

Rethinking the Attractiveness of EU Labour Immigration Policies

Comparative perspectives on the EU,
the US, Canada and beyond



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EUROPEAN
POLICY
STUDIES

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FOREWORD

With migration once again very much in the political spotlight, there is a real need to deepen the debate and define future policies. That is why the publication of this book is very timely. The decision to look at experiences in different parts of the world is most interesting. The debate in the EU – where we are facing one of the most difficult migration crises in decades, particularly at our southern borders, will remain lively. The debate is also animated in countries like the United States where it has been triggered by the “comprehensive migration reform” proposed by the White House in 2013.

Migration remains a complex societal phenomenon. Effectively managing migration flows means taking account of all the economic, social and human dimensions, and, obviously, of their external implications. Relations with countries of origin and transit need to be upgraded, as well as the link between migration and development policies.

This book contributes to a rational and forward-looking reflection about labour migration policies, bearing in mind the contribution that migration can bring to reducing skills and labour shortages and, more broadly, to addressing the consequences of long-term demographic trends in the EU, with an ageing population and a shrinking workforce. In this context, it is also important not to forget the positive cultural impact migration has on societies, contributing to diversity, new ideas and innovation. The comparative approach – looking also at migration policies in Latin America, the United States and Canada – allows us to learn lessons from other countries’ experiences and their often-different migration traditions and perspectives. What emerges clearly is that the challenges faced in terms of effectively managing economic migration, and its interaction with economic, labour and social policies, are rather comparable for many countries.

The responses have also evolved over time as a reaction to specific situations: an economic crisis, acute shortages and increased demand in certain sectors, or simply as a response to public perceptions. The EU, however, seems less able at the moment – compared to other developed

countries and regions – to attract the economic migrants it needs to enhance its economic competitiveness, particularly highly skilled ones. The challenge before us, to use President Juncker’s words, is for Europe to become “at least as attractive as the favourite migration destinations such as Australia, Canada and the US”. This urge was also clearly reflected in the Strategic Guidelines the European Council adopted on 26 June 2014, when stating that Europe must develop strategies to maximise the opportunities of legal migration.

Labour migration has been one of the most difficult policies to harmonise at European level: EU member states are strongly attached to their competence in this area, which helps to explain the complexity, to say the least, of the EU *acquis* on the matter. But we did manage to lay the foundations of such a common policy. Eight directives have been adopted, harmonising admission conditions and rights of non-EU nationals residing in the EU for different purposes. This includes highly skilled workers, through the Blue Card and Intra-Corporate Transferees Directives,¹ and less-skilled workers – no less needed – through the Seasonal Workers Directive.²

The first section of this book debates a provocative and interesting question in relation to migrants’ rights: Is there a real trade-off between the rights granted to migrants and the openness of migration policies? In other words, is the restriction of such rights a pre-condition for more open admission policies, as argued by one of the contributors to this book? This is a relevant question in the current context of economic crisis, and at EU level the debate on rights to be granted to non-EU nationals has taken place regularly with the member states and the European Parliament when negotiating equal treatment clauses. In some cases, this has resulted in exceptions to some social security rights, e.g. family or unemployment benefits, for certain categories of non-EU nationals (typically, those staying temporarily and/or low-skilled). This also reflects the national laws and practices in most EU member states, which tend to restrict social security

¹ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment and Directive 2014/66/EU of the European Parliament and the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an Intra-Corporate Transfer.

² Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the condition of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

rights and benefits – particularly non-contributory ones financed through general taxation – granted to temporary migrants, as compared to long-term and permanent residents.³

My answer to the question would be threefold: first of all, contrary to a widespread perception, most empirical studies have shown that the fiscal impact of migrants – the ‘burden’ of migrants on the host state’s public finances and social security system – is negligible, i.e. neither significantly positive nor negative, and is in most cases positive when it relates to labour migrants, particularly if they are highly educated or highly skilled.⁴ Secondly, reducing migrant workers’ rights might not only reduce the attractiveness of the EU for those migrants we do want to attract – bearing in mind that access to social security, educational systems and conditions for family reunification, to name just a few, can be as important as wages and other working conditions – but may also lead to unfair competitive advantages for those employing migrants and therefore negatively affect local workers. Thirdly, when assessing costs and benefits, it would be misleading to reason only in purely economic terms: the impact of migrants in a host society needs to be considered in a broader context, and account has to be taken of the broader societal costs of having ‘second-class’ workers and individuals, with fewer rights and possibly perceiving themselves as being discriminated against. A labour migration policy that relies heavily on temporary migration schemes – characterised by more limited rights granted to migrants – may entail high costs in terms of social disruption and lack of cohesion within society.

This leads me to the multifaceted question of integration of migrants, addressed in Section I of the book, which is an essential component of any well-managed migration policy, and is also closely linked to many other policies (employment, education and social policies, for example). While this area remains primarily a member state’s responsibility, some provisions regarding integration have been introduced in the EU *acquis* on legal migration and a number of tools and platforms have been developed at EU

³ See the European Migration Network (EMN) study on “Migrant Access to Social Security and Healthcare: Policies and Practice” (2014), available on the EMN website (http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/index_en.htm).

⁴ OECD (2013), “The Fiscal Impact of Immigration in OECD Countries”, in *International Migration Outlook 2013*, Paris: OECD Publishing; see also E. Guild, S. Carrera and K. Eisele (2013) (eds), *Social Benefits and Migration. A Contested Relationship and Policy Challenge in the EU*, Brussels: Centre for European Policy Studies.

level to support and provide incentives for member states' actions, especially to facilitate exchange of knowledge and best practice and favour dialogue with relevant stakeholders (such as the network of National Contact Points on Integration, the European Integration Forum, the European website on Integration, and EU Handbooks and Modules on integration). Projects developed at national level have been financed through the European Fund for the Integration of Third-Country Nationals, covering, for example, the organisation of language classes, orientation courses, intercultural dialogue and efforts in schools and education systems. Additionally, a smaller share of the Fund has been used to support transnational projects, to further capitalise on valuable experience of integration policies and practices. Member states' cooperation has also led to significant progress in the field of monitoring migrants' integration outcomes, leading notably to a set of common, comparable indicators. Over the years, this type of 'soft' harmonisation has led to a certain approximation of member states' integration policies. But much remains to be done in this sensitive area, for example, regarding migrants' political rights and the path towards citizenship, and we must bear in mind that any measures to favour integration need to take into account the different national and local contexts and to involve all the stakeholders concerned.

One of the key aspects of integration, on which I believe we need to engage further – at both EU and national level – is how to increase the labour market participation of migrants already residing in the EU, and put to use the often untapped potential of skills and talents they have, to their own advantage and to the benefit of the host society. This requires first of all close coordination with economic and social policies, which at EU level has taken place mainly via the European Semester process and the EU2020 Growth Strategy, with growing attention in the country-specific recommendations to non-EU nationals' labour market integration in those countries with the biggest gaps in terms of the employment and unemployment of non-EU nationals and nationals (for example, Belgium and Sweden), as well as on social inclusion of migrants. Secondly, it is essential to work on the improvement of national systems for the recognition of skills and qualifications, knowing that the over-qualification rate of non-EU nationals is more than double that of EU citizens. Through the equal treatment clauses in the legal migration directives (for example, in the Blue Card, the Single

Permit⁵ or the Intra-Corporate Transferees Directives), the regime of the Directive on the recognition of professional qualifications of EU citizens has been extended to certain categories of non-EU nationals, thereby facilitating the process of recognition of qualifications for certain professions. Even in those cases, however, the recognition procedures in practice vary considerably amongst member states and are often lengthy and burdensome, representing an additional hurdle for migrants wishing to integrate a member state's labour market.

More needs to be done as well to enhance intra-EU mobility of non-EU nationals legally residing in a member state, so that the EU is perceived – like the US or Canada – as a single area of migration. A mobile workforce, including legally residing non-EU nationals, is essential to improving the EU's ability to rapidly fill labour and skills shortages across the internal market. In that respect, we have managed to establish a very advanced and far reaching intra-EU mobility scheme in the Intra-Corporate Transferees Directive, whereby member states have accepted – for the first time – to allow non-EU nationals to stay and work on their territory based on a permit issued by another member state, thus going well beyond the right to travel under the Schengen rules. Enshrining the principle of the “mutual recognition” of residence (and work) permits in a legal migration directive – requiring a high level of trust between member states' authorities – represents a real milestone in this area. I am confident that a similar system will also be applied soon to the mobility of students and researchers within the EU – to contribute to the creation of a single European area of research and study – and possibly to other categories of non-EU nationals (for example, Blue Card holders).

The issue of skills and qualifications, as well as of intra-EU mobility, are of course closely linked to the broader questions related to the identification and anticipation of labour market needs and shortages, and of the role that an active policy for the admission of economic migrants can play in that respect. A number of analytical tools have been developed at EU level over the years to facilitate the collection and analysis of labour market information, analyse skills mismatches and trends, as well as foster labour mobility within the EU: for example, the EU Skills Panorama, bringing together data on skills trends in occupations, shortages and mismatches; the

⁵ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a member state and on a common set of rights for third-country workers legally residing in a member state.

European Vacancy and Recruitment reports, focusing on sector and occupation demand, growing occupations, difficult-to-fill vacancies and skills requirements; CEDEFOP analytical reports and forecasts on shortages; the EURES network and Mobility Portal, providing information, advice and job-matching services for the benefit of workers and employers throughout the EU. The development of these useful tools has, however, also shown the difficulties of such an exercise and the limits of what can be achieved in terms of reliable forecasts, hampered by lack of sufficiently precise, reliable and comparable information and characterised by unavoidable delays in responding to rapidly evolving trends.

This is the reason why I believe that more direct engagement of economic stakeholders at EU level – businesses and trade unions representatives – in the process of gathering labour market information and assessing needs, and to discuss and examine how to improve the EU attractiveness, particularly for highly skilled migrants, is essential for the development of a well-managed EU labour migration policy. A structural dialogue at EU level with the social partners was already identified by the Commission, in its Communication on the future of Home Affairs policies,⁶ as one of the key developments in this area, and flagged as well in the Guidelines adopted by the European Council on 26-27 June 2014, as a means to contribute to “maximise the opportunities of legal migration”. It will be for the next Commission to set up the future platform on labour migration and use it to underpin and stimulate future policy developments in this area.

One last aspect considered in this book, which offers different views on the subject, is whether it would be useful and appropriate to have an EU “immigration code”. This is an idea that the Commission had put forward in its Action Plan implementing the Stockholm Programme⁷ as a means to consolidate, rationalise and simplify the legal migration *acquis*. Viewed in hindsight, it was probably premature to include such an initiative at a stage where several pieces of legislation in this area were still being negotiated; to

⁶ European Commission (2014), Communication on an open and secure Europe: Making it happen, COM(2014) 154, 11.3.2014, Brussels.

⁷ European Commission (2010), Communication on Delivering an Area of Freedom, Security and Justice for Europe’s Citizens: Action Plan Implementing the Stockholm Programme, COM(2010) 171, 20.4.2010, Brussels.

be fair, however, the negotiation process lasted far longer⁸ than the Commission hoped or expected. I can understand the arguments of those who say that – after having struggled to adopt eight pieces of legislation on legal migration, with a ninth directive hopefully close to adoption⁹ – it is now time to pause for breath and focus on effective implementation and practical application of the substantial body of legislation in force. I do agree that enforcement of the *acquis* in this area must be given a high priority, as this is essential to ensure harmonisation at EU level of admission rules and for the actual enjoyment by non-EU nationals of the rights enshrined in the various directives. At the same time, we have to admit that the ‘sectoral approach’ in the area of legal migration has led to a certain fragmentation of the legal framework and that there is room – or even a need – to rationalise and streamline it, in order to ensure more coherence and clarity of the rules, while maintaining some differentiation between the various categories of migrants where needed and appropriate. In my view, then, the “immigration code” is something that needs to be seriously considered in a medium- to long-term perspective, after a careful weighing of the risks that reopening the *acquis* might entail in terms of member states’ possibly more restrictive approaches and the opportunities of providing clearer, simpler and more coherent rules, with the support of the European Parliament, traditionally more open on legal migration policies and favourable to a common EU approach.

In conclusion, I believe we can be proud of what we have achieved so far at EU level, in slightly more than ten years, in a policy area that is very sensitive and still young, compared to other EU policies: we have established common rules on the admission conditions and the rights of non-EU nationals residing in the EU for work purposes, for family reunification, for study and research, as well as for long-term residents; we have supported and helped member states to improve their integration policies; and we have made important steps towards an enhanced intra-EU mobility of non-EU nationals. At the same time, as this book highlights, there are still areas

⁸ It took almost four years to have the Directives on Seasonal Workers and Intra-Corporate Transferees – both of which were presented by the Commission in July 2010 – adopted by the co-legislators.

⁹ European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing (recast), COM(2013) 151, 25.3.2013, Brussels.

where we can progress further towards the development of an effective EU labour migration policy. I would particularly highlight the following aspects:

The need to further increase synergies, at both national and EU levels, between migration policies, on the one hand, and economic, employment and education policies, on the other hand. This will be crucial to maximising the benefits migration can bring in fostering economic growth and enhancing EU competitiveness on the world stage. The management of migration flows should also be more clearly embedded in the EU's overall external relations policy, which will help to ensure more coherence and consistency in the Union's action towards third countries and to better anticipate possible challenges and crises. At EU level, this will also entail closer coordination between all the institutional actors involved with migration and its external dimension.

It is absolutely necessary to promote a more active engagement of the economic stakeholders, particularly business, in the migration debate, as a pre-condition for changing the public discourse on migration and for making the EU more competitive and attractive, particularly for the highly skilled.

It is important to continue to work on the integration of migrants, which is essential to ensuring that they are not discriminated against and can fully enjoy their rights while at the same time play an active role in and contribute to the host society. The possibility for the Commission to play a more active role in benchmarking member states' policies, and the results achieved, will have to be further considered.

Finally, it is essential to ensure that the common EU rules on legal migration already in force are effectively implemented and applied by all member states, so that they can have a real – and positive – impact on the admission of non-EU nationals to the EU, as well as on their rights. Further changes to the legal framework, including possible consolidation and streamlining, will depend on the capacity of the current rules to ensure that the benefits of legal migration for the EU are maximised and that the objective of enhancing the EU's attractiveness and competitiveness is fully achieved.

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1. THE ATTRACTIVENESS OF EU LABOUR IMMIGRATION POLICY

*SERGIO CARRERA, ELSPETH GUILD AND
KATHARINA EISELE*

The European Union's attempt to formulate and design a common policy covering the conditions for entry and stay of third-country workers has not been exempted from controversy. The added value for 'more EU' in such a traditionally domestic policy domain has been lately dressed up with the need to ensure the attractiveness of Europe's immigration policies in increasingly competitive national and transnational settings. The underlying idea is to shape current and future contours of labour immigration control policies with the goal of offering 'attractive' conditions for certain categories of third-country nationals. Here the EU sees itself playing a role. Increasingly, priority has been given to encouraging third-country workers labelled as "highly qualified or skilled" or "talented" to choose the EU instead of other international destinations such as the US or Canada, and in this way meet the perceived needs of EU member states' labour markets.¹

Discussions among policy-makers and scholars on EU labour immigration policies cannot be properly understood without briefly looking

¹ European Commission (2005, pp. 5 and 7); the Policy Plan states: "the vast majority of Member States need these workers [highly skilled workers], because of shortfalls in the labour market pool of highly qualified workers. Furthermore, recent studies highlight for example that 54% of Med-MENA first generation immigrants with a university degree reside in Canada and the USA, while 87% of those having a lower than primary or a secondary level education are in Europe. In response to this situation a common special procedure to quickly select and admit such immigrants, as well as attractive conditions to encourage them to choose Europe could be devised." A similar argument has been presented in European Commission (2011).

at their background and general legal context. The transfer of immigration policy to shared competence between the EU and member states with the Amsterdam Treaty in 1999 officially opened the doors to the progressive building of a common policy. This was accompanied with the adoption of the first multi-annual programme for EU Area of Freedom, Security and Justice (AFSJ) policies in October 1999 – the Tampere Programme² – where the European Council adopted for the first time a common policy agenda outlining the priorities and a list of milestones to guide the progressive development of a common EU immigration policy.

The 1999 Tampere Programme called for the construction of a common immigration policy guided by fair treatment of legally residing third-country nationals, and an integration policy of granting rights and obligations comparable to EU citizens. It also identified as a priority the establishment of a common European approach to labour immigration that would approximate national legislation on conditions for entry and residence of third-country workers.³

Fifteen years later, that political goal has been stymied by a multiplicity of controversies between European and member state instances, where the agreed objectives and milestones have not easily materialised into concrete legislative outputs.⁴ Some member states have been reticent about the effective transfer of competences in these domains to EU instances.⁵ The resulting scenario has been one where a common EU immigration policy is still a project in the making, and one of its most important unfinished features relates precisely to the lack of common supranational rules covering entry and residence conditions for the purposes of employment, i.e. labour immigration.

The institutional and decision-making framework covering the making of EU immigration policy can be found in the Lisbon Treaty. Since the end of 2009 the Treaty has introduced far-reaching modifications to the previous EU policy-making framework. Article 79 TFEU states:

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States [...].

² European Council (1999).

³ *Ibid.*, paragraphs 18 and 21.

⁴ Wiesbrock (2010).

⁵ Carrera and Formisano (2005); Carrera (2007).

2. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

This provision put an end (at least formally) to previous open debates as to whether the EU actually had an attributed legal competence to legislate in the labour immigration field. While Article 79 TFEU excludes European harmonisation on issues related to ‘quotas’, “it does offer a clear possibility for Europeanisation to move forward in dealing with other administrative aspects of labour immigration, such as those that are part of the admission processes and other conditions and rights of residence.”⁶

The Europe 2020 Strategy identified as one of its key flagship initiatives the need of labour immigration to respond to member states’ needs and priorities and to attract highly qualified third-country nationals in a context of growing global competition. In policy discourses the EU seems somehow a less advantageous or appealing destination in comparison to other competing countries.⁷ The European Commission has confirmed this attractiveness and ‘competition-for-talent’ policy paradigm in its May 2014 Communication “An Open and Secure Europe – Making it Happen”. The Communication underlined that “Europe must attract new talent and compete on the global scale” and that:

[D]emographic changes, in particular the shrinking of the working population in Europe, coupled with significant skill shortages in certain sectors...hinder the EU’s productivity and thus its economic recovery. Increasing global competition for skills and talents affects labour

⁶ Carrera, Faure, Guild and Kostakopoulou (2011, p. 7).

⁷ The Europe 2020 Strategy identifies “Youth on the move” as a flagship initiative which has the aim “to enhance the performance and international attractiveness of Europe’s higher education institutions and raise the overall quality of all levels of education and training in the EU, combining both excellence and equity, by promoting student mobility and trainees’ mobility, and improve the employment situation of young people.” In addition, the flagship initiative “An Agenda for New Skills and Jobs” aims “to promote a forward-looking and comprehensive labour migration policy which would respond in a flexible way to the priorities and needs of labour markets”, p. 18, see European Commission (2010); see also European Migration Network Study (2013); and speech by former Commissioner for Employment, Social Affairs and Inclusion L. Andor (2012).

markets in many Member States and will be a decisive factor for Europe's economic prosperity in the decade ahead.⁸

The European integration process covering the development of a European immigration policy now has timely momentum. The third EU multi-annual programme covering EU AFSJ policies – the Stockholm Programme⁹ – comes to an end in December 2014. Discussions began in early 2014 at various EU institutional venues concerning priorities to guide the policy agenda for the period 2015-2020 and the next generation of EU immigration policy.

The European Council Conclusions of 26-27 June 2014¹⁰ adopted the new Strategic Guidelines for legislative and operational planning of AFSJ policies for the next five years.¹¹ The Guidelines identify as a key priority to “better manage migration in all its aspects” by addressing shortages of specific skills and attracting ‘talent’. The Conclusions highlight that in order for the EU to remain an attractive destination for “talents and skills”, coherent and efficient rules maximising the opportunities for legal immigration should be developed.¹²

This demonstrates that there is a well-developed policy agenda where the attractiveness of EU immigration policies for selected groups of ‘wanted’ or ‘welcomed’ third-country workers seems to constitute a central policy objective. This book studies the attractiveness of EU labour immigration policy from a number of disciplinary, thematic and comparative perspectives. On 14 February 2014, in Brussels, Belgium, the Justice and Home Affairs Section of the Centre for European Policy Studies (CEPS) and the former Directorate-General for Home Affairs (DG Home) of the European Commission co-organised an Expert Seminar entitled “Rethinking Attractiveness of Labour Migration Policies: Comparative Perspectives on the EU, USA, Canada and Beyond”. The event aimed to analyse and clarify the determinants and challenges characterising discussions focused on the attractiveness of labour migration policies in different supranational and international settings with the view to providing scholarly and fact-based

⁸ European Commission (2014, p. 3); similar claims have been outlined in European Commission (2013).

⁹ Refer to European Council (2009).

¹⁰ European Council (2014).

¹¹ Carrera and Guild (2014).

¹² Refer to p. 2 (para. 6) and p. 19 of the European Council (2014).

input for informed policy-making in the next generation of EU labour immigration policies.

The Expert Seminar brought together a high-level group of European Commission officials representing relevant DGs and services dealing directly or indirectly with migration-related policies, as well as representatives from other European institutions, including from the European Parliament, the European Economic and Social Committee (EESC), the Committee of the Regions, the Council and the European External Action Service (EEAS). Scholars and experts with in-depth knowledge of migration studies also attended. The full programme of the Expert Seminar is reproduced in Annex 1 of this book. The event fell within the scope of NEUJOBS, a research project financed by the European Commission under the 7th Framework Programme and coordinated by the Economic Policy Section at CEPS. For more information about the project see www.neujobs.eu.

This book presents the main results and contributions of the Expert Seminar. The panel discussions of the Seminar were structured around a set of ‘policy challenges’ in the following manner: Challenge 1 on Rights and Discrimination; Challenge 2 on Qualifications and Skills; Challenge 3 on Matching Demand and Supply; and Challenge 4 on The Way Forward in the EU: A Post-Stockholm Programme Strategy.

The book integrates all four challenges into four main sections, outlined successively below, taking into account the general framing and specific set of questions for discussion in each of the panels.

Section I of the book, which corresponds to the Seminar’s Challenge 1 on “Rights and Discrimination”, concentrates on the role played by rights and non-discrimination in making the EU more or less attractive to foreign labourers. Challenge 1 was discussed in the context of the perception in other parts of the world that racism and xenophobia are on the rise in the EU. The following questions in particular were addressed:

- What role do rights relating to security of residence, access to employment and services, and family reunification play as determinants of immigration? What role do discrimination, racism and xenophobia play?
- What are the competitive disadvantages of openness of immigration policies? Is there a trade-off between the openness of migration policies and the granting of rights (i.e. more openness, fewer rights)?

Section II of the book is developed on the basis of Challenges 2 and 3 of the Seminar, which dealt with “Qualifications and Skills” and “Matching Demand and Supply”, respectively. The recognition of foreign qualifications and skills represents a factor of vital importance for making labour markets and economies more accessible to third-country workers. The discussion in Challenge 2 was centred on obstacles and challenges regarding the recognition of foreign qualifications and professional experiences, as well as the insufficient integration or socio-economic inclusion of skills of third-country nationals in EU member states. Challenge 3 focused on the policy priority given to better job matching and filling the labour market shortages of member states. In this context, labour immigration policies are supposed to be “needs-based” in accordance with member states’ priorities and follow as a consequence a predominantly utilitarian or selective approach. The deliberations covered questions such as:

- What are the main outstanding issues in the EU and what are the most relevant obstacles to the recognition of foreign qualifications and skills?
- Beyond formal recognition of qualifications and skills, what are the informal barriers that non-EU nationals face for entry into EU labour markets? Are there any other barriers that they face? If so, how to overcome them?
- Can labour market “needs” be effectively determined? Is it actually possible to have a functioning labour market matching system in light of the temporariness of labour demands and individuals’ changing intentions?

Section III of the book addresses some international experiences and approaches and re-examines some of the assumptions underlying the competition for talent narrative. This section covers the cross-cutting comparative perspectives and experiences from the US, Canada and South America as regards the control of movement of non-nationals for employment purposes. Countries such as the US and Canada are too often uncritically presented in EU official policy documents as more attractive destinations and therefore in competition with the EU in what has been denominated as ‘the global race for talent’. Yet, are these countries and migration control regimes indeed so ‘attractive’ and ‘competitive’, and if so what makes them more attractive in comparison to the EU and member states?

Section IV of the book is based on Challenge 4 on “The Way Forward in the EU – A Post-Stockholm Programme Strategy”. During the last 15 years

the EU has at last progressively developed a body of legislation and supranational standards governing the conditions of entry and residence for third-country nationals and their rights when in the EU, including some limited employment-related dimensions for specific categories of immigrants. Still, an unfinished component in the EU immigration policy framework relates to that of labour immigration. Challenge 4 focused on the main issues concerning possible future EU legislative developments and practical mechanisms to better ensure coordination and support for EU labour migration policies. Questions addressed included, among others:

- What are the pros/cons of further legislative consolidation or even codification of EU labour immigration policy? Is the moment ripe for a consolidation of EU legislation on labour immigration? What would be the advantages and disadvantages?
- What should be key priorities for the EU in the years to come? What concrete initiatives should the European Commission focus on?

This book integrates these policy challenges and main questions covered during the Expert Seminar and elaborates on them in the various chapter contributions. There are a number of unchallenged assumptions and expected outcomes underlying policy and academic debates over the attractiveness, selection and competition rationale of controlling the movement of persons across borders for reasons of working or seeking employment, and these call for further reflection and discussion. This is one of the main goals of this book.

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SECTION I

RIGHTS AND DISCRIMINATION

2. RETHINKING MIGRANT RIGHTS

MARTIN RUHS

1. Introduction

In 1990, the General Assembly of the United Nations (UN) adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW). The Convention stipulates a very comprehensive set of civil, political, economic, and social rights for migrants, including those living and/or working abroad illegally. Hailed as a major achievement in the struggle for improving the rights of migrants, the CMW has become a cornerstone of the human rights-based approach to regulating labour immigration advocated by many national and international organisations concerned with the protection of migrant workers.

In practice, ratification of the 1990 convention has been disappointing, both in absolute and relative terms. Although the CMW was introduced more than 20 years ago, so far fewer than 50 countries have ratified it – and the great majority of these countries are predominantly migrant-sending rather than migrant-receiving. This makes the CMW the least ratified convention among all the major international human rights treaties. It has a quarter of the ratifications of the Convention on the Rights of the Child (passed a year before the CMW) and less than half of the ratifications of the Convention on the Rights of Persons with Disabilities (passed 16 years after the CMW).

