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**COORDINATING  
MIGRATION POLICY  
IN UKRAINE:  
LESSONS FROM POLAND**

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The report has taken into account the results of expert discussions, a study tour by Ukrainian specialists to Poland, and a conference "Migration policy problems and perspectives" that took place in Poland in October 2009.

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# Overview

The question of an effective migration policy is an urgent priority on the agendas of most countries today. How can migration processes be managed? How to minimize the flight of able-bodied citizens while encouraging the migration of individuals with skills that are needed by the destination country? How to staunch the flow of irregular migrants and what to do with them once they arrive? Those countries that are finding solutions to deal with these and other migration challenges are currently developing migration policy that is making a contribution to the economic and political evolution of their societies.

Ukraine occupies a pivotal position on the map of European migration, seeing major flows across its territory, as a country of origin, a transit country and a destination country. While the number of emigrating workers slowed down in 2007, the crisis in 2008 pushed Ukrainians to start looking for work abroad again. Although transit flows slowed down as borders began to be brought under control both in Ukraine and in adjacent countries, there is a general agreement as to the continued pressure of East-West illegal migration into and through Ukraine. The number of irregular migrants detected by Ukrainian state agencies exceeded 50,000 in 2008.

The significance of Ukraine in the European system of migration control was underlined in 2007 by the conclusion of a readmission treaty with the European Union, taking full effect in January 2010, which commits Ukraine to take in irregular migrants who crossed its borders into the EU. The agreement requires a high degree of coordination of Ukrainian agencies in migration management.

In 2009, the institutional and conceptual foundations for the formation and enactment of effective migration policy finally emerged. The Government began to take the steps that experts had for years talked about as urgent. Still, the much-anticipated establishment of a State Migration Service of Ukraine (SMSU) did not provide a solution to the institutional tangle of agencies currently responsible for migration issues. Although it exists *de facto*, *de jure* the Service has neither the institutional nor the judicial foundations to properly function. At the same time, setting up a service outside the Ministry of Internal Affairs of Ukraine (MIA) without the necessary legislative changes created new problems.

The reform process remains fragile, as it is limited by the larger political and institutional instability, severe Budget deficit and unclear prospects for Ukraine's entry into the EU. Given these factors, of great importance is the transfer of experience from new EU Member States, which only recently faced similar challenges as they developed fledgling migration control sys-

tems. Poland, in particular, appears well positioned to serve as an example of a country that successfully achieved major milestones on the way from a **policytaker** establishing the foundations of modern border and migration control, to a major player within the European migration policy framework.

To develop an effective migration policy, Ukraine needs many legislative and institutional changes. The most urgent steps are to: adopt a new edition of the Law of Ukraine “On the legal status of foreigners and stateless persons;” adopt the Law of Ukraine “On the State Migration Service;” and rework and adopt the Concept of State Migration Policy. At the institutional level, the most important objective remains the reform of the Ministry of Internal Affairs into an organ for developing and enacting state policy in the management of migration and state borders in Ukraine and working out principles of cooperation on the operational level among the relevant state agencies.

This report is the result of a project funded by the Ministry of Foreign Affairs of Poland to build on the established collaboration between two leading think-tanks in Poland and Ukraine, the Institute of Public Affairs and the International Centre for Policy Studies in monitoring the progress in Ukrainian migration policy reforms. Its main objective is the transfer of Polish experience in improving various aspects of professional border and migration control, analysis and projections of migratory flows, and the protection of migrants’ rights. The project has involved cooperation with the leading Ukrainian and Polish state institutions responsible for the design and execution of migration policy.

We believe that the Polish experience in reforming migration services and improving migration coordination policy could stand Ukraine in good stead. The project highlights the fact that Poland’s experience as an immigrant-emigrant country, occupying a transit location on the path of the East-West migratory flows, is relevant for its eastern neighbor, as Ukraine is seeking to improve its capacity for controlling illegal migration. Poland successfully completed reforms of its legal and institutional setups during its accession to the EU and integration into the Schengen zone. Significant milestones on this road were the conclusion of a readmission treaty with Schengen states in 1991, followed by signing parallel agreements with neighboring states and countries of origin, the harmonization of domestic legislation with the EU *acquis*, and the continuing professionalization of the Border Guard and other operational services.

The report acknowledges that Polish legal and institutional reforms cannot be emulated wholesale, as the key policy stimulus—an EU membership anchor—is currently missing in the case of Ukraine. Other factors place limits on progress: Ukraine has been so far granted far smaller financial assistance for improving its infrastructure and services; the economic downturn has reduced the amount of state investment; and relatively low priority has been

assigned to migration control in general state policy. At the same time, some new opportunities are beginning to open for Ukraine—primarily the launch of the Eastern Partnership, which serves as an enhanced framework for cooperation with the European Union on issues of common interest, and for which combating illegal migration is among the key objectives. Secondly, following the conclusion of the readmission treaty, Ukraine has been targeted with increasing technical assistance under EU-funded capacity-building projects, involving also the direct exchange of practices with the border and migration services of EU Member States, including Poland.

This study combines an overview of the magnitude of migration into, through and from Ukraine, followed by a critical review of the current stage of Ukraine's legal and institutional problems. It also presents a summary of key legal solutions, institutional and procedural mechanisms that enabled Polish state agencies to ensure adequate control of migratory flows up to and following EU accession. It is divided into five sections, followed by conclusions and recommendations.

The *first section* notes the rising significance of international migration on the agenda of developed states. As a country lying on key East-West routes for transit migration and increasingly itself a destination for both regular and irregular migrants, Ukraine urgently needs a well thought-out migration policy.

The *second section* identifies problems in the current Ukrainian legal and institutional framework of migration policy. It points out that, despite having overall well-developed legislation, the lack of a general policy concept and of a single normative act regulating the conditions for the entry, residence and departure of foreigners from the country reduces Ukraine's capacity for effective migration management. Also, the establishment of a central coordinating body, the State Migration Service of Ukraine, has failed to bring about improvement, as this agency has not yet operated.

The *third and fourth sections* outline the elements of the legal regulation and institutional setup of the Polish system of migration control, concentrating on the issue of particular significance to Ukraine's current situation—the development of a set of high-level statutory acts (in particular the Law of Ukraine "On the legal status of foreigners"), regulating the whole range of issues related to the entry, residence and departure of foreigners, clearly allocating power among central institutions, and providing for various forms of interagency cooperation. It also offers a critical review of Poland's progress towards a migration policy strategic concept and attempts at working out mechanisms for inter-agency coordination at the central level.

The *fifth section* develops on this general framework by identifying a set of legal provisions and institutional arrangements enabling Polish agencies

(in particular, the Border Guard) to conduct effective operations along the whole chain of activities from detection through apprehension and detention to expulsion of irregular migrants. Particular attention is paid to the legal framework and its enforcement with regard to guarantees of migrants' rights—especially those in temporary and long-term detention.

Finally, a set of general conclusions is offered, highlighting the factors decisive for the success of Poland's legal-institutional reforms and trying to consider to what extent these factors are present in the Ukrainian context. In addition, an attempt is made to evaluate shortcomings of current Polish migration policy, pointing to some limitations on the reform process and the resulting policy problems. These conclusions are followed by a number of recommendations on how to improve migration policy in Ukraine.



# 1. Why does Ukraine need an effective migration policy?

## 1.1 World trends: Migration on the global agenda

The right to freedom of movement was internationally recognized with the adoption in 1948 of the Universal Declaration on Human Rights. Since then, international migration has taken on enormous scale. By the end of the 20<sup>th</sup> and the beginning of the 21<sup>st</sup> centuries, the world had entered what many experts call the new “age of migration.”<sup>1</sup> Today, international migration is a global process that, as it involves nearly all continents and countries, has transformed into a major economic, social and humanitarian development factor.

The growing scale and intensity of international migration is driven by unequal development across countries, demographic changes, the globalizing economy, and military conflicts. According to the United Nations, there are 200 million migrants worldwide, or 3% of the world's population.<sup>2</sup>

Better migration control in developed countries has affected nearly all categories of migrants, restricting the opportunities to migrate legally, and becoming the driver of the growing use of illegal channels. Some 10-15% of all migrants or around 20-30 million are unlawful (irregular) migrants.<sup>3</sup>

The search for effective migration policy and the development of a workable migration management system is becoming an important task for national governments, whether they be in developed countries, which are mostly destination countries, or developing countries, which are generally countries of origin.

At the same time, there is an international effort to “put together the migration puzzle”<sup>4</sup> on the part of the Global Commission on Migration, established in 2003, the Global Forum on Migration and Development (Brussels, 2007), and the High-Level Dialog on Migration and Development at the UN (New York, 2006).

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<sup>1</sup> K. Zlotnyk, “Trends in International Migration since 1995: What do the numbers say,” *Issues in Migration*, 1999, №2(9), p. 5.

<sup>2</sup> International Organization for Migration, <http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/global-estimates-and-trends>

<sup>3</sup> United Nations' Trends in Total Migrant Stock: The 2005 revision, <http://esa.un.org/migration>

<sup>4</sup> United Nations: International migration and development, Report of the Secretary-General, [http://www.un.org/esa/population/hldmigration/Text/Report%20of%20the%20SC%28June%2006%29\\_English.pdf](http://www.un.org/esa/population/hldmigration/Text/Report%20of%20the%20SC%28June%2006%29_English.pdf)

The Global Commission on Migration was set up on 3 December 2003 in Geneva to determine understandable, multilateral and global responses to migration problems. Its initiators were Sweden, Switzerland, Brazil, Morocco and the Philippines. Today, the Commission has 19 members. Its mission is to ensure that migration stays on the global agenda, to analyze the gap between migration flows, to track the link between migration and other global problems, and to offer recommendations to the General Secretary and other stakeholders.

These and other international initiatives have come to the consensus that the issue of migration needs to be integrated with issues around development, national employment, labor markets and poverty alleviation.<sup>5</sup> Only in this case can migration processes serve as an engine of growth and development for all parties involved: for countries of origin, for destination countries and for the migrants themselves.

In 2000, the European Committee for Migration of the Council of Europe published a report called “On the path to a migration management strategy.” In this report, we see a departure from the narrowest understanding of migration management, as the control of immigration, to an important tool for improving the socio-economic development of both countries and interested parties.<sup>6</sup>

Today, migration policy is a complex of measures that belong to the sphere of public administration and include a decision-making process that is regulated by law, overseen by representative government, and directed at bringing order to migration processes.<sup>7</sup> The main components of a migration policy are: adjusting immigration policy; controlling state borders; inspecting places of employment; identifying individuals within the country; and socio-economically integrating immigrants.

Along with migration policy, it is important to distinguish the concept of migration management. This concept, which has long been used in the West, is little known in Ukraine. Migration management is a broader concept than simple migration policy undertaken by the state<sup>8</sup> and reflects the interaction of all stakeholders in the migration process—states, political parties, the press, interest groups and society as a whole—and the way that resources are distributed among them.<sup>9</sup>

<sup>5</sup> Economic Migration, Social Cohesion and Development: Towards an integrated approach, Thematic report, 8th Council of Europe Conference of Ministers responsible for Migration Affairs, [http://8emc.mvc-expo.com.ua/img/zstored/File/MMG8\\_thematic\\_report\\_color\\_final\\_en.pdf](http://8emc.mvc-expo.com.ua/img/zstored/File/MMG8_thematic_report_color_final_en.pdf)

<sup>6</sup> Ibid.

