

# The EU and Immigration Policies

Cracks in the Walls of  
Fortress Europe?

Christof Roos



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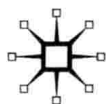
Cracks in the Walls of Fortress Europe?

Christof Roos

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# Acronyms

AFSJ	Area of Freedom Security and Justice
ALDE	Alliance of Liberals and Democrats in Europe
CCME	Churches Committee for Migrants in Europe
CEC	Commission of the European Communities
CEPS	Centre for European Policy Studies
COREPER	Committee of Permanent Representatives
DGs	Directorate Generals
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EDP	European Democratic Party
EEA	European Economic Area
EEC	European Economic Community
EESC	European Economic and Social Committee
ELDR	European Liberal and Democrat Reform Party
EMN	European Migration Network
EP	European Parliament
EPC	European Policy Centre
EPP	European People's Party
ERA	European Research Area
ETUC	European Trade Union Confederation
EU	European Union
EURODOC	European Council for Doctoral Candidates
FPÖ	Freiheitliche Partei Österreichs ("Freedom Party")
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
FSJ	Freedom Security and Justice
GATS	General Agreement on Trade in Services
GDISC	General Directors' Immigration Services Conference
G/EFA	The Greens/European Free Alliance
ICMPD	International Centre for Migration Policy Development

ILO	International Labour Organization
IOM	International Organization for Migration
ISCED	International Standard Classification of Education
JHA	Justice and Home Affairs
LIBE	EP Committee on Civil Liberties Justice and Home Affairs
MEP	Member of European Parliament
Mercosur	Mercado Común del Sur
MPG	Migration Policy Group
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
PES	Party of European Socialists
QMV	Qualified Majority Voting
S&D Group	Group of the Progressive Alliance of Socialists and Democrats to the European Union
SEA	Single European Act
TEC	Treaty of the European Community
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States
WTO	World Trade Organization



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# 1

## The Regulation of Immigration by the EU: An Empirical Puzzle

One of the key functions that a sovereign state fulfils is controlling the movements of people across its borders. This task, which determines which foreign citizens are allowed to enter the state territory and which are not, is referred to as “gatekeeping” (Hammar 1994: 188). States put up several gates to verify whether the foreigner who desires to enter and stay in the country has legitimate reasons for doing so. Checking people’s passports to determine whether someone is to be granted entry at the national state border is the first of these gates. A decision concerning more than just access to a territory is required if a foreigner intends to stay in the country for more than a short-term tourist visit. At this point, “immigration control policies” lay out the rules that determine their admission not only to the territory but also to subsystems of the society, such as the labour market and the welfare state (Freeman 2006: 228). Immigration policy is the “management of cross-border flows” (Ibid.), understood as the “rules and procedures” that govern “the selection and admission of foreign citizens” (Meyers 2004: 26). Immigration policy serves as the second gate in a state’s control of foreigners. It defines the conditions of admission and residence of foreigners who enter the country to stay for at least one year (Moulier-Boutang and Papademetriou 1994).

Determining these conditions is a highly salient topic in public and political discourse (Lahav 2004). Issues of access to the labour and educational markets, as well as redistribution in the welfare system, must be decided when immigrants enter and stay in a state. Immigrants consume public goods, are in need of housing, and can compete for employment with citizens (Freeman 1995, 2006). In addition, a state’s population becomes more heterogeneous as a result of immigration, which is perceived by many members of society as a challenge or even

a threat. Politicians and the media associate immigration with some positive issues but also overwhelmingly with negative issues, such as unemployment and crime, as well as global economic inequality and welfare state reform. It is not surprising then that immigration and its political regulation can impact the electoral success of parties and politicians (Messina 2007). Immigration regulation and sovereign statehood appear to be inextricably linked. The state is constituted by the power it exerts over its territory and its population (Jellinek 1914 [1900]). Immigrants are non-nationals, and their presence in the territory raises questions regarding their inclusion in society and future membership in the national community. Thus, any immigration policy also touches upon a state's concept of national identity and citizenship (Weiner and Teitelbaum 2001).

This book examines how and why the European Union (EU) member states are able to agree on the common regulation of immigration policies. At first glance, EU integration seems impossible in this policy area. Immigration regulation is held to be "a prime expression of the sovereignty of states" since it determines admission and exclusion of a state's non-members (Joppke 1999: 17). A state's authority in this policy area is said to be exclusive and not to be shared with any other state or supranational organisation. The establishment of an EU immigration policy would necessarily bring with it the influence of EU institutions in policy areas where the state is used to having autonomy. In terms of policies that affect redistribution within the welfare state, for example, EU member states have strongly rejected the influence of supranational organisations (Héritier 1999: 71; Leibfried and Pierson 1999). Undeniably, EU immigration policy would tackle these and other sensitive areas, which makes its regulation an unlikely case for EU integration.