“Migrant rights are human rights” is a common argument made by migrant rights advocates around the world. But nation states, especially major migrant-receiving countries, do not see it that way. Despite having signed general human rights treaties, most nation states, especially major immigration countries, are clearly reluctant to ratify international conventions that limit their discretion and ability to restrict the rights of migrants living and working in their territories.

Why have so few countries ratified the CMW? The existing literature has identified a host of legal issues and complexities as well as a lack of

campaigning and awareness of the CMW and other international conventions as key factors.¹

I argue in my new book² that the primary explanation for the low level of ratifications of international migrant rights treaties lies with the effects of granting or restricting migrant rights on the national interests (however defined) of migrant-receiving countries. This may sound like an obvious point, but the dearth of discussion about the multifaceted costs and benefits of specific migrant rights for receiving countries – and migrants and their countries of origin – suggests that this is an important gap in analysis and debates that needs to be urgently addressed.

2. Migrant rights as instruments of labour immigration policy

There is a large gap between the rights of migrant workers stipulated in international human rights law and the rights that migrants working in high-income countries experience in practice. Many UN agencies and other international and national organisations concerned with migrant workers have responded to the widespread restrictions of migrant rights by emphasising that migrant rights are human rights that are universal, indivisible, and inalienable; they derive from a common humanity and must be protected regardless of citizenship.

A key argument and starting point of my book *The Price of Rights* is that we need to expand current debates and analyses of migrant rights by complementing conversations about the human rights of migrants with a systematic, dispassionate analysis of the interests and roles of nation states in granting and restricting the rights of migrant workers. This is because the rights of migrant workers not only have intrinsic value as underscored by human rights approaches but also play an important instrumental role in shaping the effects of international labour migration for receiving countries, migrants, and their countries of origin.

For example, whether or not migrants enjoy the right to free choice of employment and other employment-related rights in the receiving country's labour market is likely to affect their productivity and earnings, remittances, and competition with local workers. The fiscal effects of immigration critically depend on whether and how migrants' social rights (including access to public services and welfare benefits) are restricted. Migrants' incentives and behaviour in and beyond the labour market – for instance, the

¹ See, for example, the introduction in de Guchteneire, Pécoud and Cholewinski (2009).

² Ruhs (2013).

extent to which they acquire language and other skills relevant to employment and life in the host country – will be influenced by whether or not they have – or are on a path to acquiring – the rights to permanent residence and citizenship.

Because rights shape the effects of labour immigration, migrant rights are in practice a core component of nation states' labour immigration policies. At its core, the design of labour immigration policy requires simultaneous policy decisions on: how to regulate the number of migrants to be admitted, e.g. through quotas or points-based systems; how to select migrants, e.g. by skill and/or nationality; and what rights to grant migrants after admission, e.g. temporary or permanent residence, access to welfare benefits, and limited or unlimited rights to employment. When receiving countries decide on these three issues, the impacts on the 'national interest' (however defined) of the existing residents in the host countries are likely to be of great significance. Policy decisions on the number, selection, and rights of migrant workers can also be influenced by their consequences for the interests of migrants and their countries of origin, whose actions and policies can play an important role in supporting, sustaining, or undermining particular labour immigration policy decisions in migrant-receiving countries.

The important implication of this approach is that migrant rights cannot be studied and debated in isolation of admissions policy, both in terms of positive and normative analysis. To understand why, when, and how countries restrict the rights of migrant workers, and to debate what rights migrant workers *should* have, we need to consider how particular rights restrictions are related to policies that regulate the admission, i.e. the numbers and selection, of migrant workers.

3. Trade-offs between 'access' and 'rights'

In *The Price of Rights*, I examine labour immigration policies in over 45 high-income countries, as well as policy drivers in major migrant-receiving and migrant-sending states. A key finding is that there are trade-offs in the policies of high-income countries between openness to admitting migrant workers and some of the rights granted to migrants after admission. Greater equality of rights for new migrant workers tends to be associated with more restrictive admission policies, especially for admitting lower-skilled workers from poorer countries. The tension between 'access' and 'rights' applies to a few specific rights that are perceived to create net costs for the receiving

countries, especially the right of lower-skilled migrants to access certain welfare services and benefits.

The trade-off creates a dilemma. From a global justice point of view, both 'more migration' and 'more rights' for migrant workers are 'good things'. The World Bank believes that more international labour migration, especially low-skilled migration that is currently most restricted, is one of the most effective ways of raising the incomes of workers and their families in low-income countries. At the same time, rights based organisations such as the International Labour Organization (ILO) and many activists campaign for greater equality for rights for migrant workers. But the trade-offs between access and rights means that we cannot always have both – more migration and more rights – so a difficult choice needs to be made.

Most low-income countries around the world are acutely aware of the trade-off between access to labour markets in high-income countries and some migrant rights. Few migrant-sending countries are willing to insist on full and equal rights for fear of reduced access to the labour markets of higher-income countries. As I discuss in my book, some migrant-sending countries have explicitly rejected equality of rights for their nationals working abroad on the grounds that it constitutes a restrictive labour immigration policy measure.

International debates about the global governance of migration have almost completely ignored the trade-off between openness and rights. Participants in the High-Level Dialogue on Migration and Development in New York and the Global Forum on Migration and Development in Sweden in 2014 should openly debate the desirability of restricting specific rights, for how long, under what circumstances, and so on. We need a reasoned debate between organisations that advocate more migration to promote development, such as the World Bank, and those primarily concerned with the protection and equality of rights, such as the ILO.

How to respond to the trade-off between openness and rights is an inherently normative question with no one right answer. I argue that there is a strong case for advocating the liberalisation of international labour migration, especially of lower-skilled workers, through temporary migration programmes that protect a universal set of 'core rights' and account for the interests of nation states by restricting a few specific rights that create net costs for receiving countries, and are therefore obstacles to more open admission policies.

4. The case for a 'core rights' approach

We should start discussing the creation of a list of universal 'core rights' for migrant workers that would include fewer rights than the 1990 UN Convention of the Rights on Migrant workers with a higher chance of acceptance by a greater number of countries – thus increasing overall protection for migrant workers including in countries that admit large numbers of migrants. Importantly, the list of core rights could complement rather than replace the existing UN conventions for migrant workers.

There is an important precedent within the UN system for a core rights approach, i.e. for stressing the fundamental importance of specific rights from a larger list of rights. In 1998, the ILO passed the Declaration on Fundamental Principles and Rights at Work, commonly known as "core labour standards". The declaration commits member states to respect and promote principles and rights in four categories, whether or not they have ratified the relevant conventions. These categories are: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour, and the elimination of discrimination in respect of employment and occupation.

The ILO Declaration therefore identified a short list of fundamental rights that are given pre-eminence over other ILO conventions. The core labour standards were adopted in the context of dwindling numbers of ratifications of ILO conventions and a general criticism that the ILO's labour standards were not effective enough at protecting workers' rights in a rapidly globalising world. So there is a direct parallel with the migrant workers conventions.

Exactly which rights should be on this shorter list of core rights is an important question to debate. In my view, the core rights should protect basic civil and labour rights, such as the right to keep your own identity documents, the right to equal access to the protections of the courts and the right to equal employment conditions.

But core rights do not need to include extensive social rights. Core rights should exclude, at least for a limited period of time, access to income-based benefits such as social housing and low-income support. In practice, these welfare benefits are already restricted under most labour immigration programmes around the world.

An important caveat: The list of core rights should complement rather than replace the existing convention, which should continue to play an

important role as an ideal toward which we should strive. Ideals and aspirational principles matter in global efforts to improve the lives of migrants. In today's world, what migrants need most are core rights that are protected now. It might be counter-intuitive, but given the reality of labour immigration policy, when it comes to protecting migrant rights, less is more.

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3. ARE THERE TRADE-OFFS BETWEEN OPENNESS, NUMBERS AND RIGHTS IN BRITAIN'S IMMIGRATION POLICY? *BERNARD RYAN*

Introduction

Over the past decade and a half, the United Kingdom has seen a significant increase in levels of labour migration, both from within the European Economic Area (EEA), and from outside it. Throughout the 1980s, and until the mid-1990s, the percentage of foreign-born individuals in the employed workforce was consistently in the 7-8% range.¹ Since 1997, the share of the foreign-born employed has more than doubled, increasing from 1.9 million (7.3%) in the first quarter of 1997 to 4.5 million (14.7%) in the final quarter of 2013.² In *absolute* terms, the increase has been greatest among those born outside the European Union, whose numbers increased from 1.3 million to 2.7 million (up 115%). In *percentage* terms, the increase has been greatest among those born in EU states, whose numbers grew from 638,000 to 1.7 million (an increase of 168%).

These trends in the labour market have contributed to the high degree of salience of immigration policy in public opinion.³ The trends and the public's response to them inspired the post-2010 Conservative-Liberal Democrat Government's target of reducing net migration to below 100,000 *per annum*, which has led to policies such as caps for skilled workers and strict income tests for family migration. At the same time, it is not clear how

¹ See Aldin, James and Wadsworth (2010, p. 58).

² Based on Labour Force Survey data (most recently for February 2014), published in Office for National Statistics, *Labour Market Statistics* (Table EMP06).

³ From 2000 onwards, opinion polling found that immigration began to appear prominently among the issues facing the United Kingdom classed as "important" by respondents: see Blinder (2012, p. 5).

differently a Labour Party-led Government would address the issue, given that its leaders have apologised repeatedly in recent years for having opened the labour market to the nationals of central and Eastern Europe member states in 2004.⁴

The terms of the political immigration debate have therefore changed in response to the increased numbers of migrants. Against this background, the question here is whether there is evidence of a linkage in the immigration policy debate between openness and numbers on the one hand, and rights on the other.

1. What role do rights relating to security of residence, access to employment and services, and family reunification play as determinants for immigration?

One way of posing the question of a trade-off is to ask whether rights can be a determinant of immigration. In the United Kingdom's case, the answer requires separate treatment of EEA and non-EEA migration.

EEA workers have a full set of rights from an early stage, including access to the labour market, public services and benefits, family reunification and security of residence. Among these, it is likely that an unrestricted right to work is the primary driver of migration. This is seen in the fact that most EEA migrant workers who work in the United Kingdom themselves seek out job opportunities (either in person, or using online communication), while active employer recruitment is only a secondary factor. Other rights are likely to be less relevant to an initial decision to migrate, and instead likely to be more relevant to the facilitation of long-term stay.

In contrast, non-EEA labour migration is mainly employer-led, with ties to individual employers in most cases, and very little scope to move in and out until settlement is obtained. It is also selective, with a strong emphasis on higher skills and qualifications. Each of these factors means that rights concerning benefits, family life and security of residence probably do play a significant part in facilitating migration, i.e. non-EEA workers with the opportunity to migrate may be unwilling to move unless these rights are available. This will be especially true if legally or practically they cannot 'come and go' between the United Kingdom and their state of origin. It will

⁴ For example, in a speech on immigration policy by shadow Home Secretary Yvette Cooper to the IPPR on 7 March 2013: "We know Labour got some things wrong on immigration in Government...We should have kept transitional controls for Eastern Europe."

also be especially the case for the highly skilled, who are more likely to have options as to their place of employment.

2. Is there an actual trade-off between the openness of migration policies and the granting of rights, i.e. more openness, fewer rights?

The other way of posing the question of a trade-off is to ask whether greater openness to migration, and/or greater numbers of immigrants, is associated with a reduction in the rights available. Some potential examples of such trade-offs can be seen in the United Kingdom context, even if they do not always entail *fewer* rights.

In the case of EEA migration, the main examples have concerned access to social benefits, where openness to migration for EU workers has been associated with curtailment of rights. Three examples over the past 20 years may be given:

- In 1994, a test of ‘habitual residence’ in the common travel area⁵ was introduced in relation to means-tested benefits. These are non-contributory benefits, and include income support, income-based job-seekers’ allowance, housing benefit and council tax benefit.
- On 1 May 2004, to coincide with the enlargement of the EU and the opening of the UK labour market to A8 nationals,⁶ a ‘right to reside’ test was added to the habitual residence test. The effect of this test has been to deny access to means-tested benefits to EEA/Swiss nationals who, though actually resident, do not have a right to reside deriving from EU free movement law. It is significant therefore that, as things stood at that time, a ‘jobseeker’ or a former worker qualified for a right of residence as long as he could “provide evidence that [he was] seeking employment and ha[d] a genuine chance of being engaged.”
- From 1 January 2014, to coincide with the removal of labour market restrictions on Bulgarian and Romanian nationals, two further changes have been made. 1) A requirement of three months’ *actual* residence in the common travel area has been added to the habitual residence test.

⁵ This comprises the United Kingdom, Ireland and the United Kingdom’s crown dependencies (the Channel Islands and the Isle of Man).

⁶ A8 nationals are the nationals of the A8 countries that joined the EU in 2004: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. Cyprus and Malta also became member states that year.

2) Job-seekers, and former workers who worked for less than 12 months before becoming unemployed, do not retain a right of residence for more than six months unless they “can provide compelling evidence that [they are] continuing to seek employment and ha[ve] a genuine chance of being engaged.”

In the case of non-EEA migration, something akin to an openness and numbers/rights trade-off is seen in the differentiated rights of labour migrants, as part of a selective immigration policy.

A first set of policies has given a relatively high level of rights to categories of economic migrant considered especially desirable. Under the highly skilled migrant programme and its successor (2002-2011), those who met a points test had unrestricted access to the labour market from the outset. In their case, a right to settlement, and therefore full access to social benefits, could be obtained after five years. Currently, those in investor and entrepreneur categories can obtain settlement in two years (investors only) or three years (both categories), and benefit from a more relaxed approach to absences during the qualifying period. When they acquire settlement, they acquire a general right to work and access to social benefits. In all the cases listed here, family rights have been available from the outset.

A second set of policies concerns skilled workers with a job offer. The long-established position has been that such workers have family rights from the outset, but full access to the labour market and to social benefits only once they acquire settlement. The period to settlement was previously four years, but was increased to five years in 2006. More recently – as part of the policy of reducing overall migration numbers – the Coalition Government has written into the immigration rules that, from 6 April 2016, skilled workers and their families will no longer be automatically eligible for settlement after five years. Instead, eligibility for settlement will be limited to workers who earn more than £35,000, or are in an exempt category (shortage occupations, PhD-level jobs, ministers of religion). Those who do not qualify will have a maximum stay of six years, and will not be permitted to apply to enter as a labour migrant for a further 12 months.

A third level covers workers on temporary labour migration programmes, which have primarily been in agriculture and food processing. When these have been in effect in the United Kingdom the workers in question have not had access to family rights or security of residence. The rationale appears to have been to discourage long-term stay. (There are no such schemes at present.)

3. Further remarks

In light of this review of the British case, we may conclude that the thesis of a numbers and openness/rights trade-off in immigration policy has some explanatory value but is nevertheless incomplete in several respects.

Staying within the logic of a trade-off, one issue is whether the focus should be on the openness of policy or on the numbers of migrants. The recent British experience suggests that increased numbers are a more important constraint on – or driver of – changes to rights regimes than the openness of policy *per se*. Indeed, the recent past has illustrated how increased numbers of one category of migrant (EEA) can lead to effects in the policy sphere on other unrelated groups (non-EEA).

A second point is that the logic of a trade-off may work better for lower-skilled workers, i.e. it is only in relation to them that it can plausibly be said that rights are restricted in order to facilitate a policy of admitting migrants.⁷ In other cases, the logic appears to be the opposite, with rights given (or denied) in order to make the United Kingdom more (or less) attractive, either for initial entry or for eventual stay. Thus the current policy is to deny certain rights to skilled workers in order to *limit* numbers, while the highest level of rights has been accorded to the most sought-after migrants (previously, the highly skilled; now, investors and entrepreneurs) in order to *attract* them to Britain.

Thirdly, even if one accepts that trade-offs can exist, the potential of a ‘high road’ remains, based on the defence of the historic gains in the fields of social and labour rights, and a requirement that any migration policy respect those principles. That would not preclude an open migration policy but would tend to prevent a levelling-down of generally applicable social rights in the name of a more open, or more extensive, immigration regime.

⁷ This is the thesis developed in relation to policy openness, in Ruhs (2013).

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4. LABOUR MIGRATION, TEMPORARINESS AND RIGHTS

RYSZARD CHOLEWINSKI

1. Labour migration, temporariness and rights

Recent global debates on international migration, and especially those relating to migration and development, are increasingly couching labour migration in the context of temporary and/or circular migration and mobility. Indeed, it is being argued that mobility is a term that better captures the largely temporary nature of movements today. However, this emphasis on temporariness can be problematic from the perspective of ensuring the protection of the human rights of migrant workers, and their right to non-discrimination and equality of treatment in particular. Rights of access to employment in terms of the ability to change employers, access to vocational training, freedom of association and collective bargaining, social protection, family reunification and security of residence are most likely to be affected adversely.

The overemphasis on labour migration as largely a temporary phenomenon is also unhelpful for a number of other reasons. First, it tends to view migrants as essentially 'commodities' to be 'traded' and only required in times of economic prosperity and buoyant labour markets. Second, such a focus entrenches unjustified distinctions between skilled/qualified migrants and middle-skilled and low-skilled migrants, implying that the former for whom there is an intense global competition among countries (and mainly developed countries) deserve greater rights protection, a position that is also reflected in legislation and policy in a number of EU member states. However, this approach ignores the obvious, namely the real labour market needs that often remain unrecognised for lower-skilled migrant workers largely because they are perceived as a potential 'burden' in terms of being more difficult to integrate and less mobile in the labour market than more skilled migrants, especially in the event of an economic downturn. Third, not addressing real labour market needs with migrant workers at all skill levels can be costly to employers, for

example, in re-training new workers, and also increases precariousness in the labour market as the available low- and middle-skilled jobs for which the need remains unrecognised are often filled by short-term contract workers, agency workers, and migrant workers in an irregular situation. Moreover, trade unions contend that many jobs filled by temporary migrant workers, including at middle- and lower-skilled levels, are actually 'permanent' jobs, given the structural nature of such labour market shortages.

2. Flawed policy debates

Current political debates on international migration, as well as some policy and academic discourses, are framed in an inappropriate way. Often, these debates lock their participants in a 'zero sum game', a 'them versus us' focus, advocating 'rights versus numbers'. There is a trade-off between more open admission policies and the granting of rights to migrant workers (meaning greater openness results in fewer rights¹) – or, as indicated above, migrants are regarded as commodities with economic 'utility'. These debates are not conducive to well-informed policy as they are fixed in a 'race to the bottom' paradigm. They engender discrimination and further inequalities within and between countries as well as between workers, thus undermining social cohesion. Unequal treatment between migrant workers and nationals can only depress the wages and working conditions of all workers. From a global perspective, these arguments are often articulated by economists based in developed countries, even though they also have their proponents in some developing countries, not least in the context of discussions on the movement of service providers under General Agreement on Trade in Services (GATS) Mode 4 and the perceived need for a greater openness to lower-skilled workers in respect of whom developing countries are seen to have a "competitive advantage". Such arguments, however, should no longer be tolerated in the context of current discussions on the post-2015 UN development agenda, which will apply to all countries (developing and developed) and where promotion of equality is seen as an important element both in terms of empowerment and inclusion of marginalised groups, including migrants, and the furtherance of greater equality between and among countries through, inter alia, policies for planned, well-governed and regular migration.²

¹ See e.g. M. Ruhs (2013).

² See the Focus Areas Document of the Open Working Group on Sustainable Development Goals, Focus area 12: Promote Equality.

While these debates generally recognise that there is a core set of rights that needs to be protected in respect of all migrant workers, they struggle to articulate what this actually entails and often fail to see that the fundamental rights enshrined in international human rights and labour standards should in principle be accorded to all human beings and workers, including migrant workers and irrespective of their migration status. It is important also to view these arguments in the broader context of today's migration governance, which, while connected by and large with labour market issues or related economic and social considerations, is often ultimately dominated by short-term political priorities or interior policy concerns.

3. Protection of the rights of migrant workers: Non-discrimination and equality of treatment as the guiding principle at the global level

The ILO has been engaged in labour migration since its inception in 1919. In underlining the “protection of the interests of workers when employed in other countries other than their own” in its 1919 Constitution,³ the ILO recognised that the exploitation of one group of workers distorts attempts to apply a level playing field within and among countries, which can result in social unrest and a breakdown of public order.

Fundamental principles and rights at work are increasingly in jeopardy in various parts of the world. Some countries attempt to ‘cherry pick’ their rights by focusing on what is more acceptable to them, although often failing to recognise that many of their ‘favoured’ standards can only be effectively taken forward if the foundation of fundamental rights – namely, equality of treatment and non-discrimination in employment, freedom of association and collective bargaining, abolition of forced labour, and elimination of child labour – is not undermined. With regard to equality of treatment and non-discrimination, the two principal ILO instruments, Equal Remuneration Convention, 1951 (No. 100) – ensuring the application to all workers of the principle of equal remuneration for men and women workers for work of equal value – and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) have been widely ratified.⁴ While there is no explicit reference in Convention No. 111 to discrimination on the

³ ILO Constitution, 1919, Preamble.

⁴ E.g. Conventions No. 100 and No. 111 have been ratified by 171 and 172 countries respectively (including all 28 EU member states).

basis of nationality (although such a ground can be added),⁵ the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has underscored that migrant workers are covered on other grounds prohibited under this instrument, whilst also being subject to discrimination on multiple grounds.⁶

Moreover, the Migration for Employment Convention (Revised), 1949 (No. 97) contains a strong equality of treatment clause that also influenced the adoption of similar provisions in EU free movement law,⁷ and Part II of the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) calls for the adoption of a national policy to promote and guarantee equality of opportunity and treatment for migrant workers.⁸ Conventions Nos. 97 and 143 have been ratified by 11 EU/EEA member states (Belgium, Cyprus, France, Germany, Italy, Netherlands, Norway, Portugal, Slovenia, Spain, United Kingdom) and 6 EU/EEA member states (Cyprus, Italy, Norway, Portugal, Slovenia, Sweden) respectively.

The application of the principle of non-discrimination and equality of treatment has been challenged in the EU through the pursuit of a “sectoral” approach to regulating labour migration from third countries as opposed to the originally intended “horizontal” approach,⁹ with the result that high-

⁵ Article 1 of Convention No. 111 reads: “For the purpose of this Convention the term *discrimination* includes— (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations, where such exist, and with other appropriate bodies”.

⁶ International Labour Conference (2012, paras. 776-781).

⁷ See Groenendijk (2010, p. 17).

⁸ See Convention No. 143, Article 10: “Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.”

⁹ See European Commission (2005); the horizontal approach was espoused in a Directive proposed by the Commission in 2001, which did not find consensus in the Council and was withdrawn, see European Commission (2001).

skilled migrants from third countries with “blue card” status can enjoy a higher degree of rights’ protection than less-skilled migrant workers.¹⁰ These distinctions, however, should also be viewed in the context of the most privileged group of third-country nationals, namely those who are family members of EU citizens.

Nonetheless, it has been possible to preserve non-discrimination and equality of treatment in key areas in the single permit directive and the seasonal workers directive,¹¹ such as terms of employment and working conditions and social security, including in respect of the export of pensions. In contrast, in other regions of the world the picture is less positive. For example, the principle of non-discrimination and equality of treatment is not a feature of the 2007 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, and in negotiations on a follow-up instrument it continues to be challenged with the concept of ‘fair treatment’ being preferred to equality of treatment. Under an initiative to promote understanding and a positive image of migrants in Southeast and East Asia, the ILO has found that much work remains to be done to ensure the application of the equal treatment to migrant workers. While approximately 80% of the respondents surveyed in four destination countries in this region recognised the need for migrant workers, close to 60% did not think that regular migrant workers should have the same rights and working conditions as national workers.¹² In the Middle East, some countries have put in place or are giving consideration to introducing national minimum wages, but with lower levels for migrant workers, while in others there is effectively no national comparator because the vast majority of workers in a

¹⁰ Compare the text of Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, with that of Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a member state and on a common set of rights for third-country workers legally residing in a member state, and especially the more favourable provisions in the former addressing family reunification, access to the labour market for family members, and intra-EU mobility.

¹¹ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

¹² The destination countries in question were Malaysia, Republic of Korea, Singapore and Thailand. Moreover, in Malaysia, Singapore and Thailand, approximately 80% of the respondents felt that migrant workers in an irregular situation could not expect to have any rights at work.

particular sector, such as construction or domestic work, are migrants, and discriminatory treatment between different national groups of migrant workers is also pervasive.

Consequently, the EU and its member states have a vital role to play to ensure that fundamental principles and rights at work, including non-discrimination and equality of treatment, which are also enshrined in the EU Charter of Fundamental Rights, are duly valued and promoted in discussions on labour migration. Policy debates openly questioning the continued application of these principles and proposing that increased labour mobility, but with reduced rights, can enhance development outcomes are profoundly flawed. Reinforcing these principles rather than undermining them is today justified more than ever in light of the need to advance human rights and social justice, and the growing consensus that eradicating global inequalities is a critical part of an equitable and sustained development framework post-2015.

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5. MIGRANT INTEGRATION IN 2020 EUROPE: THE CASE FOR INTEGRATION PARTNERSHIPS

ANNA TRIANDAFYLLIDOU

1. Introduction

Economic crisis, declining welfare services and increasing unemployment might not in themselves cause xenophobic and racist attitudes and behaviours, but they can provide fertile ground for them to flourish. After the Islamophobia of the 2000s, prejudice against Roma and xenophobia towards irregular migrants and asylum seekers from Asia and Africa are on the rise in the early 2010s. Concomitantly, across the EU, in countries either crisis-ridden or doing fairly well despite the economic downturn, far right parties have been gaining in electoral strength.

EU programmes encouraging the exchange of good practices in migrant integration and the 11 common basic principles guiding integration policies in the EU (introduced in 2004) seem to have reached a saturation point. There is a need for innovative approaches. Taking stock of the fact that integration happens at the local and regional level, we propose “integration partnerships”. These would bring together native and migrant stakeholders, state authorities and civil society, educators, professional associations and trade unions, cultural associations, and, where relevant, international organisations, with the state and local authorities, non-governmental organisations (NGOs) and hometown associations of the countries of origin of large migrant groups. Integration partnerships are intended as voluntary, grass-roots initiatives, albeit supported by a common institutional framework to be introduced at the EU level. The notion of integration partnerships is inspired by the “mobility partnerships” that have brought together a variable geometry of EU countries with a third country for labour management. Here we propose a variable geometry of one EU country with several countries of origin, with strong involvement of local and regional authorities and non-state actors.