<sup>7</sup> C. F. Denysiuk, Candidate of Law, Directions for developing migration policy in Ukraine, State Tax Administration of Ukraine, Kharkiv Oblast, <http://www.nbu.gov.ua/e-journals/FP/2008-3/08dsfpvu.pdf>

<sup>8</sup> Approaches and methods of studying migration processes, [http://www.unesco.ru/files/docs/shs/2007/publications/Manual\\_on\\_Migration.pdf](http://www.unesco.ru/files/docs/shs/2007/publications/Manual_on_Migration.pdf)

<sup>9</sup> Managing labor mobility in the evolving global economy, [http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published\\_docs/studies\\_and\\_reports/WMR2008/Ch9\\_WMR08.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/studies_and_reports/WMR2008/Ch9_WMR08.pdf)

## 1.2 Migration situation in Ukraine

*Ukraine is a country of origin, transit and, more recently, destination for migrants. Their socio-economic situation has forced many Ukrainians to emigrate in search of work, resorting to legal and illegal channels. Ukraine's geographic location makes it a major transit point for migrants from Southeastern Asia, Central Asia and the Caucasus. And the increasingly strict regulation of migration in the European Union has had an impact on Ukraine, which runs the risk of hosting potential migrants on its territory. The economic crisis has contributed only a minor quantitative adjustment in the migration situation in Ukraine, but in the next while, it could have a qualitative impact on migration policy in Ukraine.*

### 1) *Ukraine as transit country*

For Ukraine, transit migrants are a fairly common phenomenon: neighboring on the EU, the country has found itself at the crossroads of five major global routes for illegal migration from the CIS and Southeast Asia to Western Europe. This network runs through the Russian Federation, Ukraine, Poland, the Czech Republic and Slovakia to other European Union countries. Lately, this route has become secondary as migration flows through Eastern Europe take a back seat to those through Southern Europe.

Overall, from 1991 through mid-2009, the State Border Service of Ukraine disclosed 228,000 irregular migrants and prevented them from crossing into Ukraine. The peak of such illegal migration across Ukraine's territory, 65,000 foreigners, was over 1994 – 1998.<sup>10</sup>

Statistics for 2009 show that Ukraine has become less attractive for transit irregular migrants. In the period between January and October 2009, there was a decline in the number of intercepted irregular migrants (Table 1).

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<sup>10</sup> The State Border Service of Ukraine, [http://www.pvu.gov.ua/control/uk/publish/article?art\\_id=67182&cat\\_id=62916&search\\_param=%D1%81%D1%82%D0%B0%D1%82%D0%B8%D1%81%D1%82%D0%B8%D0%BA%D0%B0&searchForum=1&searchDocarch=1&searchPublishing=1](http://www.pvu.gov.ua/control/uk/publish/article?art_id=67182&cat_id=62916&search_param=%D1%81%D1%82%D0%B0%D1%82%D0%B8%D1%81%D1%82%D0%B8%D0%BA%D0%B0&searchForum=1&searchDocarch=1&searchPublishing=1)

**Table 1. Number of irregular migrants disclosed over 2008–2009**

		2008	January–October 2009
Individuals detained for illegally crossing the state border		9,931	7,465
Individuals disclosed as irregular migrants		29,724	20,621
Including:	Illegally crossed border	3,331	2,076
	In violation of border/border crossing point regimens	91	12
	In violation of rules for staying in Ukraine	1,540	969
	Other violations	2	6
Potential irregular migrants denied entry		24,760	17,558
Individuals allowed entry across the state border, millions		89.1	68.2

Source: State Border Service

Among the reasons for these trends are improved enforcement of migration controls as a result of the Readmission Treaty between Ukraine and the EU coupled with cooperation between Ukrainian and EU border and migration services and a decline in migratory flows due to the worldwide economic crisis. A study undertaken by the BBC World Service has shown that the crisis slowed down the flow of labor migrants to destination countries. At the same time, despite all the problems with finding employment, immigrants are still in no hurry to return home.<sup>11</sup>

Moreover, preventive measures on the country's eastern borders to stop the entry of potential irregular migrants has made it possible to stabilize the situation on Ukraine's western borders. As a result, the number of attempts to illegally cross the state border by migrants from the traditional areas of origin of irregular migrants—Africa, Southeast Asia and the Near East—recorded in the first 8 months of 2009 were down to two.<sup>12</sup> Still, the tendency continues for large numbers of migrants from CIS countries, who intend to illegally cross into the European Union and generally make use of forged, borrowed or invalid documents, to flood Ukraine. Between January and August 2009, the SBS recorded an increase in the number of such irregular migrants who were Moldovan citizens from 18 in 2008 to 22 in 2009.<sup>13</sup>

<sup>11</sup> Michael Fix, Demetrios G. Papademetriou, Jeanne Batalova, Aaron Terrazas, Serena Yi-Ying Lin, and Michelle Mittelstadt, *Migration and the Global Recession*, Migration Policy Institute, Washington, DC, 2009.

<sup>12</sup> Security indicators are a top priority, <http://www.pvu.gov.ua/>

<sup>13</sup> Ibid.

## 2) *Ukraine as country of origin*

Labor migration remains at high levels, both qualitatively and quantitatively, in Ukraine today. According to a study published in 2008 by the Ukrainian Center for Social Reform and Derzhkomstat, the state statistics agency, the number of Ukrainian citizens who crossed the state border at least once in the previous 39 months in search of work amounted to nearly 1,500,000 or 5.1% of Ukraine's able-bodied adult population. Of these, nearly half (48.5%) went to Russia, and nearly as many went to European Union countries: Italy (13.4%), the Czech Republic (12.8%), Poland (7.4%), Spain (3.9%), and Portugal (3.0%).<sup>14</sup>

Among the top five countries supplying workers, Ukraine is in third place globally, after Russia and Mexico.<sup>15</sup> Estimates for the number of Ukrainians abroad vary from 2 million (IOM)<sup>16</sup> to 4.5 million (Institute of Ethnology, National Academy of Science of Ukraine).<sup>17</sup> According to the Institute of Ethnology, Ukrainians abroad break down as: over 2 million in Russia (officially only 169,000); 500,000 in Italy (vs 195,500); over 450,000 in Poland (vs 20,000); 250,000 in Spain (vs 52,800); 75,000 in Portugal (vs 44,600); 150,000 in the Czech Republic (vs 51,000); 75,000 in Greece (vs 20,000); 40,000 in the Netherlands; nearly 70,000 in Great Britain; and nearly 500,000 in the US.<sup>18</sup> Most Ukrainians abroad work in construction, farming and sales.

Only a small portion of Ukrainian migrants works abroad legally. Numbers from the State Employment Service show that, in the first half of 2009, some 38,200 Ukrainians officially had jobs abroad, which represents a 5.7% decline compared to the same period of 2008 (40,500).<sup>19</sup>

## 3) *Ukraine as destination country*

In 2005, migration trends began to show that Ukraine was shifting from the status of a country of origin to that of a destination country as well. In the first half of 2009, the positive balance of external migration in Ukraine was 5,500. Because of the crisis, this indicator is three times smaller than the 14,900 recorded in 2008.<sup>20</sup> The number of foreigners who are officially working in Ukraine has also fallen, from 19,800 in 2008 to 16,300 in 6 months of this

<sup>14</sup> External Labor Migration from Ukraine: Key results of selected tracking, [http://openukraine.org/doc/migration/Brief\\_results\\_UA/Libanova.doc](http://openukraine.org/doc/migration/Brief_results_UA/Libanova.doc)

<sup>15</sup> Migration and remittances: Eastern Europe and the Former Soviet Union, ed. by Ali M. Mansoor and Bryce Quillin, World Bank, 2006.

<sup>16</sup> Labor Migration Assessment for the WNIS Region, International Organization for Migration, 2006.

<sup>17</sup> <http://novynar.com.ua/politics/24701>

<sup>18</sup> Ibid.

<sup>19</sup> Migrants arrested abroad, Kommersant Ukraine, <http://www.kommersant.ua/doc.htm?DocID=1219372&IssueId=7000197>

<sup>20</sup> Kosovsky A., Crisis migration, <http://proua.com/analitic/2009/06/25/103539.html>

year (Table 2).<sup>21</sup> This can be explained by a decline in the labor market and a reduction in the number of available jobs. The regions with the most legal immigrants in Ukraine are Donetsk, Kharkiv and Odesa Oblasts, which are among the most industrialized in the country.

**Table 2. Total foreigners granted work permits in Ukraine**

	H1	For year
2005	NA	6,110
2006	4,186	10,116
2007	8,016	19,430
2008	10,806	19,800
2009	16,300	—

Sources: MIA Migration Services Department, Office of Migrant Work and Countering Illegal Migration, August 2008

According to MIA figures, there were 732,000 irregular migrants in Ukraine in 2007.<sup>22</sup> Still, the total of all migrants residing currently in Ukraine is not known. Today, there is really no reliable method or indicators that would make it possible to clearly establish the number of foreigners who are in the country illegally at any given time.

*Thus, intensified migrational flows make the question of a more effective migration policy and migration management more urgent in each individual country as well as in the world as a whole. The major migration flows passing through Ukraine require the Government to develop a well thought-out, balanced migration policy that will:*

- *ensure effective public administration of migration processes;*
- *support sustainable demographic and socio-economic development;*
- *strengthen national security;*
- *integrate national migration policy into Europe-wide policy;*
- *provide the conditions for Ukrainian citizens to exercise their rights without interference;*
- *protect the freedoms and lawful interests of migrants;*
- *provide effective migration control that is aimed at preventing and eliminating the negative impact of migration without at the same time allowing the violation of the rights, freedoms and lawful interests of migrants and Ukrainian citizens alike.*

<sup>21</sup> Migrants arrested abroad, Kommersant Ukraine, <http://www.kommersant.ua/doc.html?DocID=1219372&IssueId=7000197>

<sup>22</sup> Pishchulina O., Institutional support of state migration policy. <http://www.niss.gov.ua/Monitor/januar2009/7.htm>

## 2. What's wrong with Ukraine's migration management system? Legislative and institutional gaps

*Ukraine lacks a well-thought-out, systematic and effective migration policy. Although migration legislation is fairly evolved and liberal, it is missing a key component: a concept of migration policy. At the institutional level, seven ministries deal with various aspects of migration issues. Efforts to set up the State Migration Service of Ukraine did not fully comply with legal standards and have been accompanied by a stand-off between the President and the Premier—which has only served to complicate the process of developing an effective migration policy.*

### 2.1 Ukraine's migration legislation: So far, no concept

Since Ukraine became independent in 1991, the country has developed a fairly elaborate, working normative base to regulate migration processes. International institutions give Ukraine's legislation high marks for being one of the most evolved among CIS countries. Still, migration policy and migration legislation have never been a priority area for many of Ukraine's Governments. The country's migration legislation has mostly been developed under pressure from external factors rather than in the context of a conscious Ukrainian vision of the development of migration policy as a whole. This situation is not conducive to the development of a comprehensive and sustainable migration policy, as it is also noted in the Polish case in Section 3.

These external factors were mainly the policies of EU countries that were directed, firstly, at restricting legal migration from CIS countries and, secondly, at strictly countering illegal migration. In this last regard, Ukraine was both a supplier of irregular migrants and a country across whose territory third-country irregular migrants transited. It was demands on the part of the EU to strengthen border security and to fight transit illegal migration, and a reluctance to regulate bilateral processes involving the stay of Ukrainian migrant workers in EU countries, that largely shaped the developments in legislation and the institutions intended to enact it.

Ukraine's legislative base for migration includes: international treaties to which Ukraine is signatory—the Convention on the Protection of Human Rights and Basic Freedoms, the 1951 Convention on the Status of Refugees and its 1967 Protocol, both ratified in 2002; the Laws "On immigration," "On Refugees," "On Ukrainian citizenship," all adopted in 2001; The Law "On the legal status of foreigners" adopted in 1994 and last amended in 2005; the Law "On the State Border Service of Ukraine" adopted in 2003 and the Law "Amending certain legislation due to the adoption of the Law 'On the State Border Service of Ukraine'" adopted in 2003.

