

# Pathways towards Legal Migration into the EU

Reappraising concepts, trajectories and policies



Edited by Sergio Carrera, Andrew Geddes  
Elspeth Guild and Marco Stefan

Foreword by Matthias Ruete

# **PATHWAYS TOWARDS LEGAL MIGRATION INTO THE EU**



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*REAPPRAISING CONCEPTS, TRAJECTORIES  
AND POLICIES*

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BRUSSELS

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## FOREWORD

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The refugee crisis has dominated the policy agenda for the past two years, certainly in the area of migration and home affairs, but also beyond. Much has been achieved to date, including significant steps to propose reforms of rules and procedures on asylum, to strengthen border protection, to combat trafficking and smuggling, and in the area of return. But we also need migration policy to be developed with a wider and more long-term outlook.

The reflections on the future of the EU as laid out in the Commission's recent White Paper map the drivers of change in the next decade and present a range of scenarios for how Europe could evolve by 2025. 'Schengen', 'migration' and 'security' are among the key policy domains, illustrating once more how central migration and home affairs have become at the EU level within a relatively short period.

Have the refugee crisis and our responses changed the way we look at legal migration policies? Yes and no. 'No' in the sense that the EU is and remains an attractive place to study or to work, and migration for these purposes makes the EU a more competitive and prosperous place. 'Yes' in the sense that legal migration, now even more than in the past, can be seen as providing positive incentives for more resilient relations with the main countries of origin of migrants, including those coming via irregular channels.

If we look at legal migration flows over the past years, the picture that emerges is one of relative stability. Even during the peak of new arrivals of asylum seekers in the EU during 2015, immigration for purposes such as education, work or family reunification numerically outweighed those arriving to seek protection. Does that mean it is 'business as usual' in the area of legal migration?

Certainly not. Already back in 2015, prior to what could be seen as the peak of the refugee crisis, the European Agenda on Migration foresaw nothing less than a 'new' policy on legal migration, with a focus on the EU Blue Card for highly skilled workers. But while the majority of the actions contained in the agenda have been completed or are in the process of being

completed, including the ongoing negotiations on a proposed revision of the EU Blue Card, we are still some way from comprehensive answers to current and future challenges in the area of migration.

This holds true particularly for legal migration, where we are finding ourselves confronted with a series of questions. For example, has the approach pursued in this area – i.e. through separate legal instruments covering specific categories of third-country nationals – been effective, and is it still viable? Do we need more comprehensive rules on legal migration, and particularly on labour migration, or should the EU do less in this area and leave it to the Member States? Should we look for alternative models for managing labour migration?

It is in this context that a thorough evaluation (a so-called ‘Fitness Check’ in EU jargon) of the entirety of EU-level rules on legal migration was launched last year. This publication, and the policy workshop on “Reappraising the EU legal migration *acquis*: Legal pathways for a new model of economic migration, and the role of social science research” that preceded it, addresses some of the most pertinent questions in the framework of the Fitness Check and beyond:

- First and most generally, how are the legal rules ‘performing’ in meeting the demands to form a cornerstone of a comprehensive migration policy? Is the ‘equal treatment’ principle effectively implemented across the legal migration directives? From an economic and innovation-led perspective, is the EU on course to be at least as attractive as ‘classic’ destination countries such as Canada or Australia?
- Second, and in keeping with the international outlook, what role is there for legal migration in the overall cooperation with third countries? How can we harness the benefits of circular migration, and effectively contribute to tackling the root causes of irregular migration?
- Third, how do our migration policies and instruments perform in trade relations? Are there already first lessons emerging from the implementation of the Intra-Corporate Transfer (ICT) Directive? Linking to the Fitness Check, are there gaps in EU legislation for other ‘Mode 4’ categories, such as contractual service suppliers?
- Finally, as a cross-cutting issue, how can research help us answer these questions and develop appropriate responses and policies?

Finding appropriate answers to these questions is by no means straightforward. The legal migration *acquis* has been developed over more

than a decade and in changing institutional and law-making backgrounds. Legal migration rules now cover in (mostly) separate directives long-term residents, family members, students, researchers, highly qualified workers, seasonal workers and intra-corporate transferees, and trainees and volunteers under the European Volunteer Service are joining these groups. We have to add to this list the Single Permit Directive with its more horizontal nature of establishing EU rules for a single application/permit and equal treatment provisions for third-country workers.

Most of the directives have been evaluated individually, but there has never been a comprehensive review of the legal migration *acquis* in its entirety. The Fitness Check will now do this: if there are gaps, inconsistencies or possible ways of simplifying and streamlining the current EU framework in order to contribute to a better management of legal migration flows, the Fitness Check should tell us so.

For the directives dealing with workers or talent (or both), this is possible only in parts, as they are too recent. What we do know already from the joint work by the OECD and the Commission,<sup>1</sup> as well as from the Impact Assessment accompanying the Commission proposal revising the EU Blue Card Directive – is that Europe is underachieving in the global competition for talent.

Embedding legal migration more strongly in the international dimension of EU migration policy has proved tricky, not least because in the area of labour migration Member States have the right to determine volumes of admission. At the same time, there is unused potential to pool more efforts at the EU level.

For example, in the implementation of the Valletta Action Plan, designed to promote concrete cooperation between the EU and African countries in the area of migration management, there has indeed been limited progress in relation to economic migration, whereas in the area of migration for the purposes of study and research, there has been a substantial upscaling of the funding provided through Erasmus+ and the Marie Skłodowska-Curie programme. More can and needs to be done, so that legal migration can be a weightier part of the package of positive incentives that can be offered to third countries in the context of a comprehensive approach to migration management.

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<sup>1</sup> See OECD and European Commission, *Recruiting immigrant workers: Europe 2016*, Paris: OECD Publishing, June 2016.

Regarding trade relations, although the ICT Directive has been adopted only recently and few Member States have fully transposed it, it is important to closely monitor the performance of our policies and legal rules with regard to service providers and intra-corporate transferees: too much depends on these rules in the context of the EU's role as a trading partner with countries outside the EU. We need more clarity as to whether our immigration rules sufficiently facilitate the application of our international commitments as regards international service providers not covered by the ICT Directive. These include contractual service suppliers, business visitors and vendors as well as independent professionals.

Questions are manifold while clear and obvious answers are scarce – a result not least of the multilayered and complex (inter-)institutional context in which we operate. This makes thorough stocktaking and analysis all the more important as a basis for future decision-making to, at best, shape, anticipate or at least respond to fast-changing developments.

The Commission has a number of well-established fora and processes to do so, including the European Dialogue on Skills and Migration, the European Migration Forum and bodies allowing for a direct exchange with Member States. Gathering and analysing information is done through, among others, the European Migration Network, specific study contracts or other initiatives like the Commission's Knowledge Centre on Migration and Demography.

The coming years may well prove decisive for the direction the EU is taking in general, and with that of its migration (and integration) policy in particular. At stake are key operational and strategic questions. Will we move towards a scenario of 'deeper integration' in the area of migration and home affairs, including a more general framework for legal migration? What would it mean for this policy field if the focus were only on the single market?

This publication unites the expertise of academics as well as expert practitioners. It helps strengthen the all-important link between research and policy-making, and most importantly provides input for a well-informed discussion on how to shape future migration policies and instruments that benefit host societies, countries of origin and the migrants themselves.

**Matthias Ruete**

Director General for Migration and Home Affairs  
European Commission

## INTRODUCTION

*SERGIO CARRERA, ELSPETH GUILD*

*AND MARCO STEFAN*

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On 27 January 2017, the Justice and Home Affairs Section of CEPS and the Directorate-General for Migration and Home Affairs (DG HOME) of the European Commission co-organised a policy workshop in Brussels entitled “Reappraising the EU legal migration *acquis*: Legal pathways for a new model of economic migration, and the role of social science research”. The event brought together leading academics, practitioners and European Commission representatives to assess and discuss the state of play in the (internal and external) EU legal migration *acquis*, and its role in developing legal pathways towards economic migration.

Held under the Chatham House Rule, the policy workshop’s roundtable discussions allowed participants to identify and address some of the key challenges, inconsistencies and gaps in the standing EU policies and legislation in the area of legal and economic migration. Scholars involved in EU and nationally funded, collaborative research projects on social science and humanities (SSH) had the opportunity to exchange interdisciplinary knowledge with European Commission officials representing the different services working on legal migration policies. The role and potential of independent academic research in the framework of EU migration policy-making were also discussed. The full programme of the policy workshop is reproduced in the annex of this book.

The policy workshop fell within the scope of EURA-NET (“Transnational Migration in Transition: Transformative Characteristics of Temporary Mobility of People”), an international research project financed by the European Commission under the 7<sup>th</sup> Framework Programme (2014–17) and coordinated by the School of Education at the University of Tampere.<sup>1</sup> EURA-NET addressed three main research questions:

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<sup>1</sup> For more information about the EURA-NET project, visit the project website (<http://www.uta.fi/edu/en/research/projects/aura-net/index.html>).

- What are the transformative characteristics and development impacts of the temporary transnational migration of people?
- What are the policy implications of people's temporary migration at national, regional (European and Asian) and international levels?
- What can we learn from temporary migration in the Euro-Asian transnational space to better understand other regions?

The main objective of the EURA-NET project was to attain a better understanding of the current features and related policy impacts of the temporary transnational mobility of people in the Euro-Asian context. The main goal of the policy workshop was to bring together the best academic knowledge to feed into the Legal Migration Fitness Check (REFIT Initiative), first announced in the 2016 Commission Communication "Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe".<sup>2</sup>

The Fitness Check's purpose is to "consider possible ways of simplifying and streamlining the current EU framework in order to contribute to a better management of legal migration flows".<sup>3</sup> According to the Commission's Evaluation and Fitness Check Roadmap, the REFIT results will be instrumental to assessing "what actions (both legislative and non-legislative) might be required to improve the coherence of the legal migration legislation, as well as its effective and efficient application".

This book draws on the main EURA-NET research findings, and further elaborates on the practical experiences presented and debated on the occasion of the policy workshop. It addresses the main issues and challenges pertaining to legal migration policies in the EU as well as in the context of the EU's cooperation with third countries.

Are EU legal migration policies, and the concepts substantiating their rationale, well suited to capture the social characteristics and changing

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<sup>2</sup> See European Commission, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM(2016) 197 final, 6.4.2016, p. 18. See also European Commission, "Regulatory Fitness and Performance Programme (REFIT) – State of Play and Outlook – REFIT Scoreboard", Commission Staff Working Document, SWD(2015) 110 final, annexed to the Communication on Better Regulation for Better Results – An EU agenda, COM(2015) 215 final, Strasbourg, 19.5.2015.

<sup>3</sup> See European Commission, *Evaluation and Fitness Check (FC) Roadmap*, REFIT Legal Migration Fitness Check, Brussels, 1 September 2016 ([http://ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_home\\_199\\_fitnesscheck\\_legal\\_migration\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_home_199_fitnesscheck_legal_migration_en.pdf)).

trajectories of individuals exercising cross-border mobility? The book addresses this overarching question by incorporating and expanding on lessons learned and key findings from previous analysis dealing with the various interdisciplinary components of legal migration governance in Europe and beyond. As such, it also contributes to the open consultation procedure on “the European Union’s (EU) legislation on the legal migration of non-EU citizens”<sup>4</sup> of the Commission over the period 19 June 2017 to 18 September 2017 as part of the Fitness Check.

The policy workshop, which laid down the foundations of this collective volume, was structured around a set of four main ‘challenges’ that are respectively outlined in the questions below.

### **Challenge 1. The EU legal migration *acquis*: Taking stock and main challenges**

- 1) Has the current EU legal and policy framework on legal migration attained its objectives, in particular by ensuring an effective and efficient management of legal migration flows to the Union? Are there any gaps that would need to be addressed by future EU policy in this domain?
- 2) Have equal and fair treatment for third-country nationals – as originally set out in the 1999 Tampere European Council Conclusions,<sup>5</sup> and now formally enshrined in the Lisbon Treaty<sup>6</sup> – been ensured and promoted? How can ‘fairness’ be understood in light of international labour and human rights standards?
- 3) Have labour migration flows responded to the actual ‘needs’ of the EU’s economy and labour market, and what are those needs? Have the admission procedures been simplified, and are they more efficient?

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<sup>4</sup> For more information, see “Public Consultations” on the website of DG HOME ([https://ec.europa.eu/home-affairs/content/consultation-european-unions-eu-legislation-legal-migration-non-eu-citizens-fitness-check-eu\\_en](https://ec.europa.eu/home-affairs/content/consultation-european-unions-eu-legislation-legal-migration-non-eu-citizens-fitness-check-eu_en)).

<sup>5</sup> See European Council, Presidency Conclusions of the Tampere European Council, SN 200/99, 15–16 October 1999.

<sup>6</sup> Art. 79.1 of the Treaty on the Functioning of the European Union (TFEU) stipulates that “[t]he Union shall develop a common immigration policy aimed at ensuring, at all stages, fair treatment of third country nationals”. For a detailed discussion, refer to ch. 21 of this book.



- 4) What role could EU policy play in addressing the exploitation of third-country workers and the dilemmas related to the attractiveness of the EU for migrant workers?

### **Challenge 2. Migration and cooperation with third countries**

- 5) What are the main issues affecting EU policy and legal approaches to bilateral and multilateral cooperation with third countries on migration, and what is the place and potential for legal paths for migration?
- 6) What should be included and prioritised in a 'comprehensive' EU approach to cooperation with third countries? How to reach an EU external policy approach that considers and covers the many issues and policy domains connected with migration?
- 7) In addition to the work done on scholarships for students and researchers, what avenues are there to pursue further action in the domain of legal immigration to the EU? How could Member States and the EU better cooperate in this area?
- 8) In its external relations, the EU has often been criticised for carrying out migration policies based on conditionality and security, linking incentives (such as visa facilitation and other legal paths for mobility) to return and readmission agreements. Have any advantages materialised from this approach and what shortcomings have emerged? What should be the way forward, in particular concerning legal pathways towards migration?

### **Challenge 3. Migration and trade**

- 9) Are existing and future Mode 4<sup>7</sup> trade commitments covered by EU legislation? Are there categories of service providers that should be covered by additional EU legislation?
- 10) If there are gaps in the current EU legislation, do these gaps entail coherence problems with national legislation? What might be the impacts of any incoherence or inconsistencies?
- 11) Although the Intra-Corporate Transfer (ICT) Directive is recent, can we say that it offers 'value' for third-country nationals providing services in the EU when compared with the existing national schemes?

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<sup>7</sup> Mode 4, in the language of the World Trade Organization, refers to the movement of natural persons to supply services internationally.

#### Challenge 4. Research and policy-making in the field of migration

- 12) What are the interactions between research and policy on migration in the EU? What is ‘policy-relevant’ research in the field of legal migration? How can SSH research better inform EU policy-makers?
- 13) How can the research and policy nexus be better understood when looking at EU migration policy? What assumptions and premises need to be critically explored regarding the role of SSH research in informing and interacting with policies and relevant actors?
- 14) How can the right balance be set in this tension between research and policy when defining the migration challenges needing SSH research in a highly politicised field?

This book incorporates these four challenges across its five main parts. Each part takes into consideration the framing and questions addressed in the various panels of the policy workshop, as well as the cross-cutting research objectives and questions explored in the EURA-NET project. **Part I** of the volume deals with “Temporary Migration: Concepts, Policies and Transnational Mobility Trajectories”. It considers the conceptual, normative and societal issues arising from the incorporation of the notion of ‘temporariness’ in the existing policy frameworks aimed at managing transnational human mobility. Adopting a comparative perspective, it encompasses the analyses of temporary and selective labour-migration schemes applied in different Asian and European contexts. This part illustrates the risks and challenges that these laws and policies pose to the socioeconomic inclusion and labour security of temporary migrants, and to the labour and living conditions and the rights of persons on the move as well as their families.

The state of play and main features of the EU legal migration *acquis* and the issue of discrimination among predefined categories of migrant workers are the key topics covered in **Part II**. Dealing with the “EU Legal Migration *Acquis*: Taking Stock and Main Challenges”, this part provides a succinct and detailed overview of EU labour migration policy and law. It also highlights the consequences of the ‘sectorial’ nature and fragmentation of the present normative shapes and dispersed matrix of legal and policy instruments composing EU policy. Particular attention is given to the examination of issues related to policy consistency, legal certainty and non-discrimination.

**Part III**, entitled “Legal Migration through External Cooperation”, continues the journey by investigating the scope and influence of concerns about irregular migration in relation to the short-, medium- and long-term outcomes of the EU’s legal and policy framework for international cooperation on migration. While dealing with specific aspects and instruments composing the external dimension of the EU’s migration policies, the different contributions help to put into perspective the costs and opportunities of framing EU external cooperation on legal migration in terms of incentives offered to secure commitments by the EU’s partners on border controls and readmission.

The legitimacy and effectiveness of the EU’s choice to use trade agreements as migration tools is investigated in **Part IV** of the book, entitled “Legal Migration and Trade Policies”. The various contributions underline the opportunities and potential positive effects as well as the possible dangers arising from the use of trade agreements and related instruments to deal with legal pathways for labour mobility.

The role and functions of SSH research in relation to EU policy-making processes and actors on migration are addressed in **Part V**, on “Reconsidering the Research and Policy Nexus on Migration and Ways Forward for the EU”. Here the chapters critically examine the false assumptions often underlying simplistic and instrumental uses of scholarly research made by EU policy-makers. The authors outline the functions of SSH research and the kinds of support it can offer in reappraising current and future EU migration policies.

The final chapter concludes the book with an in-depth analysis of the main research findings and issues emerging from the various contributions. It also puts forward policy recommendations for the European Commission and other relevant EU institutional actors to take into account when moving beyond the European Agenda on Migration,<sup>8</sup> and towards a new generation of legal avenues for migration to the EU. The chapter calls for the EU to implement a ‘beyond crisis’ policy, including as a core component **a fair EU agenda facilitating legal channels for migration**.

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<sup>8</sup> See European Commission, Communication on A European Agenda on Migration, COM(2015) 240 final, Brussels, 13.5.2015.

# **PART I**

## **TEMPORARY MIGRATION**

### **CONCEPTS, POLICIES AND TRANSNATIONAL MOBILITY TRAJECTORIES**

# 1. TEMPORARY MIGRATION BETWEEN THE EU AND ASIA

*MARI KORPELA AND PIIRKKO PITKÄNEN*

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## 1.1 Introduction

In the contemporary world, an increasing number of people move back and forth between nation-states for various reasons: people may leave one country, move to a second, and then either settle there or return to their country of origin, or move on to a third. Some move away from their countries of origin permanently, others temporarily.

The research project “Transnational Migration in Transition: Transformative Characteristics of Temporary Mobility of People” (EURANET) focused on people’s temporary migration between Asia and the EU. The project was funded by the 7<sup>th</sup> Framework Programme of the European Commission from February 2014 until January 2017.

The project countries were Finland, Germany, the Netherlands, Belgium, Greece, Hungary, Ukraine, Turkey, India, China, Thailand and the Philippines. Some of the EURANET countries are predominantly source countries of temporary migration, others predominantly destination or transit countries, but the project looked at each country from all three perspectives, thereby emphasising that temporary migration is a complex phenomenon involving various types of migratory moves and that people move in both directions between Asia and the EU. The project focused on the EU–Asia context because people’s transnational mobility is increasing in this respect and it is thus gaining more relevance than it has earlier had.

