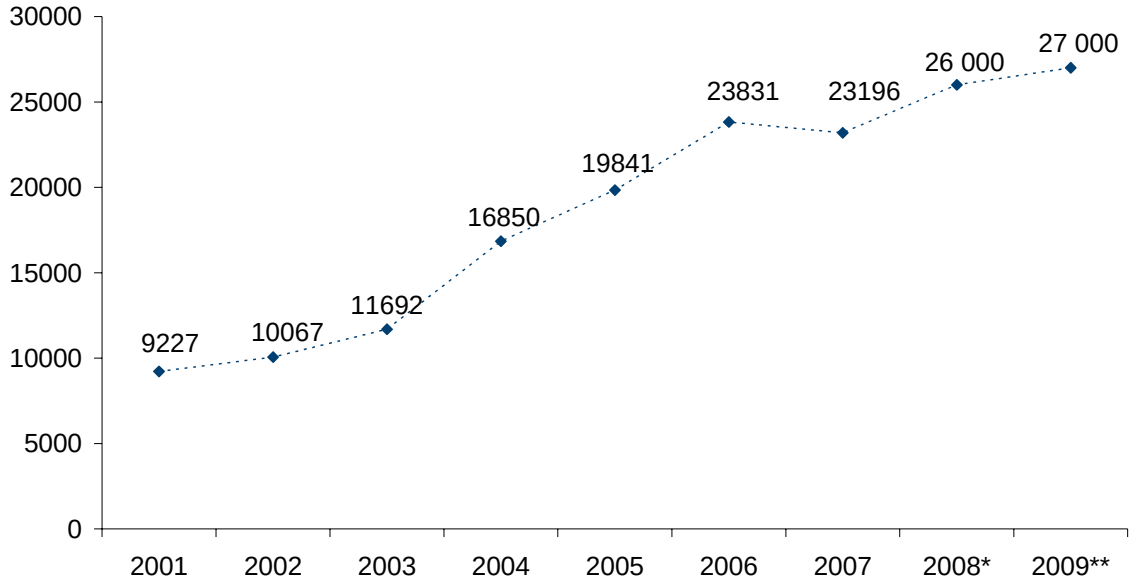
3.3.1 Key facts

Increased controls and returns

An important element in the French policy context has been the definition of an annual target of "25 000 (effected) returns" back in 2003. This objective was set by the Minister of Interior and communicated to the "*préfets*".

In 2008, the forecast of 26 000 removals is likely to have been exceeded (French Senate 2008a). Since 2002, about 125 000 foreigners have been removed from metropolitan France (French Senate 2008a; CICI 2007). An objective of 27 000 removals is set for 2009, the equivalent of 2 250 removals every month. Compared to 2001 where 9 227 returns took place, this would represent almost a tripling of returns on an annual basis.

Figure 3.3 Number of effected returns from metropolitan France



Source: French Senate 2008a, CICI 2007. * Estimates for 2008 ** Target for 2009.

The achievement of this target has been facilitated by an increase in the number of controls. The number of apprehensions of foreigners in an irregular situation has increased from 27 393 in 1999 to 67 130 in 2006 (Spire 2008; CICI 2007). The number of foreigners put in detention has increased from 25 131 in 2002 to 32 817 in 2006 (Spire 2008).

The Government has also set a target for increasing the number of infringements to the immigration code uncovered by the police ("*infractions à la législation relative à l'entrée et au séjour*"). An objective of 110 000 is set for 2009, with a target superior to 120 000 in 2010 (French Senate 2008a).

Enforced *versus* voluntary returns

As shown in Table 3.1 below, the contribution of the various "removal measures" to the achievement of the overall return target has varied over time:

- About 93 000 administrative decisions (APRF and OQTF) to return foreigners were taken in 2007, with readmission procedures and judicial ITF coming in addition. This contrasts with 64 609 APRF in 2006.
- APRF is still the dominant "removal measure": the number of APRF decisions adopted by the administration has increased significantly over the years, from 33 855 in 1999 to 64 609 in 2006 (Spire 2008; CICI 2007). The relative decline in the number of APRF in 2007 compared to 2006 results partly from the new legal status of Bulgarian and Romanian citizens, whose countries became members of the EU on 1st of May 2007. These two nationalities represented 26 per cent of the total number of removals in 2006 (CICI 2007).
- The introduction of OQTF in 2007 contributes to increasing the overall number of return decisions: the 42 263 OQTF decisions adopted by the administration add up to the cumulative number 50 771 APRF taken that year.
- Voluntary returns and readmission procedures represent an increasingly important share of decisions. In the first half of 2008, the number of "voluntary returns" was about the double of that for the entire year 2007, and it represented more than a third of the total return decisions enforced in the first half of 2008.

Table 3.1 « Removal measures » in France: decided and enforced

	2005		2006		2007		First semester 2008	
	decided	enforced	decided	enforced	decided	enforced	decided	enforced
ITF	5 278	2 250	4 697	1 892	3 580	1 544	1 421	720
OQTF	-	-	-	-	42 263	1 816	18 280	1 546
APRF	61 595	14 897	64 609	16 616	50 771	11 891	24 076	5 655
Expulsion decisions	285	252	292	223	258	206	130	83
Readmissions	6 547	2 442	11 348	3 681	11 138	4 428	5 779	2 820
Voluntary departures	-	-	-	1 149	-	3 311	-	6 386
Total	73 705	19 841	80 672	23 831	112 010	23 196	49 686	17 210

Source: French Senate 2008a, CICI 2007

For the good understanding of developments over time, it is important to bear in mind the changes brought about by the introduction of OQTF decisions. In the former system,

IQTF decisions needed to be followed up by an APRF decision to become enforceable, while this is no longer the case with OQTF decisions. The number of return decisions which are directly enforceable is therefore on the increase, in spite of a relative (and possibly only temporary) stagnation in the number of returns in 2007 (essentially due to the counting of Romanian and Bulgarian citizens).

Relatively low rates of enforcement

Overall, the French Senate - the upper legislative body - notes that there is still a significant gap between the number of decisions taken by the administration and the number of decisions which are eventually enforced (French Senate 2008a):

- Overall, the rate of enforcement varies approximately between 20 per cent and 30 per cent depending on the type of removal measures and on the year.
- Looking at APRF and OQTF decisions together, the rate of enforcement was of 14.2 per cent in 2007 and of 17 per cent for the first semester of 2008 (CICI 2008). For Paris only, according to a former official, about 2 000 irregular migrants out of the 15 000 apprehended by the police were effectively removed in 2007, a rate of enforcement of 13 per cent (Blanc 2008).
- The rate of enforcement of APRF decisions is higher than for OQTF, in the order of 20 per cent every year. The rate of enforcement has increased slightly from 16.6 per cent in 2001 to 23.4 per cent in 2007 (CICI 2008).
- The rate of enforcement of OQTF decisions was particularly low during the first year of implementation: 1 816 OQTF decisions were enforced in 2007 compared to the 42 263 decisions taken that year, a rate of enforcement of about 4 per cent. The situation in the beginning of 2008 shows a slight increase, with a rate of enforcement in the order of 10 per cent.

Main nationalities and profiles

Of the 23 831 persons effectively removed in 2006, the following nationalities were mostly represented: Romanians (5 041), Algerians (3 170), Moroccans (2 062), Turks (2 052), Bulgarians (1 201). Men under 40, without family links, having resided and worked in France for 4-5 years without a permit, are overrepresented.

3.3.2 Perceptions about daily practices

The pressure of numbers: from interpellations to removals

The majority of cases are uncovered through planned police checks. In order to check IDs, the police must request the prior authorisation of the State's prosecutor, which will specify geographical and time limits for the police operation. A significant number of cases are also uncovered following acts of "small delinquency". A practical limit for the police is that it is not legally possible to follow up OQTF decisions automatically by arresting a person at his/her home.

As a complement to random checks, the police has increasingly targeted its activities on arresting "helpers" and on dismantling organised networks, also in connection with efforts at fighting illegal work. 4 800 "helpers" were expected to be arrested in 2008 and there is an objective of 5 000 in 2009 (French Senate 2008a).

The way in which controls and removals are conducted is polemical in public opinion: random checks often lead to accusations of racial discrimination; arrests of parents or children at schools have been resisted by school staff; cases of misleading invitations to "regularise the situation" by the "*préfectures*" have been denounced as "immoral" and "illegal"; deadly accidents have occurred during arrest operations; return operations on commercial flights have been interrupted following opposition by other travellers, etc.

Over the years, a wider range of administrative services - labour inspectorates, social services and tax authorities - has been led to cooperate in uncovering cases (Spire 2008). Since July 2007, employers also bear a greater responsibility for checking the legal situation of foreign workers during their recruitment (Weil 2009).

Practical difficulties and low rates of enforcement

The low rates of enforcement of return decisions can be explained by a series of factors:

- Cancellations of decisions by judicial and administrative judges: 34.4 per cent of failures to return in 2007 were due to a cancellation of a decision by a judge (CICI 2008). The judicial judge may cancel detention decisions when the legal requirements related to the arrest, transfer or detention have not been respected, or when the administration cannot justify having taken all the necessary steps to proceed with a swift return. The administrative judge may cancel the return decisions in the light of international human rights law, notably considerations related to the right to live a normal family life, as well as health considerations. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedom is often used by the administrative judge. Article 3 is also regularly invoked in cases involving children, but the provisions of Article 8 are often sufficient to assess the situation. Article 3 can also serve to decide on the country of return. The workload of administrative Courts has increased significantly following the introduction of the OQTF: since no appeal is possible at a later stage, foreigners subject to an OQTF have an interest to lodge an appeal, even if they are not (yet) under the threat of an immediate removal. Some actors complain that this creates a "virtual" (and burdening) litigation process as only a share of persons subject to an OQTF decision will in fact be arrested and deported at a later stage. These actors suggest suppressing or reviewing the OQTF mechanism and substituting it with a new APRF-type of decisions.
- Refusals by the countries concerned to grant re-entry to their nationals ("*laissez-passer consulaires*"), which account for 30.1 per cent of failures to return in 2007 (CICI 2008). If the person under arrest has valid ID documents, such as a passport, it is easy for the administration to identify a country of return. However, this is not often the case, and the administration needs to deduct the nationality and seek agreement of the country in question to accept the return of its nationals. France has identified a list of 14 "non-cooperative" countries which often refuse or fail to provide in time an authorisation for the re-entry of their nationals: Belorussia, Cameroun, China, Ivory Coast, Egypt, Georgia, Guinea, India, Morocco, Mauritania, Pakistan, Serbia-Montenegro, Sudan and Tunisia. The French administration seeks to promote re-admission and cooperation agreements with these countries. The extension of the maximum period of administrative detention to 32 days has contributed to facilitate cooperation with the consulates. The rate of authorisations granted "within useful deadlines" has increased to reach 46 per cent in 2004, but declined to 37.4 per cent in 2007 (CICI 2008).

- Lack of capacity in centres of administrative detention: due to physical constraints in the number of places, the administration may issue an APRF without putting the person in detention. The criminal burning of the main centre of detention near Paris early in 2008 has increased practical bottlenecks.
- Possibility of political or personal interventions: elected or representative persons - for instance a mayor or a member of the parliament - have the possibility to intervene by calling the attention of the "*préfet*" on individual cases, or inviting them to reconsider their decisions. This practice may vary depending on the locality. No estimate is available.

Combined with the pressure of numbers, these constraints lead the administration to focus its efforts and decisions on cases "presenting the best potential for expulsion" (e.g. absence of family links, good cooperation of the corresponding consulates).

The use of administrative detention

The recourse to administrative detention appears much more systematic than in Norway. France has been criticised for the conditions of detention (Council of Europe 2008), and several cases of hunger strikes have been reported. The main centre near Paris was closed down for the main part of 2008 following a criminal burning.

Another issue relates to the legal assistance available at the centres. In a decree of August 2008, the Government foresaw that the service so far provided by CIMADE would be tendered out in eight different lots for a one-year period. From the point of view of NGOs, this will create additional difficulties to coordinate exchange of information across the territory with a view to lodging an appeal within the deadline of 48 hours. This may also increase the financial dependency of NGOs vis-à-vis the administration. Part of the decree was cancelled by the highest administrative Court and a new one is in preparation.

The use of voluntary return

Voluntary return schemes are increasingly used by the administration, also as a way to fulfil the "return targets".

While the aid for "voluntary return" is reserved to non-EU citizens, the "aid for humanitarian return" may be used in cases involving EU citizens. This aid is widely used in cases involving Romanian nationals, often from a Roma origin.

Table 3.2 Nationalities of persons having received financial aid to return in 2008 (up to 30 October)

Aid for voluntary return		Aid for humanitarian return	
China	275	Romania	7 028
Algeria	204	Bulgaria	834
Russia	158		
Serbia Montenegro	107		
Iraq	93		

Source: French Senate 2008a, ANAEM

Since the accession of Romania and Bulgaria to the EU, nationals of these countries have the possibility to enter France without a visa. However, they can still be subject to an OQTF or to an APRF on the grounds of a trouble to the public order or of insufficient financial means.

3.3.3 Test cases

Based on information available, Table 3.3 presents possible responses of French authorities in the test cases used in this study.

Table 3.3 Test cases in France

Hypothetical cases	***Likely response in France***
Person A: A person who had a temporary residence permit of six months, has overstayed for an additional year, and has been employed without a working permit for the last 16 months of his/her stay. This person is apprehended during a labour inspection. His/her country of origin is known and considered safe.	If the person is arrested, he/she will be subject to an APRF decision (in the absence of family links) and possibly put in detention in view of his/her removal.
Case A-1: This person has a residence permit in another Schengen country.	The person may be subject to a re-admission procedure to his/her country of residence. In practice, the person could be let free and invited to regularise his/her situation.
Case A-2: The country of origin is not safe.	In "non-asylum" cases, the person will be arrested, subject to an APRF decision and put in detention like person A. The decision on the country of return can be appealed to the administrative Court. If the person introduces a request for asylum, the OPFRA has 96 hours to decide.
Case A-3: The person would have fulfilled the conditions for a work permit if he/she had handed in an application.	If the person is arrested, he/she will be subject to an APRF decision (in the absence of family links) and possibly put in detention in view of his/her removal.
Person B: A person whose asylum request was finally rejected after two years of procedure and has been escaping the decision for another three years. The person speaks the language and has been employed on several occasions. The country of origin is known and considered safe.	If the person is arrested, he/she will be subject to an APRF decision (in the absence of family links) and possibly put in detention in view of his/her removal.
Case B-1: This person is in a relationship with a citizen of the country and the two gave birth to a child during his/her stay, who is now 3 year-old. Both share custody and financial responsibility for the child.	This person will not be returned if he/she has direct contacts with the child (who is born on the French territory and therefore has French nationality). The "community of life" between the parents is a criterion. The person will obtain a first residence permit of one year ("*titre vie privée et familiale*").
Case B-2: The initial asylum request was filed in a neighbouring Schengen country. The person has moved to the second country after his/her asylum request was rejected and met his/her partner - who holds the nationality of the second country.	Since the person lives with a French citizen, their "community of life" will be assessed in France. If the request had still been on-going in the other country, the person would have been returned to this country.

Person C: A person who had a temporary residence permit for the duration of his/her studies and contracted a "*pro forma*" marriage to obtain another residence permit. This person has been regularly employed for one year. The fictitious nature of the marriage can be proven.	If the person is arrested and the marriage is fictitious, the person is subject to an APRF. The wedding and related residence permits are cancelled (+ possible penal sanctions). NB: if the marriage is regular but ends in a divorce within 4 years, the foreigner may have difficulty to renew his/her residence permit and be subject to an OQTF.
Persons D: A married couple bringing one child comes to the country under a false identity and is granted residence permits. After eight years in the country, they apply for citizenship. The processing of their application reveals their true identity. At this time the oldest child is 12 years old. They have also given birth to another child who is now 7.	Not clear-cut: in law, the persons could be returned (through an OQTF decision). Investigation about the identity will be conducted under the control of the judicial judge. In practice, the presence of a child born in France may pledge against a return. NB: If the child arrived before the age of 13 and has reached 18, a return is not possible.

Source: Econ Pöyry on the basis of interviews

3.4 Overview of legal and policy challenges

Overall policy context

Migration issues have been very present and divisive in the French political debate in recent years. The current French President is a former Minister of Interior and has presided over migration policy since 2002. The theme of "chosen migration" is a central element of the Governments' agenda, as exemplified by the creation of a Ministry of Immigration and a policy target of "50 per cent of labour migration in total migration".

There has been a gradual toughening of the conditions to access and reside on the French territory (GISTI 2008b), for instance:

- The conditions for family reunification and for the acquisition of the main residence permit of 10 years have been made more stringent, with a greater recourse to permits of a shorter duration (typically one year). This shift has contributed to increasing the workload of immigration services, as well as the probability of irregular cases (Blanc 2008; Spire 2008).
- The number of asylum requests has gone down from 45 578 in 2005 to 26 269 in 2006 (Spire 2008), but the number of refugee statuses granted has remained relatively constant: 8 780 in 2007 compared to 9 790 in 2003 (Weil 2009).
- The Government has explored the possibility to introduce binding "labour migration quotas". The system envisaged was deemed unconstitutional (Commission "Mazeaud" 2008).
- The fight against irregular immigration has been stepped up, as exemplified by the definition of quantified return targets, the creation of the OQTF measure as a way to facilitate return, the extension of the period of administrative detention to 32 days or the suggestion to create a single immigration jurisdiction.
- The Council of Europe has criticised the conditions of arrest and detention of foreigners, as well as the use of *ex ante* return targets, and it has called for greater transparency of the law and better information and access to rights, notably to apply for asylum (Council of Europe 2008).

Policy pro-activism, legislative changes and frequent institutional reforms reflect a difficulty of the French political system to come to terms with the issue of migration.

The recent report of the "Mazeaud" Committee pledged for a "transparent, simple and solidaristic" framework to manage migration flows in a more sustainable manner. (Commission "Mazeaud" 2008). The report also stressed that many challenges could no longer be tackled at national level only, and that France needed to engage vigorously in building common policy responses at EU level.

A demanding and resource-intensive policy priority

The priority given to increasing the number of returns has translated into an increase of financial resources dedicated to this activity. In autumn 2008, the French Senate gave an estimate of the costs involved by "removal measures" (French Senate 2008). Overall, € 80.8 million are set aside in the national budget, corresponding to:

- € 28.8 million for the functioning of centres of administrative detention.
- € 42 million for travel costs (flight, boat or train tickets), which correponds to € 2 186 per removal.
- € 10 million for health and social care in the centres of administrative detention.
- € 5 million for legal assistance in the centres of administrative detention.

However, if the administrative cost of escorts by police services is included, the Senate estimates the overall costs of removals to € 415.2 million, the equivalent of € 20 970 per returned person. These costs do not include associated wage and administrative costs of officials, judges and lawyers involved in the processing of decisions and appeals.

As an observer puts it, "if we estimate that there are about 500 000 undocumented migrants in France and if the Government sets an objective of 25 000 returns per year, this would take 20 years and about € 10 billion to return today's irregular migrants".

Tensions between law, practices and policy goals

The French case illustrates the discrepancy which can exist between the letter of the law and the diversity of realities on the ground. As far as return policy is concerned, the use of return decisions lies at the crossroads of three logics, which have conflicting requirements and may be difficult to reconcile in practice: the enforcement and respect of the (national and international) law; the achievement of political commitments set at central level; and diplomatic, material and logistical constraints.