2. The challenge

Muslims might be under the negative spotlight to a lesser degree than they were a few years ago, but prejudice against Roma, for instance, has attracted a lot of attention since 2010. Irregular migrants and asylum seekers from Asia and Africa crossing the EU's southern borders have also attracted a lot of attention since the late 2000s and particularly after the Arab spring in 2011. Concomitantly, in many EU countries, whether they are crisis-ridden or doing fairly well despite the economic downturn, far right parties have been gaining in electoral strength.

Whether in periods of growth or recession, socio-economic data for employment, education, health and housing demonstrate that equal and proportional inclusion of migrants in vital spheres of life has not yet been achieved. With regard to employment, migrants suffer from low employment rates, concentration in specific segments of the labour market, low wages, poor working conditions and under-representation in senior positions in the workplace. Their educational attainment is on average lower than that of other groups, they are under-represented in university track schools and in higher education, and tend to be concentrated in poorly resourced, ethnically and socially homogenous schools. Migrants are generally in worse health, have higher death rates and are more likely to be exposed to risk than the overall population. They often live in poorer housing conditions and are less likely to own property than the rest of the population. Migrants tend to reside in poorer urban districts with fewer public facilities and a high proportion of migrant residents.¹

Migrant integration is a common challenge for state and civil society stakeholders, and at different levels of governance (local, regional, national, European). Indeed, migrant integration has been a key priority for individual member states and the EU as a whole since the 1990s. While integration remains a field of member state competence and actually is best implemented at the local level, the EU has taken a proactive approach. It set up a full toolkit of anti-discrimination legislation (the RED directives of 2000); introduced the Common Guiding Principles for Migrant Integration (2004); and finalised the EU long-term resident status directive (2003), thus providing for a common standard of rights and duties for long-term settled third-country nationals. In addition, the EU supports integration policies at member state and local level by promoting the exchange of good practices and the networking of actors through, for instance, the European Web Site

¹ See also Triandafyllidou and Ulasiuk (2013).

for Integration. It also funds several types of research and civil society programmes through the European Fund for Integration of Third- Country Nationals, the Research Framework Programmes and other policy initiatives.

Nonetheless, policies for migrant integration appear to have stalled in the ‘old’ host countries, notably those that have experienced immigration since the 1950s and 1960s and thus have a history of immigrant integration policies. Actually, migrant integration has been transformed into a migrant flow management tool through the introduction by several EU countries, e.g. the Netherlands, Denmark, France and Germany, of pre-migration language and integration tests at the countries of origin of prospective migrants.² In the meantime, ‘recent’ hosts, notably countries that have experienced immigration in the last 20 years, such as the southern European countries and Ireland, are left to their own devices, adopting rather reluctantly and hesitantly policies and programmes for the socio-cultural integration of immigrants. Recent discourses on the failure of multiculturalism, such as those pronounced by UK Prime Minister David Cameron in 2010 and by German Chancellor Angela Merkel in 2011, contribute to an overall negative climate surrounding migrant integration. There is not only a new emphasis on civic assimilation policies but also on what Cameron has called a new “muscular liberalism” that does not tolerate deviance from the majority liberal secular norms. Researchers have spoken of an emerging new liberal intolerance³ or nationalist intolerance.⁴

3. Addressing the challenge: Developing integration partnerships

This section explores a bottom-up and decentralised approach: it proposes to set up an institutional framework for “integration partnerships” that would promote cooperation and synergies among stakeholders at the regional and local level.

Integration partnerships are intended as a common EU-level institutional framework for cooperation between host country and a number of stakeholders with a view to addressing jointly the specific challenges that native and post-migration minorities and migrant populations may face in a given city or region. Such stakeholders include state authorities and civil

² See individual country chapters in Triandafyllidou and Gropas (2014).

³ Mouritsen and Olsen (2013).

⁴ Kouki and Triandafyllidou (2013).

society, migrant stakeholders, educators, professional associations, employers and trade unions, cultural associations and, where relevant, international organisations, with the state and local authorities, non-governmental organisations (NGOs) and hometown associations of the countries of origin of large migrant groups.

They are conceived as voluntary partnerships that involve one migrant host country (and one or more regions within that country) and one or more countries of origin. The partnership involves several actors at local and regional level, both state and non-state, and is based on a sense of ownership from these local and regional actors.

Recent research⁵ has shown that integration challenges are most effectively addressed at the local and regional rather than the national level, and that migrants' countries of origin may have a positive role to play in contributing to the integration of migrant populations in their country of residence. Such contributions can take the form of collaboration for training teachers and educators, providing textbooks and educational materials, elaborating common curricula, organising cultural activities that help make the migrant or minority population more accepted in its region, enhancing trade and business opportunities, or forming partnerships of professional associations. In other words, they can help in decisive ways to configure cultural diversity as a positive and creative feature in a society rather than as a cultural threat or economic liability.

As a policy instrument they are inspired by the much contested notion of "mobility partnerships" introduced by the European Commission in 2007 to help manage legal migration and combat irregular migration from important sending and transit countries outside the EU. "Diversity partnerships" share with mobility partnerships the effort to bring to a negotiation and cooperation table stakeholders that have different levels of power. In the case of mobility partnerships such stakeholders involve one country of origin and one or more EU countries. The topics that are included in the partnership and the timing for the achievement of its goals are negotiated among the parties. The mobility partnership provides the framework through which to engage in dialogue and to adopt common targets, engage in common tasks and ultimately achieve some outcomes that are considered valuable to all parties involved.

Similar to this idea, integration partnerships can involve a wider range of topics or a more restricted scope, depending on the challenges that specific

⁵ See INTERACT project: www.interact.eu.

migrant groups pose and the means available for addressing the related issues in a given region or city. They can have a very ambitious set of goals or a more restricted one and can develop along different timelines. The important thing in the integration partnerships is that they bring the different diversity stakeholders together and engage both majority and minority actors in dialogue and cooperation.

Integration partnerships are conceived as start-up schemes with very little seed funding, which will come up with concrete proposals for initiatives that may or may not require a substantial state intervention of public financial support. They are aimed at mobilising not only financial but also human and social capital resources among both immigrant and majority populations, thus contributing to a more inclusive society for all. The advantage of the integration partnerships is that they provide a common institutional framework, created by the state and activated at the regional or local level, for the different actors to meet, engage in dialogue, identify common concerns, conceive of solutions that are of mutual benefit, and proceed with implementing the agreed solutions, taking ownership of such programmes rather than experiencing them as top-down command-and-control policies or bottom-up initiatives that are not sustainable in the long run.

The integration partnerships idea is inspired by the need for more dynamic, flexible and interactive policy instruments in the overall area of managing migrant socio-economic integration while securing social cohesion. Integration partnerships can assume different shapes and sizes depending on the region or city and of course the relevant migrant populations. They are dynamic because they point to the common challenges that cultural, ethnic, religious and linguistic diversity raises in European societies, without reifying culture or ethnic identity. They rather pay attention to the grievances that people feel and the ways to address these grievances by balancing the interests and concerns of both host societies and migrants.

Integration partnerships propose a holistic approach to migrant integration, bringing together several policy areas within a given region or city, e.g. education, employment, civic or political participation, seeking to create economies of scale and multiplier effects.

Economies of scale: by addressing several policy areas within a common institutional framework for cooperation, the integration partnerships can achieve economies of scale.

Multiplier effects are intended in the sense of cultivating an overall climate and policy approach that recognises cultural diversity as integral to the given city's or region's local identity and that celebrates such diversity as an enriching and positive feature. To this end integration partnerships can become points of contact and cooperation between immigrant groups with a view to discussing common challenges and considering how to address them. The German Forum for Integration or several inter-faith dialogue initiatives taken up in the UK can serve as examples of how such multiplier effects and an overall positive integration climate can be reinforced.

An obvious policy area where integration partnerships can have a strong effect is the field of combatting discrimination in employment or housing. Migrants can come together with local authorities to devise information campaigns seeking to change negative stereotypes or may engage in common self-help projects that address housing needs. In addition, countries of origin can contribute to the development of transnational economic activities that boost trade and create business opportunities for migrants and countries of origin alike, with the participation and support of businesses, trade unions, and professional associations in the host country.

Another example comes from migrant education: while expanding provisions for support classes for migrant children may entail significant financial and organisational costs for local and regional authorities, when such courses are embedded in wider integration partnerships such costs can be mitigated. For instance, the integration partnership can work towards providing volunteer teaching assistance, or by parents and other local actors offering their premises for classes or fundraising.

Integration partnerships are intended as flexible schemes where the interested parties would define the policy areas where joint work is needed and in which direction.

The policy areas that we envisage should be covered include:

- education of migrant children, exchange of handbooks, bilingual teachers;
- religious education provision – imams and religion teachers;
- religious practice, temples, priests;
- workplace sensitivities (dress code, special dietary requirements);
- support hometown associations: for every euro they raise, pay them an additional euro;
- training and retraining of unemployed third-country nationals; and
- language courses for unemployed third-country nationals.

An integration partnership can cover one or more of these domains and provides the framework within which the specific agreement and the participating countries and actors will be specified.

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SECTION II

QUALIFICATIONS, SKILLS AND NEEDS

6. QUALIFICATIONS, SKILLS AND INTEGRATION

MARIA VINCENZA DESIDERIO

Human capital is the single most important resource for contemporary knowledge economies. As stated in the Europe 2020 strategy,¹ the availability of a highly skilled and productive workforce is a key driver of smart growth and innovation in such economic systems. While the global talent pool continues to expand, international professionals are also increasingly sought after by a growing number of countries. Against this background, the opportunities that each country can offer skilled individuals to make full use of their qualifications and competences across borders are crucial to its comparative attractiveness, economic competitiveness and growth. Efficient systems for the recognition of foreign-acquired diplomas, skills and work experience are an essential instrument to realise this potential.

The difficulties that skilled workers and professionals face in obtaining the recognition of qualifications and competences acquired in their countries of origin are a major barrier to international mobility and to the optimal integration of foreign workers in the receiving countries' labour markets, in terms of employability, jobs-skills matching and career paths. It is difficult to entirely disentangle each of the different elements that negatively affect the labour market outcomes of skilled immigrants as compared to their native counterparts. Nevertheless, it has been largely acknowledged that the lower returns to foreign education and work experience are, together with the limited mastery of the host country's language, the two main reasons explaining higher over-qualification rates for immigrants relative to the native-born.² According to a Eurostat pilot study on the indicators of immigrant integration,³ in 2009, the over-qualification rate of third-country

¹ European Commission (2010).

² Shuster and Desiderio (2013); see also Bonfanti and Xenogiani (2014).

³ Eurostat (2011).

nationals was 15 percentage points higher than for natives (36% and 21%, respectively) on average across the EU. Corresponding figures for most of the other Organisation for Economic Co-operation and Development (OECD) countries are similar if not greater. These findings point to a significant waste of human capital through migration, which needs to be addressed, especially as the global economy becomes increasingly dependent on skills, and international competition for talent intensifies.

Lengthy, cumbersome and costly procedures for the recognition of foreign-acquired credentials represent a particularly stubborn obstacle for qualified immigrants to access regulated professions, as the practice of such professions is generally conditional on formal recognition. For example, long retraining periods, such as those required in the United States for obtaining full recognition of foreign medical credentials, may discourage foreign qualified professionals to go through the recognition procedure, thus hampering their ability to put their skills to best use in the host economy. From the receiving country perspective, this skill 'waste' is of particular concern for those professions – such as, typically, the health and care professions – in which there are growing shortages of workers with domestic qualifications. This skill 'waste' also represents a loss for an immigrant's country of origin, which may have invested significant public funds in education and training of its citizens, and, lacking adequate recognition of their credentials in the countries of destination, is less likely to see the best return for this investment in terms of knowledge and capital transfers.

Access to unregulated professions by foreign-qualified immigrants is not formally conditional on qualification recognition. However, the unfamiliarity of employers with foreign education and workforce training systems and foreign professional standards may translate into relative disadvantages for migrants as compared to natives and domestically qualified foreigners in the recruitment process, as well as in terms of career paths and opportunities for upward professional mobility. This is particularly the case of small and medium-sized enterprises (SMEs), for which hiring immigrants is not a frequent recruitment practice. Notably, SME employers in OECD countries tend to perceive credentials issued by developing countries' educational institutions as a risk, as they are less likely to be able to assess the actual 'value' of such credentials during the recruitment process. The information costs, and perceived risks associated with foreign qualifications and experience, mean that employers may prefer domestically qualified candidates, even if they have inferior credentials than their immigrant counterparts. When immigrants with foreign credentials are hired, it is not unusual for them to be initially employed at lower levels of

responsibility, or to earn lower wages than employees with domestic qualifications.

Over the past five to ten years, many EU member states and OECD countries have adopted measures to improve the recognition of foreign qualifications, as part of the policy efforts aimed at fostering immigrant integration and at unlocking the economic potential of skilled migration. The Migration Policy Institute (MPI) has recently concluded research examining good practice for the recognition of foreign credentials in Europe and North America and has assessed how countries can cooperate more fully to recognise each other's qualifications.⁴ The MPI's research has identified three main groups of measures implemented at the national level that can help improve the productive use of foreign-acquired skills:

- **Measures to facilitate access to information on the recognition procedures and their outcomes for migrants, employers and regulators.**

In many EU member states and OECD countries, the path towards recognition presents a high degree of complexity. This complexity stems from a fragmentation of responsibility for assessing foreign credentials across multiple institutions (competent authorities) within each country, which may result from administrative decentralisation and/or public safety concerns. While it is unlikely and in some cases undesirable that the multiplicity of authorities in charge of recognition will be drastically eliminated – for example, it is in the public interest that foreign medical credentials are assessed by the health authority rather than by a generalist education authority – efficient and user-friendly information services that guide the foreign professionals through the complexity of the national recognition system can be particularly helpful. In Austria, for example, where the recognition process is particularly complex,⁵ dedicated 'one-stop-shops' providing comprehensive information and guidance have recently been established in Wien, Salzburg, Linz and Graz, to encourage immigrants to seek recognition of their foreign-acquired credentials.

New technologies also offer a big opportunity to facilitate access to information on recognition procedures. Thus dedicated Internet

⁴ MPI project on "Brain Waste & Credential Recognition"; the project was funded by the Delegation of the European Union to the United States for the period 2012-13, see www.migrationpolicy.org/topics/brain-waste-credential-recognition.

⁵ OECD (2012).

portals detailing national recognition procedures have proliferated over the past five years. Such tools only achieve their full potential when they provide multilingual information, including in the idioms most frequently spoken by the main immigrant groups in each country. Moreover, databases that compile the results of foreign credentials assessments, which can then be made accessible to the different assessing bodies, can make recognition procedures faster and more standardised. The new German federal law on the recognition of foreign qualifications (*Berufsqualifikationsfeststellungsgesetz*, BQFC) which entered into force in April 2012, has provided for the compilation and mutual accessibility of a database on recognition outcomes by all competent authorities, with the aim of ensuring consistency across the recognition decisions, and speeding-up assessment processes. Opportunities to make these kinds of databases accessible to the wider public – and, notably, to the employers – could be explored as a measure likely to reduce significantly the uncertainty and information costs associated with the recruitment of a foreign-qualified professionals.

- **Measures to facilitate early and timely recognition.**

The first insertion in the labour market can have a particularly persistent scarring effect for migrants, influencing their career paths and prospects for professional development in the medium-long term.⁶ On the one hand, employers typically attribute greater value to work experience acquired in the host country than to foreign credentials. On the other hand, the longer migrants stay in a receiving country without getting their foreign credentials recognised, the less likely they are to bother trying. For these reasons, foreign-qualified professionals should be provided with the opportunity to get their credentials assessed (if not recognised) at the earliest possible point in their migration trajectory, and ideally pre-departure. Australia has been a pioneer in this respect. Pre-departure assessment of foreign qualifications was introduced for the first time as a mandatory requirement for admission under the *General Skilled* stream in 1999. Since July 2012 this requirement applies to all candidates under the new *Skill Select* programme. Similarly, since May 2013, admission to Canada under the *Federal Skilled Worker Program* has been made conditional on credential assessment. In the EU, the German BQFC has

⁶ Capps, Fix and Yi-Ying Lin (2010).

foreseen the possibility for migration candidates to apply for recognition from their countries of origin prior to departure. The BQFC has also set a time limit for the issuance of recognition decisions (three to four months depending on the complexity of the case). Indeed, the timeliness of the recognition procedure is key to improving the economic contribution of foreign-qualified migrants to the host-country's economy.

- **Credentialing procedures tailored to foreign-trained professionals and allowing for early labour market access.**

To improve the efficiency of recognition procedures for regulated professions, governments may work with regulators to ensure that foreign-trained professionals get as much credit as possible for the education and work experience they acquired abroad. In most cases, automatic recognition of foreign credentials in regulated professions is not possible, as such credentials are not entirely comparable with local standards. Thus, the issuance of the authorisation to practice a regulated profession to foreign-trained professionals is generally conditional on compensatory measures, warranting that skills gaps are filled. To facilitate and encourage recognition and ensure that foreign-professionals can contribute as early as possible their full set of skills to the host country's economy, compensatory measures should be specifically designed for foreign-qualified professionals. Thus tailored training modules to fill in specific skills gaps – known as bridging courses – are preferable to less targeted options requiring immigrants to retake entire years of general professional training in their receiving country. Bridging courses are widely used in Australia and have recently gained momentum also in the EU member states, e.g. Sweden. On-the-job training and opportunities of supervised work or conditional registration while completing licensing requirements should also be promoted as far as possible, as such measures allow a candidate to familiarise his- or herself with the local working environment – and thus to acquire local job-specific language and networks – and help counteract the risk of deskilling associated with long interruptions in professional practice. Work-based compensatory measures are commonly applied in Canada. To maximise the cost-efficiency of compensatory measures for the recognition of foreign qualifications and support the optimal labour market integration of foreign professionals, training modules could be coupled with tailored language courses.

Moreover, MPI's research on the recognition of foreign credentials has showed that mutual recognition agreements can also be well-suited to serve the objectives of facilitating access to information on recognition procedures, ensuring standardised procedures and consistency in recognition outcomes, providing the opportunity for obtaining recognition at the earliest possible stage in the migration process, and setting credentialing procedures tailored to the specific needs of foreign qualified professionals.⁷

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⁷ Sumption, Papademetriou and Flamm (2013).

7. CHALLENGES IN SKILLS IDENTIFICATION, ANTICIPATION AND MONITORING

NATALIA POPOVA

Skills identification, anticipation and monitoring are a challenge throughout both origin and destination countries. There is no uniform definition of “skills”: in many EU countries “skills” are defined in terms of occupational skills and/or educational attainment levels. Further, there is no single formula for skill needs analysis; however, from the experience of the European Union member states, what has proved to be useful is a holistic approach: a combination of qualitative analysis, e.g. case studies, focus group discussions, as well as quantitative data, e.g. surveys, skill audits, model-based projections. Long-term skill forecasts are usually carried out at the national level, whereas short-term forecasts are conducted at the regional or local levels, often through the network of the Public Employment Services (PES).

It should be noted that skill forecasting methods could only provide useful insight, rather than exact measurement, of skills demand in the future in response to labour market trends and developments. These exercises could offer very useful information to a broad range of users in the areas of career guidance, employment, and training and labour migration policy design.¹

In many origin countries, skill forecasting methods are either non-existent or implemented on a limited basis, often due to data scarcity. Further, economic globalisation and the presence of a large informal sector are additional complicating factors, making the exercise of skills identification and skills matching even more challenging. Experience demonstrates that skills needs analyses are often attached to ad hoc project initiatives, which remain at pilot level and are not implemented in a

¹ Kolyshko, Panzica, Popa and Popova (2013).

systematic way. Thus it is of key importance that these types of interventions do not remain stand-alone initiatives but are rather incorporated in a broader set of education and training reforms.²

In this context, skills and labour market matching remains a challenge, both for potential and return migrants. Access to skills recognition processes, especially for low- and medium-skilled migrant workers, is often limited. Migrants frequently encounter difficulties in articulating their experiences from the destination countries into better human resources development opportunities on their return. There has been an intense policy debate on the perceived positive link between return migration and the socio-economic progress of origin countries; yet the reality is much more complex and there is often little empirical analysis to illustrate this important relationship, also in terms of labour market re-integration, and what factors play a role in facilitating or impeding it.³

A recent labour migration survey in Ukraine, implemented with EU-funding and ILO technical support and covering 27,000 households and more than 43,000 individuals, extrapolated that the migrant flow (defined in this case as those working or searching for a job abroad at any time during the preceding two and a half years) was 1.2 million or 3.4% of the population aged 15 to 70. The average duration of stay abroad was five months. Almost two-thirds of the labour migrants have completed general secondary education. Female migrant workers have higher levels of education than men; however, they are more often engaged in occupations of lower status. Almost a quarter (23.7%) of Ukrainian migrant workers were engaged in occupations different from those they had held in Ukraine.⁴ In a similar survey conducted in Moldova, covering 6,040 households, reaching 11,230 persons between the ages of 15 and 64, nearly one-fifth (17%) of Moldova's working-age population was currently employed or searching for a job abroad over the last 24 months. Labour migrants often occupy low-skilled jobs (42.3%), and only 11.3% of Moldovan migrant workers were able to find work in the same sector in which they had worked prior to leaving the country.⁵

In order to respond to continuously changing labour market demand, education and training should be provided from a lifelong learning

² Alquezar, Avato, Bardak, Panzica and Popova (2010).

³ Cantarji, Lipcanu, Panzica, Popova, Vladicescu, Toarta and Vremis (forthcoming).

⁴ Ukraine Labour Migration Survey (2013).

⁵ Moldova Labour Migration Survey (2013).

perspective, meaning that people of all ages will have equal and open access to quality learning opportunities. This will contribute to keeping individual employability throughout life, preventing long periods of unemployment and poverty.

For initial training, the skill supply should put vocational and general secondary education on a convergence path. Secondary education should reinforce the core work skills, such as learning how to learn, mathematical literacy and basic competences in science and technology, communication in the mother tongue, etc., to allow individuals to adapt to new labour market situations and acquire new skills throughout their careers. Specific occupational skills can be provided either at secondary vocational and post-secondary level or through training, preferably in the workplace.

Continuous or adult training is not sufficiently developed in many origin countries. This fact is explained by several factors: the lack of conceptual framework, the need for an effective social partnership in education and training, as well as funding availability. Thus the possibilities for unemployed workers to be retrained or for employed persons to upgrade their skills are often limited. Last but not least, reforms are needed to improve the functioning of the training market and to create incentives for employers and workers to train.

Almost all European countries have developed or are in the process of establishing qualification frameworks, providing additional mechanisms to align education and training to labour market needs. Regardless of where training takes place, it can lead to qualifications, which are recognisable and portable. The establishment of a National Qualifications Framework (NQF) sets out the levels against which a qualification can be recognised. The accreditation of qualifications ensures quality and transparency for both learners and employers.

The creation of NQFs is a long-term process. A short to medium-term solution and a stepping-stone for developing a full-fledged framework can be the establishment of sector occupational requirements committees with trend-setting companies in each sector. The validity of the work of these committees depends very much on the quality of the companies invited to participate and on the level of tripartite involvement, meaning the involvement of government, employer and worker representatives.

The above tools refer mainly to the formal education system, but recognition of prior (non-formal/informal) learning is also viewed as a means of enhancing employability, labour mobility and career prospects. In many origin countries, a large share of employment is informal. Validation

of prior learning can help workers to move into the formal economy. That is why appropriate tools should be adapted, benefiting from the experience in the EU. In this area, a recent example is the technical assistance delivered within the EU-funded ILO project “Effective Governance of Labour Migration and its Skill Dimensions”. The project worked for the establishment of a system for recognition of qualifications and validation of ‘non-formal and informal learning’ in Moldova and Ukraine.⁶ In turn, this type of assistance could contribute to improving the overall quality and relevance of education and training in the two countries. In Ukraine, 15 occupational profiles were designed in tourism, construction and agriculture, in collaboration with the relevant government institutions and the social partners. Based upon this initial phase, it appears necessary to support the national stakeholders in establishing a normative framework for a consistent design process of the occupational standards for all sectors as well as for testing the mechanism of the recognition of prior learning in other sectors. In Moldova, six occupational standards were developed for blue-collar jobs in the agriculture and construction sectors. This was coupled with the creation and capacity building of a team of national experts in occupational standards, as well as designing practical tools and recommendations for the amendment of the legal framework.

A ‘one size fits all approach’ to technical assistance does not work, since policy, process, practice, procedures and institutional logic are country-specific. At national level, providing capacity building for skill needs analysis is important and should be part of the overall improvement of labour market information systems. This will help origin countries to move to more evidence-based employment and human resources policy. Here, the main targeted institutions should be the Ministries of Labour, the Public Employment Services and the national statistical offices. However, this type of assistance is not sufficient.

Efforts to improve skills identification and matching should be combined with comprehensive education, training and labour market reforms, aimed at strengthening governance and fostering policy coherence across key institutions and the social partners to deliver on employment goals. These coordinated efforts will also result in improved coordination and information exchange between the education system and the labour market, thus providing the basis for up-to-date skills information and forecasting.

⁶ Mansfield and Downey (2013).

At organisation and systems level, skills development, training organisations and training delivery systems should be strengthened by promoting a lifelong learning approach, as highlighted also by the ILO Recommendation 195 on Human Resources Development, 2004. This frame should be translated at system level by designing and implementing policies aimed at identifying occupational requirements, which can be translated into occupational and educational standards. The success of these policies depends on the endorsement of the tripartite constituents; therefore, provision to them of adequate capacity building is crucial.

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8. LABOUR MARKET NEEDS AND MIGRATION POLICY OPTIONS: TOWARDS MORE DYNAMIC LABOUR MARKETS

MARTIN KAHANEC

Demographic changes present almost all EU member states with worrying trends, such as ageing populations, scarcity of skilled labour, lack of entrepreneurial and innovative dynamism, and financial risks in social security systems. The Great Recession has aggravated the difficulties through rising risk aversion and economic decline, but also economic nationalism and worsening attitudes towards immigrants and minorities. These challenges result in a growing competition for diminishing human capital, create holes and gaps in the EU's social fabric, and undermine the sustainability of the welfare state in Europe.

Mobility within the EU and immigration from third countries enhance efficient allocation of economic resources and thus provide for growth and welfare. They also increase the flexibility of labour markets and enable economies to adjust to economic shocks. In particular, they help to satisfy the demand for skilled workers and reduce mismatching in the labour market. Skilled migrants help to generate jobs for unskilled workers, which is important in particular during economic crises.

Interregional mobility within the EU is rather low by international standards, however. The situation is better when it comes to immigration to the EU from third countries, as immigration to the EU is substantial and the migrants who come are generally rather skilled.¹ However, Europe is losing in the global competition for skilled migrant workers, and migrants tend to downgrade into jobs below their level of qualification.²

¹ Zimmermann (2005); Kahanec (2013).