The EURANET project was set up to investigate the characteristics and development impacts of the temporary mobility of people in the European–Asian transnational space and the policy implications of temporary migration at the national, European and international levels. First, the project investigated policies related to temporary migration in the project countries and at the EU level. Second, it investigated the experiences, practices and views of individual migrants and eventually also the views of policy-makers, officials and other stakeholders in 11 project countries

(empirical research was not conducted in Belgium, whose project team was responsible for the EU-level policy analysis). The views of migrants and policy-makers were gathered through extensive interviews.

Temporary migration, to frame it simply, can refer either to people's personal intentions (that is, a person wants to stay in a destination only temporarily) or to a specific policy and legal framework within which a person is given only temporary entry or residence and one must leave after a certain period irrespective of one's willingness to do so. Temporariness is above all the perspective of the receiving state: temporary migration schemes are seen as convenient solutions for (temporary) labour shortages and the assumption is that when their labour is no longer needed, people return to their home countries, in other words the receiving state conveniently gets rid of them when they are no longer needed.

Temporary migration schemes are thus a means to control and manage migration and they are used as tools to limit migrants' rights in the destination country. In reality, however, the phenomenon is much more complex and multifaceted than the schemes assume. Above all, the simplistic nature of temporary migration schemes fails to take into account that people's intentions and life situations change over the course of time, and in practice it is very difficult to manage temporary migration.

During the policy reviews that the project researchers conducted, it became clear that European schemes for temporary migration are chiefly related to security concerns, economic needs and the needs of European labour markets. Populations in various European countries are ageing rapidly and both cheap low-skilled labour and highly skilled experts are needed in order to ensure success in global competition. The interview data, however, reveal that when labour market needs guide policies on temporary migration, people tend to be treated merely as labour instead of as human beings who also have needs and wishes other than those related to work.

## **1.2 EURA-NET data**

Within the EURA-NET project, extensive interview data were gathered. A total of 883 semi-structured interviews were conducted among various types of temporary migrants and their family members remaining in the country of origin. The groups of temporary migrants who were identified and interviewed through the project were highly skilled professionals, low-skilled workers (e.g. seasonal harvesting workers), university students, accompanying family members, entrepreneurs, humanitarian migrants

(refugees, asylum seekers), irregular migrants, returnees and lifestyle migrants. The interviews – about 80 in each project country – were conducted between November 2014 and June 2015.

As the categories of interviewees illustrate, temporary migration cannot be limited solely to labour movements, although the theme seems to dominate policy debates. The aim of the interviews was to understand the reasons why people move on a temporary basis and to gain knowledge on the experiences they have while migrating temporarily as well as on the transnational practices and the ties that different types of temporary migrants have.

In addition, 395 public officials and other stakeholders were interviewed between November 2015 and April 2016, 30–40 in each project country. Some of them were representatives of national ministries and other national-level institutions, some represented municipalities and others non-governmental organisations, trade unions, etc. The aim of was to investigate the interviewees' views and concerns with regard to temporary migration in the country in question.

Already at an early stage of the project, it became clear that there is no clear definition of temporary migration, either in academia or at the policy level; consequently, the related phenomena are often rather invisible in terms of statistics. In fact, there are no accurate statistics on temporary migration in the EU or in the other EURA-NET countries.

In the EU, there are statistics on people who get fixed-term residence permits in particular countries but one cannot know how many of them eventually leave Europe or how many renew their permits and may even stay permanently. Registration processes also vary in different countries. When the phenomenon is not recognised and is difficult to quantify, it is likewise difficult to plan policy measures. Nevertheless, amid the lack of a common definition on temporary migration, within the EURA-NET project, the rough guideline was a temporary migrant staying in the destination for more than three months but less than five years.

### **1.3 Challenges of temporary migration to the EU**

The EURA-NET project found various challenges in terms of temporary migration in the European context.

First of all, many of the temporary migrants interviewed complained about a slow and complicated bureaucratic process related to their migration, especially concerning the residence permits. This means not only

personal frustration but also a risk of Europe losing out in the competition for the most skilled and talented migrants, as highly skilled experts are welcome to work in various countries in the world and some of them may choose a non-European destination at least partly because it is much easier and faster to obtain employment visas or residence permits for those other countries. The slow and complicated processes also generate a feeling among the (potential) temporary migrants that they are not welcome in Europe.

Second, it became evident that in many countries, it is very difficult, or even impossible, for the spouses of the highly skilled Asian experts to get jobs in Europe. When highly skilled experts are recruited from abroad, it is enough that they speak English. However, when their spouses, who are typically highly skilled as well, seek employment after arriving in the destination country, fluent skills in local languages are required. The spouses' unemployment gives way to personal frustrations as well as a waste of resources, as these highly educated and skilled people are already residing in the country. In addition, if the spouse wants to work but cannot get a job, some families end up leaving the country earlier than initially planned, which means that the skills and labour of the initially recruited person are lost.

Another group of temporary migrants suffering from unemployment or underemployment consists of students graduating at the tertiary level. Students are an important category of temporary migrants and in many European countries, the internationalisation of higher education is considered desirable. Many foreign graduates would like to stay to work in Europe at least for a couple of years after graduation, and many countries – for example Germany, Finland and the Netherlands – give the graduates fixed-term residence permits that allow them to look for work in the country, typically for a year. Although the graduates have earned their degrees in the destination country, many of them lack local language skills, as a consequence of which it is very difficult for them to become employed there according to their qualifications. This is obviously a waste of resources for the destination country.

A common assumption is that temporary migrants come to Europe because of money. Although it is clear that better earnings are a significant factor in temporary labour migration and the role of financial remittances is important, the interviews with temporary migrants revealed that money is not necessarily the only significant motivational factor. For many highly skilled migrants, hopes of career advancement were equally or even more important. In addition, it became apparent that some temporary migrants do



not earn enough in order to be able to send remittances to their relatives and in fact, some of them receive reverse remittances – that is, their family members send them money from Asia in order to support their everyday living in Europe. This was the case for some low-skilled migrants, some students and some of those who had accompanied their spouse to Europe.

EURA-NET research focused on non-English-speaking countries on purpose, as they are not necessarily the most attractive immigration destinations. It became evident that in many of the project countries, the language skill requirements for foreigners are rather unrealistic. Especially with regard to temporary migration, it is not practical to expect the migrants to learn local languages. If one intends to stay in the destination only temporarily or knows that staying permanently will not be allowed in any case, the limited attraction of studying a language that is not of much use beyond the borders of that country is obvious.

Moreover, those temporary migrants who come to work in Europe do not have time for serious language studies. In a similar vein, temporary migrants are, understandably, not very interested in heavy integration measures. Yet, if they end up staying much longer than initially planned, or even permanently, the lack of integration can cause problems, and it could be the case that those who entered as temporary migrants are not entitled to integration measures, including language tuition, even if they end up staying.

It also became clear that the status of a temporary migrant means insecurity. Being a temporary migrant can be a useful and fun experience for an individual: she or he may gain a better salary than in the country of origin or may learn new skills, and it can be personally rewarding to live in another country for a while. Still, temporary migration is not a long-term solution from an individual migrant's perspective.

Prolonged temporariness and insecurity of residence status mean living in a limbo state, being unable to plan the future or build one's life with a long-term perspective. This is obviously not a desirable situation. Temporariness does not just mean that one must leave eventually, but in fact many of our interviewees did not know how long they would be able and willing to stay.

EURA-NET looked at both Asian nationals who migrate temporarily to Europe and European citizens who temporarily live in Asia. The findings reveal two major challenges. First, European returnees sometimes face problems with integration back into labour markets (as their experiences from abroad are not appreciated by employers) and social security and

healthcare systems after their return to Europe. Such problems obviously make it less attractive for them to return and there is thus a risk of brain drain for Europe. In contrast to the problems of return migration in the European context, the EURA-NET studies conducted in Asia showed that in China and India, the job markets appreciate the returnees' skills and the return migration of students and highly skilled migrants has brought positive effects to the countries' economic development.

Another challenge that concerns Europe is that an increasing number of European citizens are leading transnationally mobile lifestyles: for example, increasing numbers of retirees spend winters in Thailand and a growing number of skilled experts work in Asia for longer or shorter stints. Yet, European policies tend to define people in sedentary terms, with the result that many mobile people fall out of social security and healthcare systems. Although this does not yet concern great numbers of people, the numbers are rising and there is a risk that the situation will affect European societies at large if many of their citizens are not entitled to various benefits that are available only to those whose lifestyles are less transnationally mobile in Europe.

#### **1.4 Temporary migrants outside Europe**

Regarding transit countries (e.g. Ukraine and Turkey), the main EURA-NET finding is that they lack the legal instruments and practical measures to deal with the high number of migrants who reside in the country but whose intention is to move onward towards more attractive destinations in Europe. Consequently, many end up in very difficult in-between situations where they are stuck without rights for long periods.

The Philippines, China, India and Thailand send a lot of migrants and for these countries, it is important to try to protect the migrants and their rights at all stages of migration. At the same time, these four Asian countries are also increasingly popular destinations for temporary European migrants, including students, highly skilled experts and lifestyle migrants. European companies are promoting businesses in Asia to an ever-greater extent, especially in China and India. This means growing numbers of intra-company transfers between the countries. China is also active in trying to attract foreign students and skilled experts to work there, and Thailand has a special (renewable) one-year visa for retirees that is popular among Europeans. Therefore, although the numbers of temporary European migrants in Asia are a lot lower than vice versa, those numbers are rising.

## References

- Benson, M. and K. O'Reilly (2009), "Migration and the Search for a Better Way of Life: A Critical Exploration of Lifestyle Migration", *Sociological Review*, Vol. 57, No. 4, pp. 608–625.
- Carrera, S. and M. Korpela (2016), "Transnational Migration in Transition", Preliminary Findings of the EURA-NET project, Discussion Paper.
- Pitkänen, P. and C. Carrera (eds) (2014), "Transnational migration in transition: State of the art report on temporary migration – Collected working papers from the EURA-NET project", University of Tampere ([www.uta.fi/edu/en/research/projects/aura-net/publications/State-of-the-art\\_EURA-NET.pdf](http://www.uta.fi/edu/en/research/projects/aura-net/publications/State-of-the-art_EURA-NET.pdf)).
- Pitkänen, P. and M. Korpela (eds) (2014), "Characteristics of temporary transnational migration – Collected working papers from the EURA-NET project", University of Tampere ([www.uta.fi/edu/en/research/projects/aura-net/publications/Characteristics%20of%20Temporary%20Transnational%20Migration\\_EURA-NET.pdf](http://www.uta.fi/edu/en/research/projects/aura-net/publications/Characteristics%20of%20Temporary%20Transnational%20Migration_EURA-NET.pdf)).
- Pitkänen, P., M. Korpela, M. Aksakal and K. Schmidt (eds) (2017), *Characteristics of temporary migration in European–Asian transnational social spaces*, Dordrecht, Heidelberg, New York, London: Springer, forthcoming.

## 2. TEMPORARY LABOUR MIGRATION: A FLAWED SYSTEM IN NEED OF REFORM

GRAZIANO BATTISTELLA

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Temporary labour migration has always been a choice that some migrants have taken and a policy that countries have adopted. In recent history, some of the specific programmes adopted for temporary labour migration were later abandoned. The immediate examples that come to mind are the Bracero programme in the US (abandoned in 1964) and the ‘guestworker programme’ in Western Europe, abandoned in 1973–74. The conclusions of such programmes led to the idea that temporary labour migration was not the way to go.

While Western Europe was discontinuing the guestworker programme, the Gulf countries were reinventing it as a systematic way of providing a labour force to growing economies, and later, other countries in Asia went in the same direction (Singapore, Malaysia, Taiwan and South Korea), although with specific and significant differences. The Gulf countries have ensured temporary status (two to three years, renewable after returning to the country of origin) through the sponsorship system (*kafala*), whereby the foreign workers’ visas and employment are tied to the sponsor.

Singapore and Malaysia have utilised a combination of the percentage of foreign workers per occupation and a levy on the hiring of foreign workers to control the number of temporary migrants. Taiwan has fixed the maximum length of stay to a non-renewable permit of two to three years and progressively relaxed the single-entry policy to twelve years. South Korea has imposed a maximum of two renewals of the employment permit (each permit lasting four years and ten months). In all of the temporary labour migration systems adopted in Asia, there is a heavy involvement of private mediators (called by different terms in countries of origin and destination). The lone exception is South Korea, which opted for government-to-government agreements, implemented through renewable memoranda of understanding (MoUs) with origin countries.

In the meantime, traditional countries of immigration (the US, Canada, Australia and New Zealand) have adopted different forms of temporary

work arrangements (sometimes targeting highly skilled workers, other times focusing on agricultural workers), some of which include conversion into permanent residence status. Western European countries also continue to resort to small-scale, often seasonal programmes targeting temporary workers, project-tied workers, trainees, border commuters and others. The agricultural sector often requires seasonal workers. The transition of southern European countries from being origin to destination countries of migrants was eventually regulated by deciding on an annual admission of temporary workers.

Contrary to impressions, therefore, temporary labour migration has never been abandoned. It is prevalent in Asia, and it is utilised in different ways in other major areas of destination. Common to all programmes is the short-term visa and contract; but other than this, temporary migration programmes in Asia and in other regions present substantial differences. In Asia, return to the country of origin at the end of the contract is mandatory but in many Western countries contracts can be renewed while remaining in the country of destination. Temporary migration in Europe can lead to a long-term status, while this is not allowed in Asia; family reunification is allowed in Asia only for workers whose salary is sufficiently high to ensure that they can support the family.

In addition to its continuity, temporary labour migration has been specifically recommended, albeit with some caution, by some scholars and various institutions, among them the Global Commission on International Migration, the UN High Level Dialogue on Migration and Development, and the Global Forum on Migration and Development. The reasons behind such recommendations derive from the view that temporary labour migration maximises the benefits for countries of destination, countries of origin and the migrants themselves.

In countries of destination, temporary migrants increase the flexibility of the labour market, fill the labour shortages in some industries and strengthen the competitiveness of certain industries. These and other economic benefits are strongly based on the savings that labour migration produces: savings in the education and training of personnel, savings in social welfare benefits for the equivalent local population, and most of all, savings in the social costs of workers who do not settle and are without family members in the territory.

For countries of origin, temporary labour migration lowers unemployment rates, increases remittances and their development impact, and potentially leads to skills and knowledge transfer with the return of

migrants. The social costs of temporary migration are considered relatively small because the absence of migrants is only for a limited time. Moreover, social costs normally surface in the long term and until then, what can happen years from now is anybody's conjecture.

Finally, migrants benefit from temporary migration by way of increased earnings from gainful employment abroad. While social costs may be attendant to the migratory experience, periodic family visitations and ultimately the return of the migrant to his or her place of origin lower the costs of permanent displacement in another country and another culture.

If temporary labour migration is such a 'win-win-win' experience, why are the recommendations to implement it always accompanied by cautious remarks? The reason is that policies on temporary labour migration are often flawed. Are the flaws specific to temporary programmes or are they inherent in the system for temporary labour migration? Based on the Asian approaches to temporary labour migration, the contention is that the flaws are inherent in the system.

The temporariness of labour migration is fictitious. It originates from a permanent demand for labour, met through temporary workers whose migration experience is extended for many years, but always under a temporary status. A long time ago, scholars had concluded that nothing is more permanent than temporary migration. The increase in the number of rehires among Filipino migrants or the increase in the number of years that migrants are allowed to return and work in Taiwan is indicative of the fact that both employers and workers favour a medium- to long-term migration experience over a short-term and temporary one, and this should be recognised and be accorded an appropriate status.

Temporary labour migration is accompanied by substandard living and working conditions. Migrants are individual workers lodged often in common quarters (bed spaces) or barracks or labour camps, with limited opportunities for social life and interaction. Domestic workers live in the homes of employers who impose many restrictions. The objective of ensuring that migrants do not remain because the local societies are not willing or ready to incorporate cultural minorities reduces migrants to labour providers and denies them their humanity.

Migrants are denied some fundamental rights. The right to association and to collective bargaining is often not granted. Beginning with the recruitment process and ending with the sponsorship system in the Gulf countries, migrants have little negotiating power. Since migration is normally dictated by necessity and migrants often encumber debts to pay for

the migration costs, their possibility to negotiate better conditions is practically non-existent. In some countries, not only are migrants not allowed to join or form trade unions, but they are also discouraged from associating or establishing links with each other. In spite of some reforms, the sponsorship system in the Gulf countries requires the sponsor's agreement for the migrant to return to the country of origin, blocking the possibility for migrants to sever the contractual relationship.

Under the temporary migration system migrants do not accumulate social benefits. The limited duration of stay does not allow them to claim such benefits.

Temporary migration can lead to irregular migration. It has happened in the past and it continues to happen because temporary migration is based on unrealistic and incoherent premises. Migrants can be victims of irregularities committed by recruiters, sponsors and employers or they can resort to irregular migration as the perceived alternative to the restrictions of temporary migration.

Finally, temporary migration is flawed because the win-win-win scenario depicted above takes place on an uneven playing field. Not only are migrants the ones winning less, but they are also the ones paying the price for the winning of others. Although this inequity is typical of any labour relationship, it is excessively emphasised in the system for temporary labour migration, at least in the form experienced in Asia.

Indicating the flaws of temporary migration in Asia does not mean that all programmes for temporary labour migration have similar shortcomings. Improvements in the recruitment process, in ensuring adequate living and working conditions, and in facilitating the reintegration of migrants continue to be the object of bilateral and multilateral dialogues between countries of origin and destination. The persistence of flaws within temporary labour programmes indicates that patchy solutions will not solve the problem. The crucial element for rectifying the weaknesses in migration policies consists of increasing the agency of migrants.

Migration viewed as a choice rather than a necessity is a recognised principle for reducing the level of constraints and abuse associated with working in a foreign country. Thus, policies that offer the opportunity for migrants to decide, if they want, on a long-term stay instead of a fixed temporary status, enhance the degree of protection and the fruition of rights for migrants. The reluctance of countries to provide such a possibility assumes that most migrants would remain and this would diminish the benefits of temporary programmes and increase the economic, and most of

all, the cultural costs for countries of destination unwilling to accept and address growing cultural diversity.

While it is not proven that most temporary migrants would stay for a long-term period (although this is often demanded by the labour market), it is also unavoidable that cultural and ethnic diversity must be accepted in an ever-more globalised world. To resist such a trend by exacting a heavy cost on migrants raises questions and erodes the sustainability and ethics of temporary migration programmes.



### 3. TEMPORARY LABOUR MIGRATION PROGRAMMES IN ASIA

*GABRIELA MARTI*

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Temporary labour migration programmes (TLMPs) are widespread in Asia, notably in the field of low-skilled work, such as domestic, construction and agricultural work. Labour migration in these sectors takes place based on fixed, short-term contracts of two to three years (see e.g. Wickramasekara, 2002, p. 14). ‘Temporary’ is therefore frequently equivalent to ‘low-skilled’, but the focus on ‘temporariness’ masks the fact that workers with lower skills are afforded fewer rights (Dauvergne and Marsden, 2014, p. 231). Indeed, TLMPs are commonly associated with severe restrictions on labour rights and civil rights generally (Rosewarne, 2010b, p. 27). Moreover, persons migrating under TLMPs in Asia regularly do not have access to permanent residency and citizenship, even if they have worked and lived in the country of destination for several years, or even decades, continually renewing their contracts. They can thus become ‘permanently temporary’ migrants.