However, the legal system contains some key deficiencies, limiting the country's capacity for effective management of migratory flows. Ukraine still does not have a normative document that would establish the foundations of the country's migration policy, recognizing its goals, objectives, mechanisms and instruments. Over nearly two decades of independence, migration policy has tended to follow events, responding rather than being the result of a detailed analysis of the situation and a search for the best approach to reaching the desired goals.<sup>23</sup> According to Para. 10 of Art. 92 of Ukraine's Constitution, the country's laws alone are supposed to establish the basis for regulating demographic and migration processes.

Attempts to approve a migration concept have failed due to the poor quality of the bills and their failure to meet the challenges presented by migration. A number of such bills have made it to the Parliament agenda since 2002. The first bill, registered as №4227, was submitted by the Government; on 25 June 2004, a second one was submitted by National Deputies I. Haidosh and M. Shulga. After first reading, the legislature decided to use the one presented by the two deputies as the foundation and sent the bill to the Verkhovna Rada (VR) Human Rights, Minorities and Interethnic Relations Committee for further work.<sup>24</sup> To this day, thanks to the largely declarative nature of political slogans, the bill has never been passed.

Qualitatively new challenges connected to the signing of the Readmission Treaty with the European Union and pressure from Ukraine's European partners finally brought the question of comprehensive management of migration processes to the agenda of Ukraine's government. The decision by the National Security Council of Ukraine of 15 June 2007, which was reaffirmed by Presidential Decree №657 of 20 July 2007, noted the need to "immediately establish the basis for a national migration policy in Ukraine and increase the effectiveness of efforts to counter phenomena that represent a real threat to national security in Ukraine."<sup>25</sup> The Decree called for the development of a draft Concept of State Migration Policy in Ukraine by the end of 2007 and for it to be submitted to the VI Convocation of the Verkhovna Rada for approval. It also called for the system of public administration of migration to be optimized over 2007 – 2008 and for the question of a separate central executive body responsible for migration to be considered.

On 1 April 2009, the Rada once again rejected Bill №3506 "On a Concept of state migration policy" of 19 December 2008, which had been drafted by

<sup>23</sup> Malynovska O., Basis for migration policy in Ukraine and possible development scenarios, Migration and Labor Markets in Ukraine and Poland, Warsaw, 2003, p. 83.

<sup>24</sup> Does Ukraine need a specialized agency in migration? Laboratory of Legislative Initiatives, 13 January 2005, <http://migration.org.ua/index.php?module=pages&act=pag e&pid=93>

<sup>25</sup> Decree of President of Ukraine №657/2007 dated 15 June 2007, "On a decision by the National Security Council of Ukraine dated 15 June 2007 'On directions for Ukraine's national migration policy and urgent measures to improve its effectiveness.'"



the Ministry of Justice. In his concluding remarks, the head of the legal and specialized review administration noted that a number of provisions in the bill did not comply with the norms established in the Constitution of Ukraine, while the bill itself required serious reworking.<sup>26</sup>

As of December 2009, two alternative new Bills "On a Concept of state migration policy," №5085 of 02 September 2009 and №5085-1 of 16 September 2009, have been registered in the Rada, although they have not made it to the daily agenda so far. They were both drafted by different groups of VR deputies. The main legal and specialized review administration has had a considerable number of observations regarding both these bills and recommended that they be combined into a single one and pass first reading for further work.<sup>27</sup> Still, with a Presidential election in January 2010 and continued political instability domestically, Ukraine's legislature is highly unlikely to tackle this area actively.

The lack of a strategic view of the consequences of migration policies could lead to serious demographic and ethnic cross-purposes in Ukrainian society. The absence of a Concept of migration policy makes it impossible to resolve some aspects of the migration problem even today, while the lack of consensus among politicians in understanding the essence of migration policy and the way that powers are delegated among government institutions have made it impossible to establish an effective institutional system to manage migration.

## 2.2 Adopting a concept to improve migration legislation

The absence of a legal act providing strategic guidelines for national migration policy is a key obstacle to further legislative reform of such policy. Adoption of the Law "On a Concept of migration policy in Ukraine" will not only provide a foundation for an effective migration policy but will also open the door to improving all of the country's migration legislation. Amendments are also needed to the legal framework of asylum, rules for entry and stay of foreigners and foreign labor.

Once a migration policy concept is adopted, the Ministry of Justice of Ukraine plans to submit Bills "On the legal status of foreigners and stateless persons" (new edition) and "On refugees and persons who have the right to supplementary or temporary protection," which are both already scheduled on the Justice Ministry's work plan<sup>28</sup> for 2009.<sup>29</sup> These bills could settle the question

<sup>26</sup> Map of a Bill, [http://gska2.rada.gov.ua/pls/zweb\\_n/webproc4\\_1?id=&pf3511=33981](http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=33981)

<sup>27</sup> Map of a Bill, [http://gska2.rada.gov.ua/pls/zweb\\_n/webproc4\\_1?id=&pf3511=36153](http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=36153)

<sup>28</sup> Justice Ministry of Ukraine Work Plan for Q3'09, <http://www.minjust.gov.ua/0/21031>

<sup>29</sup> Undoubtedly, it is now necessary to revisit these schedules since not all of the bills will be drafted or submitted for approval to the Verkhovna Rada by the end of 2009.

of the legal stay on Ukrainian territory for foreigners who do not qualify for refugee status but have grounds for other forms of humanitarian protection. Resolving these problems will then allow Ukraine to more tightly and reliably track foreigners who happen to be on its territory.

A major problem is the **abuse of the refugee procedure**. When Ukraine joined the Geneva Convention on the Protection of Refugees in January 2002, it mainly took on commitments regarding the reception of asylum-seekers prior to being determined refugees and regarding the reception, location and adaptation of recognized refugees. However, once an irregular migrant is granted refugee status in Ukraine, the door the European Union is closed forever. Some irregular migrants apply for refugee status in order to legalize their stay in Ukraine, and then try to use this status to get to Western Europe by hook or by crook, where they try to get the same status in those countries. Often this is not just the result of a deliberate tactic by the migrant to be given refugee status in order to gain the freedom to continue traveling further West, but is tied into the fact that asylum-seekers have no material basis for remaining in Ukraine. Their essentially unlimited freedom of movement makes it possible for them to succeed in leaving Ukraine. Because Ukraine and the EU do not share any database of persons who have applied for or gained refugee status, migrants can even apply for such status in Ukraine and in another European country simultaneously.

Ukrainian agencies lack some of the legal and operational instruments available to their counterparts in the EU. The first step is a *revision of the Law of Ukraine "On the legal status of foreigners."* It establishes legal status and enshrines the basic rights, freedoms and responsibilities of foreigners and stateless persons who temporarily or permanently reside in Ukraine. It also establishes the proper procedure for deciding questions related with their entry into or departure from Ukraine and determines responsibility for any violations thereof. However, in its current form the law fails to provide answers to a number of other questions, especially those that arise since the signing of the Readmission Treaty between Ukraine and the EU. It is this law that should determine the status of people brought to Ukraine from the EU under readmission rules or the status of standard EU travel documents. It should probably reflect new norms regarding the procedure for and duration of detentions of foreigners at special temporary detention centers for the purpose of establishing their person or identification. But there is a problem with the fact that settling and detaining them in open centers requires considerable public funding when the procedure for granting or denying status can take more than two years.

Work is needed to amend the norms that establish responsibility for attempts to illegally cross the state border and illegally remain in Ukraine—requiring revision of the Laws of Ukraine “On refugees” and the norms of the Code of Administrative Offences (CAO) for breaking rules of entry, exit and stay on the territory of Ukraine, especially the norms establishing responsibility for attempts to cross the state border illegally and stay in Ukraine. In contrast to neighboring Poland, foreigners are treated the same as Ukrainian citizens for such violations, which are treated as mere misdemeanors, rather than felonies. This, in turn, affects standards for behaving towards and detaining them.

Another legal gap in Ukraine is the lack of an institution to provide additional protection to refugees or asylum that is comparable to the tolerant status of Poland. Having joined certain international conventions, such as the 1984 UN Convention Against Torture or the 1950 European Convention on Human Rights, Ukraine took on commitments not to return individuals to countries where they might be subjected to torture. Ukraine is likely to be unable to carry out these commitments, as its legislation does not provide any mechanisms for providing protection to such individuals. Nor can Ukraine receive foreigners or offer them protection if they do not meet the requirements of the 1951 Convention on Refugees. Yet their expulsion can be equally impossible because these people cannot be identified and there is a fear that they will be subjected to inhuman behavior or torture. Ukraine can only provide foreigners or stateless persons the status of refugee based on the Convention.

However, granting status as a conventional refugee can be one way to regulate the legal status of a very narrow circle of individuals. Of all those who apply, only 4% are given refugee status. At the same time, the development of human rights legislation establishes that refugees of wars must be granted protection, as well as individuals facing the death sentence, torture, natural disasters, and so on.

Apart from revising of the legal bases, progress is needed on *information systems*, enabling Ukrainian state agencies to identify irregular migrants. The practice of EU Member States is useful here. The EU countries, which are members of the Dublin Accord, have a common database system called EURODAC, which contains all the fingerprints of persons who have requested refugee status. Thus, any authorized person in the EU can, within 15 minutes of receiving the fingerprints of an applicant on-line, get all the information about whether this person has applied for such status previously in any other EU country and what the result of that application was.

Ukraine has been developing an inter-agency database known as Arkan since 2002. On 12 May 2008, the Ministry of Justice registered an inter-agency decree №396/15087 "On approving the 'Provision on an integrated inter-agency information and communication system to control persons, transport vehicles and freight truck crossing the state border (Arkan)'".

According to this provision, the Arkan system is to be available to the Administration of the State Border Service of Ukraine, the SSU, Ukraine's security service, the External Investigation Service of Ukraine, the Ministry of Internal Affairs of Ukraine, the State Customs Service of Ukraine, the State Tax Administration of Ukraine, the Ministry of Foreign Affairs of Ukraine, and the Ministry of Labor and Social Policy of Ukraine. The Arkan system itself is run by the Administration of the State Border Service of Ukraine.

The purpose of the Arkan system is to provide full information and analysis that is timely, accurate and functional to support the activity of those using the system when carrying out measures to:

- prevent and bar the entry into Ukraine or exit from Ukraine of persons who are, by law, not allowed to be in Ukraine because they:
  - have been temporarily restricted in their right to enter Ukraine, including at the commission of law enforcement agencies;
  - have been temporarily restricted in their right to leave Ukraine, including at the commission of law enforcement agencies;
- issue warrants at border crossing points for person who are hiding from registration, investigation and judiciary bodies or are evading punishment for criminal activities;
- stop the illegal activities of physical and legal entities that illegally direct migrants to Ukraine or transport them in transit across the territory of Ukraine;
- strengthen control over the upholding of rules for entry, exit and residence in Ukraine by foreigners and stateless individuals;
- and carry out other assignments in law enforcement, in accordance with the law.

Despite the serious progress made in developing the Arkan system, its potential is being held back by technical and financial obstacles that prevent the various agencies from making the fullest use of it.

Issues related to **migrant labor from Ukraine abroad** also remain unregulated at the legislative level. For now, Ukraine has bilateral agreements related to the employment of its citizens abroad with Armenia, Azerbaijan, Belarus, the Czech Republic, Latvia, Libya, Lithuania, Moldova, Poland, Portugal, Russia, Slovakia, and Vietnam. In regard to the social protection of its citizens, it has bilateral agreements with Bulgaria, Kazakhstan, Latvia, Lithuania, Moldova, Russia, Slovakia, and Spain. Regarding inheritance, it has agreements with Mongolia, Rumania and Hungary. In addition, Ukraine is signatory to 11 international multilateral agreements in the context of the CIS, regarding employment and social protection for its citizens, and to the 1977 European Convention on the Legal Status of Migrant Workers. Other countries in that Convention include France, Italy, Moldova, the Netherlands, Norway, Portugal, Spain, Sweden, and Turkey.