² Kahanec (2013).

What migration policy frameworks can help Europe to effectively govern international flows of workers and alleviate some of the challenges enumerated above? What migration policy frameworks can enhance labour matching in Europe, and help Europe to reinvent itself as a global leader in innovation and knowledge-driven economic progress? These are the questions and narrowly defined perspectives on migration policy that this contribution sheds light on.

Let us first consider a *laissez-faire* approach under which it is the supply of and demand for migrant workers that drive migration flows, with the state merely facilitating the process but not seeking to actively affect the size or directionality of migration flows. This policy approach best describes mobility within the EU's internal market, and is supported by several studies that highlight the benefits of enhanced mobility for EU labour markets.³

More broadly, however, we need to note that although the *laissez-faire* approach is relatively cost-efficient, it may be insufficient to tackle actual or perceived risks of immigration, or negative attitudes towards migrants. This is because migrants are perceived as competitors not only in the labour market but also in access to welfare benefits and public goods. Another problem with an orthodox *laissez-faire* approach may be that rich countries with compressed income distribution, such as most EU member states, tend to attract low-skilled immigrants.⁴ Therefore, migration policies that select migrants on skills may be needed precisely in the EU, if the grand objective of migration policy is contributing to a skill-driven knowledge economy. Finally, declining sectors, rather than innovate, might adopt low-cost strategies and hire cheaper immigrant workers to preserve their competitiveness. This would again be a problem in view of the aspiration to become a leader in terms of innovation, research and development.

One way of addressing some of the actual or perceived risks is to impose general immigration quotas. Whereas such quotas would perhaps assuage the fear of mass immigration and at least in theory provide policy-makers with an 'emergency brake', aggregate quotas are usually rather arbitrary and unrelated to labour market skill matching.

A more nuanced approach is positive selection of skills in shortage in the labour market. Its main difficulty is the problematic identification of skill shortages. Labour shortages signal imperfections and sluggish adjustment in

³ Kahanec and Zimmermann (2010); Kahanec, Zimmermann, Kurekova and Biavaschi (2013).

⁴ Roy (2014).

the labour market. Economists view skill shortage as a temporary deviation from an equilibrium, which then prompts adjustment through wages, labour supply or labour demand. However, there may be market failures, such as lack of information, adjustment costs, labour market regulation, inflexible industrial relations and skill formation systems, which all potentially delay the adjustment and result in lasting skill mismatches.

Measurement of skill and labour shortages is a complex task. The key issue is whether what we observe is a 'real' shortage (not enough people with a given skill, relative to the demand, for any reasonable wage) or a problem of matching and wage adjustment, such as when the wage offered is too low or the reservation wage is too high (though there are in principle enough workers with the demanded skill). In the literature a number of alternative measures of skill shortages have been proposed.⁵ These include the unemployment-to-vacancy ratio, wage premium, elasticity of labour supply, and difficulties to fill vacancies reported by employers. For all these measures of shortage variation over time as well as across industries, occupation and region need to be considered.

There are, however, a number of conceptual and practical problems with the proposed measures. To list just a few, first, the indicators of shortage generally produce conflicting results. One way to alleviate this issue is to look at several indicators and by doing so triangulate real shortages. Such an approach may be practical, but it does not solve the conceptual challenge. Second, the measurement of supply of skills is problematic as it requires the analyst to assign all potential workers, i.e. also those not currently working, to skill groups. This is particularly difficult with regard to the possibility that workers can adjust and amend their skills, and some skills are more general and readily adjustable whereas other types of skills are more rigid. Finally, what matters from the policy perspective is not only current but also future skill and labour mismatching. The need to forecast the supply as well as demand for labour and skills exacerbates the aforementioned challenges.

These arguments indicate that migration policy based on a preferential treatment of immigrants, nominally satisfying narrowly-defined measured demand for skills, may be self-defeating. To search for a policy alternative that addresses the shortcomings of an orthodox *laissez-faire* approach and avoids the challenge of measurement of skill and labour shortages, it is useful to briefly discuss skill-based selective frameworks.

⁵ Zimmermann, Bonin, Fahr and Hinte (2007).

A number of countries apply selective migration policies that favour the immigration of skilled workers, including points-based systems applied by, e.g. Australia, Canada or the UK (although in the last it is being deconstructed), but also a number of EU member states applying various special provisions for skilled immigrants.⁶ Especially the points-based approaches provide a systematic and transparent regulatory framework. There is also evidence that selective migration policies lead to changes of migration flows, which are in line with policy objectives, and that they increase the employability of migrants from given origins.⁷

However, depending on their design, selective migration policies tend to be costly. The costs are especially high for migration policies that are based on identification of skill and labour shortages in the domestic labour market. Although some of the burden can be shared with immigrants, e.g. if there is an automated pre-screening based on self-reported variables, identification of skill needs as well as the regular adjustment, fine-tuning and monitoring of the system involve significant pecuniary and non-pecuniary costs. Additionally, skill-based selection frameworks generally select migrants based on only a small set of observable characteristics that are only proxies for the true determinants of migrants' employability and labour market potential. Furthermore, they are not a system of quick response, should new shortages emerge or old shortages wither away. Finally, they reduce the risk but do not prevent subsequent downgrading into jobs below migrants' measured skills; hence integration policies need to complement migration policies.

Based on these considerations, I propose that an immigration framework suitable for addressing the EU's desire to become a leading global knowledge-based economy would involve a gradual liberalisation of mobility between the European Union and selected third countries. This should start with liberalisation of visa regimes, a stepped up engagement through mobility frameworks at various levels and possibly for specific sectors and occupations, work permit liberalisation and facilitation, and enhanced transparency and simplification of immigration procedures. Step-by-step liberalisation should start with a smaller set of selected countries with whom the EU already has established cooperation frameworks,

⁶ Kahanec and Zimmermann (2011).

⁷ CIC (2010); Birrell, Hawthorne and Richardson (2006); Grangier, Hodgson and McLeod (2012).

possibly including some advanced economies but also some of the countries covered by the European Neighbourhood Policy.

In order to facilitate inflow of workers with demanded skills and better labour market matching, the preferred migration policy framework should select immigrants on general skills. Although it may be tempting to favour immigrants possessing skills that one would evaluate to be in shortage, the conceptual problems of such an approach do not seem to justify its possible benefits. An approach based on selection of general skills is also considerably cheaper and more transparent to administer, given that it does not require costly evaluation of which specific skills are in shortage.

Any immigration framework should also involve enhancement of complementary migrant integration policies, including skill transferability, recognition of social rights, reduction of informational gaps, transparency towards the general public, including dissemination of results from relevant research, and involvement of relevant stakeholders.

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9. FALLING THROUGH THE CRACKS: THIRD-COUNTRY NATIONALS AND THE RECOGNITION OF QUALIFICATIONS IN THE EU

KATHARINA EISELE

In recent years the EU has repeatedly called for a forward-looking, flexible and comprehensive labour migration policy – in particular under the Europe 2020 Strategy – stressing that it can contribute to smart, sustainable and inclusive growth.¹ The European Commission emphasised in March 2014 that “Europe must attract new talent and compete on the global stage.”² However, the repudiation of professional qualifications and academic diplomas still constitutes one of the major challenges to effectively attract foreign workers to the EU: the recognition of foreign qualifications and skills is of vital importance for making labour markets and economies more attractive and accessible to third-country workers, but no EU-wide system exists.

To recall, the practice of certain professions in the member states can be contingent on having a specific qualification, for example the professions of architects or engineers. The requirements for obtaining such professional qualifications may differ across the EU, and a person who was a fully qualified professional in one member state would not necessarily be able to carry out his/her profession in another member state.³ To tackle this problem, the EU adopted consolidated rules on the recognition of qualifications in 2005. Thus for nationals of an EU member state Directive

¹ See for example on the Europe 2020 Strategy, European Commission Communication (2010, p. 18); see also Carrera, Faure, Guild and Kostakopoulou (2011).

² European Commission (2014, p. 4).

³ For a detailed study, see Schneider (1995).

2005/36/EC (Professional Qualifications Directive) provides the legal framework for the recognition of professional qualifications by the host member state for regulated professions pursued on either an employed or self-employed basis.⁴ For a limited number of professions the Professional Qualifications Directive allows for automatic recognition, such as doctors, dentists and nurses. For a large number of professions the so-called “general system” provides for the mutual recognition of qualifications in which member states proceed on a case-by-case basis (in principle access to a regulated profession is granted to a person who can demonstrate that he/she is fully qualified in the home member state).

The Professional Qualifications Directive was updated in 2013 to affirm the underlying principles of mutual recognition and mutual trust.⁵ The changes concern, among other things, the use of modern technologies in recognition procedures to speed up processes (introduction of the Internal Market Information System), but also better access to information, the modernisation of harmonised minimum training requirements, and common training principles.

Today, about 740 categories of regulated professions exist in all EU member states.⁶ In October 2013, the Commission announced the start of an evaluation of national regulations on the access to professions.⁷ The aim is to improve access to regulated professions with a view to promoting the mobility of qualified professionals in the EU’s internal market as well as to facilitate the cross-border provision of services.

While there are specific rules applicable to EU nationals on the recognition of professional qualifications, no EU framework exists that applies to third-country nationals. The fact that there is no common EU

⁴ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, consolidated version of 24 March 2011.

⁵ Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System (“the IMI Regulation”).

⁶ See “Regulated Professions Database” of the European Commission: http://ec.europa.eu/internal_market/qualifications/regprof/index.cfm?fuseaction=home.home.

⁷ European Commission Communication (2013).

framework for third-country nationals in place, nor a framework that regulates the recognition of qualifications from outside the EU, is one of the main outstanding issues.

Yet the scope of application of the Professional Qualifications Directive is extended to certain groups of third-country nationals, namely:

- family members of EU citizens under Directive 2004/38/EC (Citizens' Directive);⁸
- refugees under Directive 2004/83/EC;⁹
- long-term residents under Directive 2003/109/EC;¹⁰
- EU Blue Card holders under Directive 2009/50/EC (EU Blue Card Directive);¹¹
- researchers under Directive 2005/71/EC.¹²

This extension of the Professional Qualifications Directive applies, however, with geographical limitations, which adds considerably to the variable geometry: while the Citizens' Directive binds all EU member states, the EU Blue Card Directive and Directive 2003/109/EC on long-term residents are not applicable to the UK, Ireland and Denmark. Directive 2004/83/EC on refugees binds the UK and Ireland, but not Denmark. By contrast, Directive 2005/71/EC on researchers does not apply to the UK and Denmark, but Ireland opted in.

It is interesting to note that the preamble of the EU Blue Card Directive states that "professional qualifications acquired by a third-country national in another Member State should be recognised in the same way as those of

⁸ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

⁹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

¹⁰ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

¹¹ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

¹² Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research.

Union citizens. Qualifications acquired in a third-country should be taken into account in conformity with Directive 2005/36/EC".¹³ In line with the wording member states are thus not obliged to recognise the professional qualifications acquired by a third-country national (before submitting an EU Blue Card application) in another member state in the same way as those of EU citizens.

Directive 2004/83/EC on refugees provides that member states must ensure equal treatment between beneficiaries of refugee or subsidiary protection status and nationals in the context of the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications.¹⁴ Similarly, long-term residents, EU Blue Card holders and researchers (as well as holders of a single permit under Directive 2011/98/EU¹⁵) enjoy equal treatment with nationals of the member state concerned as regards the recognition of professional diplomas, certificates and other qualifications in accordance with the relevant national procedures.¹⁶

This equal treatment rule raises some fundamental questions: first, the equal treatment concerning recognition of qualification is granted in relation to nationals of a member state – however, qualifications that nationals have obtained are normally not subject to recognition procedures (if not obtained abroad). Second, one may wonder what exactly is meant by the addition “in accordance with the relevant national procedures”. A fair system must ensure that member states cannot invoke national rules and procedures to circumvent the equal treatment accorded by the respective directives. Third, it is not specified whether the equal treatment covers qualifications issued by member states and those issued by third states alike.

¹³ See Recital 19 of Council Directive 2009/50/EC of 25 May 2009.

¹⁴ See Article 27(3) of Council Directive 2004/83/EC of 29 April 2004.

¹⁵ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State; the third-country workers referred to under Art. 12 are defined in Art. 3(1)(b) and (c) of Directive 2011/98/EU on a single permit.

¹⁶ Art. 11(1)(c) of Council Directive 2003/109/EC of 25 November 2003; Art. 14(1)(d) of Council Directive 2009/50/EC of 25 May 2009; Art. 12(a) of Council Directive 2005/71/EC of 12 October 2005; Art. 12(1)(d) of Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011.

The lack of an EU-wide recognition of qualifications has been criticised in relation to the EU Blue Card Directive that aims to attract “highly qualified” third-country nationals. “Many EU countries do not have adequate legal frameworks for recognizing qualifications from outside the EU. In addition, there is no common EU framework for determining qualifications earned in external countries. Consequently, a degree that one Member State recognizes as qualifying for a Blue Card may be rejected by another Member State.”¹⁷

Looking at member state level, Germany adopted a new law on the recognition of professional qualifications that entered into force in April 2012.¹⁸ This law aims to reduce the formal and informal barriers in Germany.¹⁹ Key features of this law relate to:

- the general legal entitlement for a recognition procedure independent of the country of origin;
- the entitlement for a recognition procedure includes all unregulated professions for which no recognition procedure exists;
- strict time limits for more efficient procedures;
- the request for recognition can be made while being abroad;
- previous work experience is taken into account.

Finally, another interesting rule introduced under German law is a new visa for foreign professionals holding a university degree (either a German degree or a comparable foreign one), permitting them to search for employment for up to six months in Germany provided they dispose of sufficient funds to sustain themselves.²⁰

¹⁷ Gümüs (2012, p. 446); see also Eisele (2013, p. 25).

¹⁸ *Gesetz zur Verbesserung der Feststellung und Anerkennung im Ausland erworbener Berufsqualifikationen* vom 11 Dezember 2011, Bundesgesetzblatt Jhg. 2011 Teil I Nr. 63, 2515.

¹⁹ See Braun (2012).

²⁰ Article 18c *Aufenthaltsgesetz* (German Residence Act).

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SECTION III

INTERNATIONAL PERSPECTIVES

10. RETHINKING ATTRACTIVENESS: THE CASE OF SOUTH AMERICA

DIEGO ACOSTA ARCARAZO

This chapter brings the experiences of America into the debate. South America is a key region for the EU when discussing migration for at least two reasons. First, it has a special partnership with the EU since 1999. The importance of this partnership, and its impact on migration, has been the subject of various Commission Communications¹ and Council statements.² Second, and perhaps surprisingly, there are an increasing number of EU citizens residing in South America,³ some of whom unfortunately find themselves in an irregular situation. A recent study conducted for the International Centre for Migration Policy and Development (ICMPD) and for Brazil's Ministry of Labour⁴ found that out of the 40 Spaniards and Portuguese who had been interviewed, all of whom had been living in Brazil since 2008, 35% had an irregular legal status.⁵ This is a new important aspect which should not be ignored in the relationship between South America and the EU.

With this in mind, I would like to discuss successively three key issues: irregular migration, access to rights and the role of migrants' rights.

First, the Expert Seminar's programme states that "in other parts of the world the perception that racism and xenophobia are on the rise in Europe

¹ European Commission (2009).

² Council of the European Union (2010).

³ Córdova Alcaraz (2012); there would be around 1.3 million EU nationals residing in Latin America and the Caribbean with flows increasing since 2008.

⁴ This study was financed by the European Commission and the results were presented at a conference in Brussels, 20 November 2013 (www.icmpd.org/CalendarDetail.1587.0.html?&no_cache=1&tx_calender_pi2%5Bentry%5D=601).

⁵ Magalhães Fernandes, da Consolação Gomes de Castro and Pena Knup (2013, pp. 225-270).

is widespread". This is true and worrisome. Starting with the adoption of the Returns Directive in 2008, South America has been very critical of the EU's policies on migration. This is clear from various documents of its regional organisations, such as MERCOSUR, the Andean Community and UNASUR, from the final declarations of each of the yearly South American Conferences on Migration,⁶ and from the statements of various presidents and important officials in the region.⁷ The European Union needs to be aware of the consequences of being perceived as restrictive and xenophobic, since this might have negative effects "in terms of the EU's own credibility on human rights and the principle of solidarity in the world".⁸

Indeed, South American countries have defined their recent migration measures in opposition to the EU, notably on irregular migration.⁹ We can observe how in the last 15 years a completely renewed discourse on migration and rights has been taking shape in South America. This discourse, as the 2013 Buenos Aires declaration of the South American Conference on Migrations summarises, emphasises the human right to migration, the recognition of migrants as bearers of rights, the respect of the fundamental rights of migrants and their families irrespective of their migratory status and the opposition to any criminalisation of irregular migration.¹⁰

This discourse is affecting all the phases which could be included in the governance of migration: agenda setting, consensus building, policies and legislation as well as implementation of those policies. It is true, however, that there still exists a certain gap between rhetoric and law in some countries in the region. That gap is nonetheless being reduced by the numerous pieces of legislation at regional level (such as the MERCOSUR

⁶ The South American Conference on Migrations is a regional consultative process on migration in which all 12 countries in South America participate. The conference seeks to build consensus aimed at harmonisation of migration policies and the consolidation of regional processes at MERCOSUR and CAN level in an intergovernmental non-binding forum.

⁷ Acosta Arcarazo (2009).

⁸ Guild, Carrera and Faure Atger (2009, p. 17).

⁹ Acosta Arcarazo and Geddes (2014).

¹⁰ Declaración de Buenos Aires, Posicionamiento de la Conferencia Suramericana sobre Migraciones ante el II Diálogo de Alto Nivel sobre Migración Internacional y Desarrollo de las Naciones Unidas, Buenos Aires, 28 August 2013; see on this discourse: Acosta Arcarazo and Freier (2013).

Residence Agreement) or at national level, e.g. new Immigration Laws in Argentina (2004), Uruguay (2008) and Bolivia (2013).

This proves how a rights-based discourse on migration is possible and, as the recent debates on free movement of EU citizens in countries such as the UK demonstrate, that rhetoric is an important element where the Commission can and should take the lead. The Commission seems to be aware of this, because in 2013 it rewrote its historical motto, “Fight against illegal, then irregular, migration”, to read “A coherent approach to reduce irregular migration”.¹¹

Second, I would like to highlight the importance of access to rights. EU migration law is, after more than 10 years of legislation, at a crucial stage of development. In 2014, a directive on the rights of seasonal workers has been adopted. Also, a new directive on intra-corporate transferees was published. In addition, the ongoing interpretation by the Court of Justice upholds many of the rights of third-country nationals covered by the directives.¹²

Interestingly enough, EU migration law provides for more rights in various aspects, e.g. access to permanent residence, than some of the outdated legislative migration frameworks in certain countries in South America, such as Chile or Brazil. When I present this reality to the representatives from the Government in Brazil, to think tanks or academics in Argentina or to NGOs in Colombia, the response is invariably the same: It is not rights enshrined in the law that matters but rather access to them.

The European Commission shares this thought in theory but seems to be less active in practice. Both reports on the implementation of the Long-term Residence Directive and the Family Reunification Directive deplored their insufficient implementation and eventual infringement proceedings were announced.¹³ This emphasis on the monitoring of the correct implementation of EU law had already been the subject of the Commission’s first communication on a common agenda for integration as early as 2005.¹⁴ Almost a decade later, it is well known that only one infringement proceeding has reached the Court of Justice (Commission v Netherlands on the Long-term Residence Directive) and that, in the meantime, many third-

¹¹ European Commission (2013, p. 15).

¹² Acosta Arcarazo (forthcoming).

¹³ European Commission (2008); European Commission (2011).

¹⁴ European Commission (2005, pp. 6 and 8).

country nationals have been denied rights deriving from EU law. Legal certainty and access to the rights enshrined in the directives are essential so that the EU's immigration law does not become a 'revolving door' system in which the possibility of being excluded looms large over the lives of non-EU nationals.¹⁵ It is time for the Commission to launch infringement proceedings where necessary. This could be combined with other strategies such as producing clear and detailed implementing guidelines, something anticipated in 2008¹⁶ and mentioned again in 2013,¹⁷ but with no results so far. National lawyers, NGOs and judges also have a central role to play in encouraging national courts to ask for preliminary references.

Third, and finally, what role do rights play as a determinant for migration? This can be perhaps rephrased as follows: is there a need to be restrictive with migrants' rights before allowing them to enter, or to prevent their entering in large numbers? EU Commissioner László Andor answered this question recently at a meeting at the University of Bristol. It is job opportunities, he said, together with other factors such as networks or language which produce the movement of people, both within and from outside the EU. Sociologists have of course provided a vast amount of literature on this. "A careful examination of virtually any historical era reveals a consistent propensity towards geographic mobility among men and women, who are driven to wander by diverse motives, but nearly always with some idea of material improvement".¹⁸

Have migration flows increased in Argentina, for example, with the shift from a very restrictive legislative framework which came from the period of the military dictatorship and which had been adopted in 1981, to one of the world's more liberal legislative regimes in many aspects with the adoption of its 2004 Law? The answer, according to studies in Argentina, is no. Migration has been affected by the economic opportunities in certain economic sectors of the country rather than by any legal framework.¹⁹ Indeed, Argentina is a clear example of a country which has received

¹⁵ Acosta Arcarazo and Martire (forthcoming 2014).

¹⁶ European Commission (2008, p. 13).

¹⁷ European Commission (2013, p. 16).

¹⁸ Massey, Arango, Graeme, Kouaouci, Pellegrino, Taylor (1999, p. 1).

¹⁹ Cerrutti (2009).

migration and at the same time has expanded the rights granted to non-nationals.

Spain is another good example of that trend. On 31 December 1999, there were around 800,000 non-Spanish nationals residing in the country, less than half of whom (approximately 380,000) were third-country nationals whose status was included in the so-called “Regimen General” and who therefore were subject to Spanish migration law.²⁰ Ten years later, the increase in the non-Spanish population was notable. On 31 December 2009, it numbered 4,791,232, of whom 2,562,032 (or 53%) were included in the “Regimen General” and 2,229,200 (47%) in the Community Regime.²¹

During the first decade of the century, Spain modified its immigration law several times in order to adapt it to changing population trends, various European directives and rulings from Spanish courts, including the Constitutional Court.²² Whereas the legislation in 2000 was more restrictive than the legislation in 2009, this did not impact migration flows. It is only with the economic crisis that Spain has gone from being a net receiver of migration to having negative net migration in the last two years.²³

Portugal offers a similar example. Indeed, Portugal also has negative net migration²⁴ despite having one of the most generous implementations of EU migration law and, as in the case of Spain but unlike many other EU countries, ordinary regularisation mechanisms which provide ways for migrants in an irregular situation to obtain a regular residence permit. As in Spain, it has been the availability of jobs that has produced migration flows rather than the openness of the legislation.

In conclusion, rhetoric, law and, most important, correct implementation of the EU migration law framework and the rights it provides are essential factors in tackling discrimination and in providing for

²⁰ Ministerio del Interior, Comisión Interministerial de Extranjería, “Anuario Estadístico de Extranjería 1999”.

²¹ See Ministerio de Trabajo e Inmigración (2010), Extranjeros con certificado de registro o tarjeta de residencia en vigor y Extranjeros con autorización de estancia por estudios en vigor a 31 de diciembre de 2009.

²² In 2000, the new Spanish immigration law, repealing the previous and outdated one from 1985, was adopted. This law was subsequently amended three times: in 2000, 2003 and 2009. In addition, the law has been further developed with three different implementing regulations: in 2001, 2004 and, finally, 2011.

²³ Instituto Nacional de Estadística, España en Cifras 2013.

²⁴ Instituto Nacional de Estadística, Estimativas Anuais de População Residente, 2013.

a society in line with the EU's values. Certainly, law cannot solve all the problems a migrant will encounter in terms of discrimination or adaptation to a new society. It is clear, however, that a restrictive legislative framework may lead to social exclusion, harsher living conditions and unnecessary obstacles, and the establishment of a second class citizenry, which in turn affects the values that a society claims to uphold. Migration is not primarily determined by legislative frameworks but by economic opportunities. As it has done in the case of EU citizens, the Commission could and should play a much more vocal role in demystifying discussions on the issue and in ensuring the correct application and implementation of the current EU migration law.

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11. LABOUR MIGRATION IN CANADA: A MATTER OF 'SUPPLY' AND 'DEMAND'

CHRISTINA GABRIEL

Introduction

At the Expert Seminar, Challenge 3 on Matching Demand and Supply raised a number of unstated questions/assumptions that should be interrogated and pursued. These included:

- What do we mean by 'temporariness' of labour demand?
- How do we approach the term 'credible'?
- Can the term 'human capital' and its desirability be queried further?

Below I will address these three questions by reflecting on Canada's experience. As outlined below labour migrants are 'selected' through a points-based system but they also enter the country through a variety of other pathways.¹ For example, sponsored family members and those who are admitted through the refugee category often end up in the labour market. This presentation focuses on new directions in the economic categories of Canada's immigration system.

1. Can labour needs be effectively determined?

Canadian policy-makers have grappled with this question for some time. Canada pioneered the 'points-based' selection model in the 1960s and it was formally enshrined in the 1976 Immigration Act. Under the terms of the model applicants applied directly to immigrate and those who met criteria

¹ In 2012 the Economic Class included Federal-selected (Federal Skilled Workers, Federal Business, Canadian Experience Class, Live-in-Caregivers); Quebec-selected Skilled Workers; Quebec-selected Business; Provincial and Territorial Nominees. Economic Class Principal Applicants accounted for 68,266 admissions. Spouses and dependents of the Economic Class Applicants numbered 92,553. Other categories of permanent residents include: Family Class; Protected Persons, see CIC (2013, p. 14).

were admitted. Points were awarded for factors such as age, education, language and occupation demand. The number of points a prospective immigrant had to earn has varied (initially 50 constituted a 'pass mark' but this has moved upwards to as high as 70), as has the weight of each element. The occupational element was based on a projected list of occupations in demand. "The occupations list [was] premised on an understanding that the state can play a role in anticipating and meeting the labour market needs of the country".² Subsequent changes retained the points-based model but moved toward an emphasis on flexible, transferable skills. In the 1990s increasing emphasis was placed on formal higher education. The 2002 Immigration and Refugee Protection Act (IRPA) consolidated these changes and emphasised flexible, transferable skills as embodied in individual migrants as opposed to occupations. High-skilled migrants are cast as integral to the country's ability to compete in a global economy.³

It has been noted that points-based selection models are appealing to policy-makers "because they enable government to set clear and transparent standards for the human-capital level of incoming immigrants" while simultaneously signalling to the public that the government "controls" admission of labour migrants. However, admission to a country doesn't necessarily guarantee newcomers a job commensurate with their experience and skills. Points-based models "can only access quantifiable skills and credentials, and have difficulty distinguishing between qualifications of different quality or utility".⁴

Despite the continual fine-tuning of the Canadian selection model, including the increasing emphasis on selecting people with higher education, skills and experience, there is mounting evidence that the labour market experiences of immigrants and most especially recent immigrants have not been good. Concerns have been raised about unemployment, underemployment and lower earnings. Immigrant skill underutilisation - brain waste - is a significant policy challenge.⁵

² Abu-Laban and Gabriel (2002, p. 44).