Several features reflect the tensions of the French system: the heterogeneity of practices across the territory and the wide scope for interpretation of "*préfectures*" depending on the local context; the high rate of cancellation of decisions by the Courts; pressure put on employers and labour inspectorates to control the legal situation of foreign workers while seeking to increase the share of labour migration in total migration; criticisms by NGOs of the "repressive" nature of immigration policy; criticisms by the Council of Europe about the conditions of administrative detention; the risks of "bottlenecks" in jurisdictions following the creation of the OQTF, etc.

Reflection is on-going on ways to improve the system. The "Mazeaud" Committee recommended in particular (Commission "Mazeaud" 2008):

- To suppress the OQTF, without re-establishing the former "APRF by mail": only those foreigners who are arrested by the police without documentation would be subject to a return measure (APRF). This woud reduce the "virtual" litigation of OQTF decisions.

- To train staff of services in "*préfectures*" to improve the quality and motivation of decisions, as well as the defence of the position of the administration before the Courts. This would increase legal certainty and limit cancellations by the judge.
- To establish a compulsory administrative appeal before the jurisdictional appeal. Such administrative appeal would be considered by a local committee (at the level of the "*départements*"). The persons would be invited to present his/her situation and his/her links to the French society would be scrutinised.
- To change the rules according to which the judicial judge must validate (or not) the first period of administration detention within 48h. The idea would be to let sufficient time for the administrative judge to assess the appeal first.
- To encourage administrative magistrates to hold "delocalised" or "tele-conferenced" sessions as a way to avoid to escort physically persons from the detention centres to the Courts.
- To amend the immigration code with a view to better distinguish between substantial and less substantial requirements in the procedure, and to ensure that migrants are notified their rights at their arrival to the centres of detention. The idea is to reduce the number of cases of migrants who are set free as a result of a procedural problem, while the substance of the case would justify a return.
- To enlarge possibilities for administrative Courts to proceed with simplified examinations (without conclusions) as a way to reduce their workload.

The impact of the "Return Directive"

The French legal system is bound to change again in the context of the transposition of the "Return Directive". While French law would seem in line with most of the provisions of the Directive, at least two aspects may impact French practices:

- The requirement to issue a re-entry ban when return decisions have not been enforced (Article 11 of the Directive). As shown above, there are no automatic re-entry bans in France. Moreover, decisions on bans are taken by judicial Courts, not by the administration.
- The provision foreseeing an appropriate period for voluntary departure ranging between seven days and thirty days, except in defined circumstances (Article 7 of the Directive). There is no such delay in the case of APRF decisions, as the persons arrested in an irregular situation may be put in detention and returned without having the possibility to do so voluntarily. The logic of the system advocated by the Directive would seem closest to the functioning of OQTF decisions in this respect.

The French administration is currently considering options for the transposition of the Directive into French law.

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4 Poland

By way of introduction, the Polish case can be summarised as follows:

- In the period preceding the accession of Poland to the EU and the Schengen area, the Polish immigration legislation was amended several times in order to meet western standards. Moreover, the capacity of the State to manage migration and asylum cases was significantly overhauled, including through the help of external financial assistance.
- Several actors are involved in the issuance and implementation of return decisions in Poland. A central role is played by the Polish Border Guard, police services, the Office for Foreigners and the "*Voivodes*", i.e. State governors at provincial level (with Poland being made up of 16 "Voivodeships" since 1999).
- Two types of return decisions are currently in use. Decisions on an "obligation to leave the country" ("*decyzja ozobowiazaniu do opuszczenia terytorium Rzeczpospolitej Polskiej*) are issued in cases where the administration assumes that the person will leave the country voluntarily. "Decisions of expulsion" ("*decyzja o wydaleniu*") are issued in other cases.
- A status of "tolerated stay" ("*zgoda na pobyt tolerowany*") may be granted to irregular migrants who cannot be returned for legal or practical reasons.
- "Decisions of expulsion" are accompanied by a re-entry ban to the Schengen area ("*wykaz cudzoziemcow ktorych pobyt na terytorium Rzczpospolitej Polskiej jest niepozadany*"). The ban is normally of five years but if the foreigner contributes to the costs of removal, the prohibition period is limited to three years. Data are registered in SIS. "Obligations to leave the country" are accompanied by a ban of one year from the Polish territory. Data are recorded in a Polish registry only.

Section 4.1 presents the main elements of the Polish law. Sections 4.2 and 4.3 focus on practical aspects of the Polish return policy.

4.1 Legal and regulatory framework

4.1.1 Background

The possibility to "expel" was introduced in Polish law in 1926 by a presidential ordinance: if the presence of a foreigner was deemed "undesirable", he/she was to be expelled without any judicial supervision.

The 1963 Act on Aliens introduced a new provision on expulsion. The Act was initially very brief in terms of procedural rules. During the subsequent period, expulsion decisions were mostly taken in response to diplomatic considerations.

A ruling from the Constitutional Tribunal in October 1992 stated that several articles of the 1963 Act, for instance the practice of keeping foreigners in arrest until sufficient evidence was gathered, were unconstitutional. This ruling forced the Polish authorities to start working on a new legislation.

When a new set of rules was introduced in 1997, the immigration situation in Poland was still influenced by the developments related to the fall of communism. Some groups

of migrants had overstayed their visas since the 1980s. Moreover, new waves of newcomers from the former republics of the Soviet Union, Romania and Bulgaria had arrived in the first half of the 1990s. At the time, it was widely considered that the State lacked experience and resources to deal with return cases, as exemplified by problems in organising repatriation air flights. The work of the Polish Border Guard focused mainly on returning migrants with a criminal background.

Over the last decade, institutional and legal developments followed a two-fold track. Firstly, the legislation was revised on several occasions to take account of legal obligations originating from international and European commitments. Secondly, the State has sought to reinforce its institutional and administrative capacity to implement these new standards, including for the management of return cases.

The current rules derive from the 2003 Act on Aliens[12], which has been amended several times since then[13]. In particular, the 2003 Act on Aliens established "obligations to leave the country" as a complement to "decisions of expulsion". Table 4.1 summarises the main differences between the two types of decisions currently in use.

Table 4.1 Main differences between "obligations to leave the country" and "decisions of expulsion" in Poland

	Obligation to leave the country	Decision of expulsion
Justification	It is assumed that the person will leave voluntarily	It is assumed that the person will not leave voluntarily
Main actors	The Polish Border Guard and police services	"*Voivode*" (governor representing the State at provincial level)
Detention	No	Possible for up to 12 months
Time to comply	Up to 7 days	Up to 14 days
Financial costs	Borne by the foreigner	Borne by the foreigner, the public budget or the employer in cases of irregular employment
Re-entry ban in the Polish registry	For 1 year	For 5 years, but only 3 years if the foreigner bears the costs
Registration in SIS	No	For 3 years and, if applicable, to be renewed for 2 more years

Source: Econ Pöyry based on the Polish Act on Aliens and interviews

[12] Act on Aliens of 13 June 2003 ("Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach"), *Dziennik Ustaw* 2003 No 128 item 1175, also know as *Consolidated text containing the amendments introduced by the Act on participation of the Republic of Poland in the Schengen Information System and Visa Information System*, hereinafter referred to as Act on Aliens.

[13] *Inter alia*, Act amending the Act on Aliens, Act on Granting Protection to Foreigners within the Territory of the Republic of Poland and related other Acts of 22 April 2005 ("Ustawa z dnia 22 kwietnia 2005 r. o zmianie ustawy o cudzoziemcach i ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw"), *Dziennik Ustaw* 2005 No 94 item 788; Act amending the Act on Aliens and other related Acta ("Ustawa z dnia 24 maja 2007 r. o zmianie ustawy o cudzoziemcach oraz niektórych innych ustaw"), *Dziennik Ustaw* 2007 No 120 item 818.

4.1.2 Grounds for "expulsions" and for "obligations to leave"

Grounds for a "decision of expulsion"

Article 88.1 of the Act on Aliens ("The expulsion of foreigners and the obligation to leave the territory of the Republic of Poland") lists the grounds for issuing a "decision of expulsion" from the territory of Poland:

- Residing in Poland without the required visa, residence permit or permit to settle, or without a residence permit for long-term EC residents.
- Carrying out work contrary to the Act of 20 April 2004 on the promotion of employment and institution of labour market, or undertaking another economic activity contrary to the laws in force in the Republic of Poland.
- Insufficient financial resources to cover the costs of residence on the territory of Poland and absence of credible sources to obtain these resources.
- Having individual data recorded in the list of foreigners whose residence in the territory of Poland is undesirable if the entry of the foreigner takes place during the period of registration; or having individual data registered in the Schengen Information System for the purpose of refusal of entry if the foreigner resides on the territory of Poland on the basis of a short-term residence visa or as part of a visa-free travel.
- Crossing or having attempted to cross the border contrary to the laws.

Moreover, a "decision of expulsion" will be notified to foreigners who have failed to leave voluntarily the territory of Poland within the time limit specified in one of the following decisions:

- Decisions of "obligation to leave" the territory (see below).
- Decisions of refusal of an application for a residence permit.
- Decisions of withdrawal of a residence permit.

Other grounds to issue a "decision of expulsion" include: a threat to public security; non-conformity with Polish tax obligations; a jail sentence resulting from intentional crime or tax offences; cases foreseen by extradition procedures.

Grounds for an "obligation to leave"

A decision of "obligation to leave the country" may be issued in cases where the foreigner has breached the immigration law on similar grounds as above, but it can be assumed by the administration that he/she will leave voluntarily.

In practice, two factors are taken into account to assess whether the person can be assumed to leave voluntarily: the existence of valid ID/passport documents and the availability of financial resources to purchase return tickets.

Absolute limitations

A "decision of expulsion" shall not be rendered if:

- The foreigner possesses a permit to settle or a resident permit for long-term EC residents (Article 88.2).

- The foreigner is a spouse of a Polish citizen or of a foreigner possessing a permit to settle or a resident permit for long-term EC residents, and his/her residence does not constitute a threat to state security and defence or to public security and order, unless the marriage has been concluded in order to avoid expulsion (Article 89.1).
- There are grounds for granting a permit for "tolerated stay" on the basis of Article 97 of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland[14].

Status of "tolerated stay"

The Polish law foresees several categories of protection which foreigners may enjoy: refugee status; supplementary protection; asylum; temporary protection and permit for "tolerated stay". The latter category refers in particular to situations where:

- The return may be implemented only to a country where the foreigner's right to life, freedom and personal safety could be under threat, where he/she could be subject to tortures or inhumane or degrading treatment or punishment, or could be forced to work or deprived the right to fair trial, or could be punished without any legal grounds, within the meaning of the European Convention on Human Rights and Fundamental Freedoms (EHRC).
- The return would violate the right to family life within the meaning of the EHRC or would violate the child's rights determined in the Convention on Child's Rights to such an extent that it could threaten his/her psycho-physical development.
- The return is not enforceable due to reasons beyond the authority executing the decision or beyond the foreigner. In practice, this situation may occur when it is impossible to determine a country of origin, or where the authorities of this country do not issue appropriate identity and travel documents for the person to return.

Refugees and persons who are granted permission for a "tolerated stay" have the same social rights as Polish citizens. For instance, they are entitled to social allowances on the basis of the Law on Social Assistance of 2004. However, the status of "tolerated stay" is less favourable than the refugee status: for example, only recognised refugees can access individual integration programmes which include financial assistance and language courses (European Parliament 2008).

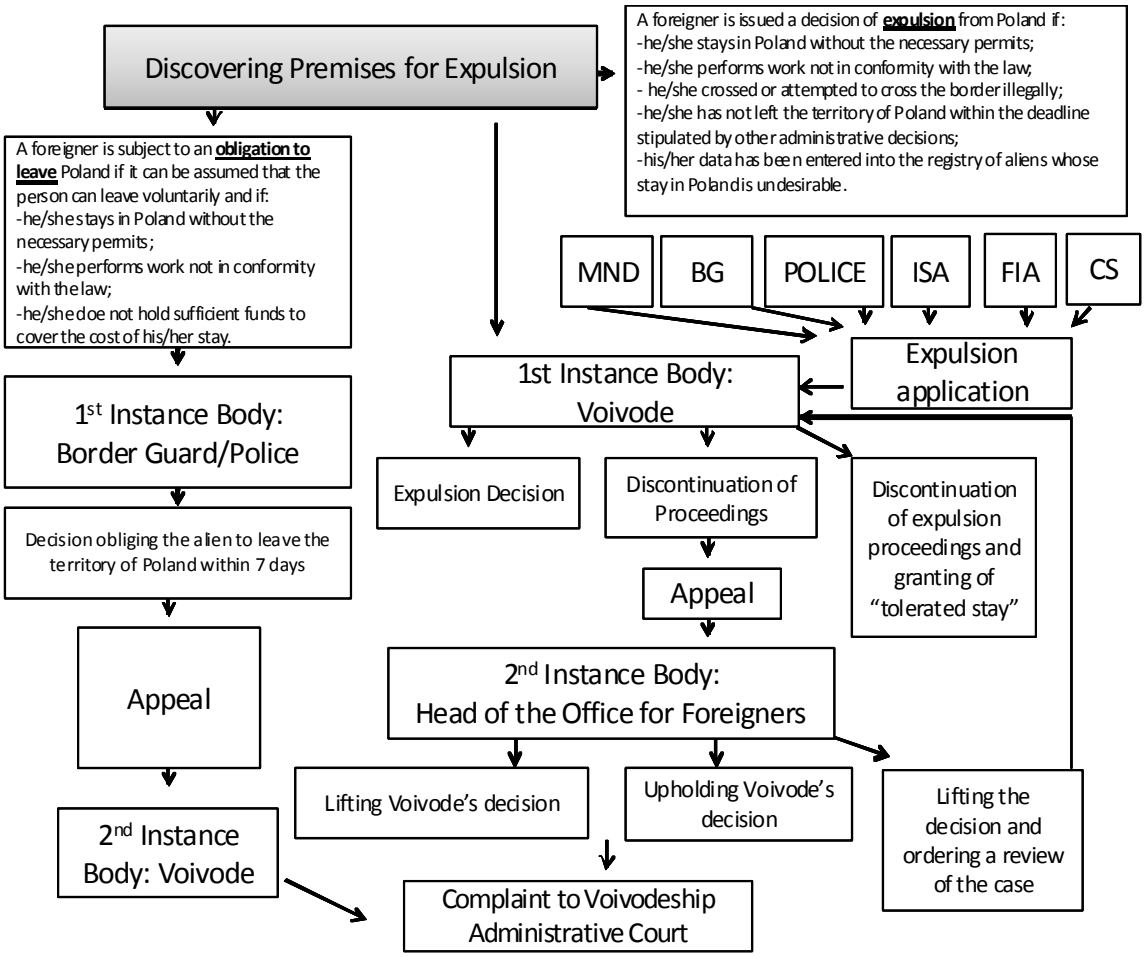
4.1.3 Main steps in the return process

Two main channels leading to a return decision

Figure 4.1 below describes the main steps in the return process. Two main options exist in the Polish legislation depending on the type of decisions. If it is assumed that the person will not leave voluntarily the country, a "decision of expulsion" may be issued by a "*Voivode*" *ex officio* or following the request of the relevant authorities, notably the Border Guard and the police. If it can be assumed that the person will leave voluntarily, the Border Guard and the police may issue an "obligation to leave the country".

[14] 13 June 2003; *Dziennik Ustaw* 2003 No 128 item 1176.

Figure 4.1 Main steps in the return process in Poland: "obligations to leave the country" (left side) and "decisions of expulsion" (right side)



Source: Polish Ministry of Interior, Econ Pöyry. Acronyms: MND: Ministry of National Defence; BG: Polish Border Guard; ISA: Internal Security Agency; FIA: Intelligence Agency; CS: Customs Service Agency.

Content and form of a "decision of expulsion"

The "decision of expulsion" has the following characteristics:

- It is presented in a written form in Polish but translations can also be made available in English, Vietnamese, Russian and Arabic. The decision may also be communicated orally along with rights and obligations at detention centres.
- The decision specifies the time limit within which the person must leave the country. According to the law, this can be up to 14 days but the practice suggests that there are more and more decisions with an immediate effect.
- In the decision as such, no information is provided about the re-entry ban and possibilities for legal assistance: this information is given orally or is available in leaflets distributed in detention centres.
- The decision may contain information about the country of destination and the route of return, as well as place of border crossing, but this is not automatic. If the latter information is missing, the Border Guard will issue another technical decision with the necessary details.

- A foreigner subject to a "decision of expulsion" may be requested to notify his or her presence to relevant authorities at given intervals of time, be obliged to stay at a given place or be put in administrative detention.

Other administrative decisions are necessary to implement the "decision of expulsion", for instance to determine whether the persons will be put in detention and which authority will be responsible for the removal process.

Use of coercive force

The law foresees possibilities for the administration to maintain irregular foreigners in detention for up to one year.

Once arrested, the person may be detained by the Border Guard or the police for a first period of up to 48 hours. Within this period, the Police or the Border Guard may request the Court to place this person in one of the guarded centres or in arrest for the purpose of expulsion ("*wniosek o umieszczenie w strzezonym osordku albo wniosek o zastosowanie aresztu w celu wydalenia*"). In particular, the foreigner may be placed in a centre of administrative detention if:

- This is essential for the good conduct of the removal.
- There is good reason to believe that the foreigner will otherwise abscond.
- The foreigner would cross or attempt to cross the border illegally if he or she was not taken directly to the border.

The Court has 24 hours to issue a decision (Art. 101 of the Act on Aliens). The person is released after the first period of 48 hours in the absence of a request for administrative detention. According to Article 41 of the Asylum Act, the detention of minors, as well as persons with disabilities or victims of violence, follows stricter rules.

4.1.4 Remedies

Return decisions may be appealed as described above in Figure 4.1.

For "decisions of expulsion", the Office for Foreigners is the first body of appeal ("appeal at administrative level") and it has 14 days to issue its decision. The appeal to the Office for Foreigners suspends the "decision of expulsion" for 14 days unless the foreigner represents a threat to public security. Decisions of the Office for Foreigners may be appealed before the Voivodeship's administrative Court ("appeal at judicial level"). At this stage, the Court will only consider issues related to the legality of the decision; it will not re-assess individual circumstances.

A person who is detained has the right to appeal this decision within seven days from the day of receipt of the Court's decision. The appeal should be treated by the Court immediately. According to NGOs, this period of seven days is hardly sufficient for detainees to gather information and initiate a procedure (European Parliament 2008).

4.1.5 Re-entry bans and registration in SIS

The individual data of persons subject to a "decision of expulsion" or to an "obligation to leave the country" are recorded in the registry of aliens whose residence in Poland is undesirable (Article 128 of the Act on Aliens).

The duration and scope of the ban vary depending on the type of decision and ability to cover the costs of return:

- For persons who are subject to an "obligation to leave", the ban will be of one year and relate to the Polish territory only.
- For persons who are subject to a "decision of expulsion" and who are able to cover the costs of return (or whose costs are covered by other entities than the State), the ban will be of three years and relate to the Schengen area.
- For persons who are subject to a "decision of expulsion" and whose costs of return are covered by the State, the ban will be of five years and relate to the Schengen area.

These differences are reflected in the way in which data are registered in SIS:

- Data of foreigners subject to an "obligation to leave" are not registered in SIS, but only in the Polish registry.
- Data of persons subject to a "decision of expulsion" are registered in SIS for a period of three years. If the period of the ban is of five years, they will be re-introduced after the initial three years for an additional period of two years.

4.2 Institutional and administrative set-up

A multiplicity of actors is involved in the Polish return policy. The Polish Border Guard and the "*Voivodes*" play a prominent role

4.2.1 The Polish Border Guard

The Polish Border Guard ("*Straż Graniczna*" - SG) is the Polish State security agency responsible for the control of the Polish border. With Poland becoming a member of the EU, the Border Guard is now in charge of securing EU external frontier and of patrolling the 1 163 km long border between the EU and Russia, Ukraine and Belarus. The role and resources of the Border Guard have been considerably upgraded as a result: around 10 000 officials are working on the external borders of Poland, an increase by one third in just a few years. Control of transport connections has also been stepped up. In addition, 2 000 officials are stationed in the main international airport.