The main obstacle to effectively use bilateral agreements as a mechanism for handling the issue of employment for Ukrainian citizens abroad is that such agreements only cover those citizens who entered the destination country on the basis of a work visa and who have permission to work and reside there. Given that only a small percent of the overall number of migrant workers actually legally find employment abroad, many of these agreements, including the Agreements with Poland and Slovakia, are *de facto* not operative.<sup>30</sup>

*In this way, Ukraine's legislative underpinnings for migration issues do not provide the basis for migration policy in the country. There are no established goals, objectives, mechanisms, implementation instruments, or financial support for migration policy. Ukraine's legislation on refugees needs to be brought in line with international standards and best European practice. How to set up an asylum system, which Sec. 2 of Art. 26 of the Constitution of Ukraine establishes as a right for both foreigners and stateless persons, remains unresolved. Ukraine also needs to take an active position on putting together international agreements on the protection of migrant workers abroad in countries who take in Ukrainian workers.*

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<sup>30</sup> Shkurov V., Deputy Director of the Department of Cultural and Humanitarian Cooperation under the Ministry of Foreign Affairs of Ukraine, Report presented at the "Models for interethnic relations in Ukraine and Europe: Legal and ethno-political practice," roundtable, Kyiv, 5 November 2008.

## 2.3 No single migration agency – no effective coordination

### *Without a single body, managing migration is a problem*

Migration issues are handled by seven different central executive bodies in Ukraine (see Table 3).

**Table 3.** *Central executive bodies involved in migration issues and their responsibilities*

Entity	Area of responsibility
Ministry of Internal Affairs of Ukraine (MIA)	Coordinating activity to counter illegal migration
Ministry of Foreign Affairs of Ukraine (MFA)	Visa policy and consular activities
Ministry of Labor and Social Policy of Ukraine	Setting quotas for the labor market in Ukraine
Ministry of Health of Ukraine	Controlling the sanitary and epidemiological situation in Ukraine
State Committee for Nationalities and Religion (SCNR) under the Ministry of Justice of Ukraine	Handling refugees (to be reorganized as part of the state migration service of Ukraine)
State Border Service of Ukraine (SBS)	Border control; countering illegal migration at the state border
Security Service of Ukraine (SSU)	Control of foreigners related to national security

The fact that there is no single center for migration issues prevents the main objectives of control over migration from being effectively carried out, such as coordinated oversight over the entry, stay and exit of foreigners and inter-agency exchange of information about individuals who have been granted visas to enter Ukraine, who have crossed the state border, and who are prohibited from entering Ukraine.

At the same time, migration functions are scattered among many central executive bodies, complicating the decision-making process. As long as the question as to who is the ultimate authority on various aspects of migration policy in Ukraine remains, all kinds of tangles are likely to arise in interactions with migration agencies in other countries. This is evident, for instance, in the unresolved issue as to the responsibility of MIA and SBS for overseeing cooperation with border and migration services of EU Member States on the basis of executive protocols to the readmission treaty.

Effective migration management is also hampered by the fact that responsibility for expelling irregular migrants is split between the SSU and MIA. Thus, various groups of migrants are handled by different agencies. In particular, those who have:

- illegally entered the country are in the competence of SBS;
- legally entered the country but stayed beyond the expiry of their established term and become illegal as a result are in the competence of MIA;
- applied for refugee status or other protection and are being determined are in the competence of SCNR.

The absence of effective coordination among migration agencies has prevented certain problems from being resolved to date:

- effective control over irregular migrants and ensuring their right to asylum;
- coordinated interagency control over the entry and stay of foreigners and stateless persons in Ukraine and their timely exit beyond the country's borders;
- an appropriate mechanism for exchanging information among MFA, MIA and the SBS about individuals who have been issued visas for entry to Ukraine and who have crossed within the proper timeframe and registered at border crossings, as well as individuals who are prohibited from entering Ukraine.

Insufficient coordination among state agencies has prevented them from working out a single approach to the exchange of data on migration flows. Data from different sources often varies or is internally inconsistent. There is also no effective system for collecting, processing and analyzing statistical and other information about migration.

In this way, the main problems in coordinating and carrying out migration policy lie not so much in the unclear objectives of a migration service but in the scattering of law enforcement charges between the MIA and SBS. Although the current political instability does not provide favorable conditions for institutional reforms, a comprehensive institutional rearrangement is needed in the long run to ensure effective management of migratory flows. In this context, best practice from EU Member States, in particular from Poland, are worth considering.

In practice, it might be possible to improve the level of coordination of the process of preparing and enacting migration policy in this area if this activity were directed from a single political organ, the Ministry of Internal Affairs, while the State Border Service functioned as an autonomous border police under the Ministry with all the necessary tools of a policing body, including the right to undertake law enforcing activity across the country's entire territory. Such an arrangement has worked effectively in Poland, making it possible to concentrate strategic planning in the hands of the Ministry of International Affairs and Administration and the policing of aliens in the competence of the Border Guard.

In that situation, all the functions necessary for carrying out migration policy would be concentrated in the hands of a single political body. Further legislative changes would need to separate two aspects of migration management, assigning them to two institutions, subordinated politically to the MIA. The State Migration Service under the MIA would then be responsible for the "humanitarian" portion of the objectives of migration policy (issuing permissions for legitimate entries and stays, registering foreigners across the country, issuing citizenship papers, granting refugee status, and so on). The Border Police would be responsible for countering illegal migration, ranging from illegal entry into or crossing the border of Ukraine to the readmission and deportation of other country nationals. This institutional evolution will be possible, however, only after the full range administrative reform in Ukraine has been undertaken and the MIA is changed from the "Police Ministry" to a political internal affairs agency.

## 2.4 How the SMSU came to be: Jockeying for power and resources

Over the last 10 years, a number of bills that establish the basis for a migration policy and for setting up a single body to manage migration have gone to the Verkhovna Rada for debate. But none of them have been approved as a result of differences of an interagency nature among the central executive bodies that currently handle various aspects of migration. The main visible conflicts were around the question of how to combine functions of a humanitarian and law enforcement nature in a single agency, which could well lead to conflicts of interest.

However, other interagency conflicts that have not been visible to the public were battles to maintain functions for regulating migration and, as a result, to hold on to human and financial resources at the given agency. For instance, just handing over the function of pre-trial investigation of crimes related to the organization of illegal border crossing from the SSU to the MIA would require simultaneous transfer of 80% of the personnel from the SSU investigation units in border regions. In these regions, criminal cases launched by SSU detectives that involve border legislation constitute the absolute majority.

Another difficult question is the subordination of the centers for detaining irregular migrants and refugees. The transfer of such centers to the migration service would take major human and financial resources, including international technical assistance, away from the bodies that are currently responsible for them.

It is worth noting that the issue of setting up a "single migration service" in Ukraine has been constantly the focus of attention among Ukraine's international partners. In the section on "Migration and Asylum," the EU Action Plan



recognized this as a top priority in justice and internal affairs for 2006 – 2008. In the context of this Plan, the option of broad-based technical assistance to Ukraine was also included, provided such reforms were undertaken. This has also been one of Ukraine's key commitments in the Ukraine – NATO Targeted Cooperation Plan during the last three years.

The most common practice in European countries is to set up a migration agency within the Ministry of Internal Affairs. Setting up such an agency under Ukraine's MIA would make it possible to concentrate efforts within a single service to tackle five key objectives:

- handle the issue of Ukrainian citizenship;
- take in applications and handle the procedures involving foreign citizens and stateless persons who are applying for refugee status or additional protection in Ukraine;
- locate and detain persons who are in the process of applying for refugee status;
- detain, filter and identify persons who have been apprehended for illegally entering or remaining on Ukrainian territory;
- seek and expel persons who are on the country's territory illegally or who have lost the right to legally remain.

This is the kind of logic that operated when the Cabinet charged the Ministry of Internal Affairs with “carrying out the function of the specially-authorized central executive body for migration as delineated in legislation on refugees and coordinating the activities of central executive bodies in enacting migration policy until such time as the question of setting up a proper central executive body to handle this is legislated within the coming year” in its 18 June 2008 Resolution.<sup>31</sup> In essence, the Government did not set up a central executive body as the President had demanded and he responded by suspending several provisions in the Resolution and filed suit with the Constitutional Court to have it declared unconstitutional.<sup>32</sup>

## 2.5 SMSU: De facto exists, de jure cannot operate

On 24 June 2009, the Government issued Resolution №643, establishing the State Migration Service of Ukraine (SMSU) out of the State Department for Citizenship, Immigration and the Registration of Physical Entities, which was thereby terminated.<sup>33</sup> SMSU has been set up as a central executive body

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<sup>31</sup> Cabinet of Ministers of Ukraine Resolution of 18 June 2008 №558 “Some issues regarding public administration of migration policy”.

<sup>32</sup> Presidential Decree №643/2008 dated 21 July 2008.

<sup>33</sup> Cabinet of Ministers of Ukraine Resolution of June 24, 2009 №643 “On establishing State Migration Service of Ukraine”.

whose activity is directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Internal Affairs of Ukraine.

This same Resolution affirmed the Resolution on the State Migration Service of Ukraine, which established the main functions, objectives and powers of this agency. A certain part of the SMSU's powers is directly used to counter illegal migration, enforce legislation on the legal status of foreigners and implement readmission treaties. In addition, the Government altered the scope of MIA functions related to countering illegal migration, which were directly delegated to Interior Ministry bodies by the Laws of Ukraine "On the legal status of foreigners and stateless persons" and "On the police." These were transferred to the SMSU by this Resolution.

The Resolution was challenged as unconstitutional by the President of Ukraine, who pointed out that the acts of the Cabinet of Ministers had established changes in the overall functions of the MIA connected to the countering of illegal migration and had changed the general structure and size of the Ministry. Such changes, according to Part 1 of Art. 17, Point 22 of Part 1 of Art. 85 and Points 1, 2 and 10 of Part 1 of Art. 92 of the Constitution of Ukraine, come under the competence of Ukraine's legislature and are supposed to be dealt with exclusively through Laws of Ukraine. This caused the promulgation of a number of Presidential decrees<sup>34</sup> that dissolved all earlier Cabinet provisions authorizing the State Migration Service of Ukraine.

*Thus, the State Migration Service, de facto set up by the Government, de jure does not have the institutional or legal basis to function properly. There is no normative act that establishes its main objectives, functions and powers. Any powers that are granted to the Migration Service will affect "the status of foreigners and stateless persons and the basis for regulating migration processes in Ukraine." And it is these very legal categories that are regulated exclusively by Laws of Ukraine according to Art. 92 of the Constitution. Given the extreme caution with which such powers are granted to central executive bodies by the Verkhovna Rada of Ukraine and given the political situation, we can expect that instituting all these changes will be possible only after the conclusion of the upcoming Presidential campaign. This means not earlier than Spring 2010.*

*In our opinion, the State Migration Service would function most effectively today as an agency subordinated to the Ministry of Internal Affairs and administrated by the Government, and not as a central executive body. This would remove any direct disputes regarding the options for the SMS to exercise powers that lie within the law enforcement arena inside the Internal Affairs system. Moreover, the organization of interaction, both internally within the Ministry and externally through the Minister with other Ministries and agencies, would also be more effective.*

<sup>34</sup> Decree of President of Ukraine of July 14, 2009 № 544 "On suspending some provisions of the Cabinet of Ministers of Ukraine Resolution of June 24, 2009 №643;

Decree of President of Ukraine of August 27, 2009 №675 "On suspending some provisions of the Cabinet of Ministers of Ukraine Resolution of July 17, 2009 №750, of July 29, 2009 № 807 and №810, Resolution of Cabinet of Ministers of Ukraine of July 29, 2009 №958-p".

## 3. What lessons do Polish migration reforms offer Ukraine?

### 3.1 Amending legislation regarding foreigners

Work on reforming Ukraine's legal framework for state migration policy continues and the country has at its disposal the fundamental legal instruments that enable state services to carry out control functions. Still, the Polish pre-accession experience remains relevant, as it addresses two key challenges facing current Ukrainian migration policy—bringing order to the structure and hierarchy of the legal foundation and clear determination of areas of competence and procedures for coordination among central state institutions.