³ *Ibid.*, pp. 61-100.

⁴ Papademetriou and Sumption (2011, p. 3).

⁵ Reitz (2004, pp. 117-120); Reitz, Curtis and Elrick (2014).

2. What would be a credible alternative to a 'selective approach' to migration, what are the main obstacles, and what are the experiences and practices of third countries?

The points-based selection model remains in place to select prospective immigrants under the Federal Skilled Worker (FSW) programme. However, the period from 2008 was marked by a staggering number of policy changes to all categories within the Canadian immigration architecture.⁶ In terms of labour migration there is an emphasis on prearranged employment and by corollary a growing role for employers and more private actors. In this respect the Canadian approach is moving to embrace some elements of what Papademetriou and Sumption term a hybrid selection system - which "prioritizes employer demand while using a points test or other set of criteria to distinguish between applications of differing quality". While they assert "countries dependent on points systems have come to appreciate and accommodate the unparalleled advantages that employer selection brings in terms of both immigrant integration and firms' competitiveness",⁷ concerns have been raised in Canada about pursuing this policy direction because of the emphasis on short term economic gain.⁸

It's beyond the scope of this presentation to outline all policy changes being pursued and given their very recent introduction it would not be prudent to comment on their 'credibility', however defined. Nevertheless, some initiatives are highlighted below because they are indicative of Canada's recent attempt/experience to 'match demand and supply'.

- *Changes to the points-based selection model*⁹

There have been a number of significant regulatory changes directed at the points-based selection model. These changes have been necessary, according to the federal government, to eliminate backlogs and improve processing times. The FSW backlog "has been particularly problematic as it constituted a major roadblock to Canada's ability to respond to rapidly changing labour

⁶ See Alboim and Cohl (2012).

⁷ Papademetriou and Sumption (2011, p. 5).

⁸ See Alboim and Cohl (2012).

⁹ These changes were noted in the oral presentation at the Expert Seminar. I have included some additional material that came up in the subsequent panel discussion.

market needs”.¹⁰ The government first moved to limit the pool of applicants in 2008 by announcing the Department of Citizenship and Immigration Canada (CIC) would only process applications if individuals “have an offer of arranged employment or; [are] a foreign national living legally in Canada for one year as a temporary foreign worker or an international student, or; [are] a skilled worker who has at least one year of experience in one or more of [38] occupations”.¹¹ Subsequently, the in-demand occupations were reduced; limits were placed on the total number of applications and on the number processed in each occupation. In 2012, CIC moved to return all applications (and application fees) received prior to 2008 that had not yet been determined. These numbered 98,000. Further, there was a temporary halt placed on FSW applications with the exception of those individuals with prearranged employment and students pursuing Canadian PhDs. “This measure enabled CIC to focus its processing resources for the FSW Program on the remaining applications received since 2008”.¹² This moratorium remained in place till May 2013. The adoption of narrower occupational lists within the selection model has prompted Koslowski to suggest that Canada has shifted away from a human capital model toward a system that “increasingly operates like a combination of the Australian and US models, i.e. a point system weighted toward an occupational skills list and increasing admission of temporary workers (discussed below) who then apply for permanent immigration with employer sponsorship”.¹³

- *Introduction of a new immigration category - Canadian Experience Class*

The Federal Government introduced the Canadian Experience Class (CEC) in 2008. Under the terms of this new category international students and some categories of temporary workers (professional, managerial and high-skilled) with Canadian work experience are eligible to apply for permanent residence. Current requirements demand applicants have “12 months of full-time Canadian work experience, or the equivalent in part-time work, in high-skilled occupations and (applicants have)...up to 36 months, to accumulate

¹⁰ CIC (2013, p. 6).

¹¹ CIC (2009).

¹² CIC (2013, p. 7).

¹³ Koslowski (2013, p. 10).

their experience".¹⁴ In 2012, 9,359 people were admitted through this stream making it the "fastest growing immigration program".¹⁵ This said, a number of concerns have been raised in respect to this category. First, as some non-governmental groups noted at the outset the required work experience criteria renders workers vulnerable to employer abuse and less likely to report any abuses so as not to compromise their chance of obtaining permanent residence.¹⁶ Second, this stream excludes temporary workers in low-skilled occupations that offer no path to permanent residence. It has been speculated that when their temporary employment ends some of these workers may go underground as irregular migrants, "increasing their vulnerability and subjecting Canada to problems like those European countries experienced with their guest workers".¹⁷ Lastly, analysts have argued that the current immigration system makes Canada an attractive destination. People are selected, enter the country as permanent residents and are able to access full social rights. In contrast, the CEC establishes a "two-step" immigration process that delays integration because temporary migrants cannot access settlement services and many are not eligible to bring their families to Canada. For this reason, they argue, "two-step immigration" should not be the norm.¹⁸

- *Provincial Nominee Programs*

Constitutional provisions mandate that immigration is an area of shared jurisdiction and responsibility between the provinces and the federal government. For most of the post-war period provinces, with the exception of Quebec, were not active players in immigration policy. This changed in the 1990s when the federal government established Provincial Nominee Programs (PNPs). Beginning with Manitoba, Saskatchewan and British Columbia in 1998 provinces entered into agreements with the federal government. While the specifics may vary from one province to the next in general under PNPs provinces nominate individuals who meet local/regional labour market needs. In some cases a minimum criteria must be met and some provinces, such as Manitoba, also have a provincial points

¹⁴ CIC (2013, p. 6).

¹⁵ Ibid., p. 15.

¹⁶ Gabriel (2011, p. 54).

¹⁷ Alboim and Cohl (2012, p. 45).

¹⁸ Ibid., p. 44.

system. Some jurisdictions also prioritise nominations in certain occupations and permit nominations for low-skilled workers.¹⁹ According to CIC these programmes are the second largest economic immigration stream after the Federal Skilled Worker Program.²⁰ However, Alboim and Cohl point out that one evaluation for CIC noted “over time, federal skilled workers have better economic outcomes”, leading them to argue that “Canada is achieving short-term economic gain through provincial nominees as opposed to long term gain through federal skilled workers”.²¹ It has to be emphasised that the emergence of PNPs provide an alternative avenue of entry for labour migrants to the federal government’s FSW and CEC programmes. They have also prompted a “gradual shift from a centralized model of immigrant selection toward devolution of federal authority to provinces”.²²

- *Temporary Foreign Workers Programs (TFWPs)*

There has been a massive expansion of temporary labour migration in Canada since 2000. From 2006 on, the number of temporary migrant workers exceeds the number of economic immigrants who receive permanent resident status.²³ Employers of migrant workers entering under the provisions of the Seasonal Agricultural Worker Program (SAWP), Live-In Caregiver Program (LCP), the Low Skilled Pilot Program²⁴ and Other Temporary Workers (LMO required) have to obtain a Labour Market Opinion (LMO) detailing that there is a genuine job, the employer meets programme requirements and there is a labour market need. Further, employers have to demonstrate that an attempt was made to hire Canadians or permanent residents.²⁵ However, a full 60% of workers received work permits under categories requiring no LMO. Their work permits derive from “international agreements such as NAFTA or other international reciprocal

¹⁹ Baglay (2012, pp. 126-127).

²⁰ CIC (2013, p. 16).

²¹ Alboim and Cohl (2012, p. 24).

²² Baglay (2012, p. 123).

²³ Faraday (2012, p. 5).

²⁴ For a discussion of the dynamics of these specific programmes see Lenard and Straehle (2012).

²⁵ Alboim and Cohl (2012, p. 46).

arrangements, youth exchange programs, intra-company transfers, or post-doctoral research fellowships".²⁶

As Faraday notes the "greatest proportionate growth has been among low-skilled, low-wage migrant workers primarily from the global south who are employed in sectors such as caregiving, agriculture, hospitality, food services, construction and tourism". She points out that the legal status of low-skill migrant workers affords them fewer rights and protections than other workers and positions them in such a way that it is difficult to exercise the rights they are entitled to.²⁷

3. Concluding observations

Labour migration in Canada has been marked by a number of profound policy changes including changes to the points-based selection model, the introduction of Provincial Nominee Programs and the expansion of the temporary worker programme. These changes are characterised as short-term and directed at addressing specific labour market pressures and skills shortages.²⁸ However, the "long run economic outcomes of immigrants and their children and the broad impact of immigration on standards of living" also need to be taken into account.²⁹

Recent changes have been enacted through the use of Ministerial Instructions. As a result key measures have been enacted with little public consultation, debate or legislative scrutiny.³⁰ Lastly, the increasing emphasis on temporary migrant workers to meet labour market demands tends to contradict Canada's self-perception or national imaginary as a country built by immigrants.

²⁶ *Ibid.*, p. 53.

²⁷ Faraday (2012, p. 5).

²⁸ Picot and Sweetman (2012).

²⁹ *Ibid.*, p. 1.

³⁰ Alboim and Cohl (2012, pp. 9-12).

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12. AN OVERVIEW OF LABOUR MIGRATION POLICIES IN THE UNITED STATES

MARYELLEN FULLERTON

The United States has a robust immigration policy and a robust anti-discrimination legal framework. Together with a strong commitment to labour mobility and to family unification, these elements create an environment that is attractive to labour migration. This commentary will situate labour migration within the overall US legal framework for immigration, note some of the social and legal policies that enhance its attractiveness to migrants, and conclude by identifying the laws that migrants can use when discriminatory and racist acts occur.

Annually, the United States admits approximately one million immigrants as lawful permanent residents. These immigrants have the right to live permanently in the United States and to apply for citizenship after five years of residence.¹ In addition, more than 50 million non-citizens enter the United States each year as temporary visitors.² As Box 1 illustrates, the lion's share of lawful permanent residents enter based on their family relationship with a US citizen or with a US lawful permanent resident. Congress has imposed an annual numerical limit of 140,000 on employment-based immigration and 50,000 on immigration via the diversity lottery. There is no cap on the number of immediate relatives (spouses and unmarried

¹ Immigration and Nationality Act (INA) §316; the residence requirement is reduced to three years for immigrants married to US citizens (INA §319); lawful permanent residents (but not naturalised citizens) may be deported for certain criminal convictions, on national security grounds, and for a limited set of other reasons (INA §237).

² There were 53,887,286 non-immigrant admissions in Fiscal Year 2012, see US Department of Homeland Security (2013a); this number reflects entries to the United States, rather than individual non-citizens. A non-immigrant may enter more than once in a year.

children under 21) of US citizens who may immigrate every year; a 226,000 annual limit applies to other relatives of US citizens and lawful permanent residents. As a result, as Figure 1 shows, labour migration accounts for roughly 14% of annual immigration.³

Box 1. Immigrant Admission Category Overview (approximate number of annual admissions)

Total Annual Immigrant Admissions 1,016,000

Employment-based 140,000 subtotal

- 1: Priority workers **40,000**
 - 1A: *Extraordinary ability*
 - 1B: *Outstanding professors and researchers*
 - 1C: *Multinational executives and managers*
- 2: *Advanced degrees or exceptional ability* **40,000**
- 3: Bachelor's degrees or workers in shortage occupations **40,000** (unskilled workers limited to 10,000/year)
- 4: Special immigrants **10,000**
- 5: Investors **10,000**

Family-sponsored 726,000 subtotal

- Immediate relatives of US citizens **500,000**
- Other relatives of US citizens and Lawful Permanent Residents **226,000**

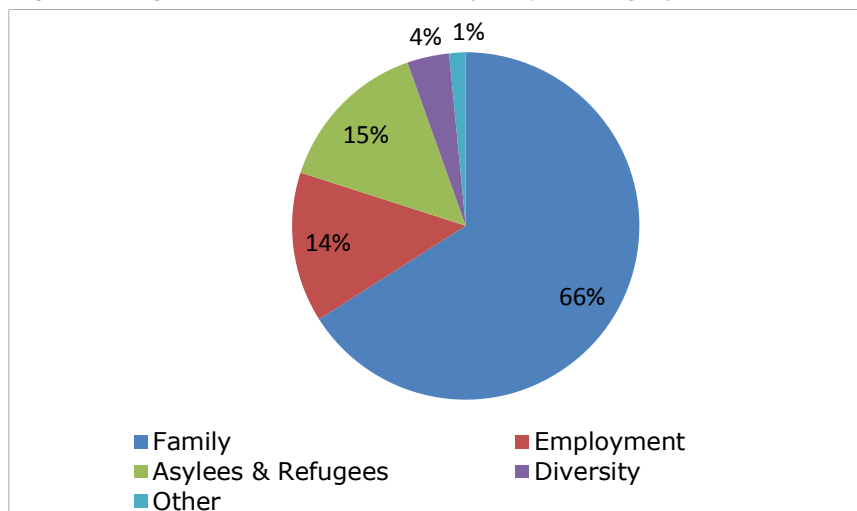
Diversity lottery 50,000

Humanitarian 100,000 subtotal

- Overseas refugee admissions **70,000**
- Asylum **30,000**

³ Family-sponsored immigrants are authorised to work and contribute to the labour force, but their admission to the United States is not premised on their labour skills.

Figure 1. Legal Permanent Residence by Major Category, FY 2012



Source: U.S. Department of Homeland Security, 2012 Yearbook of Immigration Statistics, Legal Permanent Residents.

As Box 1 shows, US legislation further subdivides permanent labour migration into five categories, each with an annual numerical limit. The first category, with an allotment of 40,000 individuals per year, includes priority workers, defined as outstanding or extraordinary workers. The second category, also with a 40,000 annual quota, includes workers with advanced educational degrees and those who can demonstrate exceptional ability. The third category, also allotted 40,000 per year, focuses on professionals holding baccalaureate degrees as well as skilled and unskilled workers. The statute specifies that no more than 10,000 of this quota can be filled by unskilled workers.⁴ The fourth category, comprised of religious workers and former employees of the US government and of international agencies, has an annual allotment of 10,000. Similarly, the fifth preference, reserved for individuals who will invest \$1 million and create 10 jobs for US workers, receives an annual quota of 10,000.⁵

⁴ Actually, subsequent legislation limited this number even further, to 5,000 per year for the foreseeable future, due to an effort to 'borrow' some admissions for beneficiaries of the Nicaraguan Adjustment and Central American Relief Act (NACARA) of 1997.

⁵ INA §203(b)(5). The required investment is reduced to \$500,000 in targeted areas (INA §203(b)(5)(C)(iii); 8 CFR §204.6(m)).

Labour migration in the United States is largely employer-driven. That is, in most instances a US employer must initiate the immigration process on behalf of a non-US citizen employee.⁶ This links labour migrants to specific jobs that are available and that employers want to fill. In an effort to protect US workers, the immigration law imposes several requirements on employers. Employers who petition for the admission of workers in the second and third preference categories, a total of 80,000 migrants, must demonstrate that there are no qualified US workers for the jobs that the migrants will fill *and* that the employers will pay the prevailing wage, a process known as labour certification.⁷ Box 2 below identifies the numerical allotments for each of the five employment-based categories, the categories of migrants who need an employer to petition for their admission, and the categories that require the successful completion of the labour certification process.

Box 2. Employment-Based Immigrant Categories & Processes

Annual Employment-based Immigration 140,000 Total

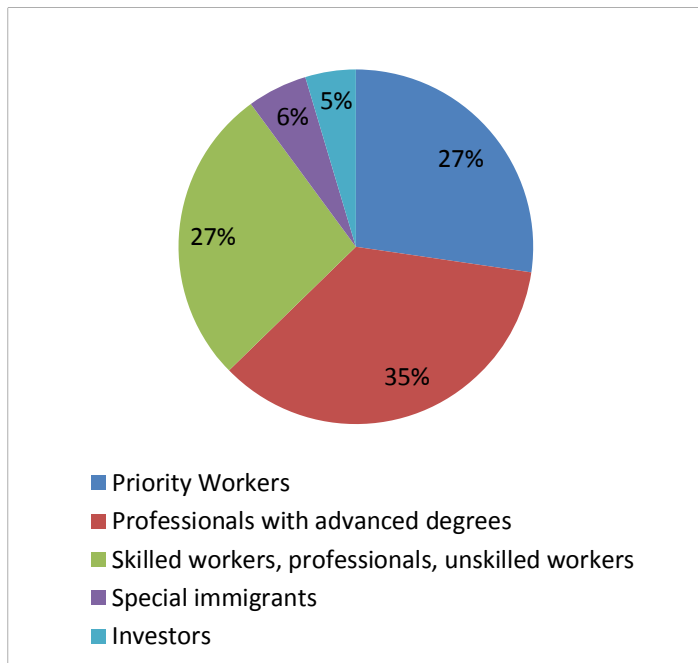
- Preference 1: Priority workers **40,000**
 - 1A: *Extraordinary ability* **Self-petition**
 - 1B: *Outstanding professors and researchers* **Employer petition**
 - 1C: *Multinational executives and managers* **Employer petition**
- Preference 2: *Advanced degrees or exceptional ability* **40,000 Employer petition & labour certification (prevailing wage & no qualified US workers)**

Note: exceptional ability can self-petition IF national interest waiver
- Preference 3: Bachelor's degrees or workers in shortage occupations **40,000 Employer petition & labour certification (prevailing wage & no qualified US workers); expedited process for physical therapists & professional nurses**
- Preference 4: Special immigrants **10,000 Self-petition**
- Preference 5: Investors **10,000 Self-petition**

⁶ Labour migrants in two of the three subcategories of the first preference and all of those in the second and third categories must have a current job offer from an employer who petitions on the migrant's behalf.

⁷ Some employees who satisfy the second preference criteria can demonstrate that it is in the national interest to waive the labour certification process (INA §203(b)(2)(B)). For example, medical doctors who will work for five years in designated underserved communities are eligible for a national interest waiver from undergoing the labour certification process (INA §203(b)(2)(B)(ii)).

Figure 2. *Employment-based LPR Admissions, FY 2012*



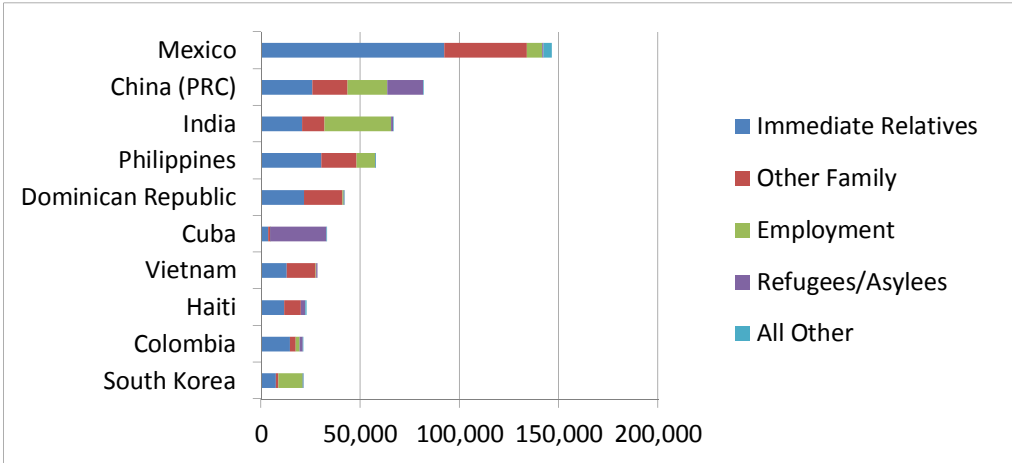
Source: U.S. Department of Homeland Security, Annual Flow Report, LPRs.

As Figure 2 indicates, the fourth and fifth preferences have been undersubscribed; the numbers not used in these two categories have been absorbed by the other categories. Nonetheless, some of the other preference categories remain seriously oversubscribed. For example, in March 2014, the waiting time for migrants in the skilled workers category, the third preference group, was almost one and a half years; skilled workers from the Philippines faced a seven-year backlog, while skilled workers from India faced a nine-year wait.⁸

Figure 3 reveals major differences in labour migration from different countries. It demonstrates that India, China, and South Korea are particularly important labour-exporting countries for the United States. It should be noted, however, that Figure 3 must be interpreted with an important fact in mind: many of the migrants who arrive in the United States based on their family relationship rather than employment skills do enter the labour market and contribute substantially to the US economy.

⁸ U.S. Department of State (2014).

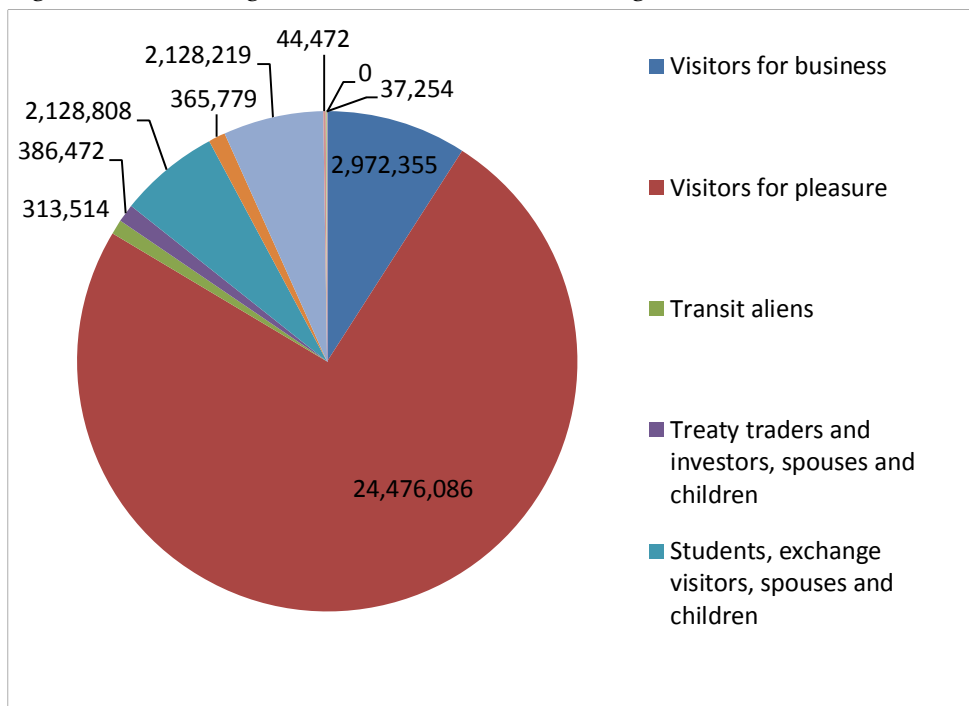
Figure 3. Top ten countries of origin of lawful permanent residents arriving in the US, 2012



Source: U.S. Department of Homeland Security, 2012 Yearbook of Immigration Statistics, Legal Permanent Residents.

Thus far the discussion has focused on migrants who arrive in the United States as immigrants, with permission to remain permanently. The labour migrants who arrive for temporary employment, however, dwarf in number those who come as permanent residents. As Figure 4 shows, roughly 2 million entered as temporary workers and trainees, 3 million entered as business visitors, and 380,000 entered as intra-company transferees in 2012, along with 25 million tourists, 2 million students, and many others.

Figure 4. Non-immigrant admissions in selected categories, FY 2012



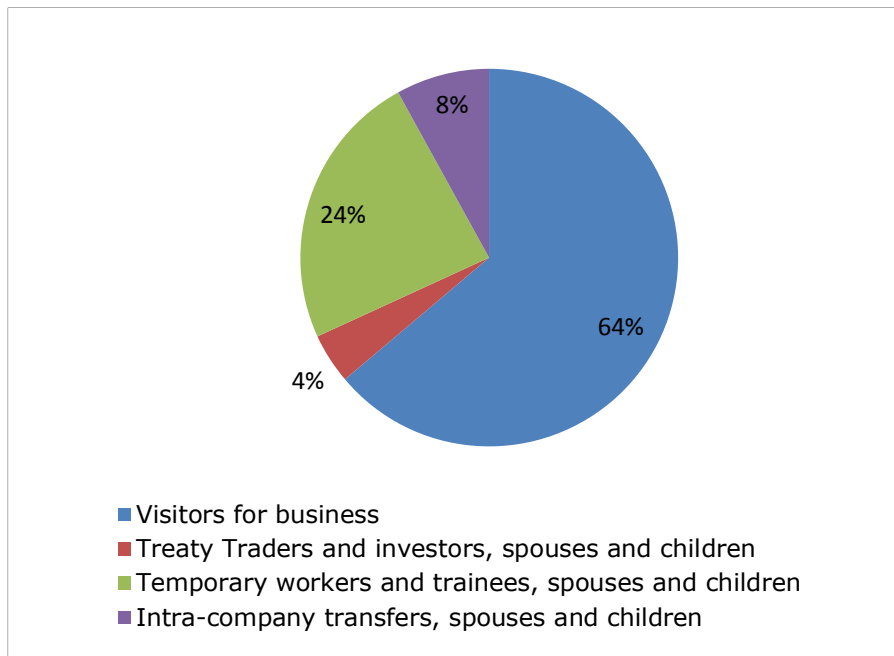
Source: U.S. Department of Homeland Security, Annual Flow Report: Non-immigrant Admission to the U.S.: 2012 (August 2013).

The variety of non-immigrant workers is revealed in Box 3 and Figure 5. Box 3 shows the many different categories of temporary workers and intra-company transferees. It also demonstrates that as many visitors for business arrived through the visa waiver programme as travelled with a visa, for a total of 5.7 million in that category. The total number of business-related temporary admissions amounted to 8.7 million in 2012. Figure 5 depicts the percentages in each category.