Nevertheless, the conditions of entry and residence for some migratory categories were commonly regulated by EU member states in the 2000s. In the area of "regular immigration" or "legal migration", as it is also called (Pastore 2004: 109), EU rules apply to nationals from third countries who want to enter the territory as a student, researcher, highly skilled worker, or family member. Furthermore, the rights of those immigrants who stay legally as workers or have already been living in a member state for some time as long-term residents are commonly defined. The following EU legislation is of interest, listed from the earliest to the most recent date of adoption:

- "Council Directive of 22 September 2003 on the right to family reunification" (2003/86/EC)

- “Council Directive of 25 November 2003 concerning the status of third-country nationals who are long-term residents” (2003/109/EC)
- “Council Directive of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service” (2004/114/EC)
- “Council Directive of 12 October 2005 on a specific procedure for admitting third-country nationals for the purpose of scientific research” (2005/71/EC)
- “Council Directive of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment” (2009/50/EC)
- “Directive of the European Parliament and the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State” (2011/98/EU)

These six directives, adopted between 2003 and 2011, define the conditions of entry and residence for groups of foreigners, also called immigrant categories, who want to stay in the EU for a year or longer. Thus, the policies can be considered as immigration policies.<sup>1</sup> It is puzzling that common policies have been adopted in this policy area, given that it is an unlikely case for EU integration. Finding explanations for this puzzle triggered the research interest. As such, this study seeks an answer to the following question: Why and in which ways is the EU involved in defining member states’ immigration policies?

## **A single market and a common border**

Reflecting on the factors that can explain EU integration in this policy area suggests that the regulation of cross-border movements lies at the heart of regional cooperation in Europe. Even before the European Communities (EC)<sup>2</sup> were formed in the 1950s, the Benelux countries, as well as Northern European countries, established passport unions permitting free movement in these states’ combined territories (Turack 1972: 81–100). Soon thereafter, cooperation among EU member states created internal and external borders. These impact the EU’s insiders and outsiders differently. As much as these borders define an EU territory and an EU people, they also determine inclusion and exclusion of third-country nationals. Freedom of movement and residence was first established for

member states' citizens in the single market. The Treaty of Rome, signed in 1957, already allowed for the six founding states' citizens from the Benelux countries, France, Germany, and Italy to move to another member state in order to take up work. This freedom of mobility for labour was expanded to accompanying family members of EU workers in 1968. The Single European Act (SEA) of 1986 further extended this privilege to the freedom of movement for all EU citizens. The single market was envisioned as a space in which not only should goods, capital, and services be traded without restrictions, but also people should be able to move and establish themselves anywhere in the EU. The step-by-step creation of the single market followed the abolition of border controls at common borders of member states in 1995 with the Schengen Agreement (1990) (Ugur 1995a; Geddes 2000a). Since then, a common EU visa policy has been established, which regulates cross-border mobility and the short-term cross-border movements of non-EU nationals. This means that member states no longer decide unilaterally which people gain permission to enter their territory. Instead, EU institutions such as the European Commission (short Commission) and the Council of the European Union (short Council) determine the conditions for acquiring an EU visa and the enforcement procedures at the external Schengen/EU border. As soon as the control of people's movements at borders between member states was abolished and shifted to the external EU border, EU institutions obtained considerable discretion in coordinating cooperation on these policies among member states (Monar 2005; Lavenex 2010: 467). Borderless free movement within Europe and a harmonised EU border and visa policy go hand in hand. The EU's external borders have taken over the control functions of former national borders.

However, border control policy is different from immigration control policy. The conditions that must be met to access a territory are only one of multiple barriers that states put up for migrants who want to reside in their country (Hammar 1994). In comparison with border control policies, immigration control policies affect many more issues which have proved to be salient in political and public discourse. At the same time, the single market and its four freedoms question the well-guarded distinction between a common border control and a national immigration control policy. In theory, the borderless free market enables anybody to move and reside anywhere in the EU – citizens from member states as well as third-country nationals. This neo-functionalist paradigm, where common regulation of the single market triggers integration in other policy areas, needs to be studied with regard to EU immigration policies. This research examines whether a connection between mobility

rights for EU nationals in the single market triggers those rights for non-EU nationals as well. The tension between ultimate freedoms for EU citizens and limited mobility for third-country nationals living in the EU is considered to be driving EU institutions' pursuit of obtaining common immigration policies. The freedom of movement and establishment can only be granted to foreigners entering the EU by creating a common immigration policy (Callovi 1992; Philip 1994; Favell and Hansen 2002). Aside from mobility rights, the demand for immigrants' equality in social rights with member states' citizens is also an important dynamic in establishing common immigration policies (Garth 1986). The EU can be the level where immigrants' access to member states' welfare benefits, the labour market, and the education system is granted. The puzzle of why EU immigration policies are being established can be explained by studying EU institutions, member states, and other actors who are able to promote such rights at the EU level.