The Constitution of Ukraine requires that the legal norms regulating migration processes and human rights and civil freedoms be governed exclusively by laws of Ukraine, which are approved by the Verkhovna Rada, Ukraine's legislature. The general practice of EU Member State is that all the basic norms and procedures governing the conditions of entry, residence and departure of foreigners should be brought together into comprehensive aliens acts. Polish migration legislation underwent a complete transformation since the 1990s and 2000s, when consecutive amendments to the Act on Aliens introduced a modern legal framework. The amendments brought two benefits. Firstly, they clarified the structure of the legal bases, translating a set of declarations into a coherent system of norms, enforced by strictly-defined procedures and carried out by designated state services. Secondly, they introduced in domestic legislation the modern instruments for control of illegal migration found in the legal frameworks of EU Member States.

By the mid-1990s it had become apparent that the 1963 Act on Aliens had become obsolete, as it provided a mere sketch of the principles of migration control and was inadequate in the context of mass movements of persons across open borders following the end of the Cold War. The new Act on Aliens, adopted in 1997 and amended in 2001, followed by a complete revision in 2003 and successive amendments, is a much more detailed and comprehensive law, offering a much more precise wording of regulations and covering the entire range of operations of competent state agencies (see Section 4 for details).

From the perspective of the shortcomings of the current Ukrainian legal framework, the changes in the Polish Act on Aliens helped establish a solid base for working out procedures for adequate treatment of all categories of foreigners and stateless persons. Since 2003, four basic acts are in force, covering various types of persons who do not hold Polish citizenship: nationals

of EU Member States and members of their families; repatriates (foreigners of Polish origin who qualify for Polish citizenship); refugees and recipients of other forms of protection; and other third-country nationals. Each act regulates the manner in which state agencies handle a foreigner of a given category at all the steps of the aliens procedure (granting and change of status, entry and departure), which helped eliminate the legal limbo in which some foreigners found themselves. All these acts also adopted definitions of basic terms in compliance with standards found in the legislation of EU Member States and in the EU *acquis*.

Amendments to aliens legislation, introduced in revisions of the Act on Aliens of 1997, also laid foundations for the current system for managing illegal migration in Poland. The changes equipped the major state institutions implementing migration policy (listed in the following section) with the instruments of control common to the legal frameworks of EU Member States. The new solutions involved restricting conditions of entry and residence, facilitating expulsion and providing safeguards against abuse of the right to asylum.<sup>35</sup> Among the most important changes were:

- tightening the conditions for entry and residence:
  - extension of the criteria for denying a visa or residence permit to include the disparity between the declared and actual purpose of visit and valid suspicion of trafficking and smuggling;
  - requirement of demonstrating sufficient financial resources for residence in the country (or obligatory declaration of financing the foreigner's stay by the invitee);
  - requirement of demonstrating proof of legal residence and employment at the time of registration.
- facilitating expulsion:
  - introduction of a procedure of obligation to leave the territory of the country;
  - a broader list of grounds for expulsion for illegal employment or lack of required financial resources;
  - establishment of tolerated status, granted to foreigners who may not be expelled.
- safeguards against abuse of asylum:
  - adoption of the terms "manifestly unfounded application," "safe country of origin" and "safe third country" as grounds for refusing to consider asylum applications substantively;
  - introduction of an "accelerated procedure";
  - limitation of period in which an alien may file an application to 14 days after border-crossing.

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<sup>35</sup> A chronological overview of the changes in Polish migration law until 2004 can be found in: A. Kicingier, *Between Polish Interests and the EU Influence—Polish Migration Policy Development 1989-2004*, CEFMR 9/2005, Working Paper Central European Forum for Migration Research: Warsaw 2005, pp. 10-16.

This report considers in particular the measures enabling state services to identify and expel irregular migrants as this is the most urgent task facing Ukraine following the full entry into force of the readmission treaty with the European Union.

## 3.2 Developing strategy for migration management and improving institutional coordination at the central level

Poland offers mixed experience with regard to the elaboration of a strategic concept for national migration policy. On the one hand, the country has failed to develop a single document outlining the directions of state activities in the entire field of migration management, covering at the same time combating illegal migration, promoting lawful movement and providing incentives for return and contacts with Polish emigrants. This is related to the low priority assigned to migration in overall state activity, as well as the absence of a coordinating analytical and policy center, which is essential for producing, promoting and monitoring the implementation of the concept. On the other hand, as part of the EU accession process, some strategic documents were developed for coordinating the activities of relevant state agencies in more narrow fields of migration policy, in particular border control. Immensely useful as tools for mobilizing resources and coordinating the actions of state agencies, these documents did not cover some vital aspects of state policy in migration. As a result, the level of cohesion and coordination of national policy on migration remains uneven, ranging from high in the case of combating illegal migration and enforcing border and residence checks, to low in the case of policy on integration of migrants and emigration.

This failure to develop a comprehensive migration policy concept is due both to unfavorable institutional and environmental factors and to the unresolved fundamental question as to the desired directions of state policy. Firstly, the priority of entry into the EU and Schengen, which determined state activities in this field, did not provide a good environment for broader reflection over the needs of Polish society and the interests of the Polish state. In particular, the preoccupation of the EU with the security of external borders and countering unauthorized migration required that these issues be accorded necessary status, leaving little space for considering other aspects of state action. Secondly, as noted by experts, in the last two decades Poland failed to develop a single state migration doctrine. According to Antoni Rajkiewicz, author of the "Report on the State Migration Policy," consensus was not reached that would bridge two divergent approaches to migration policy: on the one hand, the elaboration of a legal-institutional framework regulating the conditions for foreigners' entry and residence in line with the EU *acquis* and, on the other hand, the integration of immigrants into Polish society in light of its

demographic and economic needs as well as cultural adaptability, consistent with the priorities outlined in general national strategic documents.<sup>36</sup>

The positive example can be noted in the fact that, during EU accession process, a strategic approach was adopted with regard to questions of border management and the control of illegal migration. This involved the collection and analysis of available institutional, financial and human resources, the identification of actions needed to achieve the general objectives in border and migration security, and the allocation of responsibilities to various ministries and operational services. The Ministry of the Interior took the leading role as a coordinating agency in the process and specialized bodies were established for facilitating inter-agency collaboration to meet the objectives. Cooperation was regulated by a strategic document, *Poland – The Strategy of Integrated Border Management*, elaborated by the Ministry of Interior in 1998 and updated in 2000, which was a novel type of strategic document.

As noted in an assessment made by one of the authors of this study in 2007, the Strategy

“included a detailed description of competences and tasks for particular departments in the scope of border management, the experience in the co-operation with other neighboring countries, as well as the policy and the principles for planning and the allocation of financial resources intended for border infrastructure development. [Moreover, it] comprehensively stated the necessary tasks to be fulfilled by the Polish government administration in the period before 31 December 2002 in order for Poland's eastern border to become an external border of the EU.”<sup>37</sup>

The process of enforcing the Strategy was overseen by the Interdepartmental Group for State Border Development, established by a regulation of the Prime Minister of 30 October 1998. The Group worked out executive strategic documents, which were revised to reflect the changing priorities in the course of the EU and Schengen accession: the Plan of State Border Development in 2000, the State Border Development Program in the years 2000 – 2002 and the Assumptions for a State Border Development Strategy by 2010.

The EU accession process was also an incentive for the establishment of a separate office at the central level for dealing with migration affairs. The Office for Repatriation and Aliens, set up in 2001, did not become, however, a central immigration office and multiple functions of state policy remained scattered among various institutions (see Section 4.1 for an overview of the current division of competence among central agencies). Visa policy re-

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<sup>36</sup> Pacek M., “Polska polityka migracyjna na tle rozwiązań i doświadczeń Unii Europejskiej,” *Studia Europejskie*, №4/2005.

<sup>37</sup> Kaźmierkiewicz P., *The Polish Experience in Controlling Illegal Migration: Lessons for EU Candidates and Neighbors*, Institute of Public Affairs, 2007, p. 20.

mained in the unique competence of the Ministry of Foreign Affairs while legalizing of residency continues to be the area of responsibility of the regional administration and the Office for Foreigners supervised by the Minister of the Interior. In turn, the employment and social integration of foreigners are the competence of the Ministry of Labor and its local agencies. No permanent central level coordination mechanisms were established among these institutions for outlining the directions of migration policy.

Lack of coordination mechanisms reflects the low priority assigned to migration in general state policy. This can be seen in the virtual absence of references to migration in strategic documents outlining Poland's priorities in the area of social and economic development. Neither of the planning documents regulating state policy for the labor market—the National Strategy for Employment and the Development of Human Potential (*Narodowa Strategia Wzrostu Zatrudnienia i Rozwoju Zasobów Ludzkich*) of 4 January 2000 and the National Action Plan on Employment (*Krajowy Plan Działań na rzecz Zatrudnienia*) of 21 September 2004—refer to the role of foreigners in the national economy. Moreover, the strategy for employment advocates restricting the access of foreigners to the Polish labor market based on sufficient domestic labor resources and concerns about the cultural adaptation of foreigners to Polish society.

However, a large outflow of Polish labor due to emigration to several Western European states and the resulting drop in the unemployment rate raised the issue of demand for foreign workers. The Preparation materials to the National Plan of Development for 2007–2013, developed on the eve of accession (*Założenia do Narodowego Planu Rozwoju* 30 April 2004) forecast that, by 2010, the migration balance would be negative for the country. The document called for incentives for the return of Poles and an active policy of using foreign labor that was already in the country but not yet registered.<sup>38</sup> One of the concrete steps taken to act on this was a migration amnesty in 2003–2004, which regularized the status of nearly 7,000 migrants, mainly from Armenia and Vietnam.

Since 2004, a significant number of young Poles have left the country in search of foreign employment and by now it is clear that this wave of migration is at least partly permanent. This has serious implications for the Polish labor market. In response to demand expressed by Polish farmers and entrepreneurs, as well as to the voices of experts calling for the access of foreigners to the Polish labor market to be liberalized, successive measures were introduced since 2007 allowing the seasonal employment of nationals of Belarus, Russia and Ukraine and, in effect, facilitating their longer-term integration into the Polish economy and society.

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<sup>38</sup> See the discussion of the place of migration in national labour and development strategies in: N. Parkhomenko (ed.), *Ukrainian Labour Migration in the Enlarged Europe*, CPCFPU: Kyiv, 2005, pp. 59-63.