TLMPs are usually defended by instrumentalist arguments and on the grounds that they create a “win-win-win” situation – with “wins” for the countries of destination, the countries of origin, and the migrants themselves (see e.g. IOM, 2008, p. 93). TLMPs allow countries of destination to address labour shortages in specific sectors that cannot be filled with local workers. The intake of low-skilled, temporary migrant workers can be increased and decreased as required by the economy (Kaur, 2010, p. 10). Furthermore, TLMPs allow states to admit workers on a temporary basis, without adding new members to the political community (Sager, 2014, p. 199). In this manner, major host states in Asia have been able to avoid the issue of integrating large numbers of immigrants into the community (Piper, 2010, p. 399). In the countries of origin, TLMPs are said to contribute to development and poverty reduction by generating foreign exchange revenue through the remittances transferred by overseas workers, and to easing domestic unemployment. In this context, it is argued that the temporariness of migration is essential, since the temporary duration of migrants’ stay abroad

and the prospect of returning to their home countries after the conclusion of their contracts ensures a steady stream of remittances. Indeed, the amount of remittances transferred is said to decrease the longer the migrants stay in the host country (see e.g. de Bruyn and Wets, 2006, pp. 12–13; Rodriguez, 1996, p. 431). Finally, TLMPs are held to benefit the migrants themselves, by enabling them to contribute to their own and their families' welfare and development (IOM, 2008, p. 92).

By contributing to the development of countries of the Global South, and by alleviating the poverty of migrants and their families, TLMPs are often said to contribute to global justice. It is argued that global justice, or development, is best served when large numbers of migrants from developing countries are admitted to work – even if only temporarily – in wealthy economies (see Lenard, 2014, p. 159). These labour migration programmes are thus temporary and – in the case of low-skilled migrant workers – regularly close off the route to permanent residency and citizenship in the host country. They usually offer limited rights compared with those of highly skilled migrant workers or permanent residents and citizens. This is often defended by arguing that it constitutes a trade-off between rights and numbers (Ruhs and Martin, 2008, pp. 254–55). If migrants were accorded more rights and a path to permanency, it is argued, the costs of these workers for employers and the host states would increase, making them less likely to be hired. This is against the interest of migrant workers, it is said, who would prefer to migrate and take on jobs abroad even under the prevailing substandard conditions, and even if they are granted fewer rights than other (local and highly skilled foreign) workers.

However, even though the remittances of overseas workers have contributed significantly to the gross domestic product of several countries of the Global South, it is unclear to what degree TLMPs actually contribute to sustainable development in the countries of origin in the longer term. Several commentators have argued that the link between migration and development (the “migration–remittances–development nexus”) is tenuous (see e.g. Rosewarne, 2010b, p. 3). Remittances do not seem to have generated the momentum for development envisaged in the migration–remittances–development nexus (Rosewarne, 2010b, p. 32).

Despite their tenuous connection to development, TLMPs are praised by international financial institutions and international organisations, as well as governments of countries of origin and destination, as a solution for the trade imbalances and the high levels of unemployment in the countries of the Global South. At the same time, little attention is accorded to the costs

associated with migration for migrants and their families, or to the improvement and protection of their – usually very limited – rights. Based on a neoliberal rhetoric of ‘self-reliance’, low-skilled migrants from developing countries – many of whom are women – are expected to bear the responsibility of contributing to the development of the Global South, and of correcting the failures of global economic programmes (Rosewarne, 2012, pp. 80–81). Notably, migrants are expected to shoulder this responsibility without adequate rights and working conditions, and usually by forfeiting access to permanent residency and citizenship in the host countries. This is one way in which TLMPs can be said to be deficient. Yet, the popularity of TLMPs lies precisely in the fact that people are hired for a specific type of job, and that no new members are added to the political community (Sager, 2014, p. 199). In the migration–remittances–development discourse, therefore, labour migration – like other commodities – is presented simply as a means to generate export revenue for the Global South (Rosewarne, 2010a, p. 99).

A further shortcoming of TLMPs is that they are based on a “myth of temporariness” (Lenard, 2014, p. 164). Many ‘temporary’ migrant workers engage in circular migration, repeatedly completing a short-term contract, returning to their home country, and re-migrating. In this manner, they often spend years, or even decades, in a particular destination country. In the sector of domestic work in particular, many employers seem to have an interest in continuously employing the same domestic worker for an extended period, since these workers frequently perform care work, such as looking after children or elderly persons (Piper, 2010, p. 403).

Nevertheless, host states regularly insist on the ‘temporariness’ of the migrant workers’ stay, and do not allow low-skilled temporary migrant workers to acquire residency and citizenship, even if they have worked and lived in the respective country for a very long time. In Singapore and Hong Kong, for instance, migrant domestic workers (MDWs) are excluded from applying for permanent residency and, eventually, citizenship (Singapore) or the right of abode (Hong Kong). TLMPs, and the restrictions they impose on migrants, are designed to prevent low-skilled migrant workers from integrating into the host society, and to ensure that they will return to their home country after the completion of their contracts (Lenard and Straehle, 2010, p. 284). The fact that the path to permanency is closed off, for MDWs in Singapore and Hong Kong, deprives them of any meaningful political leverage in the host society.

It seems that just TLMPs should offer a route to permanency (that is, permanent residency and, eventually, citizenship) to migrant workers (see also Lenard and Straehle, 2010, p. 293). It appears profoundly unjust that migrant workers should work and reside in a state for an extended period, providing essential services to the community, and that they should not be allowed to participate, in time, as full members of the host society (see Lenard, 2014, p. 168). If temporary labour migrants were granted a path to permanent residency and citizenship, this would mean the end of several TLMPs in their current form in Asia, such as the programmes for MDWs in Singapore and Hong Kong. Still, this author does not believe that it is realistic to expect that the major host jurisdictions in Asia will allow MDWs (and other low-skilled temporary migrant workers) to settle permanently anytime soon, as they do not have an interest in changing the status quo. Indeed, the Court of Final Appeal of Hong Kong decided on 25 March 2013 that MDWs are not permitted to apply for the right of abode (*Vallejos and Domingo v Commissioner of Registration*).

At the very minimum, though, and even if they do not grant access to permanent residency and citizenship to MDWs, the host jurisdictions in Asia should protect the fundamental human and labour rights of temporary migrant workers like MDWs, as enshrined in international conventions such as the International Labour Organization (ILO) Domestic Workers Convention and the UN Migrant Workers Convention. Once they are living and working in the destination state, temporary migrant workers should be accorded the same employment rights as permanent residents and citizens. The TLMPs for MDWs in Singapore and Hong Kong, however, are very far from adhering to this standard (particularly the programme in Singapore). Even adhering to minimum standards of justice and human rights would mean drastically changing the systems currently in place in Singapore and Hong Kong.

MDWs in Singapore are excluded from the scope of the Employment Act, the main piece of labour legislation of the country, leaving them with practically no protection under employment law. In addition, there is no mandatory, standard employment contract for the employment of MDWs in Singapore. In fact, it seems that some MDWs are employed without signing a written contract at all. MDWs in Singapore also do not have a minimum wage, resulting in very low wages. MDWs' contracts can be terminated without giving notice, and they are completely excluded from social security. MDWs are not permitted to become pregnant, nor are they permitted to marry Singaporean citizens or permanent residents, without the prior approval of the Controller of Work Permits (this applies even after the

expiration of their work permit). They are required to undergo a six-monthly medical examination, including a pregnancy test and an HIV test, and they are immediately deported if they fail the examination. These regulations constitute a severe restriction of MDWs' reproductive and marriage rights. Moreover, the above-mentioned regulations do not comply with international (human rights and labour) standards, and should be amended. In particular, it appears crucial that MDWs are included under the scope of the Employment Act, like other workers. Finally, MDWs in Singapore cannot form their own unions or other advocacy-oriented migrants' organisations. Their right to associate is therefore severely restricted. The issue of freedom of association in Singapore is also problematic for local workers (and other migrant workers), since trade unions are not independent of the government, and civil society in general is suppressed. In Hong Kong, although MDWs can join and form unions, they cannot bargain collectively (this is the case for most MDWs worldwide).

In both Singapore and Hong Kong, MDWs are mandatorily required to live with their employers. This significantly increases their risk of abuse and exploitation, and makes them highly dependent on their employers. The live-in requirement should be abolished, that is, MDWs should have the possibility to opt for live-out arrangements. In Hong Kong, MDWs are, in principle, not permitted to change employers for the duration of their contract. In Singapore, MDWs may be 'transferred' to another employer, but only with the consent of the current employer. The restriction on changing employers renders MDWs highly dependent on their employers, and potentially 'traps' them in an abusive work relationship. In both Hong Kong and Singapore, MDWs are not allowed to change occupations – they are hired to perform work only as a domestic worker, and only for a specified employer. MDWs are also not entitled to family reunification, in either Singapore or Hong Kong.

Furthermore, MDWs in Hong Kong must leave the host jurisdiction within two weeks at the latest, if their contract is terminated by their employers, for whatever reason (the 'two-week rule'). The timeframe of two weeks is clearly insufficient for MDWs to find a new employer and for the immigration department to process an application for change of employer. It is also insufficient to process and resolve a complaint filed with the authorities by an MDW for abuses and violations of (employment and other) rights. MDWs' access to justice is thus severely compromised by the two-week rule. MDWs in Singapore must leave the country once their work permit has been cancelled. For non-Malaysian MDWs, the MDW's departure date must be within two weeks after cancellation of the work permit, and the

employer must ensure that the MDW leaves as scheduled. In practice, however, MDWs often have to leave the country within a few hours after their employment contract has been terminated. All these regulations and practices are highly restrictive and controlling. Several of them do not comply with international standards, and should be amended.

A further issue is the role of private intermediaries in TLMPs. In Asia, the recruitment of temporary migrant workers, notably of domestic workers, relies heavily on private intermediaries, such as recruitment and employment agencies and brokers. MDWs from the Philippines and Indonesia commonly use the services of private recruitment agencies, which usually charge them very high fees. The MDWs' debts to the recruitment companies are repaid via salary deductions over the first few months of their employment relationship (usually the first six to ten months of their employment). During this time, they normally only receive a small allowance, while the rest of their salary is deducted to repay their debts to the agency. The indebtedness of MDWs at the beginning of their employment relationship makes them highly dependent on their employers and vulnerable to abuse, since they may constantly fear being terminated prematurely and, consequently, being repatriated.

In terms of possible suggestions for reforming the system of temporary labour migration in its current dominant form in Asia, it is argued here that a multi-pronged approach is necessary. At the level of the host jurisdictions, temporary migrant workers should have decent working and living conditions, and their human and employment rights should be guaranteed and protected. In principle, these rights should be equivalent to those applicable to permanent residents and citizens. If the host jurisdictions fail to protect the rights of temporary migrant workers once they are working and residing in the jurisdiction, they fall short of their responsibilities as hosts of migrant workers they have called to fill specific labour shortages in their economies.

It appears unjust to let temporary migrant workers, who are providing important services to the host community, work under inadequate conditions and with restricted rights, and to repatriate them after the completion of their contracts, without adequately rewarding them (see Lenard and Straehle, 2010, p. 285). Unfortunately, in most major Asian host jurisdictions, there is little political will to effectively protect the rights of temporary migrant workers, and organisations such as the ILO and the International Organization for Migration, as well as the Association of

Southeast Asian Nations (ASEAN tread carefully where state sovereignty over migration is at issue (Kneebone, 2010, p. 392).

Moreover, the longer ‘temporary’ migrants have lived and worked in the host jurisdiction, the stronger the moral claim becomes to grant them access to political rights. It seems unjust to have people reside and work in a particular state for an extended period, subject to its laws and institutions, without granting them the right to participate in shaping these institutions (see Lenard and Straehle, 2011, p. 217). Yet as noted earlier, it does not seem likely that the major host jurisdictions in Asia will grant MDWs access to permanent residency and citizenship (including the corresponding political rights) anytime soon.

At the level of the countries of origin, measures are required to protect their citizens working overseas. The Philippines in particular has put in place several laws, policies and programmes for the protection of overseas Filipino workers. Nevertheless, these measures usually only have a limited impact, due to problems in implementation, and because the legal system of the host state has the most direct effect on temporary migrant workers’ living and working conditions. States of origin have limited power to change the conditions in the host jurisdictions, and they are often dependent, to a considerable degree, on the goodwill of the host jurisdictions for the adequate treatment of their citizens abroad.

Nevertheless, it appears possible that if a number of major countries of origin in Asia, such as the Philippines and Indonesia, were to work together more, as a block of countries they could exert greater pressure on major host jurisdictions in the region to change the legal situation and the welfare of their citizens working in those jurisdictions. Since these countries are competing with each other for jobs overseas, however, they normally do not collaborate to negotiate better terms and conditions with the host jurisdictions.

Therefore, promoting the economic development of the countries of origin in Asia appears crucial, in order to increase the bargaining power of migrant workers. If large-scale unemployment and a lack of alternative options in the countries of origin persist, temporary migrant workers will continue to have less bargaining power and fewer rights, and they will continue to be vulnerable to exploitation and abuse. Only if the citizens of the (current) developing countries have the possibility to find decent work in their home countries will migration genuinely be a choice, and will they not be forced to migrate in the first place, if they do not wish to. Clause 12 of the ASEAN Declaration on the Protection and Promotion of the Rights of

Migrant Workers of 2007 states that labour-sending states should “[e]nsure access to employment and livelihood opportunities for their citizens as sustainable alternatives to migration of workers”. That notwithstanding, addressing the inequities in the global distribution of wealth and opportunities should be a shared responsibility of the international community (see also Rosewarne, 2012, p. 80).

That low-skilled, temporary migrant workers (among them many women migrant workers) – who are lauded as ‘new national heroes’ in the Philippines, and as ‘foreign exchange heroes’ in Indonesia – should bear the responsibility of reducing poverty and developing the Global South by way of their remittances (while the responsibilities of the state and the market remain unchanged), seems profoundly unjust. These workers do not receive adequate rights, protections and rewards that would correspond with this responsibility, and they and their families pay the main emotional and social price due to family separation during the migrant workers’ absence. Indeed, it appears that states and private actors, such as recruitment agencies, often wish to extract the economic benefits of migration, without undertaking sufficient efforts to provide even minimum rights and protections to temporary migrant workers.

## References

- Dauvergne, C. and S. Marsden (2014), “The ideology of temporary labour migration in the post-global era”, *Citizenship Studies*, Vol. 18, No. 2, pp. 224–242.
- de Bruyn, T. and J. Wets (2006), “Remittances in the Great Lakes Region”, International Organization for Migration, Geneva.
- International Organization for Migration (IOM) (2008), “World Migration 2008: Managing Labour Mobility in the Evolving Global Economy”, Geneva.
- Kaur, A. (2010), “Labour migration in Southeast Asia: Migration policies, labour exploitation and regulation”, *Journal of the Asia Pacific Economy*, Vol. 15, No. 1, pp. 6–19.
- Kneebone, S. (2010), “The Governance of Labor Migration in Southeast Asia”, *Global Governance*, Vol. 16, No. 3, pp. 383–396.
- Lenard, P.T. (2014), “The ‘rights’ of temporary labour migrants in Asian states”, *Asian Ethnicity*, Vol. 15, No. 2, pp. 157–173.
- Lenard, P.T. and C. Straehle (2010), “Temporary labour migration: Exploitation, tool of development, or both?”, *Policy and Society*, Vol. 29, No. 4, pp. 283–294.



- Lenard, P.T. and C. Straehle (2011), "Temporary labour migration, global redistribution, and democratic justice", *Politics, Philosophy & Economics*, Vol. 11, No. 2, pp. 206–230.
- Piper, N. (2010), "All Quiet on the Eastern Front? Temporary contract migration in Asia revisited from a development perspective", *Policy and Society*, Vol. 29, No. 4, pp. 399–411.
- Rodriguez, E.R. (1996), "International Migrants' Remittances in the Philippines", *Canadian Journal of Economics*, Vol. 29, pp. 427–432.
- Rosewarne, S. (2010a), "Globalisation and the Commodification of Labour: Temporary Labour Migration", *Economic and Labour Relations Review*, Vol. 20, No. 2, pp. 99–110.
- Rosewarne, S. (2010b), "The feminisation of international labour migration and the 'migration–development nexus': Engendering responsibility for development?", Paper for presentation at the International Association of Feminist Economics Conference, Buenos Aires, Argentina, 22–24 July ([https://editorialexpress.com/cgi-bin/conference/download.cgi?db\\_name=IAFFE2010&paper\\_id=87](https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IAFFE2010&paper_id=87)).
- Rosewarne, S. (2012), "Temporary International Labor Migration and Development in South and Southeast Asia", *Feminist Economics*, Vol. 18, No. 2, pp. 63–90.
- Ruhs, M. and P. Martin (2008), "Numbers vs. Rights: Trade-offs and Guest Worker Programs", *International Migration Review*, Vol. 42, No. 1, pp. 249–265.
- Sager, A. (2014), "Political rights, republican freedom, and temporary workers", *Critical Review of International Social and Political Philosophy*, Vol. 17, No. 2, pp. 189–211.
- Wickramasekara, P. (2002), "Asian Labour Migration: Issues and Challenges in an Era of Globalization", International Labour Organization, Geneva.

## 4. A MIGRATION-CYCLE APPROACH TO TEMPORARY LABOUR MIGRATION POLICIES: LOOKING BEYOND THE RESPONSIBILITY OF DESTINATION COUNTRIES

*MARIE-JOSÉ L. TAYAH*

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### 4.1 Introduction

International debates provide simplified accounts of migration (Pécoud, 2015, p. 9). They are grounded in clear and dichotomic typologies, such as sending/receiving, forced/voluntary, temporary/permanent, skilled/unskilled and regular/irregular migration (ibid., p. 86). These narratives obscure the complexity of migration processes, and therefore deny policy-makers the opportunity of designing comprehensive strategies that address the multifaceted nature and many nuances of migration (ibid., p. 93).

Debates on temporary labour migration are not immune to this oversimplification. Research that examines the 'in-betweenness' of temporary migration is nonetheless beginning to emerge. For example, Carrera and Korpela (2016) have challenged the unidirectionality of research on temporary labour migration – traditionally focused on south–north mobility – by examining the impact of temporary migration schemes in Asian and European countries as countries of destination (i.e. Asia as a destination for European temporary migrants and Europe as a destination for Asian temporary migrants).

This chapter points to three additional nuances that could be considered in examining the in-betweenness of temporary migration. Scholars often single out countries of destination for designing temporary schemes that result in permanent migration under conditions of irregularity. This chapter analyses the shortcomings of temporary schemes in relation to the migration policies of countries of origin, transit and destination. This is done from the prism of research on migration for domestic work, which, in many parts of the world, is governed by temporary programmes.

## 4.2 Temporary migration gone awry: The responsibility of countries of origin, transit and destination

### *Promoting fair foreign employment policies in countries of origin*

Countries of origin with an employment-driven emigration policy encourage the temporary migration of their nationals. Temporariness is likely to lead to higher remittance transfers than migration policies that encourage permanent settlement (Dustmann and Mestres, 2008). Further, immigrants with return plans place a higher proportion of their savings in the home country, and the shares of assets and housing value accumulated in the home country are also larger (Dustmann and Mestres, 2011).

Countries of origin react to restrictions on temporary migration at the destination in one of two ways: i) they legitimise and further the restrictiveness of these arrangements by competing among themselves over access to the labour markets at destination; or ii) they impose bans on the deployment of their nationals to these countries. Bans are intended to prevent constituents' uproar over the abuses that tend to result from these restrictive arrangements and to encourage nationals' integration into higher paying jobs on the home front (such as in the growing garment sector of India, Bangladesh and Sri Lanka) or in alternative countries of destination (usually in higher income countries in East Asia). Both these measures have proved ineffective (see the rationales in the following two subsections).