The Border Guard is structured in regional offices and its headquarters are divided into Departments. The Department of Foreigners handles all issues related to the control, escort and/or removal of immigrants and it is composed of three units. Unit I is responsible for the implementation of "decisions of expulsion", voluntary returns and the transfer of asylum seekers from or to other EU states. Unit II handles complaints against decisions issued by the regional divisions of the Border Guard, such as decisions on "obligations to leave". Unit III provides analytical input to the work of the Department and coordinates cooperation with other countries.

4.2.2 Voivodeship Offices

The "*Voivode*" is the governor representing the State at provincial level. Since 1999, Poland is administratively divided in 16 Voivoideships. Within each Voivoideship, the Department for Immigration Affairs processes all types of permit requests.

In particular, these Departments are responsible for:

- controlling the legality of stay of immigrants,
- reviewing complaints against "obligations to leave the country" issued by the police or the Border Guard,
- issuing "decisions of expulsion",
- assessing who should bear financial responsibility in the context of an expulsion,
- issuing, renewing or withdrawing permits of "tolerated stay",
- ordering arrests with a view to enforcing "decisions of expulsion", as well as deciding over the release of foreigners from guarded centres.

4.2.3 The Office for Foreigners

The Office for Foreigners is a central body of the Polish governmental administration responsible for granting refugee status, dealing with asylum requests, issuing permits of "tolerated stay" and granting temporary protection in cases which are not reserved for other bodies. The Office is also responsible for appeals of decisions made by the "*Voivodes*". Since July 2007, the Head of the Office for Foreigners partly took over duties of the President of the Office for Reparation and Foreigners.

Within the Office, the Department on Legalization of Stay and the Register of Foreigners is responsible for expulsion procedures. The Department employs 48 people in total. It is composed of three units: the Unit of Legalization of Foreigners, the Unit of the Register of Foreigners and the Unit of the Central Visa Authority. The Unit of Legalization of Foreigners handles appeals from Voivodes' decisions concerning, inter alia, "decisions of expulsion". The Unit also provides replies to complaints filed to an Administrative Court and it represents the Head of the Office in that Court (15 employees). The Unit of the Register of Foreigners is responsible for the administration of the register of foreigners whose entry or stay on the territory of Poland is undesirable (8 employees). It also prepares decisions to enter or change data in the register and handles requests for adding or deleting personal data, as well as related complaints submitted to the administrative Court in Warsaw.

4.2.4 Ministry of Interior and Administration

The Ministry of Interior and Administration is responsible for migration issues, in cooperation with other relevant ministries[15]. The activities of the Ministry focus on overall policy and legislative developments: all procedural and logistical aspects related to expulsion procedures are carried out by the "*Voivodes*", the Border Guard and the Office for Foreigners.

Within the Ministry, the Department of Immigration Policy coordinates migration files and related international cooperation, as well as provide relevant information and analytical inputs.

[15] In February 2007, an interministerial Committee on immigration was established to reinforce administrative coordination. The Committee is chaired by the Minister of Interior and gathers representatives from various ministries (regional offices of Voivodes are not represented). The Committee has six working groups and serves as an advisory body to the Prime Minister. The working group dealing with illegal immigration has so far discussed issues related to marriages of convenience and the misuse of work permits.

The Department also deals with matters related to the Minister's supervision of the Office for Foreigners. The Department takes part in the activities to the European Migration Network.

4.2.5 Police services

The activities of the police focus essentially on the arrest and escort of irregular foreigners, for instance in the initial phase of 48 hours following an apprehension. With the new role played by the Border Guard, the role of police services in migration issues appears more limited than in the past. For example, the Border Guard took over the responsibility to supervise a guarded centre in Lesznowola in January 2009.

4.2.6 Administrative Courts

Voivode's administrative Courts ("*wojewodzki sad administracyjny*") are the second instance appeal bodies in charge of reviewing the legality of administrative decisions. The Courts may also decide on the detention of foreigners in guarded centres.

4.2.7 National Labour Inspectorate

The Inspectorate may investigate the legality of work of foreigners, typically through inspections in enterprises. It shares this task with the police and the Border Guard.

4.2.8 Civil society and international organisations

The Helsinki Foundation for Human Rights is a well-known human rights association active in Poland. It runs a Programme on "legal aid for refugees and migrants" and offers practical legal assistance for (legal and illegal) foreigners. The Halina Niec Legal Aid Centre and Legal Clinics at universities (where students from faculties of legal studies volunteer) also provide legal assistance. Funding of NGOs remains limited in Poland and their activities often concentrate on projects funded by the Government, the EU institutions or other external sources of income.

The International Organization for Migration (IOM) established an office in Warsaw in 2002 and has been involved in developing assistance programmes for voluntary return.

4.3 Implementation challenges

4.3.1 Key statistics

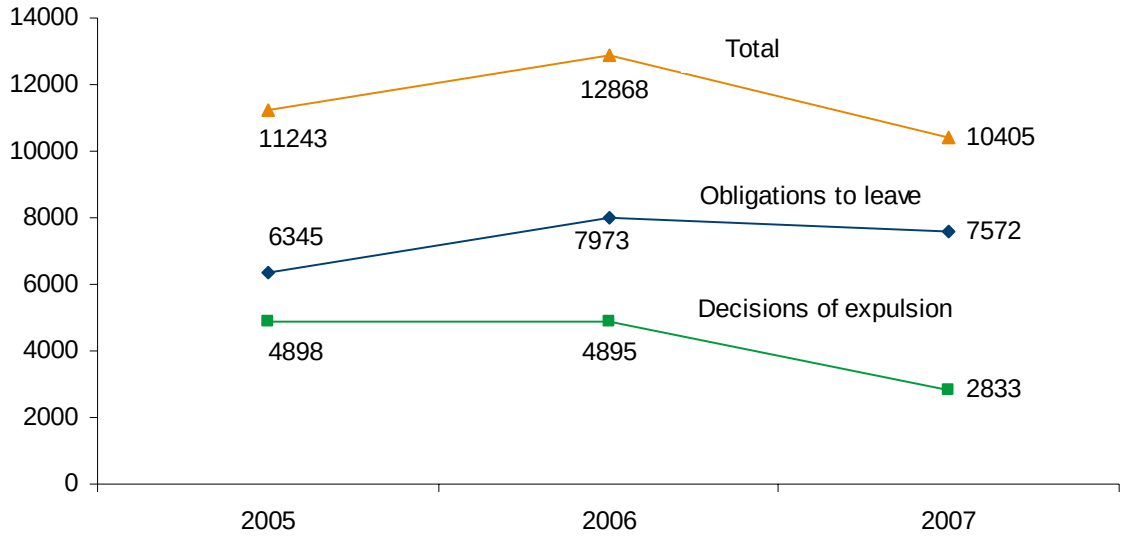
About 12 000 return decisions every year

When the 2003 Act of Aliens was passed, the Office of Repatriation and Foreigners estimated the undocumented population at around 45 000 to 50 000 persons in Poland, including about 30 000 Vietnamese (Center for International Relations 2005).

Poland joined the EU in 2004. Over 2005-2007, the Polish authorities issued about 12 000 return decisions on an annual basis, including about 7 000-8 000 "obligations to leave the country" and 3 000-5000 "decisions of expulsion".

The decrease in 2007 is partly explained by the accession of Romania and Bulgaria to the EU and the fact that citizens from these countries are now subject to different rules.

Figure 4.2 Number and types of return decisions in Poland in recent years



Source: Polish Office for Foreigners, Econ Pöyry

Over 2005-2007, Ukrainian citizens represented a significant share of all return decisions: they accounted for more than two-thirds of "obligations to leave" and about half of "decisions of expulsion".

Table 4.2 Number of persons subject to an "obligation to leave" in 2005-2007

Nationality (top 5)	2005		2006		2007	
	persons	%	persons	%	persons	%
Total	6 345	100	7 973	100	7 572	100
Ukraine	4 391	69.2	5 823	73.0	6 216	82.1
Belarus	921	14.5	642	8.1	528	7.0
Bulgaria	352	5.6	480	6.0	1	0.0
Armenia	206	3.3	252	3.2	167	2.2
Romania	100	1.6	240	3.0	0	0.0

Source: Polish Office for Foreigners

Table 4.3 Number of persons subject to a "decision of expulsion" in 2005-2007

Nationality (top 5)	2005		2006		2007	
	persons	%	persons	%	persons	%
Total	4 898	100	4 895	100	2 833	100
Ukraine	2 518	51.4	2 222	45.4	1 541	54.4
Moldova	509	10.4	478	9.8	154	5.4
Vietnam	331	6.8	414	8.5	215	7.6
Armenia	343	7.0	335	6.8	222	7.8
Bulgaria	189	3.9	261	5.3	3	0.0

Source: Polish Office for Foreigners

Some nationalities - such as Vietnamese - are more systematically subject to "decisions of expulsion" as it is generally assumed by the authorities that these persons do not possess relevant ID documents or adequate financial resources to leave the country.

In the period 2005-2007, over a quarter of "decisions of expulsion" were issued by the "*Voivode*" of the Lubuskie Region (South-West of Poland), and about 15 per cent by the "*Voivode*" of the Mazowiecki Region (with Warsaw as capital).

Mixed implementation numbers

According to data provided by the Border Guard and the Office for Foreigners, the ratio of implementation of "decisions of expulsion" is high: 73.1 per cent in 2006 and 85.6 per cent in 2007. The enforcement ratio of "obligations to leave the country" is even higher: 82.1 per cent and 85.8 per cent respectively.

It is to be noted that the above figures include "decisions of expulsion" issued to migrants crossing the border illegally, as well as "obligations to leave the country" issued to foreigners who are apprehended on their way back home in an irregular situation. This practice may explain the relatively high rates of enforcement.

Moreover, this ratio differs significantly depending on the nationality of the persons, varying from 28 per cent for Vietnamese to 91 per cent for Ukrainians (Russians: 44 per cent; Armenians: 65 per cent; Bulgarians: 86 per cent) According to the Ministry of Interior, the discrepancy between the number of decisions concerning Vietnamese nationals and the number of persons who have actually left the country is an illustration that return procedures involving Vietnamese are long and complicated, and that the implementation of the recent readmission agreement between the two countries has not been smooth (MSWiA 2007).

Asylum cases and use of "tolerated stay"

In 2007, 10 048 requests for asylum were registered in Poland. 9 239 originated from Russian nationals. 116 refugee statuses were granted, including 104 Russian nationals, often from a Chechen origin. In the same year, 2 871 persons were granted a permit of "tolerated stay", out of which 2 829 were Russians. The same pattern is noticeable in the first three months of 2008 when 459 (out of 465) decisions on "tolerated stay" were granted to Russian citizens.

4.3.2 Perceptions about daily practices

Uncovering cases

Given their limited resources, the Border Guard and other competent institutions seek to focus their investigation activities on selected places or premises.

As regards the breach of the legality to stay, three types of premises - farms, enterprises and open-air markets[16]- are regularly inspected by different authorities. As regards the regularity of entry, patrolling guards are organised on the main international roads and railways. ID controls are also frequent in Warsaw Central Station.

[16] Since January 2009, the Border Guard is entitled to check the legality of employment, and not only of stay.

In addition, the services of the Border Guard often receive information from individuals denouncing the presence or employment of foreigners, for instance Polish citizens denouncing Ukrainians employed in farms during spring and summer.

Both the police and the Border Guard are entitled to conduct "on the street" controls of ID or residence permits, but these are rare. The Boarder Guard sees it as a time-consuming and costly activity, while the police refrains from dealing with immigration cases as it feels it does not have the staff to assess the legality of documents.

"Decision of expulsion" *versus* "obligations to leave"

Once a person is arrested, the authorities can decide between the two types of return decisions in use. "Obligations to leave a country" are considered as a cheaper and "lighter" response than "decisions of expulsion": the decisions can be issued by the Border Guard (or the police) and does not need to involve a Voivode Office (as is the case of "decisions of expulsion"). It also implies that the migrant covers his/her travel costs, while choosing the best way to comply with the decision (within seven days).

Persons captured while crossing the border illegally are automatically subject to a "decision of expulsion" (Article 88.1.6). At the same time, as seen above, it is common practice to issue an "obligation to leave the country" to irregular migrants who are captured by the police as they are leaving the country out of their own will.

The fact that "obligations to leave" are easier to implement than "decisions of expulsion" may explain some abuse of the procedure in particular cases.

Use of the status of "tolerated stay"

The status of "tolerated stay" was introduced by the 2003 Act on Aliens to provide a possibility for migrants to stay in Poland in cases where a return would put the person in danger, or where links to Poland (e.g. family ties) are strong. As there is no official list of unsafe countries in Poland, each file is considered on a case-by-case basis.

The "tolerated stay" is intended to ensure the temporary protection of migrants until conditions are created in their country of origin to return, or in Poland to obtain a residence permit. Such permits have notably been used in cases involving citizens of Russia declaring Chechen nationality and seeking refugee status.

Some migrants benefiting from a "tolerated stay" are aware of advantages of family ties in Poland, and cases of absuse have been reported. In addition to cases of "pro forma" marriages, some foreigners have paid up to € 650 for having their child recognised or adopted by a Polish citizen. The Polish authorities are concerned about the spread of such practices.

For some experts, the status of "tolerated stay" is partly a "legal limbo". Some aspects may need to be reconsidered in the context of the transposition of "Return Directive", with a more direct requirement for Member States either to return a migrant or to regularise his/her stay.

Cooperation between authorities

The success of the Polish return system depends on the cooperation between a range of actors. For instance, the Border Guard has no means to appeal decisions from the

"*Voivodes*". In practice, cooperation is deemed good: in 99 per cent of cases, "*Voivodes*" agree with the Border Guard's requests to issue "decisions of expulsion". Cases of public or political pressures to overturn a decision exist but are rare.

Recording of data in the national registry

In 2007, the individual data of 10 121 foreigners were recorded in the national registry of persons whose entry or stay is undesirable, whereas 2 631 were deleted from the registry. There were around 20 000 cases where modifications and additional information were required. The responsible unit in the Ministry replied to over 1 000 enquiries from other institutions in 2007 (e.g. the Border Guard, consulates, the police, Courts, prosecutors). Since December 2007, the same unit has been responsible for entering data in SIS and has cooperated with the police's unit for SIRENE (nearly 10 requests for consultation every day in the latter case).

Cooperation with other countries and readmission agreements

In the opinion of the Border Guard, the enforcement of "decisions of expulsion" is not a problem from a logistical point of view. Flights can be arranged in cooperation with counterparts from other countries. Cooperation with Germany and the Netherlands, for instance, proves to be very good. Cooperation with Russian authorities at the Sheremetyevo Airport in Moscow has also been evaluated as positive.

To minimise financial costs, Poland is used to organising joint charter flights with other countries. In autumn 1998, the Polish authorities organised the first charter flight deporting illegal immigrants and rejected asylum seekers to Romania and Sri Lanka (IOM 2004).

Moreover, Poland has signed bilateral readmission agreements with Croatia, Macedonia, Moldova, Ukraine and Vietnam. As a member of the EU, it is a party to agreements with Albania, Bosnia and Herzegovina, Hong Kong, Macao, Macedonia, Moldova, Montenegro, Pakistan, Russia, Serbia and Sri Lanka. While this list of readmission agreements is considered satisfactory, some observers suggest that agreements with Belarus and Russia, as well as African and Asian countries, could be improved further.

Cooperation is more difficult with countries which do not have a diplomatic representation in Poland. In these cases, the Polish authorities often need to contact respective embassies in Europe or Russia.

Difficulty in establishing the identity: the case of Vietnamese nationals

As seen above, the rate of implementation of return decisions varies significantly depending on the existence and functioning of readmission agreements. One practical problem relates to the difficulty to establish the identity of the persons with certainty, and thereby to assess their individual situation. Although this concerns only a limited number of cases, this has proved particularly problematic with several Vietnamese nationals.

To facilitate cooperation between Vietnam and Poland, a readmission agreement was signed in 2004 after six years of negotiations. The first years of the functioning of the agreement did not seem to have brought significant improvements. Cooperation improved following a high-level meeting and the signature of an additional protocol in

May 2007, and several technical visits of Vietnamese officials from the Ministry of Interior have been organised since then[17].

According to the Polish Border Guard, this cooperation not only facilitates the identification of the persons but also accelerates the delivery of the necessary travel documents required for the removals.

Use of administrative detention

The Polish authorities have five guarded centres at their disposal with a "light" regime of detention: Lesznowola (with the capacity of 131 places and conditions required to keep families), Przemysl (138), Ketrzyn (150), Biala Podlaska (152), Bialystok (142). Arrest centres may also be used in exceptional circumstances, with a "tougher" regime of control. Until 2009, the centre in Lesznowola (established in the facilities of two former military barracks) was supervised by the police whereas other centres (and the one in Lesznowola since 2009) are coordinated by the Border Guard.

A migrant may be kept for 90 days in one of the guarded centres, but this requires prior authorisation from a court. This period may be prolonged to one year. In 2008, about 6 000 persons were detained. Ukrainian citizens represented nearly half of this number: Other nationalities included Russian, Belarusian, Vietnamese, Moldovan and Chinese citizens.

The conditions of detention have improved over the years (European Parliament 2008). Legal assistance by NGO staff is possible but often given on an ad hoc basis. The Border Guard and the Office for Foreigners are currently considering the possibility of a permanent presence. The fact that the police is not involved anymore in the supervision of detention is also seen as a major difference compared to the 1990s when most foreigners were kept in arrest at police stations.

Use of appeals

Immigrants are more and more aware of their rights and they realise that with the accession of Poland to the EU, a legal stay on the Polish territory may broaden life and work opportunities. This is particularly true for Ukrainian citizens.

Once in deportation centres, immigrants receive information about legal assistance provided by the Helsinki Foundation of Human Rights or students' associations. In general, cooperation between the Polish authorities and NGOs is considered satisfactory, but access of NGO lawyers (about 10 people in detention centres) is limited in the absence of a state-sponsored system. For instance, the Halina Niec Legal Aid Centre provides regular consultations in the guarded center of Lesznowola but cannot meet all the needs in this area. Other detention premises are often left without assistance (European Parliament 2008).

On several occasions, NGOs have reported cases of migrants subject to a "decision of expulsion" with immediate effect, even if these persons had family ties in Poland. The administration would argue that these cases may involve public security matters.

[17] In February 2008, one such visit caused an outcry in the Polish media when it was reported that Vietnamese officials had interrogated arrested Vietnamese nationals without witnesses from the Polish administration. However, apart from this case, such cooperation did not cause much controversy.

Use of voluntary return

Following an agreement between the Polish government and the IOM in July 2005, Assistance Voluntary Return (AVR) programmes have been coordinated by the IOM, with financial contribution from the Polish government and the European Refugee Fund. The programmes include help in the preparation to the travel and for the travel itself, as well as support to settle in the country of destination (in-kind or in cash).

Assistance may be offered to asylum seekers while their application for a permit is being considered or after it has been rejected but the period to leave Poland has not yet expired. In principle, a person who is potentially subject to a "decision of expulsion" may not benefit from that type of assistance. However, the practice allows for some flexibility. If it is not explicitly recorded that the person has crossed the border illegally and if the person enters in contact with IOM, the Border Guard may issue an "obligation to leave" instead of "a decision of expulsion", thereby allowing access to the schemes. Decisions of support are taken by the Head of the Office for Foreigners.