However, as Krystyna Iglicka noted in her assessment of Polish migration policy on legal labor migration, these partial measures might, in fact, be “too little, too late” given the shifting preferences of migrants from Ukraine and other CIS states, who are choosing Southern European destinations (Spain or Portugal) over Poland.<sup>39</sup> The fact that Poland has so far failed to create incentives for migrants to settle supports Iglicka's criticism of Polish migration policy in the period leading up to EU accession as “reactive.” We may add that the situation has not been helped by the lack of a genuine immigration office and the dispersion of foreigner affairs among various institutions, often resulting in lack of transparency and contradictory decisions by relevant organs. Research among migrants from Ukraine conducted by experts from the Institute of Public Affairs for the last few years suggests that one major disincentive for migrating to Poland is the difficulty that even migrants with a close cultural background, such as Ukrainians, face while trying to work through the official procedure for immigrating to Poland.<sup>40</sup>

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<sup>39</sup> K. Iglicka, *Kierunki Rozwoju Polskiej Polityki Migracyjnej w Ramach Obszaru Legalnej Migracji Pracowniczej na Lata 2007-2012, Raporty i Analizy 1/07*, Center for International Relations: Warsaw 2007, [http://csm.org.pl/fileadmin/files/Biblioteka\\_CSM/Raporty\\_i\\_analizy/2007/Krystyna\\_Iglicka\\_Kierunki\\_Rozwoju\\_Polskiej\\_Polityki\\_Migr.pdf](http://csm.org.pl/fileadmin/files/Biblioteka_CSM/Raporty_i_analizy/2007/Krystyna_Iglicka_Kierunki_Rozwoju_Polskiej_Polityki_Migr.pdf)

<sup>40</sup> M. Bieniecki, M. Pawlak, *Strategie przetrwania. Adaptacja ukraińskich migrantów zarobkowych do polskiej rzeczywistości instytucjonalnej. Skróć raportu*, Institute of Public Affairs: Warsaw 2009, <http://www.isp.org.pl/files/16522426570895987001256220638.pdf>



## 4. What institutional framework underlies Polish policy on irregular migrants?

### 4.1 Division of competence among central state institutions

Notwithstanding the setbacks in the process, the setting up of the State Migration Service of Ukraine marks progress towards establishing a central body to coordinate the activities of other state agencies, to develop the necessary legislative framework, and to outline the directions of state policy on illegal migration. Various institutional models have been adopted in European states for coordinating among state migration executive bodies, ranging from a decentralized model presupposing a high degree of interagency coordination or a central body subordinated to a single ministry (the Ministry of Interior, Justice or Labor) to an independent high-level agency (in cases, even a separate ministry).

In new EU Member States, the central migration service is typically subordinated to the Ministry of the Interior, which may be explained by the fact that most of these states are still responsible for securing the external border of the EU. At the same time, differences can be seen among countries as to the precise role that interior ministries play in coordinating migration policy. The role of a ministry may be as broad as in the Czech Republic and Slovakia, where it has direct control of the entire spectrum of operational tasks (border control, immigration and asylum). By contrast, the Ministry of Interior may limit its role to that of a supervisor of the work of operational services (the Police, the Border Guard) that retain organizational independence and their own rank structure and of a conceptual center drafting directions for overall state policy.

The Polish system disperses responsibilities among various institutions. Firstly, it lacks a genuine immigration office, so that shaping overall migration policy lies, not with the Office for Foreigners, but with the Ministry of Internal Affairs. Secondly, due to the decentralized structure of state administration, important functions such as the legalization of residency (issuing of residence permits) are carried out by regional offices. The Polish model cannot be directly emulated by Ukraine, given the differences in the general state administrative model. Still, Polish experience is worth considering with respect to the clear allocation of competence for statutory acts that also designate the grounds and procedures for running joint activities and sharing information.

*The Ministry of Internal Affairs and Administration*<sup>41</sup> is the central state organ responsible for the development, oversight and coordination of national migration policy. It is well-positioned for this task, as it oversees the agencies in charge of controlling the legal entry, residence and departure of foreigners from the country: the Office of Foreigners, the Border Guard and the Police. The Ministry of Internal Affairs has had the primary initiative in preparing the aliens act and a host of executive regulations implementing aliens legislation.

The Aliens Act names the *Border Guard* as the main operational body enforcing the rules for the entry and stay of foreigners in Poland. Accordingly, it has the sole competence for executing the admission, readmission and expulsion of irregular migrants. In other words, the Border Guard is the only agency authorized to implement executive protocols of agreements with third states and to undertake the return and transfer of migrants both by land and air. Return is administered at the border and airports by territorially-designated units upon the orders of unit commanders.

The *Office for Foreigners*<sup>42</sup> was an agency established by an amendment of the Act on Aliens (originally as the Office for Repatriation and Aliens), playing the role of a central-level agency, authorizing the issue of visas by consuls and residence permits by regional administrations. It is also the central body reviewing asylum applications and granting refugee status and other forms of protection, including "tolerated" status. The Office processes appeals against decisions on issuing visas and permits. The director of the Office for Foreigners decides whether or not to place asylum-seekers in facilities for refugees.

The establishment of a specialized body dealing with migration and the residence of foreigners in Poland was proposed by the EU during Poland's accession negotiations. The EU's position was that setting up the Office would improve cooperation with counterpart immigration offices in Member States. The European Commission placed significant emphasis on the need to form the Office, referring to it as a priority in several annual progress reports in the Justice and Home Affairs area.

## 4.2 Interagency operational cooperation

In terms of the measures introduced to increase the effectiveness of various aspects of migration control, from detection to expulsion, the extension of competences of various agencies enables them to perform joint activities. The primary forms of operational cooperation are the exchange of information and joint patrols and controls. Although common activities are performed to enable participating institutions to perform their own statutory competencies, as a rule, the two institutions that are specifically charged with control-

<sup>41</sup> <http://www.mswia.gov.pl>

<sup>42</sup> <http://www.udsc.gov.pl>

ling the legality of foreigners' residence, the Border Guard and the Police have developed an additional mechanism for closer cooperation.

In 2004, an agreement on forms and procedures for operational collaboration was concluded between the commanders-in-chief of the Police and the Border Guard.<sup>43</sup> The agreement, *inter alia*, imposes an obligation on the two agencies to coordinate their activities with the purpose of disclosing and identifying persons who are being investigated by the services. During investigation, the two agencies are to make available to one another necessary logistical support, operational information and the results of criminal and other expert analysis. The agreement envisions running consultations and establishing inter-agency working teams for the purpose of joint investigations and operations.

The agreement introduced a very comprehensive form of operational cooperation at all levels of the hierarchy of the two services. By default, requests for cooperation may only be denied if their approval would prevent the requested service from carrying out its own tasks. Requests for collaboration can be placed by officers of either service from the level of commanders of HQ units down to local stations of the Border Guard or the Police.

In addition, the agreement facilitates the exchange of information between the two services by introducing a proper procedure and listing the types of data that either agency shares by default. Data from central registers are made available to the other service: the Border Guard's central database as well as the border-crossing register (*Centralna Baza Danych Straży Granicznej i Ewidencji Złeczeń* and *Centralne Archiwum Odpraw*) and the Police's criminal database register.<sup>44</sup>

Under the Agreement, the two services also agree to provide immediate notifications at the operational level so that the information on the circumstance as well as consequences of a relevant event and the identity of participants is reported to the local unit's duty officer. Thus, the Border Guard is notified by the Police of all disclosures of irregular migrants, cases of trafficking in people and data on traffickers, smugglers of goods, forged passports and other documents authorizing border-crossing. In exchange, the Police are informed by the Border Guard of all apprehensions of aliens found to have committed criminal offences.<sup>45</sup>

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<sup>43</sup> Agreement of 17 June 2004 between the Commander-in-Chief of the Police and of the Commander-in-Chief of the Border Guard on cooperation between the Police and the Border Guard.

<sup>44</sup> Article 5 (3) of the Agreement of 17 June 2004 between the Commander-in-Chief of the Police and of the Commander-in-Chief of the Border Guard on cooperation between the Police and the Border Guard.

<sup>45</sup> Annexes to the Agreement of 17 June 2004 between the Commander-in-Chief of the Police and of the Commander-in-Chief of the Border Guard on cooperation between the Police and the Border Guard.

In addition, general legislation provides for organizing joint patrols and checks on the legality of foreigners' residence by several state agencies. Thus, the Border Guard takes part in joint controls with the Customs Service, the Environmental Protection Inspectorate, the Labor Inspection, the Police, and the Road Transport Inspection, to name a few services.<sup>46</sup> Each service is authorized by its legal statutes to carry out duties within its range of competence so that an investigation can be launched by any of the participating services and run in parallel, say, with regard to illegal employment and residence or in the case of a violation of phyto-sanitary regulations.

The proper order for controlling the legality of aliens' status is presented in a separate regulation of the Ministry of Interior and Administration that lays down the competence of various agencies in this procedure. The right to initiate control is reserved to functionaries of the Border Guard, Customs Service or Police. Once the authorized officer identifies him- or herself, the authorized official of the central or regional immigration authority hands the foreigner the order to conduct the control. The order allows any of the participating functionaries representing the Border Guard, the Customs Service or the Police, or the immigration authority to verify identity and travel documents and visas or residence permits, as well as work permits, financial resources and medical coverage.<sup>47</sup>

The new instruments of inter-agency collaboration have been used extensively, particularly since Poland's full integration into the Schengen area. They were particularly important given the wider range of competences of each service, the adoption of new techniques of analysis and investigation of illegal migration, and the growing cooperation with counterpart services in other EU Member States. Section 5 presents the actual legal and institutional solutions and their operational application to cover the whole range of activities in greater depth, constituting state policy on illegal migration, from detection through apprehension and detention to the expulsion of foreigners from the country.

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<sup>46</sup> Article 85 of the Act of 13 June 2003 on Aliens (consolidated, Journal of Laws 2003, №128, item 1175).

<sup>47</sup> Regulation of 12 August 2003 of the Minister of Internal Affairs and Administration on the manner of conducting control of legality of aliens' residence on the territory of the Republic of Poland.

## 5. What tools do Polish agencies use to manage migration?

### 5.1 Control of legality of residence and detection of irregular migrants

Successive amendments to the Act on Aliens reflected a shift in the concept of control of illegal migration from the performance of checks on foreigners along the border perimeter towards the verification of the legality of residence and status of aliens across the country's entire territory. On one hand, this necessitated a reorganization of the Border Guard so that it could undertake control outside the frontier zone. On the other, this meant greater emphasis on the use of investigative and policing techniques and the involvement of a range of state services in coordinated controls at the locations irregular migrants were most likely to be. Finally, all the involved agencies established specialized units that gathered and analyzed various types of data, including those stored in national and international databases. This makes the detection of migrants an ongoing process that precedes, rather than follows, apprehension. A close link has also been established between the detection and identification of migrants.

The extension of the competences of several state agencies to detect irregular migrants across the entire territory of Poland reflects a fundamental change in the philosophy of migration control. According to the Aliens Act, the Border Guard and the Police are empowered to verify legality of foreigners' residence throughout the country. Additional regulations charged other institutions with controlling the legality of stay as well: in particular, governors' offices (to verify grounds for issuing residence permits), the Customs Office and the Office for Foreigners (as part of status determination procedures and reviews of the decisions of first instance bodies).<sup>48</sup> These legal changes enabled a range of state services to conduct joint operations, in particular in controlling the legality of foreigners' status.

The reorganization of the internal structure of the Border Guard undertaken in 2001 was particularly crucial in the context of a changing model of detection of irregular migrants, as required by accession to the EU and Schengen. The amendment of the Act on Aliens authorized the Guard to undertake the disclosure of irregular migrants and launch investigations into cases of illegal migration across the entire territory of the country.

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<sup>48</sup> Article 1, item 36 of Act of 22 April 2005 amending Act on Aliens and Act on Providing Protection to Aliens on the Territory of the Republic of Poland and certain other acts (amending Art. 81 of Act on Aliens of 2003).

This legal change was matched by institutional reorganization. An operational-investigative department was established at the head office to oversee the operations of territorial units dedicated to combating illegal migration, trafficking in people, smuggling of goods, and the forging of identifications. Since 2004, a single unit coordinates all the operations conducted in the interior of the country: the Border Guard Division of Nadwislanski Region.<sup>49</sup>

Another instrument to improve the ability of the Border Guard to disclose illegal migration throughout the country has been the development of various databases that can be accessed directly by all territorial Border Guard stations. Officers can verify the identity and criminal record of a foreigner on the spot against registers authorized by the Act on Aliens.