### *Preventing competition between countries of origin*

To maximise the development potential of migration, countries of origin with employment-driven emigration policies compete among themselves over access to the labour markets in countries of destination. Competition legitimises the temporary schemes and furthers the restrictiveness of these arrangements, pushing wages and working conditions downwards for all workers, including nationals, in a particular sector.

For example, when a number of Asian countries (like Indonesia) imposed bans on the deployment of their citizens for work in the domestic work sector of the countries of the Gulf Cooperation Council (GCC) until certain protections were extended to their workers, GCC countries turned to countries in East (Kenya, Uganda and Tanzania) and South Africa (Madagascar) for cheaper sources of labour. The 2015 Memorandum of Understanding (MoU) between Saudi Arabia and Uganda is a case in point. This MoU was intended to facilitate the access of a million college-level educated men and women to work in Saudi Arabia's domestic work sector

over a period of five years without questioning the broader protection gaps for migrants in this country. The MoU was soon followed by a ban due to the abuses reported by Ugandan workers in the Kingdom.

Taking note of the growing mobility patterns between Africa and the GCC, the International Labour Organization (ILO) initiated an interregional tripartite dialogue on migrant domestic workers (in May 2016), bringing together constituents from Africa, the Arab states and Asia. One of the recommendations of this dialogue was to place migrant domestic workers on the agenda of existing interregional consultative processes spanning the Asia–GCC migration corridor and to extend participation in these fora to African countries of origin for migrant domestic workers. Existing fora include the Colombo process (since 2003), an intergovernmental regional consultative process on overseas employment for Asian labour-sending countries, and the Abu Dhabi Dialogue (since 2008), an interregional consultative process on temporary labour migration between the governments of destination countries in the GCC and origin countries in South and Southeast Asia.

The second recommendation of the tripartite dialogue was to establish an interregional network (Africa, Arab states and Asia) of experts, civil society organisations and trade unions with the objective of building a common position across regions on migration for domestic work. Existing MoUs on labour migration between trade unions in Asia and the GCC/Levant could, for example, be revised to include signatories from African trade unions. This includes the 2015 MoU between the Arab Trade Union Confederation, Association of Southeast Asian Nations' Trade Union Council and the South Asian Regional Trade Union Council. The MoU promotes ratification of the Migration for Employment Convention (Revised), 1949 (No. 97), Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), Private Employment Agencies Convention, 1997 (No. 181), Domestic Workers Convention, 2011 (No. 189) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990. The MoU also calls on trade unions in the corridor to establish information centres for migrant workers and to examine and address their occupational health and safety concerns, among other things.

### ***Finding alternative protection measures to deployment bans***

When countries of origin choose to sanction the abuses that result from restrictive temporary schemes at destination, they do so in the form of bans

on the deployment of their nationals, particularly women, for work abroad. Bans can be total (i.e. extending to all citizens) or partial (i.e. pertaining to age, sector, skill level, gender or a combination of these).

Nepal, for example, announced a ban on women under the age of 30 from migrating to the Arab states for domestic work in 2012 before expanding the age ban in 2014 to all women seeking low-skilled employment abroad. The ban did not stop migration. Instead, migration was undertaken irregularly via neighbouring India and Bangladesh. Moreover, migrant women did not attend pre-departure orientation sessions, a valuable source of information for ensuring their safe migration, and as a result of exiting without their government's pre-approval, were excluded from the benefits of private insurance and financial compensation in the case of accident or death at the destination. Needless to say, the ban strengthened unlicensed migration agents operating out of villages, who are associated with deception, fraud and trafficking of women (Shrestha and Taylor-Nicholson, 2015).

The same scenario is applicable to migrants from other countries like Ethiopia and Madagascar, where bans on the deployment of citizens are also in effect. The government of Ethiopia imposed a total ban on the deployment of Ethiopian low-skilled workers in 2013. The government of Madagascar also issued a temporary deployment ban to Lebanon in 2010 and another to the Gulf countries in 2013. Instead, Ethiopians now rely on informal brokers who operate over land via Somalia, Djibouti and Somaliland, and over sea to Yemen and then to Saudi Arabia (Fernandez, 2011, p. 444; De Regt, 2007). Private employment agencies in Madagascar arrange travel through a transit country, such as Kenya, and from there the women continue their onward journey to Beirut. In the course of their circuitous routes, migrants are at increased risk of human trafficking and exploitation.

Deployment bans are ineffective in the absence of decent work opportunities in the countries of origin. Poverty and the loss of livelihoods compel women to migrate through irregular channels with the help of unregistered and unlicensed brokers who are accountable to no one. On arrival, migrants are admitted by countries of destination irrespective of the bans. There, they fall outside the protection of national laws as well as those of their home country. Repatriation is also complicated by their inability to pay the penalties accumulated as a result of their working without permits and circumventing official exit channels in the country of origin (Tayah and Atnafu, 2016).

Alternatives to bans include promoting the ratification of migrant worker conventions and treaties, negotiating enforceable employment contracts that protect the rights of migrant workers in receiving countries, strengthening the capacity of labour attachés to monitor the living and working conditions of migrant workers, and improving access to justice for workers. Added to this list are policies promoting women's empowerment in sending countries, such as access to rights and entitlements, freedom from gender-based violence, and access to education and programmes that enhance employability (Bosc, 2016).

### *Taking heed of de facto temporary labour migration in transit*

An often-overlooked arrangement for the temporary employment of migrants occurs in transit countries. This is a *de facto* temporary arrangement, a form of nested temporariness in the context of a longer migration journey to a destination where *de jure* temporary schemes (such as the *kafala* system in the Arab states) apply.

Migrants pass through transit countries to finance their travel to more attractive countries of destination, for lack of appropriate documentation, and for their inability to meet the requirements of the intended country of destination (Hugo, 2014, p. 2). Deployment bans are another reason why migrants transit through neighbouring countries, especially where open border policies are in effect between the origin and transit countries.

While their intention might be to transit briefly, migrants are in many cases compelled to stay in the transit countries for months or even years, taking on employment in the informal sector. A study examining the transit migration of 30 Ethiopian women found that the latter engaged in informal employment in transit countries as domestic workers, saleswomen, cleaners and sex workers – sometimes in the form of food-for-work in place of wages – for periods extending between 6 and 24 months before continuing their journey (Tayah and Atnafu, 2016).

Given the employment dimension of transit migration, it is important to engage transit countries in dialogues bringing together countries of origin and destination on labour migration. Trade unions in transit countries are central to these dialogues. In their collaboration with trade unions in countries of origin and destination they can ensure that migrants have access to information about their migration journey and can provide them with legal recourse. With support from the ILO, a declaration was signed by trade unions and domestic workers' organisations from South Africa, Lesotho and Zimbabwe in 2014. The declaration commits signatories to support strategies

promoting the human and labour rights of migrant domestic workers along the Zimbabwe–Lesotho–South Africa migration corridor.

*Promoting migration policies that take into consideration labour market needs at the destination*

Destination countries admit domestic workers on a temporary basis to meet care demands while avoiding potential economic and societal problems connected with long-term integration. Nonetheless, the absence of decent work opportunities in the countries of origin and the growing demand for domestic and household care workers in destination countries result in permanent migration under conditions of irregularity.

Working families across the world are facing difficulties in combining paid work with family responsibilities. There were 1.27 billion women in the labour market in 2015 having to combine family and care responsibilities.<sup>1</sup> At the same time, rapid population ageing, increasing life expectancy and lower fertility rates are putting a strain on traditional care arrangements. The UN Department of Economic and Social Affairs estimates that there will be 20 young people for every 100 adults by 2050 (UNDESA, 2015a). Further, tight fiscal policies and social policy budgets have weakened public care services and delegated the financial and actual responsibility of care arrangements to private households (Tayah, 2016).

Given these labour market, demographic and policy transformations, it is important to design migration policies at the destination that take into account long-term care needs and on this basis, decide whether to prioritise temporary labour migration or migration channels that lead to permanent settlement (Tayah, 2016). Belgium, for example, has made the admission of migrant domestic workers conditional on labour market tests (Gallotti, 2015).

### 4.3 Conclusion

There are inherent risks in temporary migration schemes. Designing and implementing fair migration policies requires cooperation between all the countries concerned (origin, transit and destination), more specifically,

- i) concerted effort among different countries of origin, including between the social partners in these countries, is important to avoid

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<sup>1</sup> See the UN Secretary-General's High-Level Panel on Women's Economic Empowerment (2016) ([www.WomensEconomicEmpowerment.org](http://www.WomensEconomicEmpowerment.org)).

a race to the bottom in the working and living conditions of workers from different nationalities;

- ii) transit countries must take heed of the employment dimension of migration, which is largely informal, adding to the vulnerability of migrants; and,
- iii) countries of destination must ensure that admission and post-admission policies respond to established labour market needs, while respecting the principle of equal treatment between migrants and national workers.

## References

- Bosc, I. (2016), "Women's Mobility and Domestic Work", Policy Brief, International Labour Organization, New Delhi.
- Carrera, S. and M. Korpela (2016), "Transnational migration in transit: Preliminary findings of the EURA-NET Project", Discussion Paper prepared for the side event "Temporary migration and workers' rights: Comparing EU-Asia Experiences and Perspectives" on the margins of the Human Rights Council in Geneva on 13 June 2016.
- De Regt, M. (2007), "Ethiopian women in the Middle East: The case of migrant domestic workers in Yemen", Paper presented at the African Studies Centre seminar, University of Amsterdam, 15 February 2007 ([www.ascleiden.nl/Pdf/paper-deregt.pdf](http://www.ascleiden.nl/Pdf/paper-deregt.pdf)).
- Dustmann, C. and J. Mestres (2008), "Remittances and temporary migration", University College London and Centre for Research and Analysis of Migration.
- Dustmann, C. and J. Mestres (2011), "Savings, asset holdings, and temporary migration", Discussion Paper No. 5498, Institute for the Study of Labour, Bonn.
- Fernandez, B. (2011), "Household help? Ethiopian women domestic workers' labor migration to the Gulf countries", *Asian and Pacific Migration Journal*, Vol. 20, Nos 3-4.
- Gallotti, M. (2015), "Making decent work a reality for migrant domestic workers", Domestic Work Policy Brief No. 9, International Labour Organization, Geneva.
- Hugo, G. (2014), "Urban Migration Trends, Challenges, Responses and Policy in the Asia-Pacific", Background Paper for IOM, *World Migration Report 2015, Migrants and Cities: New Partnerships to Manage Mobility*, International Organization for Migration, Geneva.



- International Labour Organization (ILO) (2015), "Global estimates on migrant workers: Results and methodology", Geneva.
- Pécoud, A. (2015), *Depoliticizing migration: Global governance and international migration narratives*, London: Palgrave Macmillan.
- Shrestha, J. and E. Taylor-Nicholson (2015), "No easy exit - Migration bans affecting women from Nepal", International Labour Organization, Geneva.
- Tayah, M.-J. and A. Atnafu (2016), "Promoting and protecting the rights of migrant domestic workers in transit: The case of Ethiopian women migrants", Research Series, International Labour Organization, Geneva.
- Tayah, M.-J. (2016), *Decent work for migrant domestic workers: Moving the agenda forward*, International Labour Organization, Geneva.
- UN Department of Economic and Social Affairs (UNDESA) (2015a), *World Population Prospects, 2015 Revision*, Population Division, New York, NY.
- UN Department of Economic and Social Affairs (UNDESA) (2015b), "Trends in international migration 2015", Population Facts No. 2015/4, Population Division, New York, NY.
- UN Secretary-General's High-Level Panel on Women's Economic Empowerment (2016), *Leave no one behind: A call to action for gender equality and women's economic empowerment*, New York, NY.

## 5. VARIOUS SHADES OF TEMPORARINESS AS A NEW POLICY CHALLENGE AGNIESZKA WEINAR

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When stuck in the world of policy analysis, we tend to be bound by ascribed definition. Temporary migration seems to be an unproblematic category, designated to describe low-skilled migrant workers moving with temporary work contracts to do menial jobs. Yet in this author's opinion, this is one of the greatest shortcomings of contemporary migration policy-making. Temporariness is a stable feature of many migration patterns and each presents policy-makers with a different set of challenges.

Let us think about the simplest way of telling a temporary worker from a non-temporary one: their entry rights. Only a handful of countries in the world offer permanent residence *before* setting foot on their territory (so-called countries of immigration, like Canada or Australia). Pretty much everywhere else everyone is a temporary migrant. This concerns family members reunified with their sponsors (crossing the border almost exclusively on temporary visas); asylum seekers; first-time jobholders coming to work for an employer simply because they were hired from abroad; seasonal workers in agriculture coming under a bilateral scheme; intra-corporate transferees; trainees and researchers; and also students. With time, they might hope to change their status to permanent, depending on the specific legal framework applied to each particular situation. However, upfront they are all temporary migrants.

The biggest policy challenge of our times is the exponential growth of temporary flows in comparison with permanent flows, even in the countries that traditionally favoured permanent immigration. For example, the yearly intake of temporary immigrants in Canada is now double of that of permanent immigrants. This worldwide trend suggests that destination countries are more and more interested in receiving workers rather than citizens. In other words, immigration is now becoming a labour market instrument rather than a nation-building instrument. What is interesting is

that even the highly skilled, an object of the global talent race, tend to be admitted as temporary workers first.

The precarious position of the temporary worker is not evenly distributed. A manager or a technician moving around the globe within the same organisation is well covered by social security and takes fewer risks, but these examples are less and less common. A recent study of French expatriates prepared for the French government<sup>1</sup> shows, inter alia, that many of the mobile French are no longer well-paid ex-pats, but rather young people looking for better opportunities elsewhere, having precarious employment situations in France and abroad. In the same vein, the myth of the well-paid highly skilled researcher might already be old: many PhDs move around the globe looking for a chance of stable employment, building their careers on a series of temporary placements, their social rights and pension rights scattered around the world, with limited ways of retaining them.

Temporary workers coming to work under bilateral agreements have the best chance of having their rights safeguarded, depending on the monitoring that the two governments put in place. The issues of portability of social rights and pension rights should be included in such agreements.

For example, the much-criticised Canadian Temporary Workers Program has some strands that work pretty well: where there is Canadian governmental monitoring of implementation, abuse can lead to prosecuting the abusers.<sup>2</sup> Still, the social and pension rights of temporary workers coming in this stream are the same as other temporary workers who come individually, i.e. they depend on a provincial policy of granting access to such rights. They also depend on the existence (or not) of the bilateral agreements on the portability of social security rights. Also, the abuse happens only in a couple of sectors traditionally prone to abuse (e.g.

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<sup>1</sup> See H. Conway-Mouret, *Retour en France des Français de l'étranger*, Editeur: Premier ministre, France, 2015 ([http://www.gouvernement.fr/sites/default/files/document/document/2015/07/rapport\\_helene\\_conway-mouret.pdf](http://www.gouvernement.fr/sites/default/files/document/document/2015/07/rapport_helene_conway-mouret.pdf)).

<sup>2</sup> See S. Noakes, "Migrant workers get little protection from workplace abuse: A sexual abuse case highlights the difficulty of enforcing labour standards for workers on visas", *CBC News*, 2 July 2015 (<http://www.cbc.ca/beta/news/business/migrant-workers-get-little-protection-from-workplace-abuse-1.3132292>).

agriculture). The lower the skill level, the more abuse there is.<sup>3</sup> Out of 94,109 workers admitted in 2014 under the Temporary Foreign Worker Program scheme, 42% were highly skilled. Only 10% were admitted for low-skilled jobs in agriculture.

In comparison, German–Polish agreements on contractual workers from the period before Poland’s accession to the EU worked quite well, assuring that the rights of the workers were met and that the pension and social rights of the workers were paid back to the Polish social security system.<sup>4</sup> That was possible because of the detailed bilateral agreements covering these issues and monitoring from both ends.<sup>5</sup>

However, where there are no bilateral agreements, the situation can deteriorate quickly. The supposedly privileged intra-EU mobility is one example. Polish workers in the UK and Italy after the accession often fell prey to unscrupulous recruitment agencies and employers.<sup>6</sup> The shady practices and de facto slavery were possible in Europe in the context of free labour mobility, not safeguarded by any bilateral agreement or monitoring system. Again, this happened in specific sectors of the economy, most often in agriculture.

There should be a way of using temporary workforce in certain sectors in which there is low interest from the host population. In addition, because many temporary workers do not necessarily want to emigrate for life with their families, emigration is a decision that brings about a completely new set of issues, which are more complex. In any case, the practices around these programmes should be strictly monitored and never left for the free market

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<sup>3</sup> See Macdonald-Laurier Institute, “Straight Talk with Linda Nazareth”, Ottawa, Ontario, May 2014 (<http://www.macdonaldlaurier.ca/files/pdf/NazarethStraightTalk-05-14-V2.pdf>).

<sup>4</sup> See B. Samoraj, *Polityka Społeczna* No. 1, January 2003 (<http://ips.uw.edu.pl/pliki/pracownicy/bsamoraj/PS%201,%202003.pdf>).

<sup>5</sup> See “German and Polish unions cooperate over seasonal workers in agriculture”, European Industrial Relations Observatory online, October 2003 (<http://www.ilo.org/dyn/migpractice/docs/96/Dribbusch.pdf>).

<sup>6</sup> See F. Lawrence, “Polish workers lost in a strange land find work does not pay in the UK”, *The Guardian*, 11 January 2005 (<http://www.theguardian.com/uk/2005/jan/11/immigration.foodanddrink>); see also P. Kiefer, “Poles Seeking Jobs Found Forced Labor in Italy”, *New York Times*, 23 July 2006 ([http://www.nytimes.com/2006/07/23/world/europe/23italy.html?\\_r=0](http://www.nytimes.com/2006/07/23/world/europe/23italy.html?_r=0)).

to settle. Regarding low-skilled workers and economic sectors where corruption and abuse have traditionally been present, this is of utmost importance.

There are also other ways of dealing with the needs of traditionally shady sectors of the economy. For example, in Australia each year well over 150,000 Work and Travel participants, mainly youth from other OECD countries, spend several obligatory months working on Australian farms.<sup>7</sup> The issue of social or pension rights is not really discussed, maybe because we are talking about young people coming to work for only a year and for fun.

Mid-skilled and high skilled temporary workers represent another set of challenges. Many of them use the temporary programmes to escape deskilling: still working in their field, at their skill level, but agreeing to precarious employment in return. There is no simple recipe to assure their rights are covered. While in cases where bilateral agreements exist, they might be able to collect their pension rights across the countries (for example, in the EU), in other cases, they will not acquire them anywhere and hence lose them. This is a new phenomenon, and not well recognised by policy-makers. Yet, it will require new solutions and more international cooperation.

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<sup>7</sup> See OECD, *International Migration Outlook 2016*, Paris: OECD Publishing, 2016.