The administration is stepping its efforts to raise participation of irregular migrants in voluntary return schemes, with information provided in open-air markets and through migrant organisations. In 2006, 412 foreigners were return through assisted programes, of which 8 were subject to an "obligation to leave". In 2007, both numbers increased: 740 and 189 respectively (Kicinger 2009). 95 per cent of the beneficiaries returned to Russia, notably Chechnya, Dagestan and Ingushetia. There is also a growing number of migrants returning to Armenia, Mongolia and Ukraine. Those returning in the framework of a regional programme "Enhancing Mechanism and Harmonising Standards in the Field of Voluntary Return in Central Europe" could submit a business proposal and obtain a grant of up to € 2 000 (IOM 2008).

According to an expert from the Office for Foreigners, voluntary return should be considered a priority for the Government and special conditions for female migrants and children should be introduced. The cooperation agreement between the Government and the IOM may not suffice, and a binding law could usefully complement the framework.

Use of regularisation procedures

As the 2003 Aliens Act was passed, Poland put in place its first regularisation programme. However, according to the authorities responsible for the programme, this was largely a failure (European Commission 2007b, Migration Research Group 2005): no official information about the programme was available in writing, and the information provided did not reach the majority of illegal immigrants.

In total, only 3 508 persons - 1 626 Armenians and 1 341 Vietnamese - submitted applications. As of November 2004, 2 413 applications (69 %) had been approved, with 1 052 Armenians and 1 001 Vietnamese receiving legal status. These figures compare defavourably with the 45 000 to 50 000 irregular migrants estimated to reside in Poland at the time (see above).

4.3.3 Test cases

Table 4.4 illustrates the likely responses which may be envisaged in Poland in the four test cases of comparison.

Table 4.4 Test cases in Poland

Hypothetical cases	***Likely response in Poland***
Person A: A person who had a temporary residence permit of six months, has overstayed for an additional year, and has been employed without a working permit for the last 16 months of his/her stay. This person is apprehended during a labour inspection. His/her country of origin is known and considered safe.	In principle, the person will be returned and the decision will be coupled with a re-entry ban of 5 years (3 years if the person bears the costs). The employer(s) may be sanctioned financially. If the person is a citizen from Belarus or Ukraine, an "obligation to leave" is more likely.
Case A-1: This person has a residence permit in another Schengen country.	The country in question will be consulted. The person may be subject to a re-admission procedure to his/her country of residence.
Case A-2: The country of origin is not safe.	The person will not be returned and would seem likely to qualify for a status of "tolerated stay".
Case A-3: The person would have fulfilled the conditions for a work permit if he/she had handed in an application.	In principle, the case will result in "decision of expulsion". There may be a possibility that the person will not be returned if the employers bears the entire blame. Rules on labour migration are currently under revision.
Person B: A person whose asylum request was finally rejected after two years of procedure and has been escaping the decision for another three years. The person speaks the language and has been employed on several occasions. The country of origin is known and considered safe.	The person will be returned and the decision will be coupled with a re-entry ban of 5 years (3 years if the person bears the costs). "Integration" in society is not an absolute criterion.
Case B-1: This person is in a relationship with a citizen of the country and the two gave birth to a child during his/her stay, who is now 3 year-old. Both share custody and financial responsibility for the child.	Until recently, this person could have obtained a status of "tolerated stay". Since January 2009, he/she is likely to qualify for a permit of "temporary residence". If the couple is married, this is automatic ("shall" clause). If not, this depends on the case ("may" clause).
Case B-2: The initial asylum request was filed in a neighbouring Schengen country. The person has moved to the second country after his/her asylum request was rejected and met his/her partner - who holds the nationality of the second country.	If the couple is married, it is likely that the person will be regularised. If not, the person will be returned to the country of the initial asylum request.
Person C: A person who had a temporary residence pemit for the duration of his/her studies and contracted a "*pro forma*" marriage to obtain another residence permit. This person has been regularly employed for one year. The fictitious nature of the marriage can be proven.	The residence permit will be terminated and the "*Voivode*" will issue a "decision of expulsion" *ex officio*, as well as a re-entry ban.
Persons D: A married couple bringing one child comes to the country under a false identity and is granted residence permits. After eight years in the country, they apply for citizenship. The processing of their application reveals their true identity. At this time the oldest child is 12 years old. They have also given birth to another child who is now 7.	There is no clear-cut answer, but the situation of the children would seem to militate against a return.

Source: Econ Pöyry on the basis of interviews

4.4 Overview of legal and policy trends

Overall policy and socio-economic context

Issues related to immigration and the expulsion of irregular third-country nationals are not politically controversial and are not on the political or governmental agenda. Borders are considered to be generally well protected and there are no problems with massive flows of illegal immigration.

Given high levels of unemployment in the 1990s, political parties had difficulty addressing the issue of migration and often chose a "policy of silent tolerance". For instance, the (temporary) presence of irregular Ukrainian workers has been widely accepted due to the demand for labour in certain sectors and the diplomatic ties with that country, and cases of enforced returns have been limited (Kicinger 2009).

Poland's accession to the EU has been a key factor in the structural and legislative changes over the last decade[18]. In the context of the negotiation of the Justice and Home Affairs "Accession Chapter", the Polish authorities made a special effort in upgrading border controls and immigration policy infrastructure. According to the IOM, steps taken to meet EU standards have resulted in a stricter enforcement of immigration laws, including an increased number of return decisions and removals (IOM 2004). At the same time, rules and procedures related to the management of cases were significantly improved, for instance through the control of a General Inspector on Personal Data.

With the economic boom at the turn of the century and the significant outflow of Polish citizens, demand for labour intensified in many sectors. This led the Polish government to reconsider Poland's migration policy: at the same time as new legal channels of migration were opened, the authorities sought to enhance their capacity to manage irregular migration. The fact that Poland is considered as a "bridge" between the eastern non-EU countries and the western EU reinforces political and institutional pressure on the government and the administration. The establishment of the EU borders agency - FRONTEX - and the fact that is based in Warsaw has also played a role in the priority given to enforcement.

Institutional and administrative challenges

As illustrated above, there are several bodies involved in the management of return decisions in Poland. A crucial aspect relates to the cooperation between the Border Guard and other institutions, which is said to be functioning well. Over time, the Border Guard would seem to be taking a more central role and has accumulated power and responsibilities in the management of irregular migration, such as the role of coordinator of the guarded centres.

Given the increasing number of applications for permits, the Office for Foreigners has suffered form a shortage of staff. In order to have qualified and independent officials assessing the cases, a simple legal background does not suffice and new colleagues need

[18] Poland has been using extensively pre-accession funds, the European Refugee Fund, the European Fund for the Management of External Borders, the European Fund for Asylum Seekers as well as financial assistance provided by the Swiss and Norwegian governments. Poland is also a member of the European Migration Network: it can pose *ad hoc* queries to other members and participate in longer-term cooperation projects, for instance on voluntary return in 2009.

6 months of training. The high turnover among staff is another problem. The Office for Foreigners is currently stepping up its strategy for training courses. Courses will be given by Polish and international experts on the regularisation of the status of Turkish immigrants, the case-law of the Polish Courts in the area of return and rules for labour migration. Officials in charge of migration files in the "*Voivode*" offices are also required to take part in training in order to improve their knowledge of procedures and ensure greater harmonisation of practices across the country.

Throughout the administration, many actors consider that the IT system would require significant modernisation. Poland is currently reflecting on good practices elsewhere in Europe.

The possible impact of the "Return Directive"

The work on the transposition of the Directive is being initiated and opinions differ about the scope and nature of the changes to come. Most experts do not see substantial disparities between Polish law and the provisions of the Directive. However, some changes could be envisaged regarding the control of the legality of stay, expulsion procedures, the use of detention centres, the length of detention and the use of SIS. Since the 2003 Act has been amended several times in recent years, the transposition of the Directive may also be an opportunity to consolidate and simplify the law.

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5 Sweden

In many respects, the Swedish case would seem closer to the Norwegian case:

- In a global perspective, migration patterns and socio-economic context are rather similar in the two countries.
- As in Norway, a single administrative authority (the Swedish Migration Board - "*Migrationsverket*") is established at national level to process applications and decisions related to migration and asylum.

However, the analysis of the Swedish case also reveals significant differences:

- Two main types of return decisions are used in Sweden: "refusal-of-entry" decisions ("*avvisning*") and "expulsion" decisions ("*utvisning*"). These differ from the Norwegian "*bortvisning*" and "*utvisning*".
- The use of re-entry bans is not automatic in Sweden, neither for "*avvisning*", nor for "*utvisning*" decisions, and it is less frequent. Moreover, in cases where bans are pronounced by the administration, the standard period is of two years.
- The use of re-entry bans changed radically when Sweden joined the Schengen area. While Sweden used to issue a large number of re-entry bans prohibiting access to the Swedish territory, it was considered that bans prohibiting access to the whole territory of the EU should be used with greater care given the legal and practical consequences for the persons concerned.
- At the same time as a new Aliens Act came into force in 2006, Sweden reformed its institutional system. The former Aliens Appeal Board - a quasi-administrative body - was dismantled and decisions of the Migration Board are now appealed to administrative Courts according to standard principles of Swedish administrative law. The possibility of referring individual cases for interpretative guidance to the responsible Ministry was also removed. Since the latest change in Government, the Ministry of Justice took over the responsibility for migration and asylum policy from the Ministry of Foreign Affairs.

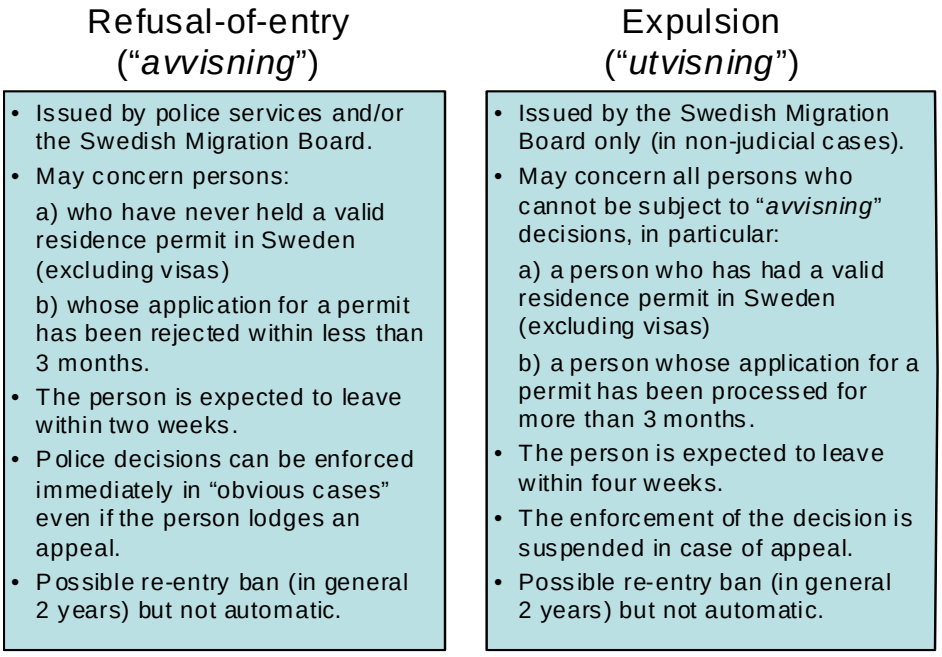
5.1 Legal and regulatory framework

5.1.1 Background

Figure 5.1 below summarises the main parameters of "*avvisning*" and "*utvisning*" decisions. In the current system, "*avvisning*" decisions are meant to provide a more rapid and flexible response than "*utvisning*" decisions. Re-entry bans are possible for both types of decisions, but they are not automatic and used with caution.

These two types of decisions have co-existed for many years, but their scope has been redefined over time, notably by the new Aliens Act of 2005/2006. One consequence of this redefinition, for instance, is that a rejection of an asylum request is now generally accompanied by an "*utvisning*" decision, while it used to be accompanied by an "*avvisning*" decision. "*Utvisnin*g" decisions may also be pronounced by Courts in penal/criminal cases.

Figure 5.1 Two types of return decisions in Sweden: refusals-of-entry ("avvisning") and expulsion ("utvisning")



Source: Econ Pöyry, on the basis of interviews and information publicly available

5.1.2 Grounds for "refusal-of-entry" and for "expulsion"

Rules related to "refusals-of-entry" ("*avvisning*") and "expulsions" ("*utvisning*") are specified in Chapter 8 of the Swedish Aliens Act (Swedish Government 2005, hereinafter referred to as "Aliens Act").

Grounds for refusals-of-entry ("*avvisning*")

An alien may be refused entry if (Chapter 8, Section 1, Aliens Act):

- "He or she has no passport when a passport is required to enter or stay in Sweden.
- If he or she lacks a visa, residence permit or some other permit that is required to enter, stay or work in Sweden.
- If it comes to light when the alien arrives in Sweden that he or she intends to visit some other Nordic country but lacks the permit required to enter that country.
- If, on entry, he or she avoids providing requested information, knowingly supplies incorrect information that is of importance for the right to enter Sweden or knowingly suppresses any circumstance that is of importance for that right.
- If he or she does not meet the requirements for entry laid down in Article 5 of the Schengen Convention.
- If he or she has been refused entry or expelled from a state belonging to the European Union or from Iceland or Norway."

The Act also foresees possibilities for refusing entry to persons lacking adequate funds to stay in Sweden or in the other Nordic countries (Chapter 8, Section 2, Aliens Act).

"*Avvisning*" decisions may be taken by police services and/or by the Migration Board.

Persons having requested asylum may be subject to "*avvisning*" decisions from the Board if the application is rejected within 3 months.

Grounds for expulsions ("*utvisning*")

An alien who is not refused entry under "*avvisning*" procedures may still be expelled from Sweden, for example, if he or she is staying in this country but lacks a passport or the permits required to stay.

"*Utvisning*" decisions may be considered in all cases where "*avvisning*" decisions may not be taken. In particular, "*avvisning*" decisions may not be applied if:

- The person has already held a valid permit in Sweden: "an alien may not be refused entry if he or she on arrival in Sweden had or, at some subsequent time, has had a residence permit that has become invalid. Nor may entry be refused on the grounds that the alien lacks a residence permit, if during a period when such a permit is required to stay in Sweden he or she instead has had but no longer has a right of residence. An alien who has a right of residence may not be refused entry" (Chapter 8, Section 3, Aliens Act).
- The administration has taken more than three months to process the case: "a first instance decision on refusal-of-entry may not be made later than three months after the first application for a residence permit has been made following arrival in Sweden" (Chapter 8, Section 5, Aliens Act).

"*Utvisning*" decisions are made by the Migration Board only (in non-judicial cases).

5.1.3 Absolute and relative limitations

The Aliens Act specifies limitations for the enforcement of "refusal-of-entry" and "expulsion" decisions.

Section 1 of Chapter 12 sets absolute limitations. "The refusal-of-entry and expulsion of an alien may never be enforced to a country where there is fair reason to assume that:

- The alien would be in danger there of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment or,
- The alien is not protected in the country from being sent on to a country in which the alien would be in such danger."

Section 2 of Chapter 12 sets relative limitations. "The refusal-of-entry and expulsion of an alien may not be enforced to a country:

- If the alien risks being subjected to persecution in that country or
- If the alien is not protected in the country from being sent on to a country in which the alien would be at such risk."

Exceptions to the latter set of limitations are possible if the person has committed an exceptionally gross offence or if he/she represents a threat to national security.

5.1.4 Expulsion rules and procedures

Burden of proof

It is the duty of a foreigner staying in Sweden, when requested to do so by a police officer, to present a passport or other documents showing that he or she has the right to remain in Sweden. It is also his or her duty, when requested to do so, to visit the Board or the police authority and provide information about his or her stay (Chapter 9, Section 9, Aliens Act).

Issuance of decisions

If a residence permit is revoked or if an application for a permit is rejected, this decision is automatically accompanied by a return decision, except for specific cases (Chapter 8, Section 16, Aliens Act). If a person is found "on the street" without valid documents, he or she will also be subject to a return decision. The destination country is specified in the decision.

Consequence of a decision

An alien who is refused entry ("*avvisning*") is requested to leave the country within two weeks and an alien who is expelled ("*utvisning*") is requested to leave the country within four weeks from the date when the order becomes final, unless otherwise provided in the order (Chapter 12, Section 15, Aliens Act).

If it is assumed that the person does not intend to leave the country voluntarily within this period, the order must be enforced as soon as possible by the responsible authority (same section). In practice, police decisions require immediate enforcement, and the Board may also decide to give immediate effect to its decisions.

Direct enforcement of "refusals-of-entry"

"Refusal-of-entry" decisions made by the police and/or the Migration Board may be enforced even if they have not become final if (see also "appeal" below):

- The alien has declared that he or she accepts the order and will refrain from appealing ("declaration of acceptance") (Chapter 15, section 1, Aliens Act). Such declarations cannot be withdrawn.
- The case is considered "obvious" by the Board, which thus decides to enforce the return decision even if the appeal process is not finalised (Chapter 8, Section 6, Aliens Act). If the person appeals this decision, the Board should nevertheless re-consider the possibility of suspending the deportation ("stay of enforcement").

Validity of decisions

A "refusal-of-entry" or "expulsion" order is deemed to have been enforced if the alien has left the country (Chapter 12, Section 21, Aliens Act).

A "refusal-of-entry" or "expulsion" decisions issued by the administration expires four years after the order became final and non-appealable. If the order has been combined with a re-entry ban which is valid for a longer period, the "refusal-of-entry" or "expulsion" order expires when the period of the ban ends (Chapter 12, Section 22, Aliens Act).

If a permanent residence permit is issued, the "refusal-of-entry" or "expulsion" order expires. If a temporary residence permit is issued, the Board may at the same time cancel the "refusal-of-entry" or "expulsion" decision.

If a "refusal-of-entry" or "expulsion" order has been enforced and the alien is subsequently found again in the country, the order will be enforced again unless the person has obtained a permit to enter or stay in the meantime (Chapter 12, Section 23, Aliens Act).

Use of coercive force

When a "refusal-of-entry" or "expulsion" order is to be enforced, the enforcing authority may retain the alien's passport or other identity documents until the order is enforced (Chapter 9, Section 5, Aliens Act).

If the foreigner refuses to comply with the decision or if the person has gone into hiding and cannot be found, the Migration Board may turn over the case to the police (Chapter 12, Section 14, Aliens Act).

Detention

Rules related to the detention of foreigners are specified in Chapter 10 of the Aliens Act. An alien who has attained the age of 18 may be detained if:

- "The alien's identity is unclear on arrival in Sweden or when he or she subsequently applies for a residence permit and he or she cannot establish the probability that the identity he or she has stated is correct.
- The right of the alien to enter or stay in Sweden cannot be assessed anyway".

An alien who has attained the age of 18 may also be detained if:

- "It is necessary to enable an investigation to be conducted on the right of the alien to remain in Sweden.
- It is probable that the alien will be refused entry or expelled.
- The purpose is to enforce a refusal-of-entry or expulsion order".

For the two latter cases, it must be assumed that the person may otherwise go into hiding or pursue criminal activities in Sweden.

If the person is detained for investigation purposes, the person may not be detained for more than 48 hours.

In other cases, the person may not be detained for more than two weeks, unless there are exceptional grounds for a longer period. If, however, a "refusal-of entry" or "expulsion" order has been issued, the person may be detained for not more than two months unless there are exceptional grounds for a longer period.

Stricter conditions apply for children, both as regards the grounds for detention and time limits (maximum of 72 hours and of 144 hours in exceptional cases).

Detention orders must be re-examined every two weeks, and they can be appealed at any point in time. Detention must stop immediately if no longer justified.