Box 3. Non-immigrant admissions (work-related), FY 2012

Visitors for business		5,705,106
Temporary visitors for business, visa	B1	2,972,355
Temporary visitors for business, visa waiver programme	WB	2,729,775
Treaty traders and investors, spouses and children	E	386,472
Temporary workers and trainees, spouses and children	H, O, P, Q, R, TN	2,128,219
Temporary worker in a specialty occupation	H-1B	473,015
Temporary worker performing agricultural services	H-2A	183,860
Temporary worker performing other services	H-2B	82,921
Person with extraordinary ability in the sciences, art, education, business, or athletics, and their assistants	O-1, O-2	70,611
Spouses and children of temporary workers and trainees	CW-2, H-4, O-3, P-4, R-2, TD	227,637
Intra-company transfers, spouses and children	L	717,893
Intra-company transferee (executive, managerial, and specialised personnel continuing employment with international firm or corporation)		498,899
Spouses or child of intra-company transferee		218,994
TOTAL		<u>8,754,525</u>

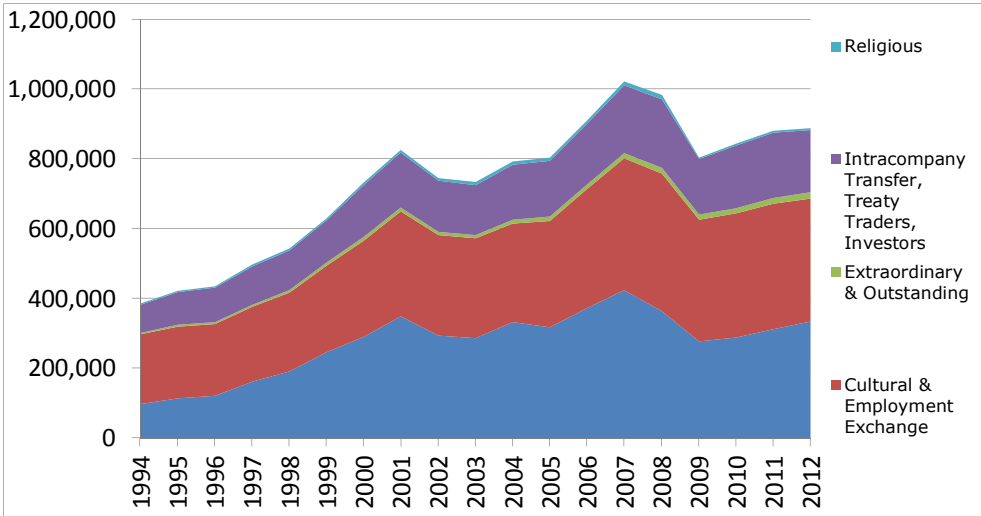
Figure 5. Non-immigrant admissions (work-related), FY 2012



Source: U.S. Department of Homeland Security, Annual Flow Report: Non-immigrant Admission to the U.S.: 2012 (August 2013).

The magnitude of temporary labour migration in the United States is visible in Figure 6, which shows the number of temporary employment visas issued each year from 1994 to 2012. The annual numbers range from 400,000 in the early 1990s to more than 1 million in 2007. Remember that throughout this period and continuing to today there is a limit of 140,000 permanent labour migrants per year.

Figure 6. Temporary employment-based visas issued, 1994-2012



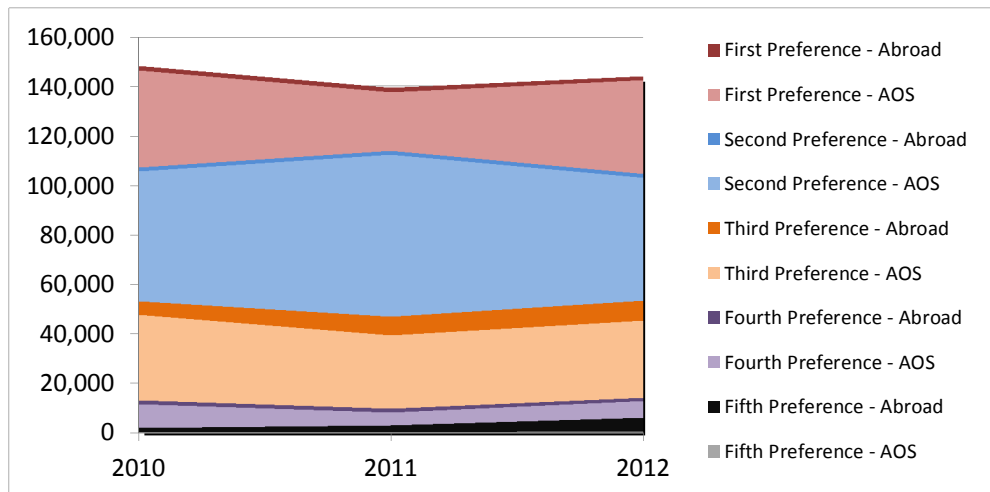
Source: U.S. Department of State Bureau of Consular Affairs Data.

The last figure reveals the dirty secret of labour migration in the United States. Figure 7 displays how many of the 140,000 annual permanent labour migrants were already in the United States as temporary workers when they officially became permanent immigrants. The technical term, adjustment of status (AOS), describes the process by which a non-immigrant currently present in the United States changes his or her legal status into that of an immigrant, also known as a lawful permanent resident (LPR). Although the US legal framework is predicated on noncitizens obtaining their immigrant visas overseas at a US consulate, Figure 7 makes clear that only a minuscule number of individuals coming to the United States as permanent labour migrants are overseas when they seek permanent resident status. Rather, almost everyone who satisfies the employment-based immigrant categories is already working in the United States.⁹ Indeed, almost everyone is already working – as a temporary non-immigrant worker – for the employer who petitions to have the worker become a permanent immigrant.¹⁰

⁹ The exception is the fifth preference category, which is comprised of investors who will create jobs for 10 or more US workers. See footnote 5 above and accompanying text for details about immigrants who qualify under the fifth preference labour migration category.

¹⁰ In 2010 92% of employment-based immigrants obtained their status via the adjustment of status (AOS) process rather than through visas obtained at the US consulates in their

Figure 7. LPR status obtained through adjustment of status in the US vs. through application abroad, 2010-2012



Source: U.S. Department of Homeland Security, Yearbook of Immigration Statistics, Lawful Permanent Residents.

The significant role that temporary labour migration plays as the doorway to permanent labour migration brings issues of labour mobility in the United States into high relief. As noted earlier, US labour migration is employer-driven. Most employment-based immigration permits result from US employers petitioning for the permanent admission of the particular named migrant in order to perform the specific job the employer has certified no qualified US worker wants. Once the petition is approved and the immigrant visa issued, however, there is no requirement that the immigrant actually work for the employer. Indeed, many do not, presumably because they find other employment more to their liking. A U.S. Labor Department survey reported that 11% of the labour migrants did not work at all for the employer after the approval of their petitions; an additional 17% more left their employment within six months of the approval of their permanent status.¹¹

home countries. In contrast, only 3% of the immigrants based on the diversity lottery relied on AOS, as did 12% of family-based immigrants, and 53% of immediate relatives of US citizens, see U.S. Department of Homeland Security (2011, Table 6).

¹¹ U.S. Department of Labor, Office of Inspector General (1996).

The situation of individuals who entered on temporary work permits is starkly different. Most of the temporary work visas are initiated by employers, and they can be renewed for multiple years.¹² The beneficiaries, of course, need to stay in the good graces of the employers in order to keep and renew their visas.¹³ Furthermore, as many temporary workers wish to seek permanent immigrant status, they often must rely on their ‘temporary’ employers to file petitions testifying to the permanent need the US economy has for their skills.¹⁴ As a practical matter, temporary workers have little bargaining power and little labour mobility. If they become lawful permanent residents, though, their labour mobility is unlimited.

The laws that provide protection against discrimination towards migrants is another feature that makes the United States attractive to labour migrants. The fundamental civil rights legislation outlaws discrimination in employment or in public accommodations on the basis of national origin, as well as on race, colour, religion, or sex.¹⁵ And it provides that successful litigants are entitled to powerful remedies, including monetary payments and job reinstatement. As a consequence, access to the courts, and the general cultural norms in favour of litigation, afford labour migrants some protections against exploitation by employers. All migrants – even those unauthorised to be present – can file suit in US courts to seek the protection of labour legislation and other US laws.¹⁶ Those working in unlawful status

¹² Visitors for business seek their own visas (or visa waivers) and do not need to rely on petitions filed by employers. The premise is that they are merely accomplishing some temporary business goal, and are not employed in the United States. In contrast, employers initiate the H-1B temporary worker visa process. These visas can be renewed for up to six years, and in some instances for even longer, see discussion in Aleinikoff, Martin, Motomura and Fullerton (2011, pp. 402-405).

¹³ Recent legislative changes allow temporary workers to change employers while in the process of adjusting their status to become permanent immigrants, but this depends on the agreement of the new employer (INA §204(j)); see discussion in *ibid.*, pp. 381-382.

¹⁴ The U.S. Department of Labor found that 74% of those for whom employers sought labour certification were already working for the employer. U.S. Department of Labor, Office of Inspector General (1996).

¹⁵ Civil Rights Act of 1964, Titles II, VII, 42 U.S.C. § 2000a, § 2000e.

¹⁶ In addition to the employment-related litigation, there is a substantial body of US constitutional law limiting the circumstances in which state governments can treat non-citizens differently from citizens, see, e.g. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Graham v. Richardson*, 403 U.S. 365 (1971); *Bernal v. Fainter*, 467 U.S. 216 (1984).

are limited, however, in their ability to receive certain forms of relief, such as back pay.¹⁷

Other social norms and economic realities – such as an entrepreneurial tradition and the great concentration of venture capital – also create strong incentives for labour migration to the United States. These topics are beyond the scope of this commentary, but they should not be ignored. Together with the generous family reunification policies and the total labour mobility accorded permanent residents granted entry based on their employment skills, they contribute enormously to the attractiveness of the labour migration policies of the United States.

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¹⁷ *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002). The *Hoffman Plastic* opinion denied back pay to workers unauthorised to be in the United States who had been fired for labour union activities. Other courts have awarded back pay to unauthorised workers who had not been paid the amount mandated by the Fair Labor Standards Act, see, e.g. *Patel v. Quality Inn South*, 846 F. 2d 700 (11th Cir. 1988).

SECTION IV

THE NEXT GENERATION OF EU IMMIGRATION POLICY

13. WHICH WAY FORWARD WITH MIGRATION AND EMPLOYMENT IN THE EU?

KEES GROENENDIJK

1. Three constant elements

A look into the future may well be informed by first looking back. Over the last 30 years, the development (or creation?) of Community and Union rules on employment of immigrants from outside the EU can be characterised by three constant elements: firstly, the opposition of Germany and some other member states to the transfer of competence to the Union; secondly, the granting of free access to the labour market to third-country nationals admitted for purposes other than employment; and, thirdly, the development of a dual system of parallel national and EU statuses for several categories of third-country nationals admitted for employment.

2. Opposition to transfer of competences to the Union

The opposition of Germany and four other member states (Denmark, France, Netherlands and the UK) to a minimal Community interference with national policies on immigration of third-country nationals was first visible in the case in which those member states asked the Court of Justice to annul the Commission's decision that obliged member states to provide the Commission with information on their national policies regarding migration from third countries. The case ended in a partial and temporary victory for the member states in 1987.¹ The Single Market, developed between 1986 and 1992, and the related abolition of controls at the internal borders of the Schengen, eventually led member states to accept Union competence on this issue in the Amsterdam Treaty in 1997. Germany's desire to retain its competence with regard to the admission of third-country nationals for the

¹ CJEU Joined Cases 281, 283, 284, 285 and 287/85 *Germany and Others v. Commission* [1987] ECR I-3203.

purpose of employment was reflected in the Europe Agreements with the future member states in Central Europe. Those agreements provided for equal treatment of the workers from those countries and some rights for their admitted family members, but did not cover admission for employment. The agreements made explicit reference to bilateral agreements on access to employment and mobility of workers.²

The opposition was also reflected in the last minute effort of German Chancellor Kohl in the negotiations in Amsterdam to delete the words “and work” in Article 63(3) of the EC Treaty,³ as well as in the current provision that states that Article 79(5) TFEU “shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed”. That provision, being an exception to the general rule of Article 79, must be interpreted in a restrictive way: it does not relate to the conditions or the branches of employment and it does not cover third-country nationals coming from another member state. The exception only relates to the number of third-country workers coming to a member state from outside the Union. German opposition was also visible in the reaction to the Commission’s 2001 proposal for a general directive on migration for employment.⁴ During the negotiations on the early proposals for directives on migration or asylum of third-country nationals, Germany argued that the EU did not have the competence to rule on the access to employment of third-country nationals who were admitted for other purposes. However, that battle was lost in 2002 during the negotiations on the Reception Conditions Directive in the Council.⁵ Once the Union legislature has exercised the competence granted in the Treaty, as it has in many directives on legal migration and asylum, member states bound by the relevant Union instruments lose their competence to make and apply national rules that are incompatible with the secondary Union law.

² See e.g. Article 37(1) and Article 41 of the 1994 EC-Poland Association Agreement.

³ See Hailbronner (1988, p. 1052); Peers (1999, p. 101).

⁴ European Commission (2001); European Commission (2006).

⁵ Council of the European Union (2002) with the opinion of the Council’s Legal Service on the question raised by one member state whether “the EC had powers regarding the access to the labour market”; and Article 11 of Council Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

3. Access to employment of third-country nationals admitted for other purposes

This brings us to the *second* constant element: practically all other categories of third-country nationals admitted for other purposes, such as family members, refugees, beneficiaries of subsidiary protection, asylum seekers, students, long-term residents, have free access to employment in the host member state, either immediately after admission, on acquisition of EU residence status or after a short waiting period. Moreover, they are entitled to equal treatment in their employment relationship.⁶ Thus there is strong opposition to transfer of competence regarding admission of one group, third-country workers, whilst practically all other groups get free access to the labour market immediately, or at least after one year. This is all the more surprising since the first group (those admitted for employment) makes up only a small minority of all third-country nationals admitted by member states. Of course, the main reason for this rather paradoxical situation is that employment supports integration of the immigrants and prevents them from becoming a burden on the national social security system of the member state. Moreover, Article 79 of the TFEU instructs the Union legislature to make rules that ensure fair treatment of third-country nationals legally staying in the territory of member states. Finally, the wish to avoid a repetition of the 'guest-worker policy' may explain the opposition to transfer of competence regarding admission of third-country workers.

4. Parallel Union and national statuses

During the last decade one can also observe the development of a practice of dual statuses. Member states continue to issue national permits rather than the permit provided for in Union law. In certain member states this is clearly related to resistance to loss of national competence regarding the admission and legal status of third-country nationals. In other member states a competition has developed between national and EU statuses. In some member states third-country nationals are forced to choose between Union status and national status. Such a forced choice is a problem where Union law explicitly or implicitly allows a third-country national to have both Union status and national status. The application of the Blue Card Directive 2009/50 and the Long-Term Residence Directive 2003/109 in some member states results in such a dual system of permits. A similar development may occur with regard to the Directive on Seasonal Employment, adopted in

⁶ Groenendijk (2005, pp. 141-174).

February 2014. Of course, member states can avoid a practice of dual permits, if they stop issuing national permits to the relevant category of migrants.

The Blue Card Directive was adopted in 2009.⁷ Member states had to transpose the directive in their national law by June 2011. According to Eurostat data, by January 2014 a total of 3,538 Blue Cards had been issued in 21 member states; two-thirds of those cards (2,584) were issued in Germany, 461 in Spain and 124 in Austria.⁸ In the Netherlands only one Blue Card was issued, whilst 6,000 to 7,000 third-country national workers received a residence permit as a “knowledge worker”, i.e., a highly qualified worker, on the basis of Dutch law in each of the years from 2010 to 2012.⁹ Of course, it is too early to conclude that the Blue Card Directive is a failure. But the tendency of certain member states to continue to issue national permits rather than the Union permit creates complexity and confusion, undermines the effectiveness of the directives and often will deprive third-country nationals of rights granted to them under Union law.

The official instructions of the German Federal Ministry of Interior to the local immigration authorities for many years explicitly stated that a third-country national could only obtain a German permanent residence permit (*Niederlassungserlaubnis*) or an EU long-term residence permit, but not both permits. A third-country national applying for the EU status had to give up his German permit. The Commission stated in its 2011 report on the application of this directive that similar problems occurred in several member states:

where third-country nationals are not allowed to hold a LTR permit and another residence permit at the same time and must choose between the two permits. Such a choice is not in accordance with Articles 4(1) and 7(3), which provide that Member States should grant LTR status when the applicant fulfils the conditions of the Directive. In addition, this situation creates a risk of competition between national and EU permits, which will not necessarily result in more favourable provisions being applied to the third-country national, given that the comparison of the advantages respectively granted by the two kinds of permits is often a

⁷ Strik and Grütters (2013); Eisele (2013).

⁸ See Eurostat, Dataset details on EU Blue Cards by type of decision, occupation and citizenship.

⁹ Tweede Kamer der Staten-Generaal (2013-2014, p. 90).

delicate issue requiring in-depth knowledge of immigration law and a thorough assessment.¹⁰

National authorities should provide correct information rather than block access to the EU status. In 2013 the *Bundesverwaltungsgericht*, the highest administrative court in Germany, ruled that long-term residents (LTRs) could be entitled to both the German and the EU permits at the same time.¹¹

5. Risk of misuse of the new Directive on Seasonal Employment

At the time of this writing two proposals regarding access of third-country nationals to employment are the subject of negotiations between the Parliament and the Council: the proposal on intra-corporate transfers [which was adopted in May 2014]¹² and the recast merging the Students Directive and the Scientists Directive.¹³ A third proposal, the Directive on Seasonal Employment, was adopted in February 2014.¹⁴ I see the risk that this directive will be misused in two ways. The directive allows for seasonal work for up to nine months per year,¹⁵ and since it is unlikely that there will be proposals in the near future for new EU legislation on admission for employment, I am afraid that this directive in practice may develop into the EU directive on temporary employment. Since the level of rights granted to workers under this directive is rather low, clearly lower than the rights under the Framework Directive 2011/98,¹⁶ there will be a temptation for employers

¹⁰ European Commission (2011, par. 3.6).

¹¹ Federal Administrative Court of Germany (*Bundesverwaltungsgericht*), BVerwG 1 C 12.12 of 19 March 2013.

¹² Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

¹³ European Commission (2013).

¹⁴ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

¹⁵ Article 14(1) of Directive 2014/36/EU.

¹⁶ Compare for example Article 23 of the Directive 2014/36/EU relating to housing, educational training and social security with Article 12 of Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the

(and for member state authorities) to give an expansive interpretation of what is defined as seasonal work. The EU standards for work defined as temporary will then become rather low. This worry is heightened by the fact that the many policy statements of EU institutions on circular and temporary migration over the last years have produced little, if any, hard EU rules on this issue.

My second worry is that the directive will allow eternal employment of “seasonal” workers. The third-country worker is employed for nine months, has to return for three months to his country of origin and returns the next year to work for the same employer for nine months again. The directive leaves member states free to provide the third-country worker with a more stable residence permit or not.¹⁷ However, seasonal workers are excluded from the personal scope of the LTR Directive.¹⁸ Thus there is a clear risk that the directive will allow for a revival of the Swiss model of employment of the 1960s and 1970s, where Italian workers were employed for nine months a year for many subsequent years without ever obtaining a more stable residence status. In my view that is not an attractive prospect. The statement in the Council’s press bulletin on the adoption of this directive – “With a view to promoting circular migration, re-entry of third-country nationals who return every year to the EU to do seasonal work is facilitated” – probably inadvertently pointed to a revival of the old Swiss model.¹⁹

6. A positive development: Intra-EU mobility of workers under Directive 2003/109/EC

For two reasons the LTR Directive rather than the Blue Card Directive probably will become the basis for intra-EU movement of third-country nationals. The LTR Directive grants those who have acquired long-term resident status the right to live and work in another member state, bound by that directive, once certain conditions are fulfilled.²⁰ In contrast, under the

territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

¹⁷ Article 14(1) Directive 2014/36/EU.

¹⁸ Article 3(2)(e) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

¹⁹ Council of the European Union (2014).

²⁰ Articles 14-17 and 21(2) of Directive 2003/109; Denmark, Ireland and the UK are not bound by this directive.

Blue Card Directive there is no right to admission to another member state.²¹ Admission to another member state depends on a decision of the authorities of that state. Moreover, the number of EU long-term resident permits issued is far greater than the number of Blue Cards. According to Eurostat data at the end of 2012, seven years after the LTR Directive had to be implemented by member states, more than 5 million third-country nationals had acquired LTR status, as compared with 3,500 Blue Cards issued by 2014. However, in certain member states the number of LTR permits issued is surprisingly low: only 6,300 in Germany and 17,200 in France.²² This is a clear indication of the important role of member states authorities in applying or disregarding a directive in practice. Practising Dutch lawyers tell me that they are increasingly contacted by third-country national clients who acquired LTR status in Italy or Spain. For immigrants from outside the EU who are unable to acquire the nationality of their member state of residence due to the restrictive naturalisation policies of some member states, Directive 2003/109 may become the basis for intra-EU mobility. Those living in member states where nationality is more easily acquired, in the long run, will be able to acquire the nationality of a member state and then realise intra-EU mobility on the basis of the rules on free movement of Union citizens.

7. The years ahead: Monitor and enforce correct transposition and application of existing Union law

For the post-Stockholm five-year period no new legislative initiatives should be proposed in this area. The need for both low- and highly skilled workers cannot really be managed at the EU level, considering the large differences between the labour market situations in member states. It is now time for monitoring the correct application of the existing EU legislation and for focusing on those member states that do not live up to their obligations. Moreover, yet another series of new EU directives will neither enhance the credibility of EU migration law nor the inclination of national immigration authorities to take that law serious. At this moment stability, continuity and reliability are far more important than further harmonisation of Union law on migration and on employment of migrant workers from outside the EU.

²¹ Article 6 and Article 18(7) Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

²² Eurostat, Long-term residents by citizenship, <http://appsso.eurostat.ec.europa.eu/nui>.

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14. AN EU IMMIGRATION CODE: TOWARDS A COMMON IMMIGRATION POLICY

STEVE PEERS

1. Introduction

The latest multi-year programme for EU Justice and Home Affairs (JHA) policy, the Stockholm Programme, was adopted in December 2009.¹ In the area of immigration law, it calls, *inter alia*, for the Commission to submit a proposal for the “consolidation of all legislation in the area of immigration, starting with legal migration, which would be based on an evaluation of the existing *acquis* and include amendments needed to simplify and/or, where necessary, extend the existing provisions and improve their implementation and coherence.”² Along with an evaluation and possibly a review of the EU’s existing Family Reunion Directive, this consolidation would implement the objectives set out in the Stockholm Programme to “ensure fair treatment of third-country nationals who reside legally on the territory of [the EU’s] Member States”, to develop a “more vigorous integration policy” which “should aim at granting them rights and obligations comparable to those of citizens of the Union”. This “objective of a common immigration policy...should be implemented as soon as possible, and no later than 2014”.³

While the Stockholm Programme does not refer to the planned consolidation as a “code” of EU immigration law, such codes have been

¹ European Council (2009).

² *Ibid.*, point 6.1.4.

³ *Ibid.*, point 6.1.3 concerning labour migration, which invites the Commission, *inter alia*, “to assess the impact and effectiveness of measures adopted in this area with a view to determining whether there is a need for consolidating existing legislation, including regarding categories of workers currently not covered by Union legislation.”

adopted in the related fields of visas and border controls,⁴ and the Commission's subsequent Action Plan on the implementation of the Stockholm Programme assumes that the consolidation would take the form of a code.⁵ The Annex to this Action Plan calls for a proposal for a code on legal immigration in 2013, following a proposal to amend the Family Reunion Directive in 2012.

The adoption of an EU code on legal immigration would be a key event in the development of a common EU immigration policy, and would also raise fundamental questions about the amendment of the existing rules in this area. While the key roles in the adoption of a code will ultimately be played by the EU institutions, the purpose of this paper is to launch an advance discussion of the content of a future code, by proposing a draft text.⁶ This text is prefaced by an explanation of the background to such a code, a discussion of the key parameters for its content, an overview of the proposed code and detailed commentary on it.

2. Background

The EU's first measures in the field of legal migration took the form of "soft law" resolutions adopted first of all by member states' ministers, and then by the Council following the start of the "Maastricht era" of JHA integration. These resolutions concerned family reunion, admission of workers, admission of the self-employed, admission of students and the status of long-term residents (LTRs).⁷ A proposed Convention on Migration Law was not successful.⁸

⁴ See respectively Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas; Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

⁵ European Commission (2010a).

⁶ See full text of proposed immigration code: Peers, Statewatch Analysis: www.statewatch.org/analyses/no-167-immigration-code-steve-peers.pdf.

⁷ The Family Reunion Resolution is set out in SN 2828/1/93, not published in the OJ; see Guild and Niessen (1996); Bunyan (1997, p. 98). The other resolutions are set out in OJ 1996 C 274 (admission for employment, for self-employment and of students) and OJ 1996 C 80/1 (long-term residents).

⁸ European Commission (1997).

Following the entry into force of the Treaty of Amsterdam, which provided for the adoption of Community measures on these issues (subject to unanimity in the Council, an opt-out for the United Kingdom, Ireland and Denmark, and limited roles for the Court of Justice and the European Parliament),⁹ the Council first of all adopted directives on family reunion and LTRs (the “Family Reunion Directive” and the “LTR Directive”), then on students (along with school pupils, unpaid trainees and volunteers: the “Students’ Directive”) and researchers (the “Researchers’ Directive”).¹⁰ An initial proposal which would have regulated admission for almost all forms of employment or self-employment was unsuccessful and was subsequently withdrawn,¹¹ but the Commission later relaunched discussions on this issue, starting with a Green Paper and policy plan,¹² and subsequently proposing a number of separate directives. In practice, this revised approach has resulted in the adoption of the “Blue Card Directive” and the “Single Permit Directive”, which respectively set out rules on admission for highly qualified employment¹³ and establish a single work and residence permit for employment migration, along with a common core of rights for migrant workers.¹⁴ Two Directives on the admission of seasonal workers and intra-

⁹ See the former Articles 63(3) and (4) and 67 EC Treaty, and the Protocols relating to the UK, Ireland and Denmark.

¹⁰ Respectively Directives: Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research; for analysis of this legislation, see particularly (with further references): Wiesbrock (2009); Hailbronner (2010); and Peers, Guild, Acosta, Groenendijk and Moreno Lax (2012, Chapters 3-10).

¹¹ European Commission (2001); for an analysis of this proposal, see Peers and Rogers (2006, Chapter 21).

¹² European Commission (2004); European Commission (2005).