## **PART II**

**THE EU LEGAL MIGRATION *ACQUIS***

**TAKING STOCK AND MAIN CHALLENGES**

## 6. QUESTIONING TEMPORARY MIGRATION SCHEMES IN THE EU

*ELSPETH GUILD*

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There are two main systems regulating access of non-EU nationals to the labour markets of EU states, which operate side by side. The first, and best known, is the system of free movement of workers that applies only to nationals of the 28 Member States (with certain limitations still applicable to Croatian nationals) and their family members of any nationality who can join them. This system is based on the principle of equal treatment with nationals of the state in all areas related to work. An EU citizen is entitled to move to another Member State to seek employment for up to six months at a time. If the person gains employment, be it part-time (the Court of Justice of the European Union has held that even seven hours a week can be sufficient for a person to claim the status of a worker) and temporary, not only is he or she entitled to equal treatment in wages and conditions of work, access to all work-related benefits and trade union membership and participation on the same basis as nationals of the state, but also no limitation can be placed on his or her permit of residence in the state.

Under this system, according to the EU's statistical agency, about 3–4% of the 508 million citizens of the EU live in a Member State other than that of their underlying nationality.<sup>1</sup> How many of these citizens are temporary migrants is less clear, as many EU migrant workers who get temporary jobs in a host Member State return to their home Member State or move on to another Member State when the job ends. The largest age group of EU migrant workers is between 15 and 34 and the largest sectors in which they work traditionally have a high turnover – manufacturing, construction, accommodation and food being among them. It is likely that there is substantial intra-state mobility in these sectors.

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<sup>1</sup> See Eurostat, *People in the EU: Who are we and how do we live?*, Statistical Yearbook 2015, Luxembourg: Publications Office of the European Union, 2015 (<http://ec.europa.eu/eurostat/documents/3217494/7089681/KS-04-15-567-EN-N.pdf/8b2459fe-0e4e-4bb7-bca7-7522999c3bfd>).

Temporality is not a legal characteristic of the EU's system for the free movement of workers. As long as EU citizens are working, be it full time or part time, they are very strongly protected against expulsion by the host state. When they are involuntarily unemployed they continue to enjoy this protection. Nonetheless, extra protection against expulsion and greater access to social welfare benefits that are not linked to employment are available to EU citizens after five years of residence when they acquire permanent residence. Even greater protection against expulsion accrues after ten years of residence.

The second system of labour migration in the EU applies to third-country nationals, that is, anyone who is not a citizen of one of the 28 Member States. This system is characterised by great fragmentation in terms of both the territory to which labour migration is permitted (the 28 Member States are divided up into their 28 different territories and the migrant worker is limited to work in only one of them) and the basis of the type of employment the migrant workers are admitted to carry out. Unlike EU migrant workers who are entitled to take any job and on the basis of that employment to enjoy full equal treatment with national workers, third-country national workers are admitted only to take employment in certain sectors and do not enjoy equal treatment with nationals of the state or with EU migrant workers. The EU has so far adopted 15 measures on regular migration for third-country nationals into the EU (see the annex to this chapter). Denmark does not participate in any of these measures and Ireland and the UK have opted into a small minority of them.

As was the case in respect of EU migrant workers, one of the first measures to be adopted provides for the coordination of social security contributions for third-country national migrant workers made in more than one Member State. The system provides for the aggregation of contributions made in different Member States, the principle of non-discrimination and the right to export social benefits accruing from one Member State to another. However, this system of coordination of social security is not accompanied by a right to work in more than one Member State. Only those third-country nationals who acquire long-term residence status under Directive 2003/109/EC gain an opportunity to move and work in a second Member State from that where they gained the status.

The main entry systems<sup>2</sup> are first, Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes

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<sup>2</sup> For these purposes, the provisions on students and researchers are not included.



of highly qualified employment (the Blue Card), which can lead to long-term residence status. The rights Blue Card holders enjoy are limited to equal treatment with nationals as regards working conditions, social security, pensions, recognition of diplomas, education and vocational training. Only after two years can they change employment to another highly skilled job, so they remain tied to one employer until then. This is the only entry system that leads to permanent residence.

The second entry system is Directive 2014/36/EU on admission of seasonal workers, which Member States have been required to apply since September 2016. It is a paradigmatic temporary worker system. Seasonal work is defined as tied to the seasons and the maximum limit of stay is between five and nine months per calendar year of residence for a seasonal worker. The entry visa is issued only on evidence of sufficient resources not to be a burden on the social assistance system of the state, comprehensive sickness insurance and adequate accommodation. The directive facilitates readmission under the scheme within five years for those who have fulfilled the conditions of a previous period of work in the EU. There is the possibility of changing employers for the seasonal worker. As regards rights, the directive requires equal treatment with own nationals in the following areas:

- terms of employment, covering the minimum working age and working conditions (including pay and dismissal, working hours, leave and holidays), as well as health and safety requirements at the workplace;
- the right to strike and take industrial action, in accordance with the host Member State's national law and practice, and freedom of association, affiliation and membership of an organisation representing workers or of any organisation whose members are engaged in a specific occupation, including the rights and benefits conferred by such organisations (such as the right to negotiate and conclude collective agreements), without prejudice to the national provisions on public policy and public security;
- back payments to be made by the employers, concerning any outstanding remuneration to the third-country national;
- coordination of social security (with the possible exclusion of family benefits and unemployment benefits);
- access to goods and services and the supply of goods and services made available to the public, except housing, without prejudice to the freedom of contract in accordance with Union and national law;

- advice services on seasonal work afforded by employment offices;
- education and vocational training (directly linked to the specific employment activity, and excluding study and maintenance grants and loans or other grants and loans);
- recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures; and
- tax benefits, in so far as the seasonal worker is deemed to be resident for tax purposes in the Member State concerned (which can be limited in its application to cases where the registered or usual place of residence of the family members of the seasonal worker for whom he or she claims benefits lies in the territory of the Member State concerned).

This may seem like a very elaborate system for workers who are only coming to do seasonal work for up to nine months but the framework of rights was exceedingly important for some of the institutional lawmakers, in particular the European Parliament, which was anxious about the issue of exploitation.

The third measure on access for labour migration that the EU has adopted for third-country nationals is Directive 2014/66/EU on admission of intra-corporate transferees. These workers, like the seasonal workers, are temporary and are not intended to qualify for permanent residence. It applies to intra-corporate transfer as managers, specialists or trainee employees. Those admitted under this category have the right to equal treatment with nationals of the state in the following areas:

- freedom of association, affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the rights and benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;
- recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures;
- social security coordination;
- access to goods and services and the supply of goods and services made available to the public, except procedures for obtaining housing as provided for by national law; and
- the possibility of bringing some family members to the host state with them.

What is surprising here is the absence of equal treatment in wages and working conditions. Instead the directive requires that all conditions in the

law, regulations or administrative provisions and/or universally applicable collective agreements related to posted workers in a similar situation in the relevant occupational branches are met during the intra-corporate transfer with regard to terms and conditions of employment other than remuneration. As regards remuneration itself, it requires that the remuneration granted to the third-country national during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established.

The benefits of temporary migration schemes, which some academics and policy-makers praise, have not, at least for the meantime, found much favour with EU lawmakers. One of the main preoccupations of the policy-makers has been the issue of equal treatment with national workers in similar jobs. EU lawmakers have been much influenced by the concerns among civil society organisations, such as trade unions, that migrant workers must not be used to undercut the wages and working conditions of those already in the labour force of the Member States. Thus, in all of the directives there has been inclusion of provisions that safeguard the relationship of equality in this area. On the other hand, EU lawmakers have been less concerned about limiting the period during which a third-country national can work in the EU.

## **Annex. EU measures on regular migration**

Regulation (EC) No. 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals, OJ L 157/1, 15.6.2002 [UK opts in], amended by Regulation (EU) No. 330/2008, OJ L 115/1, 23.4.2010.

Regulation (EC) No. 859/2003 on 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, OJ L 124/1, 20.5.2003 [UK, Ireland opt in].

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003; see also the challenge to the validity of parts of the Directive decided in favour of the Council in Case C-540/03 *European Parliament v Council* [2006] ECR I-5769.

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004.

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, OJ L 375/12, 23.12.2004.

Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289/15, 3.11.2005.

Council Recommendation of 12 October 2005 to facilitate the admission of third-country nationals to carry out scientific research in the European Community, OJ L 289/26, 3.11.2005.

Council Decision of 5 October 2006 on the establishment of a mutual information mechanism concerning Member States' measures in the areas of asylum and immigration, OJ L 283/40, 14.10.2006 [UK, Ireland opt in].

Council Decision of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the general programme 'Solidarity and Management of Migration Flows', OJ L 168/18, 28.6.2007 [UK, Ireland opt in].

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 ('Blue Card' Directive), OJ L 155/17, 18.6.2009.

Regulation (EU) No. 1231/2010 extending Regulation (EC) No. 883/2004 on social security for EU citizens to third-country nationals who move within the EU), OJ L 344/1, 29.12.2010 [Ireland opts in].

Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 on long-term resident status for refugees and persons with subsidiary protection, OJ L 132/1, 19.5.2011.

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 common set of rights for workers, OJ L 343/1, 23.12.2011.

Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on conditions of entry and stay of third-country nationals for the purposes of employment as seasonal workers, OJ L 94/375, 28.3.2014 [deadline 30 September 2016].

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, OJ L 157/1, 27.5.2014 [deadline 29 November 2016].

## 7. EQUAL TREATMENT RIGHTS IN EU LAW ON LABOUR MIGRATION: A HUMAN RIGHTS PRINCIPLE APPLIED AS A POLICY TOOL

*BJARNEY FRIDRIKSDOTTIR*

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### 7.1 Introduction

In four EU directives on labour migration that were adopted between 2009 and 2014, based on a sectorial approach to labour migration set forth in the EU's Policy Plan on Legal Migration,<sup>1</sup> access to the territory and labour market, the right to equal treatment with nationals and the right to family reunification are granted to a different extent to the groups of migrants that fall under the scope of each directive.

The subject that will be explored here is how this approach to labour migration management chosen by the EU addresses the four aspects listed above in the Blue Card Directive,<sup>2</sup> the Single Permit Directive,<sup>3</sup> the Seasonal Workers Directive<sup>4</sup> and the Intra-Corporate Transfer Directive.<sup>5</sup> In

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<sup>1</sup> See European Commission, Communication on a Policy Plan on Legal Migration, COM(2005) 669, 21.12.2005, 4.

<sup>2</sup> See Council Directive 2009/50/EC of 25 May 2009 on the conditions for entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18.6.2009.

<sup>3</sup> See 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, OJ L 343/1, 23.12.2011.

<sup>4</sup> See 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, OJ L 94, 28.3.2014.

<sup>5</sup> See 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, OJ L 157/1, 27.5.2014.

particular, it will do so having regard to the objectives of each of the directives and their compatibility with international and European human rights law and with international labour law standards.

## 7.2 Various objectives of the EU directives on labour migration

When the different objectives of the four directives are examined, it emerges that there is a clear difference between the EU's approach to highly qualified labour migrants and other labour migrants, especially the lower skilled.

The Blue Card Directive, addressing highly qualified third-country nationals, set out to improve the EU's ability to attract and, where necessary, retain highly qualified third-country workers "to increase the contribution of legal immigration to enhancing the competitiveness of the EU economy".<sup>6</sup> To achieve this, the Commission proposed to "create a common fast-track and flexible procedure for the admission of highly qualified third-country immigrants, as well as attractive residence conditions for them and their family members, including certain facilitations for those who would wish to move to a second Member State for highly qualified employment".<sup>7</sup>

Among the objectives of the Intra-Corporate Transfer Directive, also addressing highly qualified third-country nationals, were to provide for a transparent legal framework (with a set of common conditions for their admission into the EU), to create more attractive conditions for their stay and for the stay of their families, to facilitate their (intra-EU) mobility and to guarantee fair competition, including a secure legal status for them.<sup>8</sup> In contrast to these, the objective of the Seasonal Workers Directive is to "contribute to the effective management of migration flows for the specific category of seasonal temporary migration and to ensuring decent working

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<sup>6</sup> See European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, Brussels, 23.10.2007, p. 2.

<sup>7</sup> Ibid.

<sup>8</sup> See European Commission, Staff Working Document, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, SEC(2010) 884, Brussels, 15.7.2010, p. 15.

conditions for seasonal workers, by setting out fair and transparent rules for admission and stay and by defining the rights of seasonal workers”.<sup>9</sup>

Additionally, it aims at providing “incentives and safeguards to prevent overstaying or temporary stay from becoming permanent”.<sup>10</sup> The Single Permit Directive, which is a general framework directive for labour migration, has a twofold objective. The first is to set up a single application procedure for third-country nationals seeking to enter the territory of a Member State for work, and establish that if granted the permit to stay and work, the permit should be issued in a single act.<sup>11</sup> The second is to “grant rights to third-country nationals legally working in the territory of a Member State by defining fields, in particular related to employment, where equal treatment with nationals of Member States should be provided”.<sup>12</sup>

### **7.3 Access to the territory and labour market**

These differences in objectives have resulted in the formulation of different statuses for the various groups of labour migrants based on type, their level of qualifications and how economically desirable they are considered to be for the EU labour market. This is reflected in access to the territory and the labour market, as is evident in the following overview of the parameters on them as set forth in each of the directives.

The standard validity of the EU Blue Card is to be set by Member States at between one and four years, or if the work contract is shorter than one year, the period of the work contract and an additional three months (Art. 7(2) Blue Card Directive). Access to the labour market is restricted for the first two years to employment that meets the criteria for admission outlined in the directive and changes of employer are subject to prior authorisation. After the two years, the Member States are free, but not obliged, to grant the EU Blue Card holder equal treatment with nationals in access to highly qualified employment (Arts 12(1) and (2)). The directive foresees the attainment of a long-term residence status and provides for conditions for

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<sup>9</sup> See Directive 2014/36/EU, *op. cit.*, Recital 7.

<sup>10</sup> *Ibid.*

<sup>11</sup> See European Commission, Proposal for a Council Directive 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 a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638, Brussels, 23.10.2007, p. 6.

<sup>12</sup> *Ibid.*



intra-EU mobility after the first eighteen months of legal residence (Arts 16, 17 and 18).

The Intra-Corporate Transfer Directive only permits applications from third-country nationals who are resident outside EU territory (Art. 11(2)). The duration of the permit shall be at least one year or the duration of the contract, whichever is shorter and can be extended to a maximum of three years for managers and specialists or one year for trainee employees (Art. 13(2)). After this maximum period of three years or one year, the respective holder shall leave the territory of the Member State unless he or she is granted a residence permit on another basis Art. 12(1)).

The directive provides for the possibility to grant, upon application, the same person another permit of the same maximum duration, the only requirement being that the Member State may require a period of up to six months maximum between the end of one transfer and the beginning of the next (Art. 12(2)). What is noteworthy is that there is no minimum period provided; in fact, the applicant for a new permit could only be required to stay away for the time it takes to consider the application, and there is no maximum given for the number of renewals of a permit for the same person. On the basis of the permit, the holder has the right to exercise the specific employment activity authorised under the permit (Art. 17(c)). The directive provides for the possibility of both short-term and long-term intra-EU mobility to work in one or several other Member States for the same undertaking or group of undertakings for which the intra-corporate transfer permit was issued (Arts 20, 21 and 22).

The scope of the Seasonal Workers Directive solely extends to third-country nationals who reside outside the territory of the Member States (Art. 2(1)) and seasonal workers are obliged to keep their residence in a third country while 'staying' in an EU Member State for work (Art. 3(b)). It provides that the duration of the authorisation shall be between five and nine months in any twelve-month period and that at the end of the duration of the authorisation, the seasonal worker is obliged to leave the territory of the Member State unless he or she has been granted a residence permit for other purposes (Art. 14(1)).

The Single Permit Directive does not regulate access to the territory or access to the labour market, which is done by the national law of each Member State. The directive only provides that once an applicant has fulfilled the conditions of national law, he or she should be granted the single permit. The directive does not prescribe any minimum or maximum length of time for the duration of the single permit. The permit is issued in

accordance with national law, and the length of time is determined by the national law of each Member State. As regards access to the labour market, once the permit has been granted, the holder has the right to exercise the specific employment activity authorised under the single permit in accordance with national law (Art. 11(c) Single Permit Directive). As there are no time limits on this restriction in the directive, it is regulated by national law and the restrictions on labour market access are likely to vary accordingly.

#### **7.4 The right to equal treatment with nationals**

The material scope of the provisions addressing the right to equal treatment with nationals in the four directives cover the following areas: working conditions, terms of employment and freedom of association, social security, statutory pensions, goods and services, education and vocational training, tax benefits and the recognition of diplomas and qualifications. All the directives derogate from the principle of equal treatment with nationals and give EU Member States the discretion to restrict the right to equal treatment in several ways. The extent of the permissible derogations varies among the directives.

The way in which the right to equal treatment concerning social security is constructed in the directives is largely similar and all but the Blue Card Directive explicitly permit Member States to exclude family benefits.<sup>13</sup> As regards terms and conditions of employment, the Blue Card, the Single Permit and the Seasonal Workers Directives all provide for equal treatment with nationals in working conditions and terms of employment.<sup>14</sup> The Intra-Corporate Transfer Directive, however, only provides for equal treatment with nationals in remuneration (Art. 5(4)(b)). With respect to terms and conditions of employment, intra-corporate transferees are granted equal treatment based on Art. 3 of the Posted Workers Directive, with persons covered by that directive in the Member State where the work is carried out (Art. 18(1), Intra-Corporate Transfer Directive). All four directives provide for equal treatment with nationals concerning freedom of association and

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<sup>13</sup> See Art. 12(2)(b) Single Permit Directive; Art. 23(2)(a) Seasonal Workers Directive; and Art. 18(3) Intra-Corporate Transfer Directive.

<sup>14</sup> See Art. 14(1)(a) Blue Card Directive; Art. 12(1)(a) Single Permit Directive; and Art. 23(1)(a) Seasonal Workers Directive.

membership of organisations representing workers or employers, including also the benefits conferred by such organisations.<sup>15</sup>

All four directives provide for equal treatment with nationals as regards access to goods and services, although all of them give Member States the discretion to restrict equal treatment, and the permitted derogations are different. The Blue Card Directive provides for the possibility to restrict access to procedures to obtain housing (Art. 14(2)), while for single permit-holders equal treatment can be limited to those who are in employment and access to housing can be restricted fully (Art. 12(2)(d) Single Permit Directive). In the Seasonal Workers Directive, access to goods and services explicitly excludes access to housing (Art. 23(2)(e)) and for intra-corporate transferees, access to procedures for obtaining housing is excluded from the provision (Art. 18(2)(e) Intra-Corporate Transfer Directive). The Seasonal Workers Directive provides for access to advisory services, but this is restricted to advice on seasonal work offered by employment offices (Art. 23(1)(f)), whereas EU Blue Card holders are also entitled to counselling services at employment offices (Art. 14(1)(g) Blue Card Directive). For single permit-holders and intra-corporate transferees, there are no restrictions on the right to equal treatment regarding advisory services offered by public employment offices.

Unlike the Intra-Corporate Transfer Directive, the Blue Card, Single Permit and Seasonal Workers Directives include provisions on equal treatment pertaining to education and vocational training,<sup>16</sup> but give discretion to the Member States to restrict access to it. The access of seasonal workers can be limited to education and vocational training directly linked to their specific employment activity, and any grants or loans related to it can be excluded (Art. 23(2)(b) Seasonal Workers Directive). For EU Blue Card holders, equal treatment may be restricted for any types of loans or grants in relation to secondary and higher education and vocational training (Art. 14(2) Blue Card Directive), and access to university and post-secondary education may be subject to specific prerequisites in accordance with national law (Art. 14(2)(a)). In the case of single permit-holders, access can be restricted to those who are in employment, or who have been employed and who are registered as unemployed, by excluding third-country workers

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<sup>15</sup> See Art. 14(1)(b) Blue Card Directive; Art. 12(1)(b) Single Permit Directive; Art. 23(1)(b), Seasonal Workers Directive; and Art. 18(2)(a) Intra-Corporate Transfer Directive.