Possibilities to review or alter decisions

Return decisions may be reviewed before they are enforced, for instance:

- If, after a review, the Migration Board grants the foreigner a temporary residence permit, the Board may at the same time cancel the return decision (Chapter 12, Section 16, Aliens Act).
- If a Migration Court, the Migration Court of Appeal or the Government grants a temporary residence permit in a case that has been turned over or is under appeal, (same section).

Final and non-appealable decisions may also be altered if new circumstances come to light (Chapter 12, Section 18, Aliens Act), for instance if:

- "There is an impediment to enforcement.
- There is reason to assume that the intended country of return will not be willing to accept the alien.
- There are medical or other special grounds why the order should not be enforced".

In these cases, the Migration Board may grant a permanent residence permit if the impediment is of a lasting nature. If there is only a temporary impediment to enforcement, the Board may grant a temporary residence permit.

A person subject to a return decision may also invoke new circumstances, as well as a valid excuse for not previously having invoked these circumstances, which will lead the Migration Board to review the case (Chapter 12, Section 19, Aliens Act).

Appeal

A return decision of a police authority on "refusal-of-entry" may be appealed to the Migration Board (Chapter 14, Section 2, Aliens Act).

A decision of the Board (both "*avvisning*" or "*utvisning*") may be appealed to a Migration Court (Chapter 14, Section 3, Aliens Act - see "Migration Courts" below).

As for other administrative decisions, the deadline to appeal is of three weeks.

A detention order made by a police authority or the Migration Board may be appealed to a Migration Court (Chapter 14, Section 9, Aliens Act). A detention order may be appealed separately. A decision of a Migration Court on detention may also be appealed (Chapter 14, Section 10, Aliens Act).

A person who is entitled to appeal against a "refusal-of-entry" or "expulsion" order can declare that he or she will refrain from appealing against that part of the order or judgement ("declaration of acceptance") (Chapter 15, Section 2 / 1, Aliens Act).

In a limited number of "*avvisning*" cases where "it is obvious that there are no grounds for asylum and that a residence permit is not to be granted on any other grounds", the return decision of the Migration Board may be directly enforced without waiting for the results of the appeal (Chapter 8, Section 6, Aliens Act).

Decisions from Migration Courts may be appealed to the Migration Court of Appeal (Chapter 16, Section 9, Aliens Act). An appeal against a decision of a Migration Court

should be lodged within three weeks from the day of issuance of the ruling. A decision of a Migration Court in a case of a "refusal-of-entry" which was initially examined by a police authority in the first instance may not be appealed.

Decisions of the Migration Court of Appeal are not subject to appeal.

5.1.5 Re-entry bans and registration in SIS

Re-entry bans are possible both for "*avvisning*" and for "*utvisning*" cases.

However, the use of re-entry bans is not automatic and it is the subject of a separate decision by the Migration Board: "when the Swedish Migration Board orders a "refusal-of-entry" or "expulsion", the order may be combined with a prohibition against the alien returning to Sweden during a certain period of time without the permission of the Swedish Migration Board or, in a security case, the Government" (Chapter 8, Section 19, Aliens Act). Re-entry bans may also be decided by Courts in criminal/penal cases.

Return decisions accompanied by a re-entry ban are automatically registered in SIS.

Re-entry bans may be revised at a later stage, for instance to give a special permission to the person to make a short visit to the country. If there are special grounds, such permission may also be granted upon application by someone other than the person concerned (Chapter 8, Section 20, Aliens Act).

5.1.6 Alternative or complementary measures

Irregular stay is considered a penal matter and additional fines and penal sanctions are possible, although these are rarely used in practice for non-criminal cases.

In the event that the return is not possible for practical reasons, and that detention is not envisaged, for instance due to the presence of a child, the administration may subject the persons to "supervision" by obliging them to report regularly to the police authority in the locality or to the Migration Board (Chapter 10, Sections 6-8, Aliens Act).

5.2 Institutional and administrative set-up

5.2.1 Swedish Migration Board ("Migrationsverket")

The Swedish Migration Board was set up in 1969 to bring together three sets of activities, previously dealt with by separate institutions and departments: permit issues, citizenship issues and assimilation/integration issues. The Board took over new responsibilities during the 1990s, including certain police duties, coordination tasks and responsibility for return migration.

The Board is now responsible for:

- All permits for people visiting and settling in Sweden.
- The asylum process including application, residence permits and voluntary return.
- Citizenship affairs.
- Repatriation.
- Return migration.

- International work in the EU, UNHCR and other bodies
- Ensuring that all the relevant public authorities work together satisfactorily.

In return cases, the Board may take both "*utvisning*" and "*avvisning*" decisions. It is also responsible for the enforcement of detention orders.

5.2.2 Police services

The Swedish police comprises 21 local police authorities which have their own geographical areas of responsibility.

The National Police Board (NPB) is the central administrative and supervisory authority. Since January 2009, NPB has established a department for border control ("*grensekontroll*"). This department informs the local police services about new rules in the field of immigration and performs inspections of local police services. When carrying out inspections, the department is also controlling the way in which "*avvisning*" decisions, detention orders and other related immigration procedures are managed by the local police.

The local police authorities handle individual cases from the time when an alien requests entry in the country until the case is examined by the Migration Board. They also implement the decisions for which they are responsible, such as "*avvisning*" decisions. They also deal with cases which are handed over to them by the Migration Board, for instance if the person has gone into hiding.

5.2.3 Migration Courts and Migration Court of Appeal

Since the Aliens Act was revised in 2005/2006, the former Aliens Appeal Board was dismantled. Decisions from the Migration Board are now appealed before three administrative courts designated by the Government as "Migration Courts".

The rulings of these Courts can be appealed for issues of principle to the "Migration Court of Appeal", which is the administrative court of appeal in Stockholm.

Appeals against migration-related decisions are therefore treated in a similar way as appeals against other administrative decisions.

5.2.4 Ministry of Justice

In Sweden, the Ministry of Justice has taken over responsibility for migration and asylum policy from the Ministry of Foreign Affairs since the last change in Government.

5.2.5 NGOs and social partners

Several NGOs are active to assist undocumented migrants and promote their rights such as "Rädda barnen", "Rådgivningsbyrån for asylsökande", "Amnesty", "Paperless in Stockholm", etc.

Among them, the Swedish Red Cross plays a particular role. The Red Cross supports asylum seekers and the Migration Board during the application process by gathering information from the countries of origin. It also supports persons whose asylum requests

have been rejected, by providing health assistance and helping them register their children in school. Volunteers visit every migrant retained in guarded centres once a week. The Red Cross has received a financial grant from the Migration Board to assess whether human rights are satisfactorily respected in detention centres.

Within the trade union movement, a policy shift is noticeable over the last two-three years. While certain unions (e.g. in the construction sector) had traditionally feared the competition of irregular workers, the main national federations have now united on a common platform to defend the rights of foreigners illegally employed in Sweden. In autumn 2008, the main unions established a centre in Stockholm to provide legal assistance to these persons ("*Fackligt Center för Papperslös*").

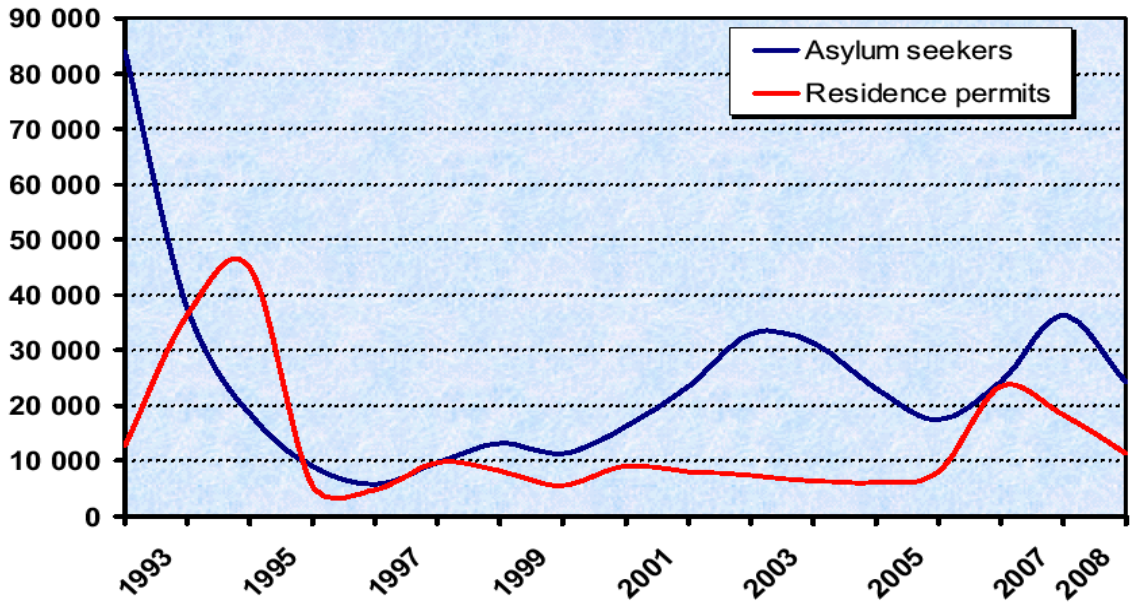
5.3 Implementation challenges

5.3.1 Key statistics

Overall context

For a number of years, Sweden has been among the European countries which have registered the highest numbers of asylum requests. Sweden received 24 353 requests for asylum in 2008, with citizens from Iraq, Somalia, Serbia/Kosovo constituting the main nationalities (Swedish Migration Board 2008). Overall, 33 845 applications were concluded in 2008, which resulted in 8 276 persons being granted refugee status (24 per cent of total applications processed).

Figure 5.2 Number of asylum seekers and residence permits granted 1992-2008



Source: Swedish Migration Board 2008

The total number of asylum requests has been reduced by a third compared to 2007, when 36 207 requests were registered. This decrease is essentially due to the decreasing number of Iraqi citizens applying for asylum (from 18 559 in 2007 to 6 083 in 2008). The number of citizens from Iran, Afghanistan, Uzbekistan, and Azerbaijan applying for asylum was on the increase in 2008.

90 021 residence permits and rights of residence were granted in 2008: 37 per cent in the framework of family reunion, 22 per cent for EU/EEA citizens, 16 per cent for labour market reasons, 12 per cent for student guests, 10 per cent for refugees and others with particularly distressing circumstances and 2.5 per cent of "UN quota" refugees.

Figure 5.3 Asylum cases concluded in 2008

Citizenship	Concluded	Granted	Share granted %	Rejected	Cancelled/ Other
Somalia	2 899	1 574	54%	679	207
Iraq	13 758	3 946	29%	7 572	1 261
Eritrea	1 013	606	60%	208	55
Stateless	1 286	422	33%	567	160
Afghanistan	863	368	43%	330	39
Russia	1 056	129	12%	520	184
Serbia	1 890	201	11%	1 115	293
Iran	784	143	18%	466	82
Mongolia	830	8	1%	703	48
Kosovo	741	55	7%	460	69
Other countries	8 725	824	10%	5 724	1 360
Total all countries	33 845	8 276	24%	18 344	3 758

Source: Swedish Migration Board 2008

Among the 11 237 persons having received a residence permit on refugee grounds, 47 per cent are considered as "persons in need of protection", 20 per cent as "UN quota refugees", 17 per cent as "refugees", and 14 per cent as "persons with particularly distressing circumstances".

Number of "*avvisning*" and "*utvisning*" decisions

The comparison of "*avvisning*" and "*utvisning*" decisions over time is not easy:

- The number of return decisions declined in 2006 as a result of the regularisation process initiated in the autumn of 2005 (see below).
- The scope of "*avvisning*" decisions was also redefined at the time of the revision of the Aliens Act in spring 2006. For instance, as mentioned above, a rejection of an asylum request is now accompanied by an "*utvisning*" decision, while it used to be accompanied by an "*avvisning*" decision. The result is that there are fewer "*avvisning*" decisions today than in the past, but more "*utvisning*" decisions.

According to the Migration Board, 152 re-entry bans were pronounced in 2008, compared with 181 in 2007 (in non-criminal cases).

Table 5.1 provides available figures for the last two years.

Table 5.1 "Avvisning" and "utvisning" decisions in Sweden in 2007 and 2008

	2007	2008
"*Avvisning*" decisions issued by police services	535	618
"*Avvisning*" decisions issued by the Migration Board	546	632
"*Utvisning*" decisions issued by the Migration Board in non-asylum cases	1 297	1 421
Total	2 378	2 671

Source: Swedish Migration Board and National Police Board, data gathered by Econ Pöyry

Voluntary return

Although absolute numbers vary depending on the year, voluntary return is commonly used in Sweden as a complement to and/or as a substitute for enforced return (European Migration Network 2006; IOM 2004).

Figure 5.4 Number of voluntary returns 2004-2008

Citizenship	2008	2007	2006	2005	2004
Iraq	1 665	854	197	460	639
Serbia/Montenegro	59	374	459	1 029	1 583
Russia	316	227	263	476	740
Bolivia	243	197	126	177	221
Lebanon	218	146	66	128	200
Stateless	126	132	77	194	236
Iran	113	123	106	174	308
Bulgaria	24	108	535	552	287
Turkey	161	86	104	226	372
Belarus	168	84	82	205	345
Other countries	2 885	1 622	1 902	3 275	5 172
Total	5 978	3 953	3 917	6 896	10 103

Source: Swedish Migration Board 2008

5.3.2 Perceptions about daily practices

Uncovering cases

Estimates of the number of people in an irregular situation vary from 25 000 to 100 000, with informants referring to a number between 30 000 and 50 000.

A significant share of these persons is employed, notably in the construction industry, in restaurants and in the cleaning industry. Their origin is diverse, with a number of them coming from South America (e.g. Bolivia, Colombia, and Venezuela) and Africa. The number of Iraqi migrants has decreased in the recent period.

On the basis of interviews, there would not seem to be a pro-active strategy by the administration or the police to apprehend irregular migrants. Most decisions are taken in relation to the application for a permit, as the rejection of the request is accompanied by a return decision. Other cases are uncovered in day-to-day "routine" incidents, such as traffic controls or labour inspections in restaurants and construction sites. Targeted ID checks are not common.

Processing of cases and use of re-entry bans

The processing of cases may take on average six months. This means that the administration has difficulty keeping the "3-month limit" to issue "*avvisning*" decisions, and must increasingly recourse to "*utvisning*" decisions instead.

The recourse to a re-entry ban is possible but the Migration Board is wary to limit its use in practice. The length of a ban is normally of 2 years and exceptionally of 4 years. Only Courts may pronounce re-entry bans with a permanent duration. This happens very seldom and may concern only cases involving very serious criminal offences. As explained above, the recourse to re-entry bans was much more frequent prior to Sweden's accession to the Schengen area.

The use of detention

Administrative detention is used in cases where there is a risk that the person will abscond. As described above, a distinction is made between detention for investigation purposes and detention with a view to returning the person.

There are about 185 places available in 5 detention centres. 80 per cent of detention orders originate from the police for the cases it deals with. Due to the limited capacity of the centres, the police is often confronted with practical problems of bottlenecks.

In 2008, 15 000 persons were subject to a detention measure but 5 000 escaped before the decision could be enforced (Swedish Government 2009). Moreover, a significant number of persons absconded before detention could be envisaged. Sweden will use the context of the transposition of the "Return Directive" to reconsider its practices related to detention.

5.3.3 Test cases

Table 5.2 illustrates the likely responses that the Migration Board and/or the police services may envisage in the four test cases of comparison.

Table 5.2 Test cases in Sweden

Hypothetical cases	***Likely response in Sweden***
Person A: A person who had a visa for six months, has overstayed for an additional year, and has been employed without a working permit for the last 16 months of his/her stay. This person is apprehended during a labour inspection. His/her country of origin is known and considered safe.	The person may be subject to an "*advising*" decision (if the person hasn't applied for a permit / for asylum). If the decision is taken by the police, no re-entry ban. A re-entry ban of 2 years (and thereby registration in SIS) could be envisaged by the Board if the person does no have family connections in Sweden. The person/employer may also be fined on the grounds of irregular work.

Case A-1: This person has a residence permit in another Schengen country.	The person may be subject to an "*avvisning*" decision with the country in question as destination country. No re-entry ban.
Case A-2: The country of origin is not safe.	The main criterion for deciding on the case is not whether the country is safe or not (Sweden does not have a list of "safe/unsafe" countries), but whether the person concerned will be faced with serious risk for his/her life. This will depend on the case.
Case A-3: The person would have fulfilled the conditions for a work permit if he/she had handed in an application.	In principle, foreigners should apply for a work permit before they come to Sweden. This person may be requested to regularise the situation by leaving Sweden and applying again. If the person holds a regular job, he/she can have reasonable hopes to get a work permit. (Conditions were simplified recently following a law of 15 December 2008).
Person B: A person whose asylum request has been finally rejected after two years of procedure and has been escaping the decision for another three years. The person speaks the language and has been employed on several occasions. The country of origin is known and considered safe.	The person was denied asylum and is therefore already subject to a return decision. The administration may enforce this decision automatically. If the individual situation or the circumstances have changed, the case might be reviewed. Possible re-entry ban.
Case B-1: This person is in a relationship with a citizen of the country and the two gave birth to a child during his/her stay, who is now 3 year-old. Both share custody and financial responsibility for the child.	The person is likely to be returned but his/her connection with the country should be re-assessed. The presence of the child plays a role, even more so if he/she has Swedish nationality. No re-entry ban.
Case B-2: The initial asylum request was filed in a neighbouring Schengen country. The person has moved to the second country after his/her asylum request was rejected and met his/her partner - who holds the nationality of the second country.	The first question to answer in this case is whether the person has the right to get his/her case assessed (again) in Sweden. If not, the person could be returned to the country where he/she first applied for asylum. No re-entry ban.
Person C: A person who had a temporary residence permit for the purpose of his/her studies and contracted a "*pro forma*" marriage to obtain another residence permit. This person has now been regularly employed for one year. The fictitious nature of the marriage can be proven.	There would be a need to consider the establishment of this person in Sweden. However, if the marriage is proven to be fake, the person is likely to be returned. A re-entry ban of two years may be envisaged but this is not automatic.
Persons D: A married couple bringing one child comes to the country under a false identity and is granted residence permits. After eight years in the country, they apply for citizenship. The processing of their application reveals their true identity. At this time the oldest child is 12 years old. They have also given birth to another child who is now 7.	Following a ruling from the Supreme Court, it is common to consider that a person who has held a permit for more than four years shall not be deprived of this permit, even if the information provided initially is proven false. A similar "amnesty/forgiveness" mechanism could apply here. Moreover, the interest of the children militates against an expulsion. In practice, it is likely that the persons would not be granted Swedish citizenship but would keep their residence permits and be allowed to apply again for citizenship after another (normal) delay of 5 years.

Source: Econ Pöyry on the basis of interviews

5.4 Overview of legal and policy trends

Revision of the Aliens Act in 2006 and reform of the procedural system

Sweden adopted a new Aliens Act in November 2005 and the text came into force in March 2006. On substance, the legislation was adapted to integrate the provisions from EU directives, notably the "Family Reunion" directive. This revision also led to an important overhaul of the migration procedural system with a view to achieving greater independence and transparency (Swedish Government 2004):

- The Migration Board was confirmed as the main authority of first instance but, as mentioned above, the former appeal body - the Aliens Appeal Board - was dismantled. Above and appeals are now brought to administrative Courts.
- While both the Migration Board and the Aliens Appeal Board used to rely on legal interpretation from the responsible Ministry in complex cases, this is no longer possible (except for matters involving national security) and channels of "political interferences" in the management of cases were removed.