¹³ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

¹⁴ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

corporate transferees (ICTs)¹⁵ have been adopted in 2014. The LTR Directive was also amended in 2011, to extend its scope to refugees and beneficiaries of subsidiary protection.¹⁶

In the meantime, the entry into force of the Treaty of Lisbon on 1 December 2009 changed the institutional framework for the adoption of measures in this area, introducing the full jurisdiction of the Court of Justice as well as the ordinary legislative procedure, i.e. qualified majority voting in the Council and co-decision with the European Parliament, to this area, as well as revising the EU's competence on legal migration, *inter alia*, to specify that "[t]he Union shall develop a common immigration policy", including the adoption of measures on "the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification" and "the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States". However, the EU's powers in this area "shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed."¹⁷

It should be noted that the first four directives on legal immigration, along with the Single Permit Directive, set only minimum standards, leaving member states entirely free to establish more favourable standards in their national law for the persons concerned, without a requirement that such

¹⁵ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers; Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

¹⁶ Directive 2011/51/EU of the European Parliament and of the Council amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international Protection; on this directive, see Peers (2012). For the sake of brevity, the six adopted directives (including the amendment to the LTR Directive) and the proposed seventh and eighth directives on legal migration are referred to as the "existing legislation" or the "current legislation" in this chapter.

¹⁷ See Article 79 TFEU; for an overview of the impact of these changes, see Peers (2011).

higher standards be “compatible” with the EU legislation.¹⁸ On the other hand, the Blue Card Directive, the Seasonal Employment Directive and the ICT Directive, in principle establish fully harmonised rules, with options for member states to establish or retain more favourable rules only as regards specified provisions.¹⁹

3. Key parameters of an EU immigration code

The possible adoption of an EU immigration code has three key parameters: the degree of harmonisation entailed, including the substantive legal rules set out in the code; the simplification, consistency and quality of the relevant legal rules, i.e. the “better regulation” agenda);²⁰ and the “publicity effect” of adopting a code.

On the first point, while an EU immigration code could restrict itself to codification of the existing legislation in this field with no substantive amendments, or even *reduce* the extent of EU harmonisation in this area, the Treaty obligation to establish a “common immigration policy” clearly suggests that an EU immigration code must necessarily establish a more ambitious level of harmonisation than the *status quo*. This higher level of ambition could have three different aspects: extension of EU law to cover more categories of persons; a greater intensity of harmonisation; and higher standards for the persons concerned. The latter two aspects are necessarily connected, because in many areas of immigration law, the EU’s standards are arguably relatively low,²¹ due to the low common denominator established as a result of the unanimous voting rule which applied prior to the entry into force of the Treaty of Lisbon. It follows that a fuller degree of harmonisation in this field could only be justified if standards were raised significantly.

On the second point, the current EU immigration legislation often contains differently worded provisions dealing with the same legal issue,

¹⁸ In contrast, such a “compatibility” requirement does apply to EU asylum directives; on the interpretation of such requirements, see CJEU *Joined Cases C-57/09 and C-101/09 Germany v B and D* [2010] ECR I-10979.

¹⁹ See Article 4 of each directive.

²⁰ Note that the Stockholm Programme refers expressly to “amendments needed to simplify...the existing provisions and improve their...coherence”.

²¹ See in particular the criticisms in Wiesbrock (2009); Peers, Guild, Acosta, Groenendijk and Moreno Lax (2012); Boeles, den Heijer, Lodder and Wouters (2009).

such as core admission criteria or procedural safeguards. In some cases, an issue (like fees for applications) is dealt with in one or more directives, but not in other similar directives. Some provisions of the existing directives are unclear and have led to divergent implementation in practice.²² A simplified and more consistent set of rules should reduce costs for national administrations, and a clearer set of rules should make life easier for third-country nationals residing (or intending to apply to reside) legally within the EU, along with their (would-be) employers where relevant.

Finally, on the third point (publicity effect), a single source of EU rules on legal migration would likely become better known and considered to be more accessible in practice than the existing disparate measures, in particular because such a code would likely be compared to national comprehensive “Aliens Acts”, and in part due to the public debate that might result from the process of adopting the code. The broader impact of adopting an EU immigration code might be the ‘rebranding’ of EU law in this area, which does not currently have a public profile comparable to (for example) the Schengen rules on visas and border controls, even though the current EU immigration legislation is applicable to a significant proportion of immigrants to the EU.²³

How should these three parameters be addressed? First of all, the third parameter will, to a certain extent, take care of itself: it might be expected that an EU immigration code would have a publicity effect even if it confined

²² See in particular the Commission’s reports on the implementation of the various Directives: European Commission (2008); European Commission (2011a); European Commission (2011b); European Commission (2011c). See also the Green Paper on Family Reunion: European Commission (2011d) and the analysis of the implementation of the Long-Term Residence Directive by K. Groenendijk in Chapter 10 of Peers, Guild, Acosta, Groenendijk and Moreno Lax (2012).

²³ According to the Commission’s 2010 annual report on immigration and asylum (European Commission (2010b, p. 3), 27% of first residence permits issued to third-country nationals in 2009 concerned family reunion, and 22% concerned education. This means that 49% of such permits fell within the scope of EU immigration law. From mid-2011, some proportion of the migrants admitted for employment (24% of the total in 2009) have fallen within the scope of the Blue Card Directive, and from Christmas Day 2013, most of the remaining applications for labour migration will fall within the scope of the Single Permit Directive. Some of the other permits issued also fell within the scope of EU legislation in other areas (asylum law, and presumably family reunion with EU citizens exercising free movement rights), but these permits will not fall within the scope of the proposed immigration code.

itself to a codification of the existing EU legislation in this area, without any substantive amendments.

Next, as for the substantive content, the proposed code advocated here does not suggest a radical overhaul of the existing legislation, but rather focusses on removing the most problematic provisions in the current legislation – particularly (but not only) the directives on family reunion, long-term residents, students and researchers, *inter alia*, in light of the various Commission recommendations in its reports on these directives. As noted above, the Commission intends to propose amendments to the Family Reunion Directive in 2012; it has also announced plans to propose amendments to the Students’ and Researchers’ Directives, respectively, in the same year.²⁴ It would be possible for the process of amending these directives to get underway before the start of negotiations on the immigration code (as planned by the Commission in its Action Plan), with the results of that process then subsequently integrated into the final code.²⁵

As regards the extension of EU immigration law to more categories of persons, the proposed code focusses essentially on extending EU family reunion rules to new categories of persons, rather than (in particular) suggesting new rules to cover more categories of economic migrants.²⁶ While a more ambitious approach (for example, adopting EU rules to facilitate the immigration of job-creating investors) could be justified in principle, there is a risk that the codification process itself would be jeopardised by suggesting too many changes to the existing substantive law. It would always be possible to agree to schedule a future discussion of such possible changes in

²⁴ See the Commission’s reports on the implementation of the various Directives; see also the Annex to the Commission’s 2012 work programme (European Commission (2011e)).

²⁵ For example, see Regulation (EC) No 390/2009 of the European Parliament and of the Council of 23 April 2009 amending the Common Consular Instructions on visas for diplomatic missions and consular posts in relation to the introduction of biometrics including provisions on the organisation of the reception and processing of visa applications, which was shortly afterward integrated into the visa code. The Commission released the proposal for the former measure (European Commission (2006a)) shortly before its proposal for the visa code (European Commission (2006b)), and in practice the negotiations on the former proposal initially took priority.

²⁶ Arguably the exhortation to consider new rules on more categories of workers, set out in point 6.1.3 of the Stockholm Programme, referred to the planned proposals on ICTs and seasonal workers, which had not yet been issued at the time that programme was adopted.

the near future, pursuant to a so-called ‘rendez-vous’ clause which would require the Commission to report back on certain issues by a specified date. Such clauses are already common in EU immigration legislation.²⁷ As for the even more ambitious prospect of a complete harmonisation of immigration law, it must be recalled that – along with the limit on EU competence set out in Article 79(5) TFEU – although the EU is obliged to establish a “common immigration policy”, this area is still a shared competence, so the principle of subsidiarity applies (Articles 2(2) and 4(2)(j) TFEU). At the very least, this must mean that the EU is not *prima facie* obliged to undertake such full harmonisation.

The fate of the Constitutional Treaty – a previous attempt at simultaneously amending, rebranding and consolidating existing rules – is surely instructive. The Treaty of Lisbon subsequently dropped the attempts to consolidate and rebrand the existing EU primary law, settling instead for a slightly less ambitious set of amendments to it. But such a solution is not possible as regards an EU immigration code, since the essential nature of such a measure is to consolidate and rebrand the existing law. It follows that the codification process, if it aims to be successful at all, must limit its ambitions as regards amending the substantive law. With this in mind, it would be particularly sensible to begin a separate process of amending the Family Reunion, Students’ and Researchers’ Directives before starting the process of adoption of a migration code, in order to remove the debates on those issues (particularly family reunion) from the discussion of the rest of the code, also thereby limiting the substantive amendments being considered as regards the code.²⁸ However, some further possible desirable changes to the existing legislation are signalled in the commentary to the proposed code.

Finally, as regards the simplification, consistency and quality of EU immigration law, the proposed code does its utmost to remove unjustified divergences and to clarify or remove unclear provisions of the existing legislation. In some cases, this results in raising standards as compared to some of the current legislation. But some divergences in rules still remain in the proposed code, where considered necessary either to take account of factual differences between different categories of persons, i.e. there is no

²⁷ See, for instance, Art. 19 of Council Directive 2003/86/EC.

²⁸ As with Regulation (EC) No 390/2009 and the visa code, the amendments to the Family Reunion, Students’ and Researchers’ Directives, once agreed, could be integrated into the text of the immigration code during the final phase of negotiations on the code.

need for rules concerning the initial admission of LTRs, or where different treatment can be objectively justified, i.e. the stronger equality rights for LTRs as compared to persons initially admitted.

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15. RETHINKING THE ATTRACTIVENESS OF EU LABOUR IMMIGRATION POLICY: CONTEXT AND CHALLENGES

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What are the determinants and challenges pertaining to the EU priority promoting the attractiveness and selectiveness of labour immigration policies for ‘wanted’ or ‘welcomed’ third-country workers? This book has critically studied from a variety of disciplinary perspectives and comparative approaches the EU’s attractiveness and selective policy paradigm of immigration policies. It has revisited some of the premises and questions that are too often taken for granted both in policy and scholarly discussions dealing with factors of cross-border human mobility for the purposes of employment and education-related activities.

This chapter synthesises the main issues, findings and controversies that have been covered in the various contributions to the book. It starts by contextualising the state of play and featuring components of EU immigration policy as it stands today. We then focus on rights, non-discrimination and openness issues, and summarise in a next step the challenges for the EU when further developing a common immigration policy in employment domains. Subsequently, the issues and obstacles pertaining to the recognition of qualifications and skills as well as the questions raised by selective policies based on labour market needs are discussed.

1. State of play and featuring components of today’s EU labour immigration policy

Since the adoption of the Tampere Conclusions and the entry into force of the Amsterdam Treaty in 1999 we have witnessed 15 years during which the EU has tried to build an Area of Freedom, Security and Justice. In the field of immigration different pieces of legislation have been adopted that are

applicable to various categories to third-country nationals. Annex 1 of this book provides a detailed list of the most relevant legal and policy instruments composing EU labour immigration from 1999 to the present.

While important European law acts and agreements have been adopted in recent years, the current picture is one where a common EU labour immigration policy is still lacking. Indeed, the legislative framework that has been developed so far reveals a number of deficits or unfinished elements affecting its normative and political configurations. Some of these have been identified in various chapter contributions of this book and can be synthesised as follows.

EU immigration policy is first affected by *fragmentation and dispersion dynamics*, which lead to *legal complexity and uncertainty*. This is partly the result of the Council's failure to reach agreement on the Commission's 2001 proposal for a directive on the conditions of entry and residence for the purpose of paid employment and self-employment – which intended to (horizontally) regulate the entry and residence conditions for all third-country nationals exercising paid and self-employed activities.¹ Following an open consultation procedure², the Commission presented the Policy Plan on Legal Migration in which the way forward and policy strategy for the years to come was outlined.³ The Policy Plan stated that the public consultation confirmed “the need to develop EU common rules in this field” and

...possible advantages of a horizontal framework covering conditions of admission for all third-country nationals seeing entry into the labour markets of the Member States. However, the Member States themselves did not show sufficient support for such an approach. Moreover, there is the need to provide for sufficient flexibility to meet the different needs of national labour markets.⁴

The main result of the Policy Plan on Legal Migration has been the emergence of a hierarchical, differentiated and fragmented EU legal framework on labour immigration granting a variable set of rights, standards and conditions for entry/residence to different migrant worker

¹ European Commission (2001); European Commission (2006); European Commission (2007a).

² European Commission (2004).

³ European Commission (2005).

⁴ *Ibid.*, p. 5.

groups and countries of origin.⁵ The rationale behind this fragmented policy approach was in fact driven by the attractiveness and selective policy paradigm, i.e. to 'attract' categories of third-country nationals who were by then deemed to be needed in the EU, in particular "highly skilled workers" and "seasonal workers". The Commission recognised in the Communication that the intention was "to strike a balance between the interests of certain Member States - more inclined to attract highly skilled workers - and of those needing mainly seasonal workers".⁶ It therefore decided to adopt a target set of complementary legislative measures, a general framework directive and four specific directives.⁷

Nine years later, the package of sectoral legislative initiatives has been adopted. The implementation of the Policy Plan has included the adoption of a directive on a common application procedure for a single (work and residence) permit and a common set of rights for legally residing third-country nationals, and three legislative proposals covering different categories of third-country workers: First, the EU Blue Card Directive,⁸ the Seasonal Employment Directive⁹ and the ICT Directive adopted in May 2014.¹⁰ This has been furthermore accompanied by the recast of the Researchers' and Students' Directive.¹¹ To the rules and standards now foreseen in these directives we need to add those provided in international

⁵ Carrera, Faure, Guild and Kostakopoulou (2011).

⁶ European Commission (2005, p. 6).

⁷ According to the Commission, "this package aims thus to develop non-bureaucratic and flexible tools to offer a fair, rights-based approach to all labour immigrants on the one hand and attracting conditions for specific categories of immigrants needed in the EU, on the other", *ibid.*, p. 5. This was later on recognised in European Commission (2007b, p. 4): "A category-by-category approach...currently seems to be the only way to move out of the impasse and beyond the Member States' reservations regarding a matter they view as falling within national jurisdiction."

⁸ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

⁹ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

¹⁰ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

¹¹ European Commission (2013).

agreements and mobility partnerships between the EU and third countries, some of which foresee employment or education-related provisions (see Annex 1 of this book).

A second featuring component characterising the first generation of EU labour immigration policies is that of *discrimination or inequality of treatment* in respect of categories of workers. This can be seen as one of the main results of the Commission's policy approach adopted by the above-mentioned Policy Plan.¹² Indeed, when the Commission proposed to adopt a sector-by-sector approach, actors such as the European Economic and Social Committee (EESC) expressed concerns on the consequences from the perspective of the workers. The EESC concluded that "if the European Council were to opt for a sectoral approach (geared towards highly skilled migrants), it would be discriminatory in nature. This might be easier for the Council, but it moves away from the Treaty provisions".¹³

A similar issue has been pointed out by Cholewinski's contribution in Chapter 4 of this book. In his opinion the internationally recognised principle of non-discrimination and equality of treatment has been challenged in the EU through the implementation of a 'sectoral policy approach' in the legislative process of EU migration policy, as opposed to the Commission's original 'horizontal approach'. Indeed, extra Union labour immigration policy heralds the allocation of different rights to third-country workers depending on their perceived value to the EU labour markets, so "the economically stronger should be privileged and the equally needed but economically weaker migrant workers should be deprived of rights".¹⁴

A third featuring component affecting the current normative shapes of the EU's immigration policy is the *multi-layered nature and multiplicity of legal statuses for third-country workers and migration policy systems across the EU*. The issue of parallel Union and national migration statuses has been pointed out by Groenendijk in Chapter 13. He has identified a practice of dual or multiple migratory statuses and the member states' practice of continuing to issue national residence and work permits rather than the permits provided for in Union migration law. For example, the EU Blue Card Directive, which – as a previous CEPS NEUJOBS research paper has shown – has led to a competing and complex multi-level system of statuses and schemes for "highly

¹² See Carrera, Faure, Guild and Kostakopoulou (2011).

¹³ European Economic and Social Committee (2004, point 2.1.4).

¹⁴ Guild (2011).

qualified third-country nationals".¹⁵ The Blue Card Directive has established minimum standards that provide "for a common floor, not a common ceiling". The possibility given to member states to keep their national migratory schemes for highly qualified immigrants has not been conducive to a genuine European scheme and even raises the question of the added value of the Blue Card system.

A final featuring component characterising EU immigration policy relates to barriers towards *accessibility to EU standards and rights* under EU immigration law as experienced by third-country nationals. EU immigration law already provides a supranational set of rights concerning various aspects, including access to long-term permanent residence, family reunification or highly qualified employment as emphasised by Groenendijk in Chapter 13. However, as Acosta Arcarazo rightly points out in Chapter 10, "it is not rights enshrined in the law that matters but rather access to them".

This fragmented, non-transparent, discriminatory and complex multi-layered system resulting from the first generation of EU immigration policy produces a number of accessibility challenges. Not only third-country nationals who consider the EU as a potential destination and who are eligible under existing EU immigration statuses are confronted with such challenges; national practitioners also have to face and deal with such challenges with a view to ensuring the implementation and litigation vis-à-vis regional/local administrations and relevant courts.

2. Rights, non-discrimination and openness: A trade-off?

The relationship between rights, equality of treatment and the degree of openness in immigration policies has received much attention and been the subject of debate in scholarly and policy venues. Is there a trade-off between the openness of migration policies and the granting of rights? This issue was covered by Section I of this book.

In Chapter 2 Ruhs argues that one of the main reasons why states often hesitate to ratify international migrant rights instruments lies with the ways in which they affect their sovereignty/national interests at times of granting or restricting migrant rights. In his view it is important to focus on the 'costs and benefits' to receiving countries of granting specific rights to third-country workers. Ruhs' starting premise is that migrants' rights perform an instrumental role as determinants in international labour migration. His

¹⁵ Eisele (2013).

main argument is that there are ‘trade-offs’ in high-income countries between ‘openness’ to admitting migrant workers and the ‘rights’ granted to them after admission.

The equation between ‘equality of rights’ and ‘restrictive immigration policy’ has been, however, subject to extensive discussion.¹⁶ Ryan’s Chapter 3 examines the case of the UK and argues that there is no evidence in immigration policy debates of a linkage between openness and rights. In his opinion, “the recent British experience suggests that increased numbers are a more important constraint upon – or driver of – changes to rights regimes than the openness of policy per se.” Also, he argues that for non-lower-skilled workers the logic is actually the opposite, “with rights given (or denied) in order to make the UK more (or less) attractive...while the highest level of rights has been accorded to the most sought-after migrants (previously the highly skilled, now investors and entrepreneurs), in order to attract them to Britain”.

Some of these rights are minimum labour standards foreseen in ILO instruments. Indeed, one of the more problematic aspects inherent to the ‘more openness, less rights’ logic is that it may challenge the set of international labour standards developed by organisations such as the ILO. This is an issue emphasised by Cholewinski in Chapter 4, which highlights how the current emphasis on temporariness and rights trade-offs can be problematic from the perspective of ensuring the protection of the migrant workers’ rights and labour standards as well as their right to non-discrimination. In Cholewinski’s opinion, the trade-offs framing device is inappropriate as it locks individuals into a “zero-sum game” (rights vs. numbers). They also lead to a “race to the bottom” and frame third-country workers as “commodities with economic utility”. In his opinion, this kind of discourse can only depress the wages and working conditions of all workers.

Ruhs advocates in Chapter 2 for “the liberalisation of international labour migration, especially of lower-skilled workers, through temporary migration programmes that protect a universal set of core rights...by restricting a few specific rights that create net costs for receiving countries”, which he denominates as a ‘core rights approach’. One of the issues that emerged during the discussions in the Expert Seminar was the extent to which those costs are based on objective and independent evidence – or are they just assumed or presumed to be ‘costs’? That is, are these real costs or only perceived costs? Moreover, when looking at cost-related

¹⁶ Castles (2004); Castles (2006); Ruhs and Martin (2008).

considerations, the debate highlighted the need to consider another kind of cost inherent to the trade-offs discussion, and that relates to the creation of a society that has members with different rights and benefits. Do we want a society granting different sets of rights? What is the impact on and costs to social cohesion?

Furthermore, in Ruhs' opinion 'non-core rights' are 'extensive social rights' (such as access to income-based benefits, including social housing and low-income support). This creates a similar dilemma concerning the extent to which a 'core rights approach' may actually lead to restricting rights. Which rights are not core for human beings? What place would family life play in that 'trade-off' framework? Is family life not a core right? Such an approach could potentially justify limiting family reunification on the basis of net costs for the receiving state. It could also justify arriving at a lowest common denominator in terms of social rights in the name of openness. It is also national workers who are affected by lowering down rights for third-country workers. ILO instruments aim to address the unequal international competition for labour, so that countries cannot exploit workers for economic purposes. The boundary between what can and cannot be defined as 'core' is blurry.

This book incorporated a comparative approach by including international experiences on similar debates. Chapter 10 by Acosta Arcarazo illuminates experiences from South American countries on the 'rights vs. numbers' rhetoric and comes to the following conclusion: in countries like Argentina, migration has been affected mostly by the economic opportunities in certain labour market sectors rather than by any specific legal framework restricting third-country nationals' rights and benefits. It is in his view far from clear whether it is rights or job availability that matters the most. The higher or lesser degree of restrictiveness of an immigration policy does not seem to be the most decisive factor in determining immigration or emigration. Yet in Acosta Arcarazo's view, it may lead to social exclusion, harsher living conditions and unnecessary obstacles to human mobility.

What role does discrimination play in the framework of attractiveness? States frequently legitimise inequality of treatment in their policies on the basis of 'quotas', 'skills' or 'needs' that are too often politicised and short-sighted. The question arises who benefits from discrimination in such policies and who loses out?

The US labour immigration system is also illustrative. Labour migration to the United States is mainly employer-led and a large majority

of non-US citizens enter the country as ‘temporary visitors’ or ‘non-immigrants’. Fullerton’s analysis in Chapter 12 shows that temporary foreign workers have a weaker legal status concerning bargaining power and labour mobility, including limited options to change employers, compared to migrants who benefit from permanent pathways. This demonstrates the vulnerability of cost/benefits and selective migratory schemes. Fullerton’s contribution highlights the importance of the legal protection that migrant workers enjoy from non-discrimination, which makes the US migration system more ‘attractive’ to immigrants. She says that “access to courts and the general cultural norms in favour of litigation afford labour migrants some protections against exploitation by employers.”

A similar scenario has been described by Gabriel in Chapter 11. Temporary labour immigrants in Canada constitute the greatest proportion of immigrants. Gabriel highlights that this ‘temporariness’ imposes a vulnerable legal status on low-skilled migrant workers, which ties them to “a single employer, affords them fewer rights than other workers and positions them in such a way that it is difficult to exercise the rights they are entitled to.” Similar to the concerns raised above when looking at current debates on rights trade-offs in the EU, she describes the latest policy changes in the domain of labour migration in Canada as “short-term focused” and mainly “directed at addressing specific labour market pressures and skill shortages”, without due consideration to the long-term perspective and impact on workers protection and society at large.

3. Matching demand and supply: A revamped ‘guest worker’ model at EU level?

A major dilemma raised by the trade-off discussions relates to the degree of ‘temporariness’ that the emerging EU labour immigration policy displays; it thereby promotes implicitly a revamped and unspoken ‘guest worker’ model. As Groenendijk has identified in Chapter 13, the adoption of the Seasonal Employment and Intra-corporate Transferees Directives reflects a worrying trend towards ‘temporariness’ that resembles too closely the former failed guest worker programmes of Germany and Switzerland, including the underlying rationale. A central issue pointed out by Groenendijk is the extent to which the EU Directive on seasonal employment will develop in practice into ‘the EU Directive on temporary employment’ and provide only for very low EU standards.

One of the main challenges facing the current and next generation of EU immigration policy is not to repeat the mistakes of failed guest worker

programmes, but instead to learn from them. ‘Attractiveness’ of migration policies is in the eye of the beholder: by focusing on the ‘attractiveness’ of a foreign labour force purely from an economic and utilitarian perspective – that of ‘the needs’ of the receiving state – the ‘attractiveness’ of policies from a migrant worker’s viewpoint is relegated to a secondary policy concern. For migrant workers, ‘attractiveness’ might well translate into issues related to security of residence, non-discrimination, access to fundamental social rights and compliance with international labour standards.¹⁷ The academic literature underlines the importance of taking account of ‘historical experiences’ of and ‘lessons learned’ from previous policies. Contributions such as those of Castles (2004),¹⁸ Cornelius, Martin and Hollifield (1994),¹⁹ Bigo and Guild (2005),²⁰ or Guild and Mantu (2011)²¹ are only a few examples that show the inherent ‘policy failure’, ‘policy gap’ or ‘fallacy’ when the actual outcomes of cross-border labour mobility make a mockery of the publicly stated goals and objectives of states’ migration control policies.²² This gap may become even larger when a supranational migration policy actor, such as the EU, is at stake.

With a view to future EU policy-making it is therefore central to consider the fact that more often than not migration control policies have achieved precisely the opposite effects of what was originally intended by national policy-makers. Castles²³ highlights the well-known example of the German guest worker recruitment policy between 1955 and 1973, which resulted in permanent settlement, family reunion and the emergence of diverse societies in Germany. Is the emerging EU immigration policy likewise prone to fail? As Castles points out “migration policies may fail if they are based on a short-term view of the migratory process...it is necessary to analyse the migratory process as a long-term social process with its own

¹⁷ See in this regard Eisele (2014).

¹⁸ Castles (2004).

¹⁹ Cornelius, Martin and Hollifield (1994).

²⁰ Bigo and Guild (2005).

²¹ Guild and Mantu (2011), the authors argue, “The fallacy between the needs of the economy and the frameworks designed by states is increasingly problematic as control paradigms build around the conceptualisation of migration as a security issue, ignore the human aspect of the phenomenon”, p. 10; in same publication, see also Bigo (2011).

²² See also Czaika and de Haas (2013).

²³ Castles (2004, pp. 205-227).

dynamics”, as a ‘societal process’ which cannot be imprisoned in law in liberal democratic regimes.²⁴ ‘Short-termism’ (short-term perspective) in policy-making tends to be a commonly shared trend in this area.

Several contributions in this book illustrated how the phantom of the guest worker model may in fact come back in different narrative shapes and policy framings that identify temporariness as a central component of EU immigration policy.

From an economic viewpoint, Kahanec shows in Chapter 8 how ‘skills-based selective frameworks’ that give preferential treatment to certain migrants based on a “narrowly defined measured demand for skills” is a self-defeating policy option. This is also the case from the perspective of financial costs. In his view, “identification of skill needs and regular adjustment, fine tuning and monitoring of the system involve significant pecuniary and non-pecuniary costs”. Moreover, the criteria for ‘selection’ are based on “a small set of observable characteristics that are only proxies for the true determinants of migrants’ employability and labour market potential”.