<sup>16</sup> See Art. 14(1)(c) Blue Card Directive; Art. 12(1)(c) Single Permit Directive; and Art. 23(1)(g) Seasonal Workers Directive.

who have been admitted for the purpose of study; excluding any grants or loans related to it; and by laying down specific prerequisites (including language proficiency and the payment of tuition fees) in accordance with national law, with respect to access to university and post-secondary education and to vocational training that is not directly linked to the specific employment activity (Art. 12(2)(a), Single Permit Directive). Only single permit-holders and seasonal workers are entitled to tax benefits provided that they are resident for tax purposes in the Member State in which they are working.<sup>17</sup>

## **7.5 The right to equal treatment in international and European human rights law and in international labour law**

During negotiations on the directives, international and European human rights law and international labour standards were rarely brought up and in the few cases in which they were, they have since been used selectively. An example of that is the discussion on social insurance contributions paid at work that lead to an entitlement to receive unemployment benefits, which are rights the European Court of Human Rights (ECtHR) has ruled as being protected by Art. 1 of Protocol 1 of the European Convention on Human Rights (ECHR). This judgment was taken into consideration in the negotiations for the Single Permit Directive<sup>18</sup> but not in those for the Seasonal Workers Directive, which permits Member States to exclude unemployment benefits from the branches of social security (Art. 23(2)(a)).

The personal scope of international and European human rights instruments and those on labour law – such as the International Covenants on Economic, Social and Cultural Rights (ICESCR) and on Civil and Political Rights (ICCPR), along with the ECHR – includes all those present in the territory of a state. They apply to ‘everyone’ regardless of nationality or administrative status, unless non-nationals are explicitly excluded from certain provisions, like those addressing political participation and freedom of movement. Although nationality is not one of the suspect grounds listed in the non-discrimination clauses of these instruments, the UN monitoring committees overseeing implementation of the ICESCR and ICCPR have

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<sup>17</sup> See Art. 12(1)(f) Single Permit Directive; and Art. 23(1)(i) Seasonal Workers Directive.

<sup>18</sup> See Council of the European Union, Note for the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum, 15 July 2010, document number: 12156/10, 4.

declared that the prohibition of discrimination includes discrimination based on nationality.<sup>19</sup> The same is true for international labour law, which applies to non-nationals unless otherwise stated (ILO, 2006, para. 9(a)). An example of case law on the ECHR on discrimination pertaining to nationality is *Gaygusuz v Austria*,<sup>20</sup> where the Court found that differences in treatment based on nationality violated Art. 14 of the Convention and that “very weighty reasons” have to be provided to make discrimination based on nationality acceptable under the Convention. In relation to administrative status, in *Niedzwiecki v Germany*<sup>21</sup> the Court found that refusing to grant migrants family benefits based on the migrants not holding a “stable residence permit” is a violation of Art. 14 in conjunction with Art. 8. The personal scope of the Treaty on the Functioning of the European Union (TFEU) and the EU Charter of Fundamental Rights includes third-country nationals, unless they are explicitly excluded, as is the case with a few provisions of both. As EU law on labour migration is based on Art. 79 TFEU, third-country nationals working in an EU Member State are entitled to equal treatment with nationals according to both the Treaty and the Charter, while EU law on labour migration falls within the scope of the TFEU.<sup>22</sup>

## 7.6 The right to family reunification

The right to family reunification is only addressed in two of the directives under discussion here. These are the Blue Card and the Intra-Corporate Transfer Directives, which grant family reunification with derogations from Directive 2003/86/EC on the right to family reunification in several important respects. First, it shall not depend on the holder of an EU Blue Card or intra-corporate transferee having the prospect of obtaining permanent residence or having a minimum period of residence.<sup>23</sup> Second, integration requirements may not be applied until after family reunification

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<sup>19</sup> See for example, Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights (2009), para. 30; see also Human Rights Committee, General Comment No. 15, The Position of Aliens under the Covenant (1986), para. 2.

<sup>20</sup> ECtHR, *Gaygusuz v Austria* (No. 17371/90), 16 September 1996.

<sup>21</sup> ECtHR, *Niedzwiecki v Germany* (No. 58453/00), 25 October 2005.

<sup>22</sup> See for example, Groenendijk (2012), p. 135; and Guild and Peers (2006), p. 112.

<sup>23</sup> See Art. 15(2) Blue Card Directive and Art. 19(2) Intra-Corporate Transfer Directive.

has been granted.<sup>24</sup> Third, the time limit given for granting the permits is shorter, limited to 90 days in the Intra-Corporate Transfer Directive and 6 months in the Blue Card Directive.<sup>25</sup> Additionally, in the case of the family members of EU Blue Card holders, no time limit shall be applied for their access to the labour market (Art. 15(6) Blue Card Directive); likewise, the Intra-Corporate Transfer Directive provides for the access of family members to the labour market but without a time limit (Art. 19(6)). The rationale for the derogation in both cases is that it is “considered necessary to set out an attractive scheme” for these groups of workers and that this approach “follows a different logic from the Family Reunification Directive, which is a tool to foster integration of third-country nationals who could reasonably become permanent residents”.<sup>26</sup> The Single Permit Directive is silent on family reunification – there is no reference to it in the directive and the preamble of the Seasonal Workers Directive states that it does not provide for family reunification.<sup>27</sup>

This approach of employing the right to family reunification as a policy tool to attract highly skilled migrants could be found to be discriminatory. It bears a resemblance to the UK’s approach of offering students and workers the right to family reunification as part of actively seeking to attract them, while denying it to refugees, which it did not actively want to attract. In *Hodi and Abdi v the United Kingdom*, the ECtHR found that this policy violated Art. 14 in conjunction with Art. 8, while there was no reasonable justification found for the preferential treatment<sup>28</sup> of granting family reunification to students and workers and not to refugees.

## 7.7 Conclusions

In EU law on labour migration, the right to equal treatment with nationals is granted to third-country nationals to a different degree, depending on the economic and labour market objectives of the EU with respect to each group of migrants.

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<sup>24</sup> See Art. 15(3) Blue Card Directive and Art. 19(3) Intra-Corporate Transfer Directive.

<sup>25</sup> See Art. 15(4) Blue Card Directive and Art. 19(4) Intra-Corporate Transfer Directive.

<sup>26</sup> See European Commission, COM(2007) 637, op. cit., 11.

<sup>27</sup> See Directive 2014/36/EU, op. cit., Recital 46.

<sup>28</sup> ECtHR, *Hodi and Abdi v The United Kingdom* (No. 22341/09), 6 November 2012, para. 53.

This fundamental human rights principle is used as a policy tool in a way that results in the grant of preferential treatment. EU law on labour migration contravenes the principle of equal treatment based on nationality and administrative status as set forth in international and European human rights law and in international labour law, by dividing migrants into types and granting them the right to equal treatment based on their different administrative statuses. In comparative terms, the level of discrimination between the different groups of third-country nationals and nationals of the Member State where they reside and work, increases the less qualified and less economically desirable a group of migrants is considered to be for the competitiveness of the EU economy and the future demography of the EU.

Through the EU's sectorial approach and by not adhering to international and European standards on the prohibition of discrimination based on nationality, EU Member States have adopted legislative instruments that differentiate between groups of migrants who are classified according to a hierarchical system that institutionalises discrimination, based on nationality and 'status', against third-country nationals compared with nationals of the Member State where they reside and work. Moreover, through this approach the EU Member States are violating their human rights obligations at the international and European levels.

## References

- Groenendijk, K. (2012), "Are third-country nationals protected by the Union law prohibition of discrimination on grounds of nationality?", in K. Barwig and R. Dobbstein (eds), *Den Fremden akzeptieren: Festschrift für Gisbert Brinkmann*, Baden-Baden: Nomos.
- Guild, E. and S. Peers (2006), "Out of the Ghetto? The Personal Scope of EU Law", in S. Peers and N. Rogers (eds), *EU Immigration and Asylum Law Text and Commentary*, Leiden and Boston: Martinus Nijhoff Publishers.
- International Labour Organization (ILO) (2006), *Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*, Geneva, January.

## 8. FAIR ALLOCATION OF RISKS: A CHALLENGE FOR LABOUR MIGRATION SYSTEMS

*PETRA HERZFELD OLSSON*

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### 8.1 Introduction

Recruiting labour from abroad always involves risks for the three main stakeholders involved, the labour migrant, the employer and the state. The labour migrant decides to leave one country for another. That in itself could be a sacrifice.<sup>1</sup> However, the move implies that the labour migrant has valued the expected gains higher than the sacrifice. In most cases these expected gains are the expected income. The risks associated with this decision are loss of employment and/or less income. For the employer, a major risk is that the labour migrant cannot carry out the planned tasks. For the state, the fears relate to overstays or that the labour migrant will become a net economic burden (or both) (Kolb, 2010, p. 83).

The allocation of the risks involved between these three actors is one important factor for establishing a labour migration scheme that will produce decent working conditions. This aspect will be examined in this chapter. The focus will be on the allocation of risks between the labour migrant and the employer. Examples will be taken from two EU directives on labour migration, the Seasonal Workers Directive (2014/36/EU) and the Directive on Highly Qualified Employment (the EU Blue Card Directive, 2009/50/EC) and the Swedish labour migration system.<sup>2</sup> Admission requirements related to working conditions will illustrate the argument. The chapter will show how attempts to inculcate idea that labour migrants must not work under working conditions inferior to national workers can lead to

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<sup>1</sup> See the introduction in Howe and Owens (2016) p. 21.

<sup>2</sup> See Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, OJ L 155/17, 18.6.2009; see also 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, OJ L 94/375, 28.3.2014.



quite unfair consequences and produce the opposite results if not dealt with in a careful way.

## 8.2 Conditions of entry

To be granted a residence and work permit in the systems discussed, the labour migrant must fulfil certain conditions. This section will focus on the requirements related to a specific level of working conditions. All systems require that the labour migrant has received a concrete offer of employment from an employer. In Swedish law, this offer of employment must include a wage, insurance and other terms of employment not worse than those provided for in the relevant collective agreements or provided for by customs in the occupation or industry. This requirement applies to all labour migrants from third countries.<sup>3</sup>

In the two EU directives under examination, the conditions are framed a bit differently. The EU Blue Card Directive prescribes that the wage level offered in the work contract or binding employment offer must not be inferior to a relevant salary threshold, which shall be at least 1.5 times the average gross annual salary in the Member State concerned (Art. 5(3)). When implementing this provision, the Member States may require that all conditions in the applicable law, collective agreements or practices in the relevant occupational branches for highly qualified employment are met (Art. 5(4)).

For seasonal workers, another option has been chosen. The valid work contract or binding job offer must, according to the Directive on Seasonal Workers, among other things specify the remuneration, the working hours per week or month, the amount of any paid leave and where applicable, other relevant working conditions (Art. 6(1)(a)). The conditions referred to shall comply with applicable law, collective agreements and practices in the Member State (Art. 6(2)).

The requirements discussed have similar aims. The Swedish government argued that the system must not facilitate attempts by unprincipled employers to find employees and offer them employment conditions that are worse than those applying to current residents in Sweden.<sup>4</sup> The salary threshold in the EU Blue Card Directive was motivated

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<sup>3</sup> See ch. 6, sec. 2, Alien's Act (SFS 2005:716).

<sup>4</sup> See the Legislative Bill 2007/08:147, p. 27.

by the need to ensure that the threshold used would not be too low for a national or highly qualified EU worker to fill the vacancy, while corresponding to his or her qualifications.<sup>5</sup> The main argument behind these conditions seems to be concern that labour migrants would outcompete the national workforce through lower wage demands.

Other perspectives were highlighted when conditions related to working conditions for the seasonal workers were presented. The remuneration requirement was considered necessary to allow the competent authorities to assess whether the proposed remuneration is comparable to that paid for the respective activity in the Member State concerned. This was deemed vital in order to avoid an unfair advantage for the employer and exploitative working conditions for the seasonal worker. The working hours requirement had a somewhat different aim. It should ensure that employers have only requested third-country seasonal workers in cases of real economic need (and have sufficient employment capacity) and would serve as a guarantee of a certain, fixed level of remuneration for the seasonal workers. The requirements related to other relevant working conditions, such as insurance, were there to enable efficient control by the competent authorities before admission.<sup>6</sup>

The arguments in the three systems are apparently structured around the concepts of unfair competition and avoidance of exploitation, but the emphasis differs between systems and categories.

### 8.3 The risks involved

#### *Failure to adhere to the requirements – Consequences for the labour migrant*

To ensure that the required level of working conditions is upheld, a particular strategy has been adopted. If the required level of working conditions in the three systems has not been upheld, the labour migrant will or can lose the authorisation to work and remain in the country. According

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<sup>5</sup> See European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, Brussels, 23.10.2007, p. 9.

<sup>6</sup> See European Commission, 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 purposed of seasonal employment, COM(2010) 379 final, Brussels, 13.7.2010, p. 9.

to Swedish law, the Migration Agency must withdraw the residence permit for the labour migrant if it turns out that the requirements related to the level of working conditions have not been fulfilled.<sup>7</sup> If the labour migrant is in Sweden when the residence permit is revoked, a corresponding decision on expulsion shall be adopted.<sup>8</sup> According to the EU Blue Card Directive, the Member States must withdraw the EU Blue Card if the holder did not meet or no longer meets the conditions for entry and residence laid down in the directive (Art. 9(1)b).

The requirement on salary thresholds is part of that package. In the Seasonal Workers Directive, the consequences of failure to adhere to the working conditions required are framed a bit differently. The Member States may withdraw the authorisation for the purpose of seasonal work where the entry provisions on working conditions were not or are no longer complied with (Art. 9(3)(a)). But, very importantly, any decision to withdraw the authorisation must take account of the specific circumstances of the case, including the interests of the seasonal worker, and respect the principle of proportionality (Art. 9(5)).

It is clear that an employer's failure to uphold the level of working conditions prescribed in the entry conditions will lead to very severe consequences for EU Blue Card holders in the EU and for all labour migrants in Sweden. Yet, for workers covered by the Seasonal Workers Directive, a failure to adhere to the working conditions does not have to imply a withdrawal of the labour migrant's permit to work and stay in the Member State. It depends on whether a withdrawal is required in a national context. However, if such a consequence is prescribed in national law, a proportionality test must be conducted before a decision to withdraw the permit can be taken.

### *Failure to adhere to the requirements - Consequences for the employer*

A failure to adhere to the required working conditions entails a high level of risk for the labour migrant in the Swedish and EU Blue Card regimes. The expected income will not be earned and the labour migrant may have to leave the country. This consequence in itself can hardly encourage the labour

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<sup>7</sup> See ch. 7 sec. 7(e), Alien's Act (SFS 2005:716). The labour migrant may, if certain circumstances are met, stay in Sweden for four months to look for a new job. The expulsion will be executed after that period if no job has been found.

<sup>8</sup> See ch. 8 sec. 16, Alien's Act (SFS 2005:716).

migrant to try to enforce the required working conditions. If a failure is detected by the authorities, the labour migrant risks being expelled.<sup>9</sup> This situation can also be exploited by unscrupulous employers. Thus, it is crucial that other mechanisms are in force that encourage the employer to fulfil the prescribed working conditions. This subsection will discuss the extent to which the labour migration schemes analysed include such mechanisms.

According to Swedish law, a failure to uphold the level of working conditions prescribed has no immediate consequences for the employer. No sanctions apply. But it could affect the employer's future possibilities to employ labour migrants. When the Swedish Migration Agency decides whether to approve an application for a work permit, it can argue that the offer is not serious and therefore the application should be denied.<sup>10</sup>

For work in specific sectors most prone to abuse, targeted checks on the employers are conducted. These sectors are berry-picking, cleaning, hotels and restaurants, construction, retail, farming and forestry, auto repairs, services and work through temporary agencies.<sup>11</sup> Previous failures to comply with the required conditions could close the door for those employers wanting to continue to employ labour migrants from third countries. This aspect could be categorised as a factor that could encourage the targeted employers to uphold the required working conditions.

For employers of EU Blue Card holders, there are no sanctions prescribed by the EU directive. There is no specific provision at all on sanctions in that directive.<sup>12</sup>

For seasonal workers, a different approach has been adopted. Art. 17 is devoted to the topic of sanctions against employers. The Member States are obliged to provide for sanctions against employers who have not fulfilled their obligations under the directive. Such sanctions shall include the exclusion of employers who are in serious breach of their obligations under the directive from employing seasonal workers. The sanctions shall be effective, proportionate and dissuasive (Art. 17(1)).

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<sup>9</sup> Problems related to the interaction of labour law and migration law have been highlighted by a number of authors, such as B. Anderson, J. Fudge, M. Freedland, C. Costello, J. Howe, R. Owens and B. Ryan, just to mention a few.

<sup>10</sup> See Legislative Inquiry SOU 2016:91, p. 64.

<sup>11</sup> See the Swedish Migration Agency website ([www.migrationsverket.se/English/Private-individuals/Working-in-Sweden/Employed.html](http://www.migrationsverket.se/English/Private-individuals/Working-in-Sweden/Employed.html)).

<sup>12</sup> The EU principles on equivalence and effectiveness for national implementation of EU law of course apply. See for example, Hofmann (2014), p. 198.

Moreover, if the authorisation for the purpose of seasonal work is withdrawn pursuant to, among other things, failure to adhere to the admission requirements on working conditions, the employer shall be liable to pay compensation to the seasonal worker in accordance with procedures under national law. Any liability shall cover any outstanding obligations the employer would have to respect if the authorisation for the purpose of seasonal work had not been withdrawn (Art. 17(2)). According to Art. 17(3), the Member States may also adopt subcontracting liability procedures for seasonal workers.

It seems that the Seasonal Workers Directive provides for quite effective mechanisms. They could potentially both encourage the employer to adhere to the required level of working conditions and limit the risks for the labour migrants if failures occur.

#### **8.4 The allocation of risks and the combined effects of the mechanisms discussed**

In the systems discussed it is emphasised that a certain level of working conditions must be upheld in the EU and in Sweden. To sharpen this requirement in Swedish law, a mandatory provision was introduced to withdraw the residence permit when failure to uphold this level is detected.<sup>13</sup> Since then, a number of residence permits have been withdrawn on this basis.<sup>14</sup> The extent to which any similar development has occurred in relation to EU Blue Cards in the EU is not known. In Sweden, this is a non-issue, as so few EU Blue Cards have been issued.

The systems nonetheless illustrate that in principle all the risks connected to upholding the admission requirements related to working conditions are borne by the labour migrant. The employer will evidently lose an employee, but that is all. For some employers, the possibility to employ labour migrants in the future could be restricted in the Swedish system. It is quite obvious that the actor who is the *primus motor* in the systems, the employer, bears the least risk. This is particularly the case in sectors where there are no labour shortages. Frequently the argument is raised that highly skilled workers are in a different bargaining position from low-skilled workers. That is probably often the case, but is not evident in all cases (Howe and Owens, 2016, p. 11). The risk of losing a residence permit for a fault

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<sup>13</sup> See Legislative proposal 2013/2014:227, p. 10.