Regularisation process in 2005/2006

Although the term is not officially used, a regularisation / amnesty mechanism was carried out in autumn 2005 and winter 2006: irregular migrants who declared themselves had their case re-assessed and were guaranteed not to be returned during the assessment period. The number of enforced returns fell dramatically in 2006 as a result.

The assessment of this experience is mixed depending on the point of view. Some actors criticised a lack of preparation and too strict criteria, which led many migrants - about 10 to 15 000 according to one informant - to go back into hiding. Others pointed at the risk of devaluating the credibility of the rule of law if such exemptions were to be granted on a regular basis. The Migration Board provided a quantified assessment of the experience at the time, but detailed evaluation is scarce.

Renewed policy focus on return issues

The rise in the number of asylum seekers from Iraq in the period 2002-2007 has given a new political attention to the issue of return. Rules have been made more stringent over the years. At the same time, mechanisms for voluntary return have been activated to facilitate the return of a greater number of persons (see above). These measures were meant to send "a signal" that Sweden was toughening its rules.

NGOs remain mobilised to defend the rights of undocumented migrants. Public demonstrations have been held every Wednesday for a hundred weeks in front of the national Assembly with a view to obtaining a greater number of regularisations.

Labour migration: new law in December 2008

In December 2008, Sweden adopted a new law on legal migration. The main approach of the new rules is to ensure that foreigner who apply from abroad (with visa possibilities for interviews) and obtain a (regular) job offer in Sweden can obtain a work permit. The law does not address the situation of irregular migrants/workers already present in Sweden, but questions have been raised whether it could create an incentive for these people to exit and re-enter Sweden through legal channels.

Preparing for the transposition of the "Return Directive"

Sweden has started to prepare for the transposition of the EU "Return Directive". As is usually done for EU legislation, a committee chaired by a lead expert - in the present case the chief judge of Gothenburg's Migration Court - was appointed to carry out an investigation on ways to implement the Directive in Sweden (Swedish Government 2009). The mandate given to the committee is broad and encompasses a review of rules related to administrative detention of foreigners in Sweden, as well as a discussion of the implications of the "Transit Directive" for the cooperation of police services within the EU. The committee will report on the main elements of the Directive in June 2009 and deliver its final report in December 2009. The result of the enquiry is not known yet. In terms of substance, it can be assumed that only limited aspects of the Swedish legislation will be affected:

- "One-step process": during the negotiation of the text, the Swedish Government, along with other Member States, has insisted on the possibility to maintain a "one-step" process whereby a return decision may be issued alongside the rejection of an application for a permit. While this was not foreseen in the initial Commission's proposal, this possibility has been secured in the final text, and Swedish practices would appear still valid.
- "Detention period": in line with the Directive, Sweden would need to specify an absolute time limit for administrative detention (exceptional maximum period of 18 months foreseen in the Directive).
- "Re-entry bans": the Directive foresees that "re-entry bans" should become automatic in certain cases. However, many exceptions are also foreseen and it remains to be seen whether and to what extent this will impact Swedish law.

Swedish Presidency of the EU

Sweden will take over the rotating Presidency of the European Council on 1 July 2009. As part of its work on justice and home affairs, the Presidency will seek to secure agreement of a new 5-year package of EU priorities for migration and asylum policy. One immediate file for the Presidency will be the follow-up of the Directive to sanction employers of illegally staying third-country nationals, which was voted by the European Parliament in February 2009.

5.5 References for Sweden

European Migration Network (2007): *Return: the Swedish Approach*. Research study prepared by Dr. Anna Jonsson and PhD Can. Dominika Borg, Uppssala University.

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Swedish Government (2005): *Aliens Act*. Swedish Code of Statuses no 2005:716. Ministry for Foreign Affairs, issued on 29 September 2005, entered into force on 31 March 2006, up to and including Swedish Code of Statuses 2006:220.

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6 Synthesis

The sample of countries reviewed in this study illustrates the diversity of national rules and practices for the return of third-country nationals in an irregular situation. At the same time, the review shows that countries are often confronted with similar issues, and that there is a wealth of experience to draw from. Moreover, the "Return Directive" will result in a further approximation of national legislation in the coming years.

This concluding chapter summarises the main similarities and differences between the rules and systems in place in the four countries under review (section 6.1). It provides replies to the research questions and to the test cases as a way to compare practices (section 6.2). Finally, it draws conclusions for Norway and stresses the potential for mutual learning and cooperation in the wider European context (section 6.3).

6.1 Overview of similarities and differences

The comparison of the selected countries reveals structural institutional and contextual differences. As illustrated in Table 6.1, the scope of the challenges, the type of decisions and the nature of actors involved vary greatly. Differences in the use of re-entry bans are also noticeable. Table 6.2 below highlights striking features of each country in comparison to Norway.

Table 6.1 Key parameters of national return policies

	Type of decisions*	**Main actors**	**Lead ministry**	**Annual decisions****	**Use of re-entry bans**
Norway	"Expulsions", i.e. non-criminal "*utvisning*" (+ "rejections" / "*bortvisning*")	Directorate for Immigration (UDI) and police services	Ministry for Labour and Social Inclusion	About 800 "*utvisning*" decisions	Automatic when "*utvisning*" decision is taken; from 2 years to a permanent ban
France	"Orders to leave" (OQTF) and "decisions to return" (APRF)	"*Préfectures*" representing the State at local level	Ministry of Immigration	About 93 000	Not automatic and not applied if no other criminal offences
Poland	"Obligations to leave" and "decisions of expulsion"	Border Guard, police and "*Voivodes*" representing the State at provincial level	Ministry of Interior	About 12 000	3 or 5 years from Schengen for "decisions of expulsion"; 1 year from Poland for "obligations to leave"
Sweden	"Refusals-of-entry" ("*avvisning*") and "expulsions" ("*utvisning*")	Migration Board ("*Migrationsverket*") and police services	Ministry of Justice	About 2 500	Not automatic; if applied, most common ban is of 2 years

Source: Econ Pöyry. * Reviewed in this study. ** Numbers not strictly comparable, see country sections in this report for definitions and sources.

Table 6.2 Main features of return rules and practices compared to Norway

	Compared to Norway…
In France	- The politicisation of the issue has led to frequent changes in the legislation over the last decade and to the definition of a quantified target of annual removals (27 000 in 2009). - The main role in the case-handling process is played by "*préfectures*" representing the State at local level. Decisions are less centralised and practices are more heterogeneous as a result. Judicial authorities, administrative Courts and NGOs also seem to play a greater role. A Ministry of Immigration was created since the last change of Government in 2007. - The number of cases is much more significant, which reflects in part migration patterns and more pro-active investigation practices. Arrests by the police and recourse to detention, in particular, would seem more frequent in France. - Irregular entry or stay is considered a penal offence, but State's prosecutors do not take legal action against irregular migrants on this ground in the absence of other criminal offences. - Return decisions are not automatically coupled with re-entry bans and correspond broadly to Norwegian "rejections" (as opposed to "expulsions"). Re-entry bans are not administrative decisions, but separate judicial decisions taken by Courts. Bans may be issued in (criminal/penal) cases where the State's prosecutors decide to take legal action against the person. The ban may be pronounced by the Court as the main sanction or as a complementary sanction against the foreigner. - Long periods of stay are likely to limit possibilities to return the person, especially if he/she has family/children in France. The law specificies several categories of persons who cannot be subject to return. For instance, persons who entered France as a child (before the age of 13) shall not be returned. - A relatively high number of return and detention decisions are appealed to, and indeed cancelled by, judicial and administrative Courts. - Many decisions are not enforced for practical reasons, because the requirements of the procedures and delays involved could not be met by the administration, or because the countries of origin refuse to issue certificates of re-entry for their nationals. France has set up a list of non-cooperative countries.
	Compared to Norway…
In Poland	- The Polish immigration legislation was amended several times before Poland's accession to the EU and the Schengen area. - A particular challenge has been to improve the capacity of the State to manage migration cases. External financial assistance played a role. - Two types of decisions are currently in use. "Obligations to leave the country" are issued in cases where the administration assumes that the person will leave the country voluntarily. "Decisions of expulsion" are issued in other cases. Foreigners married to Polish citizens may not be returned (except for "pro forma" marriages).

	- Several actors are involved in these procedures and must coordinate their activities. The "Voivode" - the authority representing the State at provincial level - may issue "decisions of expulsion" *ex officio* or following the request of other authorities, notably the Border Guard and the police. If it is assumed that the person will leave voluntarily, the Border Guard and the police may issue "obligations to leave the country". - "Decisions of expulsion" are accompanied by a re-entry ban of 5 years, but only 3 years if the person contributes to the financial costs of the return. These decisions are also registered in SIS. "Obligations to leave the country" are accompanied by a ban of one year from the Polish territory. They are not registered in SIS. - A status of a "tolerated stay" may be granted to migrants who cannot be returned for legal or practical reasons.
	Compared to Norway…
In Sweden	- Two main types of return decisions are used in Sweden: "refusals-of-entry" ("*avvisning*") and "expulsion" decisions ("*utvisning*"). "*Avvisning*" decisions can be taken by the police and the Migration Board for two types of cases: a) if the person has not previously held a valid permit in Sweden; b) if the person has applied for a permit but the administration has rejected this application within 3 months. Swedish "*utvisning*" decisions are more similar to the Norwegian "*utvisning*", except for the use of re-entry bans. - The use of re-entry bans is not automatic in Sweden, neither for "*avvisning*", nor for "*utvisning*" decisions. Moreover, in cases where bans are pronounced by the Migration Board, the standard period is of two years. - The practice of issuing re-entry bans changed radically when Sweden joined the Schengen area. While Sweden used to issue a large number of re-entry bans prohibiting access to the Swedish territory, it was considered that bans prohibiting access to the whole Schengen area should be used with greater care given the legal and practical consequences for the persons concerned. - At the same time as a new Aliens Act was passed in 2006, Sweden reformed its procedural system. The former Aliens Appeal Board - a quasi administrative body - was dismantled and decisions of the Migration Board are now appealed to administrative Courts according to standard principles of administrative law. - Sweden carried out a mechanism of "mass" regularisation in the autumn of 2005 and winter 2006.

Source: Econ Pöyry

6.2 Summary of replies to the research questions and to the test cases

Differences in national legislation and systems are particularly apparent in the light of the detailed research questions and test cases used in this study.

The following findings are of particular interest:

- National return legislation, policies and practices have changed significantly in recent years in line with developments at domestic and supranational level, notably participation in the Schengen area and national and European case-law.
- National legislations describe breaches of law justifying a return and specify limitations inspired from international and European standards, but the exact definitions and types of decisions differ. An irregular situation is usually considered a (penal) offence serious enough to justify a return, but the decision to return the person must be weighed against individual and family ties to the country. In France, for instance, a long period of (legal) stay limits possibilities for the persons to be returned. In Poland, the fact of being married to a Polish citizen is an absolute limitation against return (provided the marriage is authentic). Return decisions may be accompanied by a re-entry ban and a registration of the case in SIS (see below). Alternative sanctions in the form of a fine or a jail sentence are also possible but these are not frequently used in practice.
- The way in which systems are constructed (e.g. the requirement to check "objective" and "subjective" criteria in Norway, or the 32-day time limit for administrative detention in France) has implications on the case-handling process, which can prove more or less long and demanding. All systems foresee some form of flexibility, be it through "lighter" forms of return decisions or "fast-track" procedures giving the administration and the police greater room for manoeuvre.
- The use of re-entry bans differs significantly among the countries under review. While this concerns a limited number of cases, Norway is rather unique in the way it pronounces bans of a permanent duration. In the countries of comparison, return decisions are not necessarily accompanied by a ban (with the exception of Polish decisions) and, if pronounced, bans would typically be of a shorter duration, as exemplified by the hypothetical cases of persons A, B and C.
- Information about the use of SIS is more difficult to obtain as registration is not automatic in many countries and since responsibility is often spread among police and judicial authorities. The issuance of a decision of re-entry ban is logically followed by a registration in SIS, but not all return decisions lead to a registration in SIS, either because these decisions are not followed by a re-entry ban (e.g. France) or because the ban only relates to the country in question (e.g. Polish "obligation to leave the country").
- In addition to differences in rules and types of decisions, institutional set-ups and practices vary. The centralisation of the case-handling process is greater in Sweden and Norway compared to France and Poland. In the latter two countries, the consistency of legal interpretation and of practices by local actors is a particular challenge.

- The priority given to uncovering cases and techniques of investigation differ from one country to the other. Enforcement of decisions is a challenge everywhere: if asked to provide a rough estimate, observers confirm the Commission's estimate according to which, on average in Europe, "between a third and a half" of return decisions are followed by a registered departure from the country.
- Administrative detention for the purpose of removals is common but would seem less systematic in Norway and Sweden compared to France and Poland. The conditions of detention, the availability of legal assistance and the presence of NGOs in guarded centres vary depending on the country.
- Return aspects are only one aspect of wider national and European migration policies. Changes in return rules and practices also reflect developments in rules for labour migration, family reunification, mechanisms for voluntary return, regularisation measures, readmission agreements, integration schemes, etc.
- In addition to the EU "Return Directive", the adoption of the new EU "Sanctions Directive", case-law originating from the European Court of Justice and the European Court of Human Rights, and future progress with the establishment of a common EU migration policy will lead to further adjustments of national rules and practices.

Table 6.3 presents summary replies to the research questions. Table 6.4 below provides an overview of possible replies of public authorities in the four test cases of comparison.

Table 6.3 Overview of practices in the light of the research questions

	Norway	**France**	**Poland**	**Sweden**
1. How are expulsion rules established and deciced on in the various countries? What breaches of law are regulated?	The relevant grounds for "expulsion" are regulated in the Immigration Act, i.e. the law is self-containing in this respect. These include: irregular entry; irregular stay; irregular work; false information or documents. Guidelines ("*rundskriv*") are issued to provide legal guidance.	The relevant grounds for return are described in the Immigration Code. These include: rejection or withdrawal of a permit; irregular entry; irregular stay; irregular work; fraud or falsification of documents. The Code has been revised several times through legislative amendments in recent years.	The relevant grounds are listed in the Act on Aliens of 2003, as amended since then. These include: irregular entry; irregular stay; irregular work; lack of resources.	The relevant grounds are listed in the Aliens Act, as revised in 2005/2006. These include: irregular entry; irregular stay; irregular work; false information.
2. Are there absolute limitations in relation to the possibility to expel somebody?	Yes. Several criteria relate to the need to protect the persons against persecution and to ensure the best interest of the child if the person was born in Norway and has lived her ever since.	Yes. Nine categories benefit from an absolute limitation prohibiting return. Several criteria relate to the length of (regular) stay and family links.	Yes. Several criteria are listed which relate to the need to protect the persons again persecution and to limit return of persons married to Polish citizens.	Yes. Several criteria relate to the need to protect the persons again persecution and to ensure the best interest of the child.
3. What breaches of law do authorities consider "serious" enough to justify an "expulsion"?	Illegal entry, stay and/or work, (beyond short periods) are valid grounds for issuing "*utvisning*" decisions. Providing false information with serious consequences for the case may also justify an "expulsion".	All breaches of law listed in the Immigration Code may justify a return decision. Since re-entry bans are not used in non-criminal cases, it is irrelevant for the administration to assess in detail the "seriousness" of the breach.	All breaches of law listed in the Act on Aliens may justify a return decision. To decide on the type of decision, including the length of the re-entry ban, the administration or the police will consider whether or not the person is likely to leave the country voluntarily.	All breaches of law listed in the Aliens Act may justify a return decision. To decide on the type of decision, the administration or the police will consider whether the person has already held a valid permit and whether an application is being processed by the administration. Re-entry bans are separate decisions.

	Norway	France	Poland	Sweden
4. What kind of evidence is required by law? Who bears the burden of proof?	The migrant must be in a position to justify his/her legal situation. The Directorate for Immigration has the burden of proof and must motivate its decision.	A migrant may be requested to provide legal documents certifying his/her identity and legal status. A person who is denied a residence permit will be subject to an "obligation to leave".	Migrants must prove their legal status. If a residence permit is not granted, they may be either "expelled" or "obliged to leave" (or be granted a "status of tolerated stay" in special circumstances).	Foreigners have the duty to prove their legal status at any point in time and to respond to requests of the administration.
5. What means of sanctions are rooted in law? Expulsion? (Criminal/penal) sanction? Other instruments of sanction?	"Expulsion" decisions ("*utvisning*") are automatically accompanied by re-entry bans. Administrative detention is possible pending the removal. If an "expulsion" is not possible, criminal/penal sanctions may be envisaged.	In addition to return decisions, other sanctions (e.g. bans, fine, and jail sentence) may be considered for cases involving penal/criminal offences. Administrative detention (with a maximum of 32 days) is used in standard cases. A person who cannot be expelled within this period is set free.	Similar system as in France, except that the length of detention may be significantly longer (up to one year).	Irregular stay is a penal offence and additional fines and penal sanctions are possible, but hardly used in non-criminal cases.
6. To what extent do countries enforce immigration regulation in practice: are the rules implemented on the ground? In the same logic, to what extent do public authorities make an active effort to find out breaches of law?	The immigration regulation is enforced in cases which are uncovered. The authorities do not make an active effort to find out "simple" breaches of law unless they have received precise information, or if the person is under suspicion for a criminal act.	Since 2003, return targets are in place to define the number of effective removals. This new "culture of numbers" has led to a multiplication of arrests but only about a quarter of decisions results in a removal: some countries refuse to take back their nationals and a significant share of decisions is cancelled by judicial and administrative Courts.	Even before Poland joined the EU, there has been a strong incentive to demonstrate the capacity of the State to apply the law. However, there is no pressure from the Government to "increase figures". The authorities investigate breaches of law but due to limited resources, they often react to information and focus efforts on obvious places.	The situation would seem rather similar to the Norwegian case. There are no "random" or "systematic" controls of ID or permits on the street. Decisions are pronounced in relation to the rejection or withdrawal of a permit, or in cases uncovered in the context of other police activities, such as traffic accidents or health and safety inspections.

	Norway	France	Poland	Sweden
7. In the event of an "expulsion" decision, what are the criteria for defining the length of the prohibition to re-enter ("re-entry ban")? How is the ban decided? To what extent is there a possibility to use room for appreciation depending on the case?	The length of the re-entry ban varies between a minimum of two years, five years and a permanent duration. Guidelines defining "subjective" criteria are set to adjust the length of the ban: the ban shall not be "excessive" for the foreigner or the close family, considering the seriousness of the case, and the foreigner's connection with Norway. The decision involves some room for appreciation.	In practice, there is no re-entry ban for cases concerning only an irregular situation. Bans are separate decisions taken by judicial Courts in cases of criminal/penal offences. The length will vary depending on the seriousness of the crime. Permanent bans are exceptional and limited to (very rare) cases of threats to the national security.	The decision to issue a re-entry ban is rather straightforward. Three options are available: a one-year re-entry ban and registration in the national registry for "obligations to leave the country" (but no SIS registration); a three-year re-entry ban in SIS for "decisions of expulsion" if the migrant covers the costs; a five-year re-entry ban in SIS if costs are covered by the State.	The issuance of re-entry bans is subject to a separate decision and is not automatic. A ban may accompany both types of decisions in use in Sweden ("*avvisning*" and "*utvisning*"), but the Migration Board seeks to limit cases (about 150 cases in 2008). If bans are pronounced, the standard duration is of two years.
8. In the event of a breach of the immigration legislation and impossibility to recourse to expulsion, what other reaction measures are used? What does each country consider as the most appropriate measures?	When it is legally possible, "expulsion" is often seen as the most appropriate measure. Detention is possible but not systematic in practice and only Courts can decide about it. Otherwise, foreigners can also be fined or punished by the police or the Court for breaches of the Immigration Act (see also reply to section 5).	If the administration is unable to return the person within the time limits set by law or the judge (e.g. 32 days of detention), the person should be set free and his/her case should be reconsidered. Some decisions remain valid permanently but their practical legal effect is limited to two phases of detention within a year.	An immigrant may be kept in a detention centre for up to one year. If his/her expulsion is impossible due to objective reasons, he/she may be granted a status of tolerated stay.	Irregular stay is considered a penal matter and additional fines and penal sanctions are possible, although these are rarely used in practice for non-criminal cases. Administrative detention may be used to facilitate removals.
9. To what extent do authorities react in the case of false information or under a false identity? What sanctions are used?	Giving false information or a false identity is seen as serious (if it is not a minor discrepancy), and will justify an "expulsion" if no limitations apply. If the "expulsion" is not possible, the authorities will react with legal proceedings.	False information is not an overriding reason to justify a return. This will depend on a case-by-case assessment. Residence permits may be terminated in serious cases.	In serious cases, residence permits may be revoked and this revocation will be accompanied by a "decision of expulsion" (unless grounds for a 'tolerated stay' exist).	When a decision of "*avvisning*" or "*utvisning*" is envisaged, false identity or the use of false information may also lead the administration to consider issuing a re-entry ban.