Consecutive amendments of the Act on Aliens have specified the range of data collected on foreigners and established the location of various databases. They have also required the inclusion of particular types of data in various databases and regulate the access of relevant state agencies to the information. The Act on Aliens allows competent state institutions to collect, process and access a wide array of data on foreigners, allowing them to determine, in particular, a foreigner's identity, physical characteristics, nationality and country of origin, education and profession, as well as place of work and residence. In addition, the legislation allows these agencies to collect and process information on criminal and military records, court sentences, and ongoing administrative or judicial proceedings. Registers also include information on all foreign travel and places of residence of a foreigner for a period of five years.<sup>50</sup>

One of the requirements of EU accession was to establish a single central database on foreigners. The base, called POBYT (Residence), is maintained by the Office for Foreigners. It contains several data registers: visas issued, residence permits granted, Polish identity documents issued to foreigners, persons refused or allowed entry and those ordered to leave Poland, as well as foreigners subject to expulsion. The database also contains additional registers of: (a) invitations issued to foreigners for short-term stays in Poland; (b) undesirable aliens; (c) and proceedings on granting refugee status and cases under the Dublin procedure.<sup>51</sup>

A number of databases are linked to POBYT. Of particular operational importance is AFIS, which is operated by the Police and contains the fingerprints of apprehended persons, including violators of administrative regula-

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<sup>49</sup> Pietraszczyk M., "Functioning of the Border Guard within the Schengen Area" in: *Polska w strefie Schengen: Refleksje po pierwszym roku członkostwa*, Ministry of Internal Affairs and Administration: Warsaw 2008, p. 65.

<sup>50</sup> Article 12 of the Act of 13 June 2003 on Aliens (consolidated, Journal of Laws 2003, №128, item 1175).

<sup>51</sup> Article 132 of the Act of 13 June 2003 on Aliens.

tions. Every time a foreigner is fingerprinted, such when applying for asylum or after illegally crossing the border, the information is verified against the EURODAC database and the result is recorded in POBYT.

While the establishment of interlinked central databases is a necessary first step for building an informational basis for investigating cases of illegal migration, it can be truly useful only once territorial units of state services obtain direct access to all the required information. This can be seen in the case of local stations of the Border Guard, which use such databases on a day-to-day basis as:

- a base of entries and departures across the state border (administered by the Border Guard Headquarters);
- an administrative database containing the residence register (POBYT, administered by the Ministry of Internal Affairs and Administration);
- the AFIS Police database, containing fingerprints of foreigners who are either on record for perpetrating a violation or as part of an asylum procedure.

The key to the effective use of databases in the work of local units of the Border Guard lies in the combination of information from various databases. The identification of asylum-seekers is a good example. Upon fingerprinting asylum applicants, the prints are verified against the AFIS police database, which in turn are checked against the EU-wide EURODAC fingerprint database and instances where there were previous asylum applications are recorded in the central POBYT database. Interviewed Polish border guards confirm that this procedure, forming part of an automatic verification of fingerprints under the Dublin II agreement, has successfully reduced attempts at multiple asylum applications, which were being filed in Poland in particular by Russian citizens of Chechen origin.

Two points are worth noting: firstly, general legislation (the Act on Aliens) clearly regulates the management of various databases by competent services, preventing conflicts at the central level. Secondly, high-level regulations mandate direct access to the data, regardless of its location, to all authorized services, specifying the type of data available, the grounds for access and the procedure for exchanging data. When combined, these solutions provide more effective tools for disclosing cases of illegal border-crossing, residence and employment and they facilitate the process of determining the identity of a migrant.

## 5.2 Apprehension, temporary detention and identification

Several solutions applied in Polish legislation could be of note to Ukraine's state agencies, as they significantly help reduce the time needed to identify irregular migrants and they provide necessary safeguards for controlling the movement of such individuals while protecting their rights. Firstly, the Polish aliens law permits apprehension and detention for the purpose of establishing a migrant's identity. Secondly, in the course of apprehension and detention, foreigners are entitled to all the guarantees attached to criminal procedures, including the right to be presented with the grounds for being deprived of their liberty, and to appeal decisions by Border Guard or Police functionaries, who are also subject to disciplinary action for exceeding their authority. Thirdly, detention is limited in time (48 hours for temporary detention and 3 months for long-term detention), and can only be extended (to a maximum of 12 months) by court order, following the court's approval of the apprehending and holding service's justified request. Finally, the length of detention can be significantly reduced by using effective identification techniques, including access to fingerprint databases, close collaboration with migration services of countries of origin, and the use of socio-cultural profiling.

The Border Guard has the authority to investigate infractions of border entry and residence regimes and to apprehend violators.<sup>52</sup> It can carry out a preliminary investigation of apprehended persons within its statutory powers or when requested by the court, a prosecutor or another competent state organ.<sup>53</sup> Upon apprehension, a foreigner is entitled to:

- learn of grounds for this measure in writing by being given a copy of the official protocol;
- meet (in presence of a functionary) with a lawyer and contact the consulate or embassy of the country of origin;
- appeal against the measure to a district court within seven days of being apprehended.<sup>54</sup>

Unless the court or the public prosecutor orders the immediate release or the foreigner is found to be physically unfit and as long as grounds for detention persist, the Border Guard or the Police may detain the foreigner for up of

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<sup>52</sup> Article 1 (2) of the Act of 12 October 1990 on Border Guard (consolidated text, Journal of Laws №78, item 462).

<sup>53</sup> Article 9 (1) of the Act of 12 October 1990 on Border Guard

<sup>54</sup> Article 14 of the Ordinance of 12 December 2007 of the Council of Ministers of the Republic of Poland on the manner of conduct of functionaries of the Border Guard in exercising some competencies.



48 hours.<sup>55</sup> Border Guard units detain foreigners upon apprehension at their own local secured facilities or in Police detention rooms. Border Guard-operated short-term detention facilities need to meet the standards stipulated in a ministerial regulation, at a level equal to those of special long-term detention facilities.<sup>56</sup>

Temporary detention serves primarily to enable the Border Guard or the Police to clarify the circumstances of any violation and identify the foreigner. For that reason, the holding authority is obliged to undertake all necessary measures to identify the detainees early on and enter the identification data into national registers that are accessible to other agencies with competence in migration. The collected data are attached to the file on the foreigner, which is then transferred to the units in charge of long-term detention facilities and of implementing expulsion.

An ordinance from the Interior Ministry lays down the standard procedure for identifying a detained foreigner. Reference is first made to documents (a passport or ID card, a travel document or another document with a photograph and a serial number) or to the testimony of an identified witness. Fingerprints and photographs are taken only when these methods fail to establish the person's identity. The local Border Guard and Police units can also make use of available national and international databases for identification purposes.

However, even the combination of these methods can prove insufficient at times. Border Guard units resort to other, less traditional techniques to determine the identity of foreigners from more distant countries of origin, such as Gambia, India, Nigeria, Palestine, Sierra Leone and Vietnam: queries to diplomatic representations of the country of origin, telephone interviews with country-of-origin officials, and contacts with border and migration authorities.<sup>57</sup>

In some cases, apart from formal requests to the embassy, more intensive cooperation with migration officials of the country of origin has been established. According to the Border Guard, a high rate of identification was achieved with the involvement of officials from the country of origin responsible for identification through interviews with the foreigner. Interviews conducted by interior officials from Vietnam over two days in May 2008 made it possible

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<sup>55</sup> Article 101 of the Act of 13 June 2003 on Aliens and Article 17 of the Ordinance of 12 December 2007 of the Council of Ministers of the Republic of Poland on the manner of conduct of functionaries of the Border Guard in exercising some competencies.

<sup>56</sup> Regulation of 30 November 2001 of the Minister of Internal Affairs and Administration on conditions, which must be met by premises in organizational units of the Border Guard designated for apprehended persons and the regulation of stay in these premises (Journal of Laws №148, item 1657).

<sup>57</sup> "Return and identification procedures on the basis of the Polish law and EU rules," presentation of the Foreigners Department of the Polish Border Guard Headquarters.

to confirm the identity of 54 out of 63 persons claiming Vietnamese origin. However, the method must be used with caution, as it could be subject to criticism on human rights grounds. Responding to a series of negative media assessments, the Border Guard denied that any asylum applicants had been interviewed or that their data had been shared with a country of origin.<sup>58</sup>

Another promising identification technique has been ongoing consultation with specialists on the culture and language of various ethnic groups in multi-ethnic and multilingual countries of origin, such as Afghanistan, Pakistan and China. The Border Guard held training for its officers on the application of socio-cultural profiling, in which the interviewers consider factors such as the model of the family, tribal and social group relations, and verbal and non-verbal communication signals, including clothing and adornments, etiquette and general conduct.<sup>59</sup>

We can conclude that success in identifying irregular migrants can be achieved through a combination of several factors:

- a solid legal framework (assigning competence to various agencies);
- improved inter-agency coordination (grounded in general legal acts and inter-institutional agreements);
- ensured access of all operational units to integrated national and international databases;
- the use of some non-traditional identification techniques (in particular, close collaboration with migration officials of countries of origin).

### 5.3 Detention in special facilities and expulsion

Following the conclusion of a readmission treaty with the countries of the Schengen Group in 1991, Poland found itself in a difficult position as a recipient of third-country nationals because it had few agreements with countries of origin and undeveloped infrastructure and regulations for expulsion and detention.<sup>60</sup> Since then, Polish legislation and institutions have undergone transformation, which enabled the country to realize its international commitments and control the scale of illegal migration at the same time. Among the most important legal solutions are the extension of grounds for detention at guarded facilities to include the need for identification and valid suspicion of obstruction of investigation (e.g. escape from the country) and the option

<sup>58</sup> Press release of the Border Guard of 30 May 2008. Available at: [http://www.strazgraniczna.pl/wps/portal/tresc?WCM\\_GLOBAL\\_CONTEXT=pl/serwis-sg/przekaz\\_wiadomosc/komunikaty-prasowe/o\\_komunikat+prasowy+z+dnia+30+maja+2008+r./](http://www.strazgraniczna.pl/wps/portal/tresc?WCM_GLOBAL_CONTEXT=pl/serwis-sg/przekaz_wiadomosc/komunikaty-prasowe/o_komunikat+prasowy+z+dnia+30+maja+2008+r./)

<sup>59</sup> Lt. Col. Dr. Krzysztof Jacewicz, Central Training Centre of the Border Guard in Koszalin, "Sociocultural Notion of Identification" presentation.

<sup>60</sup> The matter is treated in depth in P. Kazmierkiewicz, *The Polish Experience in Controlling Illegal Migration: Lessons for EU Candidates and Neighbors*, Institute of Public Affairs: Warsaw 2007.

of granting “tolerated” status to foreigners who cannot be expelled. The institutional setup is noteworthy as it allocates the management of migrant facilities to the Border Guard, which also handles the apprehension, admission, transportation and expulsion of irregular migrants.

An important factor in facilitating the process of determining identity and carrying out investigations into illegal migration is the ability of state services to detain foreigners in special facilities assuring both security and humane conditions. Thanks to the support of the EU and international organizations, standard regulations on migrant accommodation centres (MACs) have been developed in Ukraine, and the network of MACs is growing. However, the practice of managing such facilities and experience with cooperation among state services in transportation, detention and expulsion is still limited and it may be useful to consider the more established legal and institutional framework for these processes in Poland.

Detention in a special facility, that is, a guarded center or detention facility for those subject to expulsion, or its extension, requires the approval of a Border Guard or Police request by a local district court.<sup>61</sup> The foreigner may appeal the court decision on the basis of a breach of procedure within 7 days of the date of the decision being announced.<sup>62</sup>

Polish legislation on foreigners assures that the investigation into cases of irregular migrants may be completed successfully by authorizing detention for preventive purposes so as to minimize the risk of obstruction or absconding. It does so by listing the specific circumstances in which the court shall issue a decision to detain in a special facility. The court will authorize detention in particular (1) when it is needed to enable the effective implementation of expulsion procedures or the rescinding of a permit to settle or an EC long-term residence permit; (2) when it is legitimately suspected that the foreigner will seek to evade such procedures. Moreover, foreigners who have crossed or attempted to cross the border unlawfully may also be placed in a guarded facility if they cannot be removed “without delay” or lack identity or travel documents.<sup>63</sup>

Polish asylum legislation also authorizes the detention of potential asylum-seekers in certain cases. Detention is expressly prohibited only with regard to those foreigners who place an application for refugee status in Poland directly on crossing the state border and demonstrating that they arrived from a coun-

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<sup>61</sup> Article 101, item 3, of the Act of 13 June 2003 on Aliens and Article 41 of the Act of 13 June 2003 on Providing Protection to Aliens on the Territory of the Republic of Poland.