<sup>14</sup> See the Legislative inquiry SOU 2016:91, p. 84; see also Centrum för rättvisa (2016).

committed by an employer can hardly be perceived as attractive for any worker. Such a system does not really encourage an employee to try to enforce his or her rights. The risks involved are too high and the likelihood of earning at least some of what was expected could be considered better than earning nothing at all.

One idea could therefore be to reconsider the allocation of risks connected to failures to uphold a particular level of working conditions. It is important to keep in mind that the labour migration regimes discussed to a very large extent focus on the interests of the employer. It is the employer's needs that should be fulfilled. The labour migrant's presence on EU territory is to a great degree in the hands of these employers.

From these perspectives, the solution in the Seasonal Workers Directive is an important step forward, for a number of reasons:

- First, it does not prescribe mandatory withdrawal if the required level of working conditions is not upheld.
- Second, the required proportionality test will lead to a fair balance between the interests involved in those cases where withdrawal is discussed.
- Third, and also very importantly, any failure to fulfil the obligations under the directive should lead to sanctions against employers – sanctions that must be effective, proportionate and dissuasive. It is likely that the sanction provision has the potential to enforce the level of working conditions required. And this is in particular the case when the labour migrant does not risk a withdrawal of the authorisation to work in the EU. The mandatory application of the proportionality principle in cases where a withdrawal is applicable is also of utmost importance. According to Swedish law, quite minor errors can lead to expulsion because no proportionality principle applies. Fourth, according to the Seasonal Workers Directive, if the withdrawal takes place, the employer will be obliged to economically compensate the employee for the unfulfilled expected wages. The allocation of the risks involved in this system is very different from the others. The prescribed interaction between withdrawal and sanctions seems to be a very promising example of a system that theoretically could lead to the prescribed level of working conditions being upheld. This system could therefore act as a role model for labour migration systems.

During 2017, revisions of both the Swedish system and the EU Blue Card are on the agenda. Could it be possible to see any traces of an ambition to use the Seasonal Workers Directive as such a role model?

## 8.5 The way forward

The Swedish government recently launched an inquiry with the task of considering measures that would strengthen the position of the labour migrant on the Swedish labour market. One specific task was to look at introducing sanctions against employers failing to fulfil the prescribed level of working conditions.<sup>15</sup> The inquiry proposed to criminalise employers that intentionally do not fulfil the requirements on working conditions in the Alien's Act.<sup>16</sup> The sentence would be a maximum of one year of imprisonment or fines. The inquiry also considered financial sanctions similar to those in Art. 17(2) of the Seasonal Workers Directive. However, that was turned down with the argument that it could be difficult for the employer to foresee its financial situation and the precise needs the company would have when the labour migrant enters Sweden.<sup>17</sup> The government has not yet decided how to proceed on these issues.

In the Commission's proposal for a revised EU Blue Card Directive, the question of sanctions is only dealt with in relation to cross-border movements (Art. 22). The admission requirements related to working conditions have been strengthened (Art. 1(3)) and a proportionality test before deciding on withdrawals has been added (Art. 7(4)). These two provisions are important steps forward. It is nonetheless a pity that there has been no further advance on the route taken by the Seasonal Workers Directive. Maybe the European Parliament can push for corresponding provisions on sanctions and withdrawals in this directive. Taking into account that this directive addresses groups that are considered greatly wanted on EU territory, the potential costs for employers are not likely to be very high. Still, such sanctions could alleviate a labour migrant's doubts in choosing an EU country.

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<sup>15</sup> See Instructions for the committee, Kommittédirektiv 2015:74, p. 7.

<sup>16</sup> See SOU 2016:91, p. 73.

<sup>17</sup> *Ibid.*, p. 115.

## References

- Centrum för rättvisa (2016), *Arbetskraftsinvandrares rättslöshet i Sverige – en rapport om utvisningar med bristfälligt lagstöd*, Stockholm.
- Hofmann, H.C.H. (2014), “General Principles of EU law and EU administrative law”, in C. Bernard and S. Peers (eds), *European Union Law*, Oxford: Oxford University Press.
- Howe, J. and R. Owens (2016,) *Temporary Labour Migration in the Global Era – The Regulatory Challenges*, Oxford and Portland Oregon: Hart Publishing.
- Kolb, H. (2010), “Emigration, Immigration and the Quality of Membership”, in G. Menz and A. Caviedes (eds), *Labour Migration in Europe*, London: Palgrave Macmillan.



# 9. IMPLEMENTATION OF THE ICT DIRECTIVE: A PRACTITIONER'S PERSPECTIVE

*JELLE KROES*

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## 9.1 Introduction

Although the EU Directive on Intra-Corporate Transfer (2014/66/EU) has met with enthusiasm in the Netherlands on a general level, it has also raised concerns. On 27 January 2017 in Brussels I shared a few remarks about the state of play of the Dutch implementation of the ICT Directive, and the concerns raised by several Netherlands-based multinational companies. These concerns, as it turned out, largely carried among immigration stakeholders: legal practitioners, (semi-)government institutions, bilateral trade organisations and so on. The dominant concern was the obligatory character of the ICT permit scheme in relation to its limited renewability. In this chapter I will reflect on the Dutch implementation, the way the industry has responded and the counter-reaction of the immigration authorities.<sup>1</sup>

## 9.2 Transposition of the ICT Directive in the Netherlands

The transposition of the ICT Directive in the Netherlands was quick and sudden: the three final legal texts were publicised on 25 and 28 November 2016 and entered into force on 29 November 2016. The draft implementation instruments had not been put forward for consultation with relevant stakeholders (companies, immigration advisers). Apparently, the government was of the opinion that the directive was easy to transpose and should raise no major issues. By way of service, the Dutch Immigration and Naturalisation authorities (IND) during the month of November 2016 organised a series of information meetings for stakeholders about the new rules.

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<sup>1</sup> This chapter draws upon the Alien's Decree (Vreemdelingenbesluit), the Alien's Provision (022451521 Voorschrift vreemdelingen) and the Implementation Guidelines to the Employment of Foreigners Act (Regeling uitvoeringsegeling Wav).

At these meetings, however, the IND did struggle to answer a certain number of questions, particularly those related to the (non-)renewability of the ICT permit. The Netherlands applies a six-month waiting term before a new ICT permit can be applied for after a previous one has reached its maximum duration, and the question was raised about whether an ICT permit holder would be able to switch to a national permit scheme after three years, without observing the waiting period. The IND gave no conclusive answer to this question, which led to some confusion among stakeholders.

### **9.3 Confusion among stakeholders**

The analysis, in fact, seems simple. Art. 2 of the directive clearly stipulates that the directive applies (also) to ICT permit-holders (in addition to third-country nationals who fall under the material scope of the directive). Hence, the obligation to leave the territory of the Member States applies to them, as well as the obligation to observe the waiting period. The only way to be eligible for a national permit immediately (i.e. without moving out of the EU and observing the waiting period), is to make them fall out of the material scope of the ICT Directive. To that end, the employee would have to be placed on a local contract and payroll.

The IND seemed unhappy with that outcome and suggested that a national permit was a possibility, regardless of whether the contract and the payroll were transferred to the Netherlands. Since it did not substantiate its position with legal arguments, stakeholders got confused, and a certain amount of anxiety started to build up. Would transferees effectively be able to continue their stay immediately after the maximum three years of the ICT permit, or not?

### **9.4 Corporations' favourite pet: The scheme for highly skilled migrants**

By way of background, it is useful to note that the national permit for a highly skilled migrant (HSM) (the Kennismigrantenvergunning) is granted for five years, and is renewable without limitation. Its application process is simple and fast (two weeks) and it offers favourable associated rights (e.g. full access to the labour market for spouses). Although there is a national ICT scheme, employers had the option to choose an HSM permit even if the contract and payroll remained in the country of origin. In practice, therefore, the HSM scheme was used on a large scale by companies for both local hires

and for their intra-company transferees. But the ICT Directive changed all that. Since it is transposed over whatever national scheme applies, companies worried about not being able to continue with their tested and proven mobility programmes, and that the directive would effectively limit the existing options.

This resulted in questions that we received at our practice about how to legitimately avoid the application of the directive. These questions came primarily from major multinational corporations and from bilateral chambers of commerce/trade organisations (e.g. the Japanese External Trade Organisation). The concerns were to a certain extent connected to the social security policies that some corporations have in place. For example, a Japanese multinational may prefer to maintain its staff on a Japanese payroll when they are seconded abroad, in order to achieve a better arrangement for the burdens of social premiums in comparison with the employees being transferred to a local Dutch contract and payroll. Such beneficial solutions are based on bilateral treaties and although they are generally limited in time, the limitation is often longer than the three years of the ICT permit. As in the case of Japan, postings could last for a maximum of four years before losing the social security premium benefit, and most postings therefore were for four years, at the end of which the company would have to make a decision on whether to recall the transferee, or put him or her on a local contract and payroll. Under the ICT permit, this decision should be made within three years, as the only way to continue staying is to make sure the case falls out of the scope of the ICT Directive in order for the national HSM scheme to become available, or at least some were of this opinion.

However, placing employees on a Dutch payroll simply for the purpose of renewing their legal stay and work authorisation was perceived as highly undesirable by some companies due to the reasons just explained, and by others for even more fundamental reasons, e.g. companies that have a human resource policy to centralise all of their payroll in one specific country for all of their staff, regardless of the country of the world in which they are effectively stationed.

## **9.5 Legislation by frequently asked questions**

Since November 2016, the IND has published two new documents: the ICT Directive frequently asked questions (FAQs) in the Dutch language, dated 8 December 2016, and the ICT Directive FAQs in the English language dated 16 February 2017. These texts have no formal legal status, and there is no

precedent for this form of communication in the field of immigration law. It seems nevertheless that the IND has chosen this format by way of guidelines for the day-to-day implementation of the ICT Directive scheme. The FAQs are posted on the IND website and there is no formal process for their drafting or amendment. The official immigration guidelines, the Immigration Circular (Vreemdelingen-circulaire), do not contain the same level of detail as the FAQs.

## 9.6 A national permit after expiration of the ICT permit?

When the English version (the 'English FAQs') was published in February 2017, it contained more questions and answers than the Dutch version (the 'Dutch FAQs') of December 2016, and some of the answers were different. The Dutch FAQs contained the following wording:

The idea behind the ICT Directive is that after the stay in the Netherlands the employee returns to the foreign employer or goes to another EU based undertaking of the organisation.

Yet in the English FAQs, a sentence had been added to this:

However, the employee can apply for a national residence permit after the maximum period of residence.

This suggests that the waiting period must not in all cases be observed, which is affirmed explicitly by the following question and answer:

*Q: May the holder of an ICT residence permit get a highly skilled migrant permit after three years of residence, even if he keeps his labour contract with the employer outside the EU?*

*A: When the maximum period of residence on the grounds of the ICT Directive (this is 3 years for a manager or specialist and 1 year for a trainee-employee) has passed, the employee no longer falls within the scope of the Directive now that he has residence in the Netherlands at the moment of submitting the application. If he meets the conditions of the Highly Skilled Migrants' Scheme and the Dutch undertaking where he works is recognised as a sponsor, he can apply for a highly skilled migrant residence permit.*

The Dutch FAQs were amended on the same date and now contain the same wording.

## 9.7 The government's position

So the IND has finally taken the 'official' standpoint that even when the contract and payroll remain abroad, the ICT permit holder can apply for a national permit immediately after expiration of the ICT permit. This position has been endorsed by the Ministry of Security and Justice, or more likely, the latter has decided that this should be the official interpretation of the directive.

Although the directive leaves no room for this interpretation, in my view, one might argue that as long as it is a requirement that the ICT permit must first be held for its full duration, the spirit and purpose of the directive are not directly jeopardised by this approach. What is less easy to understand, is why the Dutch government chose to use the option of a waiting term – of six months no less – if it did not aspire to implement it. It would have reached essentially the exact same result, but in a more consistent way.

## 9.8 World Trade Organization/General Agreement on Trade in Services

The ICT Directive allows for the application of immigration schemes included in pre-existing bilateral agreements. Here again, the Dutch government has taken a quite liberal approach. Its interpretation of the General Agreement on Trade in Services (GATS) Mode 4 obligations is such that these should prevail, even when a transfer is in the scope of the ICT Directive. The GATS Mode 4 obligations cover the same types of transferees, but an important difference is that the GATS obligations (at least in the way they have been transposed into Dutch law) can effectively be renewed, if the transfer for some reason is prolonged. No six-month waiting period applies. More importantly, the prevalence of the GATS scheme applies to all transferees coming from a WTO member country; it is not required that they fall into the scope of the GATS Mode 4 definitions.

This approach has been incorporated into the Implementation Guidelines of the Employment of Foreigners Act, a ministerial decree. Whether it is compliant with the exemption clause in the ICT Directive remains to be seen. For the time being, the GATS ICT scheme is an outcome for those companies who are not recognised sponsors. For recognised sponsors, the permit under the ICT Directive is processed in two weeks; otherwise, the 90 days apply. The GATS ICT scheme is a work permit

scheme, operated not by the IND but by the Central Labour Office (UWV), which applies a three-week target processing time, and is thus much faster. In urgent cases, the GATS ICT permit will form a useful alternative to the ICT Directive.

### **9.9 Chief executive officer/major shareholder: Important news**

Another question that came up in our practice was whether the ICT Directive would cover the transfer of a chief executive officer or other executive, who at the same time was a major shareholder of the legal entity that holds the undertaking established outside the territory of the Member States. The FAQs address this as follows:

*Q: Within the framework of the highly skilled migrant regulation a managing director may not possess more than 25% of the shares. Does this also apply to managers within the scope of the ICT Directive?*

*A: No, this condition does not apply.*

In the Netherlands, this is an important point, as the permit scheme for entrepreneurs is functioning very poorly. Practitioners are generally looking for alternatives in the form of sponsored employee-oriented schemes. However, 25% (or more) shareholders are not supposed to use those schemes. The ICT Directive seems to solve this issue and somewhat close the gap between entrepreneurs/business owners and employees. The FAQs do not make clear whether there is a certain maximum. Will a 100% shareholder be able to transfer him- or herself, too?

### **9.10 The European Commission**

It remains to be seen what the position of the Commission will be, basically on all of the issues discussed above. But at present the Commission is probably more interested in ensuring the transposition of the ICT Directive in the Member States where this has yet to take place.

# 10. LABOUR MIGRATION TO EUROPE: WHAT ROLE FOR EU REGULATION?

*MIKKEL BARSLUND AND MATTHIAS BUSSE*

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## 10.1 Introduction

In recent years the focus in the EU has been on controlling irregular migration flows of third-country nationals. Less public attention has been given to the issue of shaping managed migration, in particular labour immigration from third countries. This chapter delves into the role of the EU in facilitating labour migration to EU Member States. Immigration policy for third-country nationals is fundamentally a Member State competence.<sup>1</sup> Hence, EU policies in this area necessarily trade Member States' ability to control the entry of third-country nationals for the gain from positive externalities of EU regulation. Moreover, immigration policy is a particularly salient issue; thus, the added value of EU intervention needs to be clear-cut and significant.

At the EU level, two instruments are of central importance when it comes to highly skilled labour migration: the Blue Card Directive (2009/50/EC) and the Students and Researchers Directive (2016/801/EU). In 2013, the Commission proposed to combine and recast the Students and Researchers Directives. The proposal with amendments was finally adopted in the spring of 2016. One of the main improvements is the right to a nine-month job-search period after graduation within the host country. Minor improvements for the mobility of students and researchers were achieved by, for example, lowering the administrative burden of applying for a visa in a Member State different from the country of graduation. Subsequently, in June 2016, the Commission proposed a revision of the EU Blue Card

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<sup>1</sup> In the case of irregular migration and individuals seeking protection – i.e. asylum seekers – Member States are subject to principles laid out by the Common European Asylum System and adherence to international treaties, hereunder the Geneva Convention.

scheme aimed at making the EU a more attractive destination for highly skilled individuals.

This chapter concentrates on these two directives, with the main emphasis on the Blue Card Directive. Both directives are especially important for attracting highly skilled and talented individuals to the EU labour markets and are the main tools for policy action at the EU level. However, it is important to keep in mind that the labour force of Member States is complemented by third-country nationals in a number of other ways through asylum, family unification and various national schemes to attract skilled foreigners. In fact, only a small percentage of third-country national migration comes through the current Blue Card scheme and related national schemes, as well as through the Students and Researchers Directive.

We argue that the current proposal for a recast of the Blue Card Directive is well measured and ensures proper, though small, added value of EU regulation on this issue. Consequently, this means limiting EU regulation to highly skilled individuals only, as is currently proposed. The reason for this is, as we argue, that European labour markets are fragmented and distinct – not only as to current performance in terms of unemployment rates but also when it comes to shortage professions. Furthermore, population ageing, an often-repeated argument for increasing labour migration, will occur at different speeds and intensities in Member States.<sup>2</sup> This implies that Member States are best placed to design their own flexible mechanisms to cope with perceived labour market needs. Overall coordination of labour market needs at the EU level adds little value. From a public finance perspective, the pure cost-benefit analysis when it comes to low-skilled migration is also far from clear-cut.<sup>3</sup>

The rest of the chapter is structured as follows: the next section describes the most important features of the Blue Card Directive. Subsequently, we show how diverse the EU is in terms of labour market performance and future challenges with respect to population ageing. We then dive into the core purpose of the Blue Card scheme of attracting talented individuals, and illustrate that the EU is not only competing with the US (and

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<sup>2</sup> We do not find the direct link between population ageing and immigration convincing, but it is nevertheless an oft-repeated argument in the debate on labour migration.

<sup>3</sup> Another argument for increasing low-skilled migration from third countries is that it fosters economic development in poor countries. It goes beyond this chapter to consider its merits. We focus on added value for EU Member States.



in the near future the UK), but also emerging countries for the best and brightest.

## 10.2 The Blue Card Directive<sup>4</sup>

The 2009 Blue Card Directive was meant as a cornerstone in the strategy to make the EU more attractive to highly skilled workers from third countries. Indeed, the directive itself mentions the provisions as a tool for “becoming the most competitive and dynamic knowledge-based economy in the world”.<sup>5</sup> The central idea behind a Blue Card is that highly qualified and talented individuals increasingly consider global possibilities and opportunities. The market for human capital with skills in high demand is ever-more global.

To benefit from the current scheme a Blue Card applicant has to prove a valid work contract that meets the national salary threshold of at least 1.5 times the national average.<sup>6</sup> The applicant has to hold an accredited university degree.<sup>7</sup> For the holder, the Blue Card provides not only a work permit but also a set of additional rights, among them the right to switch jobs within the EU without much administrative burden, if certain prerequisites are met.

Nevertheless, the current version of the Blue Card Directive has not delivered on its promise. Germany is de facto the only country giving Blue Cards based on the directive in any meaningful numbers, with 14,600 out of the total 17,100 Blue Cards issued in 2015.<sup>8</sup> The directive allows Member States to apply national rules, which do not necessarily confer any rights of movement within the EU (Eisele, 2013; Wiesbrock, 2010). Member States have significant discretion in defining the criteria for issuing the Blue Card

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<sup>4</sup> This section builds on Barslund and Busse (2016).

<sup>5</sup> See 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, OJ L 155/17, 18.6.2009 (<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32009L0050>)

<sup>6</sup> The threshold can be lower – in several countries, sectors that are nationally identified as having shortages offer a lower threshold.

<sup>7</sup> In some countries, a similar length of relevant work experience may also suffice.

<sup>8</sup> See European Commission, Executive Summary accompanying the Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, SWD/2016/0194 final – 2016/0176 (COD), Brussels, 2016.