	Norway	France	Poland	Sweden
10. What consideration do countries give to family links with partners and children during an illegal stay?	In practice, family links established during an illegal stay are not given strong consideration in the decision, because the parties could not have had a justified expectation to have a family life in Norway. However, according to the law and rulings from the European Court of Human Rights, the family situation is considered.	In practice, the extent of family links and the increase in the duration of stay are likely to limit possibilities for the administration to return the person.	The existence of family links, regardless of whether they were established during an irregular stay, may be a reason to grant a status of "tolerated stay". On the other hand, the scope of integration of an irregular migrant without family links is not taken into account.	Law and practices would seem similar as in the Norwegian case.
11. What consideration do countries give to the length of children's stay after their asylum request has been rejected? Or because the time of processing of asylum requests are lengthened due to false information?	The length of the children's stay after an asylum request has been rejected is an important element to be taken into account for the assessment of the "subjective" criteria.	See reply to question 10 concerning family links and length of stay.	See reply to question 10 concerning family links and length of stay.	The length of stay of children pending the assessment of an asylum request is a factor which is taken into account. On the other hand, the length of an irregular stay is not meant to be taken into account.
12. To what extent is the practice of sanctioning illegal work influenced by labour market demand for additional workforce?	Labour market needs do not influence the assessment of individual cases, but they may influence changes in the legislation in longer term.	Illegal work, sometimes combined with irregular stay, is a separate offence which can be prosecuted before Courts. Sanctions have been increased in recent years, notably for smugglers.	The irregularity of employment is one of several sufficient reasons to issue a return decision. Labour demand is not factor taken into consideration. Some flexibility has been created for (temporary) work permits, for instance in the agricultural sector.	Control and sanction of irregular work or employers would seem rather loose. Foreigners must apply for work permits before they enter Sweden: a foreigner who is irregularly employed will be returned and could seek to come back through legal means.
13. To what extent do authorities react in the case where a person has given false information to obtain residence and work permits?	See reply to question 9.	See reply to question 9. Permits acquired under a false identity will most likely be removed.	See reply to question 9. Permits acquired under a false identity will most likely be removed.	See reply to question 9.

	Norway	France	Poland	Sweden
14. Have the countries gone through changes over time when it comes to the definition of serious breaches of law? If so, in what directions have the changes gone?	The definitions have not changed, but the nature of cases and therefore the volume of different types of breaches of law have changed over time. Considerations of the best interest of the child have been reinforced over the years.	"Seriousness" is not an issue as such, as there is no re-entry ban attached to the return decision. The main changes relate to the extension of the length of administrative detention and to instructions given to the police/administration to increase the number of removals.	No relevant changes in the law but significant efforts have been made to make the system more effective.	Grounds for return have not changed radically, but related developments may be of interest: limitation in the use of re-entry bans since Schengen accession; changes in the scope of "*avvisning*" decisions in 2005/2006; "regularisation" experience late 2005; and 2008 law on labour migration.
15. What are the possibilities for having an expulsion decision altered at a later stage?	Possibilities are foreseen but changes will occur only if circumstances have fundamentally changed.	If the person has executed the decision by leaving the French territory and is not subject to a re-entry ban, he/she may seek to enter France through legal (or illegal) channels.	For "decisions of expulsion", possibilities are limited since a re-entry ban applies. If the appeal of migrants is concluded successfully while he/she is already abroad, he/she will be notified,	The person subject to a return decision is expected to comply with it. If the return is accompanied with a re-entry ban, the latter may be revised at a later stage, for instance to allow for a short visit.
16. What authorities have the formal expertise and resources to address breaches of the immigration law?	The local police are usually responsible for establishing the "objective" grounds for expulsion. UDI is responsible for considering both the "objective" and the "subjective" criteria, and for issuing the decision.	Police services are responsible for controls and arrests. "*Préfectures*" (State authorities at local level) are responsible for issuing permits and for return decisions.	Police services and the Polish Border Guard play a direct role of investigation and may pronounce "obligations to leave the country". "Decisions of expulsion" are pronounced by the "*Voivodes*"	The Swedish Migration Board and the police are responsible for issuing return decisions. Only the Migration Board can pronounce re-entry bans.
17. What are the similarities and differences in rules and practices for the registration of cases in the Schengen Information System (SIS)?	More than 90% of expulsion cases ("*utvisning*") are registered in SIS. Formally, the decision to register in SIS is a separate decision, but it follows the same considerations.	Registration in SIS is not automatic and depends on the cooperation between administrative, police and judicial services. Only certain decisions are transferred to the national registry and a share of them is registered in SIS.	"Decisions of expulsion" are registered in SIS. If the length of the re-entry ban is of five years, the registration of the data will be extended by two years following a first period of three years.	Return decisions accompanied by a re-entry ban are automatically registered in SIS. The number of cases is limited.

Source: Econ Pöyry, on the basis of findings in this study

Table 6.4 Overview of likely responses in four hypothetical cases

Hypothetical cases	Likely response in Norway	Likely response in France	Likely response in Poland	Likely response in Sweden
Person A: A person who had a temporary residence permit of six months, has overstayed for an additional year, and has been employed without a working permit for the last 16 months of his/her stay. This person is apprehended during a labour inspection. His/her country of origin is known and considered safe.	The person has breached the Law. He/she will be subject to an expulsion decision coupled with a permanent re-entry ban.	If the person is arrested, he/she will be subject to an APRF decision (in the absence of family links) and possibly put in detention in view of his/her removal.	The person will be returned and the decision will be coupled with a re-entry ban of 5 years (3 years if the person bears the costs). The employer(s) may be sanctioned financially.	The person may be subject to an "*avvisning*" decision (cf. conditions). A re-entry ban of 2 years (and thereby registration in SIS) could be envisaged if the person has no family connections in Sweden.
Case A-1: This person has a residence permit in another Schengen country.	The country in question will be consulted before registering the case in SIS. In practice, cooperation may prove difficult. If so, the person may be expelled from Norway, but not from the Schengen area.	The person may be subject to a re-admission procedure to his/her country of residence. In practice, the person could also be let free and invited to regularise his/her situation.	The country in question will be consulted. The person may be subject to a re-admission procedure to his/her country of residence.	The person may be subject to an "*avvisning*" decision with the first country as destination country. No re-entry ban.
Case A-2: The country of origin is not safe.	The person cannot be expelled if he/she is in danger. UDI will notify the police. Other alternative means of "sanction" (penal or financial) may be envisaged.	In "non asylum" cases, the safety of the country is not a prime consideration. The response will be the same as person A. The decision can be appealed, and/or the person may request asylum.	The person will not be returned and would seem to qualify for a status of "tolerated stay".	The risks faced by the individual will be considered. The response will depend on the case.
Case A-3: The person would have fulfilled the conditions for a work permit if he/she had handed in an application.	The person will be subject to an expulsion decision but the re-entry ban may be of a shorter duration (possibly 2 or 5 years) if the absence of declaration was not deliberate.	If the person is arrested, he/she will be subject to an APRF decision (in the absence of family links) and possibly put in detention in view of his/her removal.	There may be a possibility that the person will not be returned if the employers bears the entire blame.	The person may be requested to leave Sweden and apply again. If the person is accepted for a regular job, he/she can have reasonable hopes to obtain a permit.

Hypothetical cases	Likely response in Norway	Likely response in France	Likely response in Poland	Likely response in Sweden
Person B: A person whose asylum request was finally rejected after two years of procedure and has been escaping the decision for another three years. The person speaks the language and has been employed on several occasions. The country of origin is known and considered safe.	The person has breached the Law. He/she will be subject to an expulsion decision coupled with a permanent re-entry ban.	If the person is arrested, he/she will be subject to an APRF decision (in the absence of family links) and possibly put in detention in view of his/her removal. No re-entry ban.	The person will be returned and the decision will be coupled with a re-entry ban of 5 years (3 years if the person bears the costs). "Integration" in society is not an absolute criterion.	The person was denied asylum and is therefore automatically subject to a return decision, which can be enforced immediately. If the individual situation or the circumstances have changed, the case might be reviewed. No re-entry ban.
Case B-1: This person is in a relationship with a citizen of the country and the two gave birth to a child during his/her stay, who is now 3 year-old. Both share custody and financial responsibility for the child.	While the case would qualify for an expulsion decision, special individual/family circumstances may militate against an expulsion or justify a shorter shorter re-entry ban (possibly 2 or 5 years).	This person will not be returned if he/she has direct contacts with the child (who is born on the French territory and therefore has French nationality). The "community of life" between the parents is a criterion. The person may obtain a first residence permit of one year ("*titre vie privée et familiale*").	Until recently, this person could obtain a "tolerated stay" permit. Since January 2009, he/she could qualify for a "temporary residence permit". If the couple is married, this is automatic ("shall" clause). If not, this depends on the case ("may" clause).	The person is likely to be returned but his/her connections with the country should be re-assessed. The presence of the child plays a role, even more so if he/she has Swedish nationality. No re-entry ban.
Case B-2: The initial asylum request was filed in a neighbouring Schengen country. The person has moved to the second country after his/her asylum request was rejected and met his/her partner - who holds the nationality of the second country.	The person has breached the Law. He/she will be subject to an expulsion decision coupled with a permanent re-entry ban (or down to 5 years depending on the circumstances).	Since the person lives with a French citizen, their "community of life" will be assessed in France. If the request was still being processed in the other country, the person would be returned to this country.	If the couple is married, it is likely that the person will be regularised. If not, the person may well be returned.	The first question to answer in this case is whether the person has the right to get his/her case assessed (again) in Sweden. If not, the person could be returned to the country where he/she first applied for asylum. No re-entry ban.

Hypothetical cases	Likely response in Norway	Likely response in France	Likely response in Poland	Likely response in Sweden
Person C: A person who had a temporary residence permit for the duration of his/her studies and contracted a "*pro forma*" marriage to obtain another residence permit. This person has now been regularly employed for one year. The fictitious nature of the marriage can be proven.	The person has breached the Law. He/she will be subject to an expulsion decision coupled with a permanent re-entry ban.	If the person is arrested and the marriage is fictitious, the person is subject to an APRF. The wedding and related residence permits are cancelled (+ possible penal sanctions). NB: if the marriage is regular but ends in a divorce within 4 years, the foreigner may have difficulty to renew his/her residence permit and be subject to an OQTF.	The person will be returned. The residence permit will be terminated and the "*Voivode*" will initiate a "decision of expulsion" *ex officio*.	There would be a need to consider the establishment of this person in Sweden. However, if the marriage is proven to be fake, the person is likely to be returned. A re-entry ban of two years can be envisaged but this is not automatic.
Persons D: A married couple bringing one child comes to the country under a false identity and is granted residence permits. After eight years in the country, they apply for citizenship. The processing of their application reveals their true identity. At this time the oldest child is 12 years old. They have also given birth to another child who is now 7.	There is no clear-cut answer and a more detailed analysis of the case is needed. The situation of the children may militate against an expulsion decision. Alternative means of "sanction" (penal or financial) may be envisaged.	There is no clear-cut answer. In law, the persons could be returned (through an OQTF decision). In practice, the presence of a child born in France may pledge against a return. NB: If one of the children had arrived before the age of 13 and had reached 18, a return would not be possible.	There is no clear-cut answer, but the situation of the children would seem to militate against a return.	An "amnesty/forgiveness" mechanism (delay of 4 years after false information) could apply here. Moreover, the interest of the children militates against an expulsion. In practice, it is likely that the persons would not be granted citizenship but would keep their residence permits and be allowed to apply again for citizenship after another (normal) delay of 5 years.

Source: Econ Pöyry, on the basis of findings in this study

6.3 Conclusions

Rules and practices for the return of irregular migrants are best understood in their national context. History, migration patterns and political changes play a role, and there are no "one-size-fits-all" solutions to tackle the diversity of situations. As is the case for this study, comparison can prove instructive, but it requires a wider understanding of national institutional and legal systems. The findings presented here should be considered as a way to stimulate reflection at national and European level and not as recommendations to "cut and paste" measures from other models.

A wealth of experience in Europe

The sample of countries illustrates the diversity of return polices in Europe:

- The nature and number of cases vary greatly. Given their size and geography, France and Poland are more exposed to diverse migration patterns combining regular and irregular channels of entry, (over)stay and transit. In Sweden and Norway, a significant share of cases would seem to consist of persons whose asylum requests have been rejected (more than two thirds of irregular migrants in Norway are former asylum seekers according to estimates by Statistics Norway).
- Institutional and administrative set-ups differ. There are pros and cons with every system, and each country is confronted with complex, and sometimes contradictory, options to guarantee that the decision-making process is both fair and cost-effective. Given their size and the number of cases, Sweden and Norway have opted for a centralised system of case-handling. In France and Poland, authorities representing the State at sub-national level play a primary role. Depending on the complexity of the situation and the nature of the return decision, the examination of the case by the administration and possible removal of the person may take between one day and several months.
- The nature and legal consequences of return decisions are diverse. Two logics emerge from the array of practices reviewed in this report. A first type of decisions imposes a return while assuming that the person will leave voluntarily. Such decisions apply notably in "obvious" or "simple" cases such as the rejection of a permit request or illegal entry. A second type is more directly enforceable and is often accompanied by the use of administrative detention. Such decisions may also involve greater legal consequences for the persons concerned in terms of re-entry bans. However, the main criteria for choosing between one or the other type of decisions vary depending on the country: the seriousness of the irregularity (Norway); the possession of a regular permit in the past or the time taken by the administration to deal with the case (Sweden); the fact of having had an application for a permit rejected or the fact of being arrested "without papers" (France); the assumption that the person will leave voluntarily or not (Poland).
- The provisions of the "Return Directive" would seem to reinforce a division of tasks between two types of responses, or at least two levels of gravity. In the case of an irregular entry and short irregular stay, and in the absence of family ties, a rapid response should be provided by the administration or the police, including through the possible use of coercive force (such as detention) and re-entry bans. In the case of an irregular stay having led to a longer presence in the territory and possible family ties, greater protection should be given to the persons concerned.

- The context of the transposition of the "Return Directive" provides a window of opportunity for mutual learning and cooperation, as well as for reviewing national rules and practices. Comparative information is scarce but may prove even more necessary in future with the development of a common EU return policy. This study seeks to fill some gaps. Several financial tools are in place – such as the European Return Fund or the EEA financial mechanisms – to support closer exchange between European countries.

Norway's specificities

As regards Norway, this study sheds light on a number of specific issues:

- Re-entry bans: The use of re-entry bans in Norway - both in terms of automaticity and of the length of the prohibition to re-enter - is not in line with practices in other countries, nor would it seem to correspond to future EU requirements, with far-reaching implications for the persons concerned. Moreover, the need for the administration to weigh "proportionality considerations" in order to set the duration of the ban adds to the complexity and length of the case-handling process. The use of re-entry ban would deserve particular attention in the context of the transposition of the "Return Directive" into Norwegian law.
- Institutional set-up: Case-handling may be more homogeneous and cost-effective in Norway given the central role played by UDI. The establishment of a police's agency for immigration (PU) specialised in asylum cases also provides a development of possible interest to others. On the other hand, a wider set of actors takes part in the decision-making process in the other countries, also as a way to provide control over the administration: judicial and administrative Courts are more directly involved for the appeal of administrative decisions; civil society and non-administrative experts would also seem to play a more active role of legal assistance and expertise in the other systems.
- Monitoring and statistics: While it is difficult to estimate the number of irregular migrants, a collaborative effort between UDI and Statistics Norway in 2007/2008 led to the development of a methodology which will provide a picture of the relative numbers over time. Norway may thus be expected - perhaps more than other countries given the centralisation of information - to collect and publicise thorough data on the activities of the police and administration, as well as to assess the enforcement and impact of its return decisions. The lack of an informed overview has been identified as an issue by the authorities and efforts are being made to improve the monitoring of cases.
- Detention: in order to comply with the "Return Directive", Norway will have to introduce a maximum length of detention time for the purpose of removal.
- Regularisation and voluntary return: Although this goes beyond the scope of this study, it can be observed that practices related to "regularisation" and "voluntary return" are less developed in Norway than in other countries.

In this context, the efforts of Norway to compare its system with others are worth underlining. Migration has been and will continue to be a structuring feature of Norway's demography, economy and society. Despite differences of opinion, Norway would seem to have the means, and the ambition, to develop a pragmatic and effective migration policy which can base itself on the highest standards of international and European human rights law.

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Additional references for Norway, France, Poland and Sweden are provided at the end of each country section.

Annex 1: Background statistics

Data on the number of irregular migrants

By the very nature of illegal immigration, reliable estimates on the scope and nature of this reality are difficult to obtain. According to the European Commission: "estimates of the total number of illegal migrants in the EU include two to three million (Global Migration Perspectives 2005), 4.5 million (IOM 2000) and seven to eight million (United Nations' Trends in Total Migrant Stock: The 2003 Revision).

Estimates of annual increases of illegal immigrants into the EU include 500 000 (Wiener Zeitung 2005) and 350 000 (Global Migration Perspectives 2005). However, aggregating available estimates for 21 individual Member States suggests that there is an annual inflow of illegal migrants to the EU of between 893 000 and 923 300.

It needs to be noted that most estimates that are available relate to the period prior to 2004 and the accession of the EU-12, where nationals from those countries were considered as third-country nationals" (European Commission 2008b).