<sup>62</sup> Migrant information site, “Administrative regulation of foreigners,” [http://www.migrant.info.pl/en/residence/detention\\_of\\_foreigners/the\\_placing\\_of\\_an\\_alien\\_in\\_a\\_gua/](http://www.migrant.info.pl/en/residence/detention_of_foreigners/the_placing_of_an_alien_in_a_gua/), accessed on 20 April 2009.

<sup>63</sup> *Ibidem*.

try where they could be subject to persecution (*non-refoulement* principle).<sup>64</sup> The court will allow the placement of asylum-seekers in a guarded facility in these four circumstances: (1) when apprehended while attempting to cross the border illegally, (2) when identity needs to be established, (3) when there are valid concerns that if they were to remain at large they might obstruct the progress of an investigation (e.g. by attempting to leave the country), (4) and when there are concerns for state security and public order.

Detention serves to clear the obstacles to expulsion, such as the need to establish the foreigner's identity or to secure the country of origin's cooperation to effect a return. It should end once the grounds for placement in a facility are removed. A court issues an original authorization for placing a foreigner in the guarded center or in the facility for arrest for the purpose of expulsion for a period of 30 to 60 days.<sup>65</sup> Applicants for refugee status may be held for up to 90 days from the date of filing an application. Under the Act on Aliens, the overall period of detention may not exceed 12 months.<sup>66</sup> The meaning of this norm was clarified by the Supreme Court, which heard the case of a foreigner readmitted into Poland from Germany who had been detained for the total of 15 months (originally for six months and, upon a second apprehension, for three consecutive periods of three months). This practice was found to be in violation of the law. In line with this decision, all individual periods of detention for infractions of the Act on Aliens must not exceed 12 months in total, after which the foreigner must be released.<sup>67</sup>

In some cases, however, 12 months of detention may not be sufficient to arrange for the expulsion of a foreigner. The procedure is then terminated and the foreigner is granted "tolerated" status, valid for 12 months and subject to indefinite renewal. This status is granted if removing the foreigner is not possible as doing so (1) would potentially expose the foreigner to torture or inhumane and degrading treatment or punishment, or the individual could be deprived of life, freedom, personal safety or the right to a fair trial and expulsion would thus violate the guarantees of the European Convention on the Protection of Human Rights and Fundamental Freedoms; (2) is not allowed by a court decision or ministerial order; (3) or cannot be carried out for reasons that are beyond the power of the agency or the foreigner.<sup>68</sup>

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<sup>64</sup> Article 87 of the Act of 13 June 2003 on Providing Protection to Aliens on the Territory of the Republic of Poland.

<sup>65</sup> Article 89 of the Act of 13 June 2003 on Providing Protection to Aliens on the Territory of the Republic of Poland.

<sup>66</sup> Article 106 (2) of the Act of 13 June 2003 on Aliens of 13 June 2003.

<sup>67</sup> Decision of the Supreme Court of 27 September 2007 on the duration of stay of a foreigner in a guarded center or a pre-expulsion facility (I KZP 36/07), *Biuletyn Prawa Karnego* №17/07, Office of Studies and Analyses of the Supreme Court, [http://www.sn.pl/orzecznictwo/uzasadnienia/ik/I-KZP-0036\\_07.pdf](http://www.sn.pl/orzecznictwo/uzasadnienia/ik/I-KZP-0036_07.pdf)

<sup>68</sup> Articles 97-101 of the Act of 13 June 2003 on Providing Protection to Aliens on the Territory of the Republic of Poland.

# Conclusions:

## What are the key lessons from Polish experience?

Two primary factors were crucial for ensuring the completion of lengthy, costly and deep-reaching reforms in internal affairs that were preconditions for Poland's accession to the EU and integration into the Schengen zone. First were the tangible rewards following up shortly on the accomplishment of required policy changes. Second were the mobilization of the entire state administration and the climate of political stability needed to maintain the reform process on course. Unfortunately, neither of these two factors appears to be sufficiently strong in Ukraine to overcome obstacles to the reforms needed to put Ukraine on the road towards association and eventually membership in the EU.

The Polish government, bureaucracy and society were generally supportive of the EU accession process and did not perceive the need to undertake legal and institutional reforms as a price too high to pay.<sup>69</sup> In the case of border and migration control, the "stick" of technical requirements and budgetary investment was from the outset matched with some desirable "carrots." In the early 1990s, in exchange for concluding a readmission treaty with Schengen states, Poland obtained visa-free movement for its nationals into all states of Western Europe. Tightening control on the borders with Belarus, Russia and Ukraine in early 2000s was followed by the abolition of controls on the frontiers with EU Member States in December 2007, when Poland could fully implement the Schengen regulations.

Unfortunately, no such symmetry can be seen in the case of Ukraine, which has so far not been significantly rewarded for its cooperative attitude towards the EU. Kyiv has not been satisfied with the response it received after demonstrating its willingness to meet the EU's needs by first unilaterally waiving short-term visas for citizens of EU Member States and then by concluding a readmission treaty under which it would accept its own as well as third-country nationals who were shown to arrive from Ukraine and did not fulfill the criteria for legal stay in the EU. Only selected categories of Ukrainian citizens and residents of regions adjacent to the border with the EU enjoy facilitated access to EU territory while the overwhelming majority of Ukrainians need to pay visa fees. Even more symbolically and significantly, Ukraine's declared objective of EU accession has not been formally acknowledged by the Union or majority of its Member States.

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<sup>69</sup> Kazmierkiewicz, P. *The Polish Experience in Controlling Illegal Migration: Lessons for EU Candidates and Neighbors*, Institute of Public Affairs: Warsaw, 2007.

Another factor underlying Poland's ability to meet strict EU and Schengen accession requirements was the mobilization of the state administration and political consensus on the priority of EU integration in all state activities. Even though nearly all Polish Governments were precarious multi-party coalitions, the country's major political forces agreed on the strategic goal of EU membership and accepted the need for the major overhaul of existing state structures and review of the country's legal framework that were required for negotiations with the EU to be concluded. This also meant that sectoral reforms could build on systemic changes. In the case of internal affairs, these included the reform of the Ministry of the Interior, the Police and the Border Guard in 1989–1991, followed in later years by the decentralization of the state apparatus and the establishment of EU integration departments in all ministries, along with a coordinating body, the Office of the Committee for European Integration.

However, undertaking reforms primarily in response to the requirements of EU accession resulted in an unbalanced development of national policy in the period to 2004.<sup>70</sup> Consecutive amendments of aliens legislation tended to focus on security aspects and the need to combat illegal migration. At the same time, insufficient attention was paid to the long-term demographic, social, cultural and economic needs of Poland for migration. These questions began to be tackled in earnest only in 2007, when the first initiatives to liberalize the Polish labor market were launched.

The absence of public debate on national priorities in migration as a whole has reduced the legislative process and institutional changes in this area to a technical exercise of approximation with the practice of EU Member States. Of course, legal and technical harmonization was valuable, as it produced an effective system for controlling illegal migration on which the state can now build. However, one general lesson is worth considering in Ukraine when analyzing the Polish experience: a country of continuing significant emigration cannot limit its migration policy to combating illegal forms of immigration (with occasional amnesties) but must also develop instruments for attracting immigrants of choice. Facilitating access to the labor market is a good step in this direction. But without offering comprehensive integration packages and opportunities for easier access to long-term migration, the current seasonal migration from Ukraine, Belarus or Russia is not going to meet the long-term demographic and societal needs of Poland.

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<sup>70</sup> The impact of EU accession requirements on the national migration policy in Poland is further elaborated in: A. Kicingier, *Between Polish Interests and the EU Influence—Polish Migration Policy Development 1989-2004*, CEFMR 9/2005, Working Paper Central European Forum for Migration Research: Warsaw, 2005.

# Recommendations:

## How to improve migration management in Ukraine

Over the past decade, migration policy was not a high priority for any of Ukraine's Governments. In effect, Ukraine failed to formulate a comprehensive national migration policy and basically accepted European trends. As the case of Poland demonstrates, failure to develop a country's own migration concept can result in an unbalanced policy toward various migration flows. While Poland was rewarded with EU membership for its arduous work in improving capacity to secure the Union's external frontier, Ukraine risks landing in a limbo, accumulating irregular migrants in its territory as it attempts to protect the Union from this security threat.

Ukraine has not drawn up a Concept for its own migration policy that might become a comprehensive document focused on handling most migration issues. The absence of consensus among politicians in understanding the essence of migration policy and the way that powers were delegated among government institutions have made it impossible to establish an effective institutional system to manage migration. For this very reason, Ukraine's strategic goals in formulating and enacting migration policy remain the same—just as they did five and ten years ago.

The lack of a strategic view of the consequences of migration processes could lead to serious demographic and social instability in Ukrainian society. Ukrainian policy-makers need to reconcile various aspects of the national interest, going beyond a preoccupation with security, as dictated by the needs of the EU, and acknowledging the capacity of local communities for integrating migrants, opportunities for repatriating Ukrainian emigrants, and the objectives of balanced economic growth and social stability.

To improve coordination in migration and develop an effective migration policy at the strategic level, a number of things are needed:

### **For the Parliament:**

- rework and adopt the Law of Ukraine "On a Concept for a state migration policy," which would lay down the goals, objectives, mechanisms, instruments for enacting, and financial basis for migration policy. Adopting such a law is required by the Constitution of Ukraine;
- draft and pass a new version of the Law of Ukraine "On the legal status of foreigners and stateless persons" as a consolidated piece of legislation

that regulates a single area: the legal relationship between the state and all categories of foreigners, including refugees and persons who are in need of additional protection;

- pass the Law of Ukraine “On the State Migration Service” to regulate issues connected to the status of this agency and the functions and powers of its service and official staff.

**For the Government:**

- reform the Ministry of Internal Affairs of Ukraine as a component of public administration reform and the reform of law enforcement agencies. In line with developed countries, MIA should be an agency for developing and enacting state policy in five key areas:
  - preserving the public order;
  - migration and asylum;
  - regional development;
  - border protection;
  - handling emergencies;
- attach the State Border Service (SBS) to the Ministry of Internal Affairs once the latter has been reformed and speed up the reform of this agency into a law enforcement entity that is responsible for managing the country's borders and countering illegal migration across its entire territory;
- expand the law enforcement functions of the SBS by:
  - allowing it to operate across the entire territory of Ukraine;
  - allowing it to handle pre-trial investigations;
- set up interagency committees or groups to draft and lobby bills related to migration policy and involve representatives of NGOs in this process;
- participate in expert debate on migration policy issues and make this the norm for civil servants.

**For experts and NGOs:**

- continue research into the reasons for problems in formulating migration policy;
- improve the dialog between experts and the Government in order to provide analytical and methodological support for the Government and Parliament to formulate policy and legislation related to migration;
- launch work on a Migration Strategy for Ukraine.



**For Ukraine's international partners:**

- carry out commitments regarding consultation over and support for migration reform, including financial aspects;
- ensure coherence in EU funding by adopting a roadmap for achieving EU standards in border and migration issues, involving a regular monitoring mechanism (paralleling that adopted for measuring progress of Central European candidates for EU accession);
- assign a greater share of resources within existing and future EU programs such as the Eastern Partnership to institutional capacity-building;
- offer opportunities for direct contact between Ukrainian state agencies and their counterparts in EU Member States, in particular in countries directly neighboring Ukraine (taking note of the success of the twinning mechanism);
- work up a mechanism for strictly monitoring partner institutions regarding the carrying out of reforms and tie it in to the provision of future funding to continue doing so.

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