Moreover, international experiences are offering similar deficits. The failure of temporary migration programmes is illustrated by the contribution by Fullerton on the US. In Chapter 12 she shows how “although the US legal framework is predicated on non-citizens obtaining their immigrant visas overseas at a US consulate...only a miniscule number of individuals coming to the US as permanent labour migrants are overseas when they seek permanent resident status. Rather, almost everyone who satisfies the employment-based immigrant categories is already working in the US”.²⁵

A similar move towards a system said to combine the US and Australian model has been identified in Canada by Gabriel’s Chapter 11; one which increasingly functions as a points-based system geared toward specific skills (points-based selection model) and mainly focuses on temporary admission of foreign workers. When examining the so-called “Canadian Experience Class” Gabriel highlights that the system focuses purely on the interest of the state, and the economy renders vulnerable temporary workers in “low-skilled occupations that offer no path to

²⁴ Ibid., p. 207.

²⁵ See Chapter 12 of this book where Fullerton concludes: “The significant role that temporary labour migration plays as the doorway to permanent labour migration brings issues of labour mobility in the US into high relief”.

permanent residence” and lead to irregularity of stay, thus “subjecting Canada to problems like those European countries experienced with their guest workers”.²⁶

4. Skills, qualifications and labour market needs

Debates on matching ‘supply’ and ‘demand’ of foreign labour force are also at the heart of current policy discussions in the EU. Most EU policy documents give priority to immigration policies that follow a national labour-market needs rationale, which is mainly economic in nature. Such policies often set aside wider political, societal, historical and legal questions underlying the framing of human mobility as a migration policy issue. Can labour market “needs” be effectively determined? Is it actually possible to have a functioning labour market matching system in light of the temporariness of labour demands and individuals’ changing intentions?

This book has pointed out that a fundamental challenge behind these debates is the central role played by obstacles affecting the recognition of qualifications and skills, as well as informal barriers that non-EU nationals face to entry into EU labour markets. As Desiderio’s Chapter 6 underscores, the opportunities that countries grant to skilled individuals to make full use of their qualifications and competences constitute a central determinant fostering attractiveness, competitiveness and growth. In her view, efficient systems for the recognition of foreign-acquired diplomas, skills and work experience represent a key instrument for realising this potential.

Recognition of qualifications and diplomas, and lengthy administrative recognition procedures, continue to be major obstacles to international mobility and the inclusion of third-country workers in domestic and international labour markets. The EU is not an exception in this respect. According to Desiderio, “the lower returns to foreign education and work experience are, together with the limited mastery of the host country’s language, the two main reasons explaining higher over-qualification rates for immigrants relative to the native-born”.

This point has also been raised by Kahanec in Chapter 8. He argues that “Europe is losing in the global competition for skilled migrant workers and migrants tend to downgrade into jobs below their level of qualification”. Kahanec explains how amongst the various options available in respect of migration policy frameworks to be devised, one which may be more interesting is the selection of skills in shortage in a given labour market. In

²⁶ Gabriel refers here to Alboim and Cohl (2012); see also Gabriel (2011).

his view, however, a key challenge characterising such a policy is the feasibility in identifying skills shortages in a method which is not ‘political’ in nature and takes due account of market failures. Kahanec explains how the academic literature has proposed a number of alternatives in this respect, which include “the unemployment-vacancy ratio, wage premium, elasticity of labour supply, or [taking into account] difficulties to fill vacancies reported by employers”.²⁷

The contribution by Popova in Chapter 7 has also underlined skill identification, anticipation and monitoring as challenges. Accessibility to skills recognition remains very limited in practice. A key point is that no commonly shared definition of ‘skill’ exists; nor does a definition exist for a ‘high’, ‘medium’ or ‘low’ skill or talent. These are too often poorly and artificially framed in terms of “occupational skills” or “educational attainment”, or even in terms of the receiving country’s “needs”. Kahanec has also referred to some of these challenges. He argues in Chapter 8 that there are a number of conceptual and practical dilemmas inherent to these kinds of policies. How to assign a particular worker to a specific skill group? How to address the fact that ‘needs’ for specific skills are time-dependent and vary in short-, medium- and long-term perspectives? What may be needed now may not be tomorrow. Time-dependency and politicisation therefore constitute two main obstacles that challenge the effectiveness of skills recognition and matching policy attempts.

Here the experience of Canada is illuminating. In Chapter 11 Gabriel illustrates the uncertainties as to whether ‘labour needs’ can be effectively determined by the state. As she points out “admission to a country does not necessarily guarantee newcomers a job commensurate with their experience and skills”. In her view, “points-based systems” face a common challenge consisting of the difficulty in differentiating between qualifications of different quality and utility. Gabriel criticises a selective approach (to match demand and supply) in Canadian migration policy and states that “the labour market experiences of immigrants and most especially recent immigrants have not been good”, with “immigrant skill underutilisation” and excessive focus on “short-term economic gain” constituting central policy challenges for Canada.

Discussions on skills and labour market needs are too often trapped by a narrative that assumes the categorisation of ‘low’ and ‘high’ skills and the workability of these categories in domestic and supranational contexts. They

²⁷ Zimmermann, Bonin, Fahr and Hinte (2007).

also tend to neglect the ‘medium’ skills. Yet as it is demonstrated in several EU member states, the labelling of an individual as a ‘highly skilled’ third-country national – which is now also made possible by the EU Blue Card – does not always relate to the specific ‘skills’ or actual qualifications or experience of the person involved, but rather, first, to the ‘utility’ of the worker in a labour market sector that has been considered as suffering from ‘gaps’, and, second, to the actual salary level that the worker will receive in the receiving country.

So, when official discourses refer to a ‘mismatch’ or lack of ‘supply’ and ‘demand’, what precisely are they referring to? Moreover, an interesting development is that the ‘temporary’ or ‘guest worker’ migration management models are now shifting their target group of ‘the good’ immigrant to be attracted. While formerly European countries were mainly focused on the ‘low skilled’, now the logic of temporariness expands across the various levels of skills of the migrant worker. There is an increasing number of states that are shifting their policies on ‘attractiveness’ and ‘permanent settlement’ or even granting nationality to ‘investors’ and ‘entrepreneurs’ with golden visa programmes and/or citizenship-for-sale schemes.²⁸

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16. THE NEXT GENERATION OF EU LABOUR IMMIGRATION POLICY: CONCLUSIONS AND RECOMMENDATIONS

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The EU policy paradigm of attractiveness calls for careful reconsideration and critical reflection. The various chapter contributions comprising this book have provided a wealth of arguments, dilemmas and comparative perspectives when considering the determinants and challenges characterising discussions focused on the attractiveness of labour migration policies in different supranational and international settings. There are at least five preliminary questions that can be raised and that call for further research when examining some of the commonly held premises underlying the narratives of ‘attractiveness’ and ‘global competition of talent’.¹

First, *‘attractive’ in comparison to whom?* The rhetoric of attractiveness presupposes that other ‘developed’ world economies such as the US or Canada seem to be in conscious competition with the EU over a certain kind of desired foreign labour force, the so-called ‘talented’, ‘highly qualified’ or ‘brightest’. This competition is in turn used to justify differential treatment in relation to the desirable labour migrant. Yet is there such a ‘race’? It is also often assumed that these countries may even constitute ‘good examples’, embodiments of ‘lessons learned’ or even ‘models’ for the EU to follow in its currently ongoing internal deliberations on how to frame and further develop immigration policies and policy regimes. This book, however, does not support this presumption and actually shows that the US and Canadian

¹ Shachar (2006).

immigration systems face similar dilemmas and are not as ‘attractive’ as often portrayed in the EU policy discourse.² In fact, such systems offer a number of ‘lessons not-to-be learned’ when further developing immigration public policies in the EU.

Second, *attractive for whom?* Another uncritically examined assumption is that immigration control policies can be designed or made in such an especial manner that may attract or even convince those wanted or needed third-country workers (‘the good’ labour migrants) to choose one particular international destination over another. It is still based on the illusion that the state can in fact fully control human mobility and the complex set of sociologies inherent to this human phenomenon. The addressee of these policies seems to be therefore primarily the ‘foreign worker-to-be’ or the individual who is still in her/his country of origin to be covered by migration regulations and meeting ‘the high skills’ or ‘new talent’ supposedly needed by EU and member states’ labour markets.

Third, *how can an immigration policy be ‘attractive’? What are the incentives at play for making any immigration policy more attractive?* Among the factors making a certain immigration policy attractive, reference is often made to an improved set of rights and benefits conferred to the foreign workers, and other incentives such as the ease of (fast-track) administrative procedures for admission and residence, unrestricted access to the labour market, provision of information/employer sponsorship, etc. While these rights and benefits are indeed non-negotiable core components of international and European instruments with which EU member states abide, little evidence alludes to their determinant effects for emigration. It is also difficult to argue that there is a direct correlation between granting rights and openness. An underlying problem in any trade-offs framework is legitimising inequality of treatment on the basis of dubious grounds related to ‘quotas’, ‘skills’ or ‘needs’, which are often highly politicised and short-term-centred.

Fourth, *which kind of foreign worker is to be ‘attracted’ by an immigration policy?* The paradigm of attractiveness often refers to a selection logic focused on only those individuals considered to embody the ideal kind of migrant worker: ‘the talented’, ‘the brightest’ or ‘the highly skilled’. The framework for discussion therefore takes as the starting principle a utilitarian and economic approach that justifies inequality of treatment amongst workers. The argument appears to assume that it is in fact feasible to achieve a perfect

² For a critical analysis of the EU perspectives on the ‘attractiveness’ of the US labour immigration system, see Eisele (2014).

match between immigrants' skills and national labour market needs and priorities. A number of chapters in this book have challenged this assumption.

Finally, there are fundamental dilemmas in the process of artificially categorising a person as a 'wanted migrant.' *Who are those highly skilled and talented individuals? On the basis of what criteria can a specific worker be assigned to a specific skill group?* It is here equally assumed that there are exact methodologies to identify what and locate where these 'skills' and 'needs' actually are in national labour markets, in particular by national governments or the state. Yet the matching demand and supply theory is also affected by profound methodological caveats. Are the needs of the member states' labour markets only related to specific or limited set of skills? How to address the inherent time-dependency of specific skills and needs? Is the definition of 'highly' or 'low skilled' only related to the actual qualifications and competences of the person involved? How do formal and informal barriers to qualification and skills recognition, and discrimination in the receiving country, play into this equation?

On the basis of the discussions and findings presented across the various contributions of this book, this final chapter identifies the main issues and sets priorities for policy formulation and design in the next generation of this policy domain in respect of EU labour migration policies. In particular, it highlights important initiatives the new Juncker European Commission should focus on in the years to come. What are the possible policy suggestions or priorities for the new Commission?

1. Consolidating EU immigration standards: Time for an immigration code?

The state of affairs of EU's immigration policy is one revealing a framework affected by fragmentation, legal uncertainty, discrimination and competing multi-layered migratory statuses. This scenario calls for further consolidation, streamlining, and transparency of standards and rights. How can this be done? The preceding authors have, to a degree, disagreed. Groenendijk, for instance, argues in Chapter 13 that the new European Commission should not envisage or present any new legislative initiatives during the next five years of EU policy programming. In his view the priority should instead be given to better monitoring and enforcing the correct implementation of existing EU migration law and standards.

Peers, by contrast, suggests in Chapter 14 considering the idea of an EU immigration code (or code on legal immigration), previously proposed

by the European Commission on a few occasions,³ which has, however, not seen the light as originally programmed during the last five years. In his view, the code should “establish a more ambitious level of harmonisation than the status quo”, first by raising existing EU standards, and second by introducing a simplified and more consistent set of common regulations.

Behind this debate is the mistrust among certain EU member state authorities regarding the maintenance and safeguarding of already existing EU standards and rights in EU migration law. Amending current EU directives and regulations as proposed by Peers could indeed potentially open up the possibility of lowering existing EU standards and rights of third-country nationals, and therefore defeat the purpose and added value of ‘more EU’ in this policy area. While the priority could be in removing the most problematic provisions of current legislation, it is unlikely that there would be an agreement between EU institutions and national governments as to which of those provisions are ‘problematic’ and ‘why’.

The idea of codification remains, however, in some Commission corridors. In its Communication “An Open and Secure Europe: Making it Happen”,⁴ the Commission outlined its vision on the future priorities to guide the next phase of EU immigration policy and stated:

The existing EU rules on admission of migrants and on their rights must be implemented in an effective and coherent way by all Member States. An evaluation of current legislation on legal migration would help to identify gaps, improve consistency and assess the impact of the existing framework. Further steps could be taken to codify and streamline the substantive conditions for admission, as well as of the rights of third-country nationals. This would be a step towards a ‘single area of migration’, with the aim of facilitating intra-EU mobility of third-country nationals, including through mutual recognition of national permits.⁵

Should codification be the way forward? And should a ‘code’ or the consolidation of existing instruments take the form of a new legally binding

³ European Commission (2009); European Commission (2010), in which the Commission stated, “The EU must strive for a uniform level of rights and obligations for legal immigration comparable with that of European citizens. These rights, consolidated in an Immigration Code, and common rules to effectively manage family reunification are essential to maximize the positive effects of legal immigration for the benefit of all stakeholders and will strengthen the Union’s competitiveness”, p. 7.

⁴ European Commission (2014).

⁵ *Ibid.*, p. 4.

instrument? This book has demonstrated the need to address current deficits and featuring components of the first generation of EU immigration policy. This should not necessarily be seen as a zero-sum game. There exist different options to explore at times of consolidating existing EU legislation without necessarily reopening or amending the current set of EU standards. The priority should indeed be in carrying out an independent evaluation of what is already there, streamlining current EU standards and rights, providing further guidance on problematic or unclear issues identified in previous evaluations of current EU directives and highlighting gaps for future consideration while keeping the current level of harmonisation.

An EU immigration code could be an interesting step forward. Careful attention should be paid, however, to the way in which this could be done in practice. A non-legally binding corpus or compendium of existing EU rules and statuses could be a first step towards that direction. The focus should be to improve a concerted policy of what already exists but also ensure accessibility to the common EU standards and rights foreseen. Any proposal for codification should be firmly anchored on a rights-based and non-discrimination approach.⁶ Measures on promoting intra-EU mobility and addressing obstacles in member states should also be a priority. This should go in parallel with an independent inventory of ‘what is there’ and the factors challenging the intended public goal or expected added value of EU legislation, in particular in what concerns member states’ uses of national migration status versus EU statuses.

2. Recognition of qualifications and diplomas: Optimising the socio-economic inclusion of skills

Another priority should be addressing and overcoming current formal and informal obstacles for the recognition of qualifications and diplomas, as they constitute barriers to international mobility and the inclusion of third-country workers in domestic and international labour markets. The need to facilitate and ensure the recognition of qualifications has been recognised on several occasions by the European Commission. The Commission Communication “An Open and Secure Europe” states:

To attract talents, the EU should further encourage and enhance the recognition of foreign qualifications and professional skills; this will also help in putting to good use the skills and qualifications of legally

⁶ Carrera, Faure, Guild and Kostakopoulou (2011, p. 7).

resident migrants. To this effect the EU could also open discussion with its international partners. As part of the attractiveness of the EU, students and researchers should benefit from easier and faster visa procedures.⁷

Desiderio has in this respect proposed in Chapter 6 a number of measures that could improve the use of foreign-acquired skills: First, measures facilitating access to information on recognition procedures and their outcomes; second, measures to facilitate early and timely recognition; third, credentialing procedures tailored for foreign-trained professionals and allowing early labour market access; and fourth, mutual recognition agreements between receiving and sending countries.

When reviewing existing NQF in Europe, Popova's Chapter 7 calls for the establishment of "sector occupational requirement committees with trend-setting companies in each sector". Popova calls in addition for a "lifelong learning perspective", with people having equal and open access to quality learning opportunities, putting vocational and general secondary education on a convergent path, and continuous/adult training and improved recognition of prior (informal) learning. Multi-actor coordinated efforts should be prioritised to bring about country-specific challenges and experiences.

3. Enforcement, evaluation and strategic partnerships

Better enforcement of current EU standards should be also a priority. As Acosta Arcarazo highlights in Chapter 10 the priority for a better implementation has been present since long ago, yet while sharing this priority in theory, the European Commission seems to be less active in practice. During the last five years only one infringement proceeding has reached the Court of Justice of the EU. In the meantime third-country nationals are denied effective and non-discriminatory access to standards foreseen in EU immigration law. The new European Commission should therefore focus and invest capacity in better utilising infringement proceedings where necessary. Here, common EU guidelines addressed to

⁷ European Commission (2014, p. 4); see also European Commission (2013) where the Commission points out, "With increasing international (labour) mobility, work needs to be stepped up in areas such as recognition of foreign qualifications, exploring the portability of pension rights and other welfare entitlements, including, where possible, at international level. For example, the Social Protection Inter-Agency Board, which was agreed in the G20 in 2011, should consider addressing the issue of social protection of migrants", p. 11.

national practitioners and civil society organisations to better ensure the implementation by relevant regional and local administrations and litigation before relevant courts could be also a priority.

Enhancing and consolidating the dialogue and inputs by the social partners and civil society organisations should become a central priority. These could play a more active role in monitoring and evaluating the intended and unintended consequences and impacts of EU migration policies on the ground, and when identifying current gaps and deficits in member states implementation and practices. An EU level forum on immigration, integration and asylum, bringing together civil society and migrants' organisations, and a permanent EU platform for dialogue on labour immigration between the social partners (business and trade unions)⁸ could be a positive step forward at times of ensuring an evidence-based migration debate.

Strategic partnerships could prove to be particularly useful in this area. The EU is not alone at times of monitoring EU member states' migration policies and their impact on supranational commitments, standards and rights. A Strategic Partnership should be concluded with relevant actors in the Council of Europe, e.g. the Human Rights Commissioner, and the United Nations, e.g. the UN Special Rapporteur on the Human Rights of Migrants, the UN Human Rights Commissioner and the ILO. As the Commission has previously underlined significant efforts are still required to better implement internationally agreed frameworks and better enforce the protection of human rights of migrants.⁹ The EU should therefore also

⁸ See European Commission (2014) where the Commission prioritised the need “[t]o better identify economic sectors and occupations that face recruitment difficulties or skills shortages, a joint assessment of needs should be put in place via structural dialogues with Member States, businesses and trade unions on the demand for labour migration and trade related mobility. Recognising that different needs may exist in Member States, a platform of coordination at EU level would be useful to ensure that migration and mobility have a positive impact on the EU economy”, p. 4.

⁹ See European Commission (2013) in which “the human rights of all migrants” were identified as one key component of EU policies, p. 5; the Communication stipulates, “However, significant efforts are still required to better implement internationally agreed frameworks and enforce the protection of human rights of migrants, in particular at national and regional levels. In this context, it would be important to develop policies and take actions to promote the human rights of people in an irregular situation...EU Member States have not signed the 1990 UN Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families...in the longer term, there may

become a more active promoter of international human rights and labour standards, and their implementation by EU Member States, in particular in respect of those immigration policy dimensions now falling within the scope of EU law.

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be scope for reviewing the current composite normative framework, including the option of working towards a new convention that addresses the rights of all migrant workers, adapted to the realities and challenges of the 21st century", p. 6.

ANNEX 1

EU LEGAL AND POLICY INSTRUMENTS ON LABOUR IMMIGRATION

1) EU Directives, Regulations, Decisions and Conclusions

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, consolidated version of 24 March 2011.

Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research.

Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').

Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas.

Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2008 establishing a Community Code on Visas.

Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa.

Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

Commission Regulation (EU) No 1244/2010 of 9 December 2010 amending Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems and Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004.

Council Decision of 9 June 2011 on the application of the provisions of the Schengen *acquis* relating to the Schengen Information System in the Principality of Liechtenstein.

Council Decision of 16 December 2011 on the position to be taken by the European Union in the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons as regards the replacement of Annex II to that Agreement on the co-ordination of social security schemes (2011/863/EU).

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ACP States

- Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, *OJ L 287*, 4 November 2010, p. 3 (*Cotonou Agreement III*).

Albania

- Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, *OJ L 107*, 28 April 2009, p. 166.

Algeria

- Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People’s Democratic Republic of Algeria, of the other part, *OJ L 265*, 10 October 2005, p. 2.

Bosnia and Herzegovina

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- Agreement on the European Economic Area, *OJ L 1*, 3 January 1994, p. 3.

Macedonia

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Montenegro

- Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Montenegro, of the other part, *OJ L 108*, 29 April 2010, p. 3.

Morocco

- Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, *OJ L 70*, 18 March 2000, p. 2.

Russia

- Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, *OJ L 327*, 28 November 1997, p. 3.

Serbia

- Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia of the other part, signed on 29 April 2008.

Switzerland

- Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, *OJ L 114*, 30 April 2002, p. 6.

Tunisia

- Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, *OJ L 97*, 30 March 1998, p. 2.

Turkey

- Agreement establishing an Association between the European Economic Community and Turkey (Ankara Agreement), *OJ C 113*, 24 December 1973, p. 1.
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Ukraine

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LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
AOC	Adjustment of Status
AOS	Adjustment of status
ASEAN	Association of Southeast Asian Nations
BQFC	German federal law on the recognition of foreign qualifications (<i>Berufsqualifikationsfeststellungsgesetz</i>)
Blue Card Directive	Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CEC	Canadian Experience Class
CEPS	Centre for European Policy Studies
CIC	Department of Citizenship and Immigration Canada
CJEU, Court of Justice	Court of Justice of the European Union
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
COMPAS	Centre on Migration, Policy, and Society at Oxford University
DG Home	Directorate General for Home Affairs
DGs	Directorate-Generals of the European Commission
EC, Community	European Community
EEA	European Economic Area
EEAS	European External Action Service
EESC	European Economic and Social Committee
EMN	European Migration Network
EP, Parliament	European Parliament
EU	European Union
EU Charter	EU Charter of Fundamental Rights
FSW	Canadian Federal Skilled Worker Program
FY	Fiscal year
GATS	General Agreement on Trade in Services
ICMPD	International Centre for Migration Policy and Development
ICT	Intra-corporate transferees

ICT Directive	Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.
ILO	International Labour Organization
ILPA	Immigration Law Practitioners' Association
INA	US Immigration and Nationality Act
IOM	International Organization for Migration
IRPA	Canadian Immigration and Refugee Protection Act
IZA	Institute for the Study of Labor
JHA	Justice and Home Affairs
LCP	Live-In Caregiver Program
LMO	Labour Market Opinion
LPR	Lawful permanent resident
LTR Directive	EU Directive 2003/109/EC on long-term residence status
LTRs	EU long-term residents
MERCOSUR	Southern Common Market (<i>Mercado Común del Sur</i>)
MPI	Migration Policy Institute
NACARA	Nicaraguan Adjustment and Central American Relief Act
NEUJOBS	Creating and Adapting Jobs in Europe in the Context of a Socio-Ecological Transition (Commission-funded FP7 research project)
NGOs	Non-governmental organisations
NQF	National Qualifications Framework
OECD	Organisation for Economic Co-operation and Development
OJ	The Official Journal of the European Union
PES	Public Employment Services
PNPs	Canadian Provincial Nominee Programs
SAWP	Canadian Seasonal Agricultural Worker Program
SIEPS	Swedish Institute for European Policy Studies
SMEs	Small and medium-sized enterprises
TFEU	Treaty on the Functioning of the European Union
TFWPs	Temporary Foreign Workers Programs
UN	United Nations
UNASUR	Union of South American Nations (<i>Unión de Naciones Suramericanas</i>)

PROGRAMME OF THE EXPERT SEMINAR

14 FEBRUARY 2014

09.00 – 09.30: WELCOME AND OPENING

- Elspeth Guild and Sergio Carrera (CEPS)
- Laura Corrado, DG Home Affairs, European Commission
- Cristina Marcuzzo, DG Research, European Commission

09.30 – 11.00: CHALLENGE I: Rights and Discrimination

In other parts of the world the perception that racism and xenophobia are on the rise in Europe is widespread. This panel concentrates on how the EU can be made more attractive to migrant workers and the role of rights and discrimination as determinants for migration.

Chair: Eva Schultz (DG HOME, European Commission)

- **Bernard Ryan** (University of Leicester)
- **Martin Ruhs** (University of Oxford)
- **Ryszard Cholewinski** (International Labour Organization)
- **Maryellen Fullerton** (Brooklyn Law School)
- **Diego Acosta** (University of Bristol)

Discussant: Alvaro Oliveira (DG JUST, European Commission)

Open Discussion

11.00 – 11.30 Coffee Break

11.30 – 13.00 CHALLENGE II: Qualifications and Skills

The recognition of foreign qualifications and skills is of vital importance for making labour markets and economies more attractive and accessible to third-country workers. This panel discusses the challenges and remaining obstacles regarding the recognition of foreign qualifications and professional experiences, as well as the insufficient integration of skills in the EU Member States.

Chair: Fiorella Perotto (DG EAC, European Commission)

- **Maria Vincenza Desiderio** (Migration Policy Institute - Europe)
- **Katharina Eisele** (CEPS)
- **Daniel Hiebert** (University of British Columbia)

Discussants: Anna-Elisabeth Thum (DG ECFIN, European Commission)

Open Discussion

13.00 – 14.00 Buffet Lunch

14.00 – 15.30 CHALLENGE III: Matching Demand and Supply

The issue of better job matching and filling labour market shortages of Member States has been a priority for policy makers in the EU. In this context, labour migration policies that are “needs-based” have caught special attention and interest. This panel focuses on the challenges characterising the devising and implementation of job matching systems in the EU that attracts migrants and meets the “needs” of all actors involved, including social partners and migrants.

Chair: Doede Ackers (DG EMPL, European Commission)

- **Christina Gabriel** (Carleton University)
- **Martin Kahanec** (Institute for the Study of Labor, CEU and CELSI)
- **Wolfgang Müller** (German Federal Employment Agency)
- **Natalia Popova** (International Labour Organization)

Discussant: Sebastian Stetter (DG HOME, European Commission)

Open Discussion

15.30 – 16.00 Coffee Break

16.00 – 18.00: CHALLENGE IV: The Way Forward in the EU – A Post-Stockholm Programme Strategy

During the last 15 years the EU has developed a body of legislation governing the conditions of entry and residence for third-country nationals, including some employment-related dimensions. This last panel concentrates on challenges concerning possible future EU legislative developments and practical mechanisms to better ensure coordination and support for EU labour migration policies.

Chair: Laura Corrado (DG HOME, European Commission)

- **Kees Groenendijk** (University of Nijmegen)
- **Steve Peers** (University of Essex)
- **Anna Triandafyllidou** (European University Institute)

Discussant: Sergio Carrera (CEPS)

Open Discussion