### **The EU polity and EU integration**

At the EU level, the immigration policy area was established at the beginning of the 1990s. Since then, EU institutions such as the European Commission, the European Parliament (EP), and the European Court of Justice (ECJ) have been gradually empowered by member states to promote integration. The EU polity constitutes these actors and their interactions with each other. The EU's treaties, such as the Treaty of Rome and its various reforms, define the conditions that, to a large extent, determine the resources and ability of actors to influence policy-making. Some authors of the small but growing field of research focusing on EU immigration policies suggest that the EU polity, with its particular enabling and constraining functions, explains EU integration in this area (Stetter 2000; Monar 2001; Maurer et al. 2003; Monar 2005; Papagianni 2006). The Commission is a supranational bureaucracy that has the ability to promote integration. By using its right to initiate policy-making through its policy proposals, it can call for common policy that is relevant to all member states (Uçarar 2001). The EP and its political parties represent the European citizens' voice at the EU level. The parties can also promote integration by discussing immigration in its committees and by giving a voice to advocacy groups (Geddes 1998; Papagianni 2006). However, the influence of the Commission, as well as the EP, to adopt common policy was curtailed significantly by member states that acted on immigration policy in the Council. Decisions were made unanimously until 2009. This institutional rule safeguarded

each state's sovereignty concerns. Member states did not have to agree on any EU legislation that would compromise their national preferences. As noted above, they would prefer to maintain their national sovereignty on immigration policy. The immigration policies that are examined in this study were adopted by the Council under conditions of unanimity. It was not until 2009 that the EP became a co-legislator in immigration politics and the Council agreed on common policy with a qualified majority. This means that most EU legislation on immigration was adopted, although institutional conditions did not favour compromise among member states to support the adoption of supranational policies. This raises the question: How are EU immigration policies accommodated in the interests of member states?

Scholars who focus on the evolving EU polity suggest that the Commission, in particular, but also the EP and non-governmental actors were still able to exert their influence on EU immigration policy-making (Uçarer 2001; Guiraudon 2003; Lahav 2004; Rosenow 2008). Member states are seen as the driving, but not exclusive, force behind EU immigration policy-making (Birsl 2005; Geddes 2008; Parusel 2010). EU integration in this policy area is considered to be an incremental process that is evolving slowly over decades due to the growing importance of EU institutions. Therefore EU policy-making and the pro-integrative role of the Commission as well as the EP need to be examined.

EU institutions, such as European courts, that do not directly participate in policy-making can also influence the process of European integration on immigration policies. The rulings of supranational jurisdictions reinforce the commitment of EU member states to international human rights law or European treaty law. The European Court of Human Rights (ECtHR) rules on states that breach the European Convention on Human Rights (ECHR), which must be applied by all members of the Council of Europe. Although there is debate whether international human rights law and supranational jurisprudence actually limit state discretion in controlling and restricting immigration (Guiraudon and Lahav 2000), signatory states to such conventions converge on respective policies (Joppke 1999; Guild 2004b; Forder 2005). The question of how EU policies were developed as a consequence of supranational jurisprudence needs to take the ECJ's rulings into account as well. The ECJ enforces the member states' compliance with the treaties of the EU. Concerning rights, the ECJ has become an advocate for enforcing the four freedoms in the single market (Guild 1998; Ireland 1998; Onslow-Cole 1999; Guild 2004b). Accordingly, the pressure for a common approach on immigration due to ECJ rulings will be examined.



## **Migration and the EU: Common challenges**

Beyond the study of integration dynamics within the EU, research on immigration policy should always bear in mind that these policies are interdependent from actual immigration movements. Moulrier-Boutang and Papademetriou (1994: 20) hold that immigration policy reflects actual migration and, at the same time, is a key element in shaping cross-border movements. As such, how EU member states have been confronted with migration should be considered. Insights into past and current migration movements to Europe show that all EU member states have been dealing with immigration in one way or another.

Until recently, post-war immigration into Europe affected North-western European countries more heavily than Southern European countries, as the latter were mainly marked by emigration until the 1990s. From the 1950s to the 1970s, migration in Europe was largely characterised by Southern Europeans moving to the industrial centres of North-western Europe. Other migrants came from the EU's immediate periphery or from former colonies of member states (Martiniello 2006: 312). Industrialised European countries established labour immigration policies in the post-war reconstruction phase. Countries such as France, Belgium, the Netherlands, and the UK established "labour-settlement schemes" that permitted the immigration of foreign labour with the opportunity for later settlement in the country. Policies in Germany and Austria had different approaches, which basically pursued a "labour-only system". There, migrants were supposed to fill labour shortages in the economy in the short term. In these "guest worker" schemes, labour migrants' settlement and large-scale family reunification was not anticipated. Yet the guest workers stayed and became immigrants. Therefore the latter system tended to become more like the former (Moulrier-Boutang and Papademetriou 1994: 21–22). This account of immigration in Europe has changed since the 1970s. Most North-western European countries largely suspended labour immigration during the 1970s and basically pursued a zero immigration approach from then on (Martiniello 2006: 320–321). In the 1990s and 2000s, immigration became a challenge that is now common to all member states. Three major developments have affected almost every member state in the EU and signified the need for regulation. The perception of a common problem can lead to a convergence in regulation (Menz 2009; Boswell and Geddes 2010: 232–234). Regulation solutions can be pursued at both the national and the EU level. Therefore the EU can also be involved in the search for policy models that offer ways