Table A1.1 Estimates of irregular migrants in the countries under review

	Population	Estimates of irregular migrants
France	59 635 000	300 000 (a) 300 000 - 500 000 (b) 300 000 - 400 000 (c)
Poland	38 218 500	45 000 - 50 000 (d and e)
Norway	4 525 000	18 196 by 1.1.2006 (f)
Sweden	8 940 800	31 000 (f)

Notes: a: Boswell, C. and Straubhaar, T. (2004): The Illegal Employment of Foreigners in Europe, http://www.migration-research.org/dokumente/articles/ie0401-forum.pdf
b: International Centre for Migration Policy Development (2005): Estimates on the number of illegal migrants, http://www.icmpd.org/uploadimg/Metropolis%20Presentation%2D9%2D2003%2DMJ%2D1.pdf
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Source: European Commission 2007b, UDI 2008

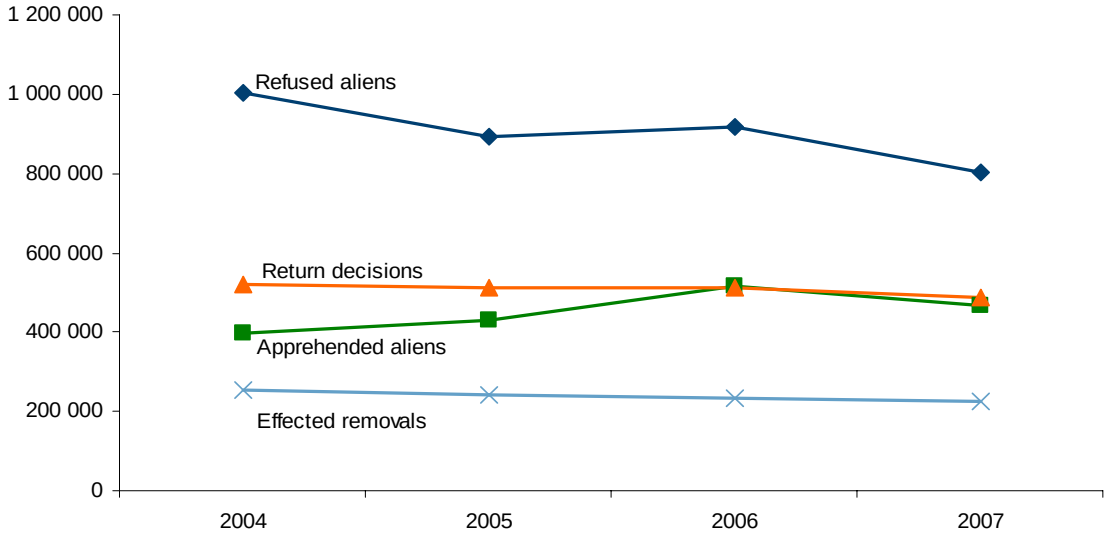
Data on refusals, apprehensions, return decisions and removals

The main source of data related to irregular migration at EU level is the so-called CIREFI data collection (Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration) managed by Eurostat. Latest figures can be found in the Commission's annual reports (European Commission 2009).

Although data must be interpreted with caution, the CIREFI collection is fairly comprehensive as it includes national data on refusals of entry at the border (category M1), apprehensions of irregular migrants in the territory (M2), apprehended facilitators (M3), apprehended facilitated aliens (M4) and removed aliens (M5). Ireland, Luxembourg and the United Kingdom have failed to provide data in recent years.

For return decisions and effected removals, available data come from the calculations for the allocations of resources of the European Return Fund and not from CIREFI (which explains why data are available only from 2004 and not 2002 as for refusals and apprehensions).

Figure A1.1 Overview of actions against irregular migration in the EU 2004-2007



Source: European Commission 2009

Figure A1.1 provides an overview of the actions taken by public authorities in the field of irregular migration in recent years. Key facts include (European Commission 2009):

- Between 800 000 and 1 million of aliens were refused entry at the border (category M1) annually over 2004-2007. About 70 per cent of all recorded refusals took place at the border between the Spanish cities of Ceuta and Melilla and Morocco. The number of refusals decreased from a level around 1.38 million in 2002. The main cause of this decrease may be due to the accession of the eastern European countries to the EU in 2004 and 2007.
- The number of apprehensions of aliens illegally present (category M2) has remained relatively stable over 2002-2007 at about 450 000 apprehensions per year. This stability hides significant increases or decreases in certain Member States (+1071 % in Cyprus; +256 % in Greece; -77.5 % in the Czech Republic; -71 % in Austria). Apprehensions in Spain, Italy, France and Greece represent about two thirds of the total number of apprehensions registered in the EU.
- Available information on return decisions and effected removals also shows a certain degree of stability, although a decreasing trend can be identified. The number of return decisions fell slightly from 521 244 in 2004 to 488 475 in 2007 (-6.3%), while effected removals went down from 252 391 to 226 179 (-10.4%).

According to the Commission, if the return policy is measured by comparing the number of effected removals to the number of return decisions, the "effectiveness rate" was 48 per cent in 2004 and 46 per cent in 2007. However, if data for Greece were to be excluded from the calculation (as Greece expels a high number of third-country nationals without prior issuance of a return decision), the "effectiveness rate" would be the same (48 per cent) in 2004 but would fall to just 33 per cent in 2007.

The Commission therefore concludes that "only between a third and a half of return decisions in the EU are effectively carried out and end in the removal of the third-country national concerned" (European Commission 2009).

Table A1.2 Return decisions and effected removals over 2005-2007

	Return decisions (2005-2007)	Effected removals (2005-2007)	Ratio removals / return decisions
Greece	54 608	141 777	2.60
Estonia	183	252	1.38
Bulgaria	3 310	4 380	1.32
Slovakia	7 360	6 616	0.90
Latvia	613	537	0.88
Cyprus	10 720	9 219	0.86
Slovenia	12 036	8 938	0.74
Spain	125 903	85 958	0.68
Portugal	18 719	10 746	0.57
Austria	47 850	26 780	0.56
Poland	38 571	20 947	0.54
Malta	4 602	2 423	0.53
UK	250 300	130 323	0.52
Finland	11 996	6 085	0.51
Sweden	51 063	25 254	0.49
Hungary	23 247	11 385	0.49
Netherlands	81 952	39 368	0.48
Germany	135 352	62 202	0.48
Italy	236 862	68 000	0.29
France	226 484	55 063	0.24
Belgium	126 589	29 213	0.23
Czech Republic	31 185	6 607	0.21
Lithuania	3 179	656	0.21
Ireland	11 773	2 110	0.18
Romania	14 244	1 957	0.14
EU TOTAL	1 528 711	756 796	0.50

Source: European Commission 2009 on the basis of national data. No complete data for Denmark and Luxembourg.

On the basis of Table A1.2, the Commission identifies four groups of countries (European Commission 2009):

- A first group would be composed of the Member States for which the number of effected removals is higher than the number of return decisions (Greece, Estonia and Bulgaria). This situation is exceptional but can be explained by the existence of readmission agreements with third countries whereby the issuance of a return decision is not a precondition for removal.
- The second group would be composed of Member States with a relatively high ratio of effected removals, ranging from 90 per cent (Slovakia) to 51 per cent (Finland).
- A third group of countries shows a moderate level of "effectiveness", ranging from 49 per cent (Sweden) to 29 per cent (Italy).
- Finally, some Member States seem to have a lower level of "effectiveness" in returning illegally staying migrants (less than 25 per cent). Among them are France, Belgium and the Czech Republic.

Data on the costs of return measures

According to the European Commission, "an average cost of return, including only the cost of arranging transport for returnees back to their countries of origin, together with their escorts, has been calculated and amounts to around € 1 000 per person returning in most Member States. (…) The overall cost of return operations, including the cost of detention and of other activities, undertaken both in EU Member States and in third countries, is clearly much higher than this, though insufficient data are available to indicate how much higher it is likely to be" (European Commission 2005d).

The exact cost depends on whether the return is voluntary or enforced: "although the extent of the difference shown by the data collected varies significantly, the cost of enforced return, as might be expected, is in almost all cases higher than when the return is voluntary" (European Commission 2005d).

Data on SIS registration

Data on SIS activities also inform about the number of irregular migrants registered in the system. According to the Schengen Convention (Article 96), the Member States are encouraged to register "illegal aliens" that pose "a threat to public order or national security and safety" or who "have been the subject of a deportation, removal or expulsion measure... accompanied by a prohibition on entry or, where appropriate, residence".

Though it is for the Member States to decide when an "alien" poses a threat to "threat to public order or national security", the Schengen Convention encourages them to register those convicted of a criminal offence carrying a custodial sentence of one year a more (a low standard which may encompass "minor" crimes) together with "aliens" where there are "serious grounds" to suspect them of committing "serious offences" or "genuine evidence of an intention to commit such offences".

However, overall, there is a broad discretion over who can be registered in the SIS and Member States have clearly taken very different approaches to Article 96. In 2003, 778 886 people were registered in SIS as aliens to be refused entry in the Schengen Area, 77 per cent of which had been registered by Germany and Italy (Table A1.4).

Table A1.3 Article 96 alerts in SIS, 1 February 2003

Italy	335 306
Germany	267 884
Greece	58 619
France	52 383
Austria	33 732
Spain	10 882
The Netherlands	9 363
Sweden	4 454
Finland	2 727
Portugal	1 744
Norway	863
Luxembourg	406
Belgium	367
Denmark	147
Iceland	10
Total	778 886

Note: On 1 Feb. 2003 there were a total of 1 266 142 records relating to persons in the SIS. Of this total 390 368 records related to aliases. Of the 875 774 remaining records, 89 % are "article 96 alerts".

Source: Statewatch 2005 quoting the Schengen Joint Surveillance Authority.

As shown in Table A1.4 and Table A1.5, data on the overall number of "wanted persons" are quite stable over the years, with "unwanted aliens" constituting the large majority of this category.

Table A1.4 Valid (unexpired) entries for "wanted persons" in SIS on 1 January

	2005	2006	2007	2008
Wanted persons (main)(see Table 2)	818 673	882 627	894 776	859 399
Wanted persons (alias)	338 311	340 856	312 052	299 573

Source: House of Lords 2007, Council of the European Union 2008

Table A1.5 Breakdown of "wanted persons" registered in SIS on 1 January 2008

Article of the Convention	Number of valid records (not expired)
95 Wanted for arrest/extradition	19 119
96 Unwanted alien	696 419
97 Adult missing person	24 594
97 Minor missing person	22 907
98 Localisation	64 684
99.2 Check / observation (serious criminal offences)	31 568
99.3 Check / observation	9

Source: Council of the European Union 2008

Annex 2: The EU "Return Directive"

DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 16 December 2008

on common standards and procedures in Member States for returning illegally staying third-country nationals

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(b) thereof,

Having regard to the proposal from the Commission,

Acting in accordance with the procedure laid down in Article 251 of the Treaty [1],

Whereas:

(1) The Tampere European Council of 15 and 16 October 1999 established a coherent approach in the field of immigration and asylum, dealing together with the creation of a common asylum system, a legal immigration policy and the fight against illegal immigration.

(2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

(3) On 4 May 2005 the Committee of Ministers of the Council of Europe adopted 'Twenty guidelines on forced return'.

(4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.

(5) This Directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.

(6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay. When using standard forms for decisions related to return, namely return decisions and, if issued, entry-ban decisions and decisions on removal, Member States should respect that principle and fully comply with all applicable provisions of this Directive.

(7) The need for Community and bilateral readmission agreements with third countries to facilitate the return process is underlined. International cooperation with countries of origin at all stages of the return process is a prerequisite to achieving sustainable return.

(8) It is recognised that it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement.

(9) In accordance with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2], a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.

(10) Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted. An extension of the period for voluntary departure should be provided for when considered necessary because of the specific circumstances of an individual case. In order to promote voluntary return, Member States should provide for enhanced return assistance and counselling and make best use of the relevant funding possibilities offered under the European Return Fund.

(11) A common minimum set of legal safeguards on decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned. The necessary legal aid should be made available to those who lack sufficient resources. Member States should provide in their national legislation for which cases legal aid is to be considered necessary.

[1] Opinion of the European Parliament of 18 June 2008 (not yet published in the Official Journal) and Council Decision of 9 December 2008.

[2] OJ L 326, 13.12.2005, p. 13.

(12) The situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed. Their basic conditions of subsistence should be defined according to national legislation. In order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation. Member States should enjoy wide discretion concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive.

(13) The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued. Minimum safeguards for the conduct of forced return should be established, taking into account Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders [1]. Member States should be able to rely on various possibilities to monitor forced return.

(14) The effects of national return measures should be given a European dimension by establishing an entry ban prohibiting entry into and stay on the territory of all the Member States. The length of the entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed five years. In this context, particular account should be taken of the fact that the third-country national concerned has already been the subject of more than one return decision or removal order or has entered the territory of a Member State during an entry ban.

(15) It should be for the Member States to decide whether or not the review of decisions related to return implies the power for the reviewing authority or body to substitute its own decision related to the return for the earlier decision.

(16) The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.

(17) Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.

(18) Member States should have rapid access to information on entry bans issued by other Member States. This information sharing should take place in accordance with Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) [2].

(19) Cooperation between the institutions involved at all levels in the return process and the exchange and promotion of best practices should accompany the implementation of this Directive and provide European added value.

(20) Since the objective of this Directive, namely to establish common rules concerning return, removal, use of coercive measures, detention and entry bans, cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

(21) Member States should implement this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation.

(22) In line with the 1989 United Nations Convention on the Rights of the Child, the 'best interests of the child' should be a primary consideration of Member States when implementing this Directive. In line with the European Convention for the Protection of Human Rights and Fundamental Freedoms, respect for family life should be a primary consideration of Member States when implementing this Directive.

(23) Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.

(24) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

[1] OJ L 261, 6.8.2004, p. 28.

[2] OJ L 381, 28.12.2006, p. 4.

(25) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Given that this Directive builds — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code [1] — upon the Schengen acquis under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark shall, in accordance with Article 5 of the said Protocol, decide, within a period of six months after the adoption of this Directive, whether it will implement it in its national law.

(26) To the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code, this Directive constitutes a development of provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis [2]; moreover, in accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application.

(27) To the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code, this Directive constitutes a development of provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis [3]; moreover, in accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, Ireland is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application.

(28) As regards Iceland and Norway, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code — a development of provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point C, of Council Decision 1999/437/EC [4] on certain arrangements for the application of that Agreement.

(29) As regards Switzerland, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code — a development of provisions of the Schengen acquis within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC [5] on the conclusion, on behalf of the European Community, of that Agreement.

(30) As regards Liechtenstein, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code — a development of provisions of the Schengen acquis within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/261/EC [6] on the signature, on behalf of the European Community, and on the provisional application of, certain provisions of that Protocol,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.

[1] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006, p. 1).
[2] OJ L 131, 1.6.2000, p. 43.
[3] OJ L 64, 7.3.2002, p. 20.
[4] OJ L 176, 10.7.1999, p. 31.
[5] OJ L 53, 27.2.2008, p. 1.
[6] OJ L 83, 26.3.2008, p. 3.

Article 2

Scope

1. This Directive applies to third-country nationals staying illegally on the territory of a Member State.

2. Member States may decide not to apply this Directive to third-country nationals who:

(a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

3. This Directive shall not apply to persons enjoying the Community right of free movement as defined in Article 2(5) of the Schengen Borders Code.

Article 3

Definitions

For the purpose of this Directive the following definitions shall apply:

1. 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code;

2. 'illegal stay' means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State;

3. 'return' means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to:

   — his or her country of origin, or

   — a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or

   — another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

4. 'return decision' means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;

5. 'removal' means the enforcement of the obligation to return, namely the physical transportation out of the Member State;

6. 'entry ban' means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;

7. 'risk of absconding' means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond;

8. 'voluntary departure' means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision;

9. 'vulnerable persons' means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

Article 4

More favourable provisions

1. This Directive shall be without prejudice to more favourable provisions of:

(a) bilateral or multilateral agreements between the Community or the Community and its Member States and one or more third countries;

(b) bilateral or multilateral agreements between one or more Member States and one or more third countries.

2. This Directive shall be without prejudice to any provision which may be more favourable for the third-country national, laid down in the Community acquis relating to immigration and asylum.

3. This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.

4. With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall:

(a) ensure that their treatment and level of protection are no less favourable than as set out in Article 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1) (b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions) and

(b) respect the principle of non-refoulement.

Article 5

Non-refoulement, best interests of the child, family life and state of health

When implementing this Directive, Member States shall take due account of:

(a) the best interests of the child;

(b) family life;

(c) the state of health of the third-country national concerned,

and respect the principle of non-refoulement.

CHAPTER II

TERMINATION OF ILLEGAL STAY

Article 6

Return decision

1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.

2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-country national's immediate departure is required for reasons of public policy or national security, paragraph 1 shall apply.

3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of this Directive. In such a case the Member State which has taken back the third-country national concerned shall apply paragraph 1.

4. Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.

5. If a third-country national staying illegally on the territory of a Member State is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished, without prejudice to paragraph 6.

6. This Directive shall not prevent Member States from adopting a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation, without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of Community and national law.

Article 7

Voluntary departure

1. A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.

The time period provided for in the first subparagraph shall not exclude the possibility for the third-country nationals concerned to leave earlier.

2. Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.

3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

4. If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.

Article 8

Removal

1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

2. If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period.

3. Member States may adopt a separate administrative or judicial decision or act ordering the removal.

4. Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.

5. In carrying out removals by air, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.

6. Member States shall provide for an effective forced-return monitoring system.

Article 9

Postponement of removal

1. Member States shall postpone removal:

(a) when it would violate the principle of non-refoulement, or

(b) for as long as a suspensory effect is granted in accordance with Article 13(2).

2. Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case. Member States shall in particular take into account:

(a) the third-country national's physical state or mental capacity;

(b) technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.

3. If a removal is postponed as provided for in paragraphs 1 and 2, the obligations set out in Article 7(3) may be imposed on the third-country national concerned.

Article 10

Return and removal of unaccompanied minors

1. Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.

2. Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.

Article 11

Entry ban

1. Return decisions shall be accompanied by an entry ban:

(a) if no period for voluntary departure has been granted, or

(b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

3. Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.

Victims of trafficking in human beings who have been granted a residence permit pursuant to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [1] shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.

Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.

Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

4. Where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third-country national who is the subject of an entry ban issued by another Member State, it shall first consult the Member State having issued the entry ban and shall take account of its interests in accordance with Article 25 of the Convention implementing the Schengen Agreement [2].

5. Paragraphs 1 to 4 shall apply without prejudice to the right to international protection, as defined in Article 2(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [3], in the Member States.

CHAPTER III

PROCEDURAL SAFEGUARDS

Article 12

Form

1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.

The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

2. Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return, as referred to in paragraph 1, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.

3. Member States may decide not to apply paragraph 2 to third country nationals who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

In such cases decisions related to return, as referred to in paragraph 1, shall be given by means of a standard form as set out under national legislation.

Member States shall make available generalised information sheets explaining the main elements of the standard form in at least five of those languages which are most frequently used or understood by illegal migrants entering the Member State concerned.

Article 13

Remedies

1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

3. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.

4. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.

Article 14

Safeguards pending return

1. Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:

[1] OJ L 261, 6.8.2004, p. 19.
[2] OJ L 239, 22.9.2000, p. 19.
[3] OJ L 304, 30.9.2004, p. 12.

(a) family unity with family members present in their territory is maintained;

(b) emergency health care and essential treatment of illness are provided;

(c) minors are granted access to the basic education system subject to the length of their stay;

(d) special needs of vulnerable persons are taken into account.

2. Member States shall provide the persons referred to in paragraph 1 with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 7(2) or that the return decision will temporarily not be enforced.

CHAPTER IV

DETENTION FOR THE PURPOSE OF REMOVAL

Article 15

Detention

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

(a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;

(b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.

The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.

Article 16

Conditions of detention

1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.

2. Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities.

3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.

4. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.

5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.

Article 17

Detention of minors and families

1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.

2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.

3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.

4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.

5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.

Article 18

Emergency situations

1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).

2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.

3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.

CHAPTER V

FINAL PROVISIONS

Article 19

Reporting

The Commission shall report every three years to the European Parliament and the Council on the application of this Directive in the Member States and, if appropriate, propose amendments.

The Commission shall report for the first time by 24 December 2013 and focus on that occasion in particular on the application of Article 11, Article 13(4) and Article 15 in Member States. In relation to Article 13(4) the Commission shall assess in particular the additional financial and administrative impact in Member States.

Article 20

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2010. In relation to Article 13(4), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2011. They shall forthwith communicate to the Commission the text of those measures.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 21

Relationship with the Schengen Convention

This Directive replaces the provisions of Articles 23 and 24 of the Convention implementing the Schengen Agreement.

Article 22

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 23

Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 16 December 2008.

For the European Parliament	*For the Council*
The President	*The President*
H.-G. PÖTTERING	B. LE MAIRE