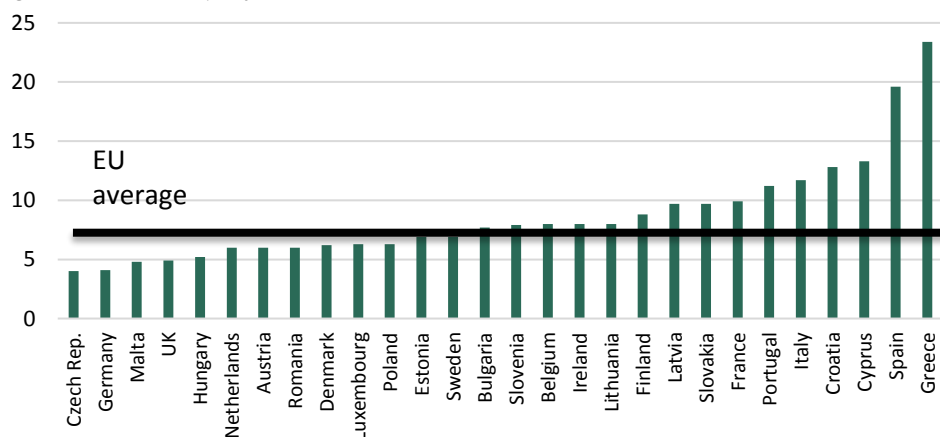
(earnings threshold, education, quotas, etc.). These factors have led to a low uptake in most Member States, with the exception of Germany and Luxembourg.

### 10.3 The diversity of European labour markets

As opposed to the single market for goods and services, a European single labour market has yet to materialise. This is clearly exemplified by the stark and deep-rooted heterogeneity of national labour markets as well as low intra-EU labour mobility (Barslund and Busse, 2016). This poses a challenge for a common EU immigration approach, since labour market needs differ and these should be reflected in appropriate national-specific entry criteria. The more homogenous the need for a type of foreign worker, the stronger is the argument for a European approach and firm embedding of rights to free movement for third-country nationals.

Still, key labour market indicators point to the profound and persistence heterogeneity of EU labour markets: the unemployment rate gap between the worst and best EU performers spans up to 19.5 percentage points, with a large dispersion around the EU average (Figure 10.1).

Figure 10.1 Unemployment rates (2016)



Data source: Eurostat.

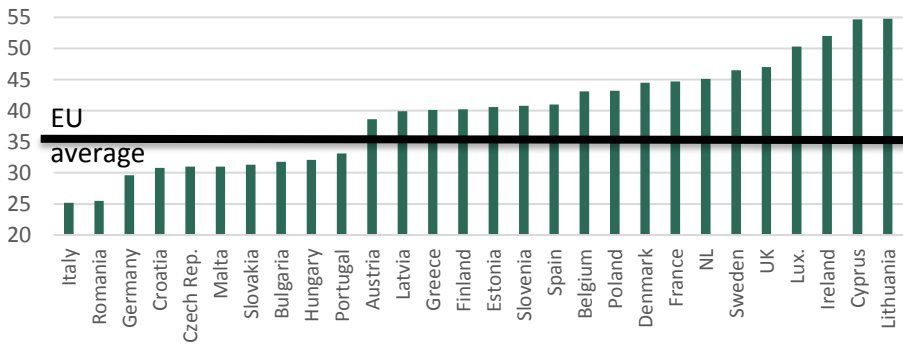
The unemployment rates of the low-qualified<sup>9</sup> display even larger gaps across the EU. Another dividing characteristic is the share of the long-term

<sup>9</sup> That is, an ISCED level of educational attainment below ISCED 3.

unemployed in total unemployment. In Sweden, very few jobseekers become unemployed long term (19%), while in Slovakia and Greece around two-thirds of all unemployed individuals have been unable to find a job over the past 12 months – evidence of clear structural differences among Member States.

Differences in labour market outcomes are not the only distinguishing feature. Educational attainment across the EU remains diverse as well. In Italy only around 15% of the workforce holds a tertiary qualification while in Ireland more than twice as many do (37%). Even for the younger generation<sup>10</sup> this gap has not shrunk: among those aged 25–34 the share for Italy is 25%, while many of the northern and Eastern European Member States achieve rates above 40% (Figure 10.2).

Figure 10.2 Share of individuals aged 25–34 with tertiary education (2015)



Data source: Eurostat.

The OECD's PIAAC<sup>11</sup> survey further shows that the (implied) skill intensities of the EU27 economies differ substantially and thus the labour demand in terms of skilled professions are not homogenous, thereby pointing to different recruitment and human capital creation needs. Moreover, the integration of the European economies has led to specialisation, which has further amplified long-standing differences in the sectoral breakdowns among the Member States. This can also be observed on the labour markets, in particular with regard to vacancies by sector. In the

<sup>10</sup> This is defined as the age group 25–34, since it is the first age group that will have completed graduate programmes.

<sup>11</sup> PIAAC refers to the Programme for the International Assessment of Adult Competencies.

Czech Republic, Poland and Hungary, nearly a third of all vacancies stem from the industrial sector (excluding construction), whereas in many other countries industrial demand is less than 10%. In Greece and Cyprus, 30% of vacancies are found in 'accommodation and restaurants', and in the former another 30% come from the wholesale sector. The Slovenian economy has a higher than average demand for construction workers (19%), while vacancies in financial services are only of macro importance for Luxembourg (9%). These discrepancies exemplify the heterogeneous labour demand according to profession as well as skill level.

The evidence points towards very weakly integrated labour markets in terms of both structural features and mobility across borders. This fact has to be borne in mind when discussing a European policy approach to labour immigration. This means there is little value in coordination at the EU level as needs differ considerably. The Blue Card can be regarded as an exception, since all EU Member States are seeking highly qualified and talented workers who already have a job offer. They are unlikely to pose an economic burden for any of the Member States (even when moving from one Member State to another over time). In light of the common interest in foreign talent, the Blue Card is seen as a tool to improve the EU's attractiveness to highly qualified and talented workers vis-à-vis its global competitors.

#### **10.4 The EU in the world battle for talent**

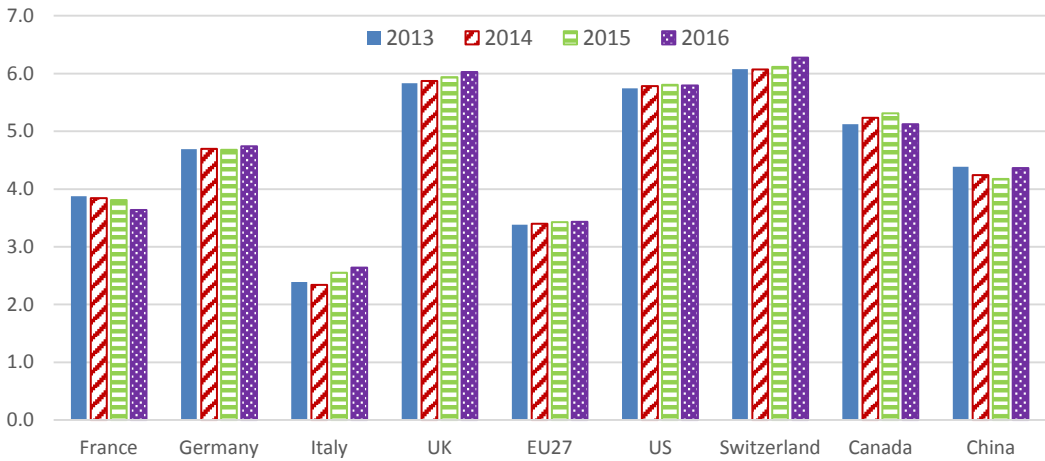
The advent of the knowledge-driven economy and the mounting demographic challenges the EU faces have led governments to implement policies to retain the domestic highly qualified while at the same time attract foreign talent. Given that demographic challenges are felt in most advanced economies, the struggle for internationally mobile, highly qualified workers has been coined the 'battle for talent'.

For talent from the emerging economies, the EU is still among the most attractive places in the world but it is by no means at the top. The US in particular has established itself as the leader in the battle for talent with smaller economies such as Canada and Switzerland at par. The World Economic Forum's Competitiveness Index<sup>12</sup> contains a survey-based sub-indicator estimating the 'ability to attract talent' (Figure 10.3).

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<sup>12</sup> See World Economic Forum, "Global Competitiveness Index", 2017 (<http://reports.weforum.org/global-competitiveness-index/#topic=data>).

Figure 10.3 Ability to attract talent



Data source: World Economic Forum.

The weighted EU27 average reaches only a score of 3.4, which remains far behind its direct competitors with a score of almost 6.0. In fact, of the major EU countries only the UK manages to breach the top 10 and is in a position to effectively compete with the US. Post-Brexit, the competitiveness of the EU will further deteriorate and the past years have not shown a substantial increase in attractiveness. More worrisome still is that new competitors are entering the stage. Foremost, China has become a new player in the talent game that competes especially on the Asian labour market but also beyond.

Why is the EU27 falling behind when its potential in terms of affluence is (in many Member States) not far behind the US? The language barrier is one of the deterring factors for foreign talent; furthermore, the US is seen as providing more opportunities in terms of the business environment and lower taxation. The excellent reputation the US enjoys has many more facets, among them the low administrative burden for visa applications for highly skilled workers. The US Green Card is highly coveted and is widely known. The EU's current Blue Card system has not been able to match the Green Card, which is reflected in the low usage and awareness, and has not had much impact on the EU's position in the battle for talent. When launched in 2009, the explicit goals were "to make the EU a more attractive destination

for foreign highly skilled workers and contribute to strengthening its knowledge economy".<sup>13</sup>

In 2014 only 38,774 highly skilled third-country nationals<sup>14</sup> entered the EU while the US, whose population is only 62% of the EU's, attracted ca. 200,000 highly skilled workers.<sup>15</sup> The EU is either not seeking to attract as many highly skilled workers or is not able to recruit as many as desired via the national or the Blue Card schemes.

Another viable strategy for the EU to ensure a sufficient supply of foreign talent focuses on drawing and retaining promising students from abroad. In the US over a million international students enrolled in 2015, which represents around 5% of all students.<sup>16</sup> Retaining foreign students after graduating from a domestic university is a useful move to fare better in the talent game. For this to succeed, two ingredients are necessary: i) attractive universities and ii) opportunities (visa)/support for students to find a job upon graduation.

The EU has many universities with good reputations, however, once again the US is the global leader and the EU is very reliant on the elite universities in the UK. The *Times Higher Education* ranking in 2017 shows that the US holds the pole position with 25 out of the top 50 universities.<sup>17</sup> The UK is only European country with a university in the top 10 and excluding the UK<sup>18</sup> the EU only boasts 5 universities in the top 50. Nevertheless, the EU possess numerous universities in the top 500, which illustrates the good average quality of EU universities as opposed to a just few outstanding

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<sup>13</sup> See European Commission, Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378 final - 2016/0176 (COD), Brussels, 7.6.2016.

<sup>14</sup> In the same year the EU issued merely 13,852 Blue Cards (nearly 90% of those by Germany) and many were provided to third-country nationals already residing in the EU. See European Commission, SWD/2016/0194 final (2016), op. cit.

<sup>15</sup> See European Commission, COM(2016) 378 final (2016), op. cit.

<sup>16</sup> See the National Center for Education Statistics (2016) and Institute of International Education (2016).

<sup>17</sup> See *Times Higher Education*, "World University Rankings 2016-2017" ([www.timeshighereducation.com/world-university-rankings/2017/world-ranking#!/page/0/length/25/sort\\_by/rank/sort\\_order/asc/cols/stats](http://www.timeshighereducation.com/world-university-rankings/2017/world-ranking#!/page/0/length/25/sort_by/rank/sort_order/asc/cols/stats)).

<sup>18</sup> The UK alone has 7 in the top 50 (more than rest of the EU) and Oxford is ranked first.

universities (as is currently the case for China – see Morehouse and Busse, 2014).

Improving the reputation of European universities will be key in the future to attract talent early but this is a Member State competence and the role for the EU is limited. One added value stems from granting graduates access to intra-EU mobility and an automatic, EU-wide, valid jobseekers visa. These are two rights of international students that could boost the attractiveness of the EU as a whole. The Directive on Students and Researchers is a first step in this direction in helping to develop an attractive package for foreign students.

## 10.5 What role for the EU?

The EU is involved in many policy areas, some where it has been granted exclusive competence and others where competences are shared with Member States. The notion behind this separation of tasks is that the EU institutions should play a decisive role only where Member State policies create externalities for other Member States and where a strong ‘economies of scale’ argument exists. Migration policy is a Member State competence, though some aspects, such as attracting highly qualified foreigners, are also dealt with at the EU level.

The Students and Researchers Directive and the Blue Card Directive are two such EU endeavours in what previously had been a Member State domain. EU added value rests on a common interest in attracting foreign talent and the additional global attractiveness of a European approach. The latter stems from the fact that coordination bringing rights at the European level – especially rights related to EU mobility – makes each country more attractive for third-country nationals than similar national schemes would. This effect is particularly large for small countries, which may otherwise struggle to attract talented individuals to what are from a global perspective small local labour markets.

For low- and medium-qualified third-country nationals, the attractiveness of EU countries lies primarily, but not exclusively, in the potential for a higher standard of living. Stated in economic terms, there is not much global competition for these segments of the labour force. Hence, there is much less scope for EU coordination to enhance attractiveness to them. For these reasons, we see little added value in expanding the scope of the proposed recast of the Blue Card Directive to the low- and medium-qualified.

In addition, there may be an important political trade-off between the inclusiveness of the Blue Card (i.e. accessibility for third-country nationals) and the rights conferred to holders. From an economic perspective, a strong set of rights (in particular mobility rights) for highly skilled people is preferable to a set of more limited rights granted to a broader set of educational levels. Reducing mobility rights for the highly qualified severely limits the attractiveness of a European Blue Card, and thus the number of people applying; not granting similar European rights to low-skilled workers hardly affects Member States' ability to attract individuals from this segment of the labour market.

The proposed changes to the Blue Card Directive seek to ensure that Member States make full use of the Blue Card, to enhance its added value to holders and to make it more accessible. In detail, the Commission plans to replace national schemes with the Blue Card so that it no longer competes with them. Additionally, the Blue Card processing time is to be reduced, equivalent work experience is to be anchored as an alternative to formal qualifications, the intra-EU labour mobility of third-country nationals is to be facilitated, long-term residence is to be made easier to obtain, refugees are to be able to gain access to the Blue Card procedure if they meet the general criteria and family reunification is to be eased. These measures will improve the attractiveness of the Blue Card. Finally yet importantly, the Blue Card is to be made more accessible by lowering the minimum salary threshold in order to qualify for the Blue Card scheme (from a fixed 1.5 times the national average to a flexible band of 1.0–1.4 times the average) and lower thresholds are to be introduced for recent graduates and workers in sectors with labour shortages – which the Member States can determine individually.

The proposed revision of the Blue Card Directive and the latest Students and Researchers Directive have focused on aspects of highly skilled immigration where the EU has added value to offer: facilitating the labour mobility of third-country nationals. The Blue Card proposal, if adopted in its current form, is well designed and would amplify the benefits of a European approach to the international talent game. The key to its success is implementation by the domestic administrations combined with raising awareness of the revised Blue Card and its benefits for international talent. Otherwise, the Blue Card will not have a substantial impact on the attractiveness of the EU.

Realistically, even with the proposed changes, the economic gains are relatively small. The European Commission estimates the economic gains from the new Blue Card scheme to range between €1.4 and 6.2 billion



annually.<sup>19</sup> However, for this to materialise, the Blue Card will have to become substantially more popular than domestic schemes have managed in the past, which should be regarded as a very optimistic scenario. An ex post impact assessment on the net – i.e. new Blue Card holders corrected for the lower uptake of national schemes – should be carefully conducted in order to evaluate the added value in the medium term.

## 10.6 Conclusion

A well-functioning Blue Card scheme covering highly qualified and highly skilled individuals should yield benefits to the Union overall and render individual Member States more attractive to foreign talent. Hence, the suggested revision of the Blue Card Directive is well measured and likely to provide a positive impetus.

Given the fragmented nature of national labour markets in terms of unemployment, occupations with skill shortages and different demographic challenges, there is no need for EU regulation on access for low- and medium-skilled individuals. In fact, broadening the scope of the suggested revision would have been counter-productive, as the rights conferred to holders of the Blue Card would likely have been substantially watered down in negotiations with the European Parliament and Council.

Lowering the threshold and eliminating competition with national schemes should substantially increase the uptake and attractiveness of the Blue Card. Moreover, by enhancing the labour mobility of third-country nationals the EU is addressing the key added value of a European approach.

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<sup>19</sup> See European Commission, “Delivering the European Agenda on Migration: Commission presents Action Plan on Integration and reforms ‘Blue Card’ scheme for highly skilled workers from outside the EU”, Press Release, Brussels, 2016 ([http://europa.eu/rapid/press-release\\_IP-16-2041\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2041_en.htm)).

## References

- Barslund, M. and M. Busse (2016), "The proposed mobility package may not have much effect on mobility, but what about politics?", CEPS Commentary, CEPS, Brussels ([www.ceps.eu/publications/proposed-mobility-package-may-not-have-much-effect-mobility-what-about-politics](http://www.ceps.eu/publications/proposed-mobility-package-may-not-have-much-effect-mobility-what-about-politics)).
- Eisele, K. (2013), "Why come here if I can go there? Assessing the 'Attractiveness' of the EU's Blue Card Directive for 'Highly Qualified' Immigrants", CEPS Paper in Liberty and Security in Europe No. 60, CEPS, Brussels.
- Institute of International Education (2016), "International Students in the United States", New York, NY (<http://www.iie.org/Services/Project-Atlas/United-States/International-Students-In-US#.WMqstfKgSGI>).
- Morehouse, C. and M. Busse (2014), *How to keep a competitive edge in the talent game: Lessons for the EU from China and the US*, Lanham, MD: Rowman & Littlefield ([www.rowmaninternational.com/books/how-to-keep-a-competitive-edge-in-the-talent-game](http://www.rowmaninternational.com/books/how-to-keep-a-competitive-edge-in-the-talent-game)).
- National Center for Education Statistics (2016), "Fast Facts", Washington, D.C. (<https://nces.ed.gov/fastfacts/display.asp?id=372>).
- Wiesbrock, A. (2010), "Free movement of third-country nationals in the European Union: The illusion of inclusion", *European Law Review*, Vol. 35, No. 4, pp. 455-475.

# **PART III**

## **LEGAL MIGRATION THROUGH EXTERNAL COOPERATION**

# 11. LEGAL MIGRATION IN THE EU'S EXTERNAL POLICY: AN OBJECTIVE OR A BARGAINING CHIP?

*AGNIESZKA WEINAR*

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## 11.1 Introduction

The year 2016 changed the geopolitics of international relations for the EU. Brexit, Russia's assertiveness in Syria and the US elections put the EU in a place it has not been for the last 70 years. And all this came just after 2015, which reshaped the internal landscape of migration policy-making. Consequently, as regards the external dimension of EU migration policy, the challenges only began to mount. In an unstable environment, the established ways of doing things will not suffice.

The EU's internal crisis caused by the significant immigration flows of 2015 revealed the importance of public support for migration policies. EU policy-makers diagnosed the perceived inability of the EU to control its borders as an obstacle to such support. It has never been clear what the real objectives of EU migration policy are, but today they seem much more apparent: they are all about border management. Indeed, cooperation with the countries of origin and transit is supposed to engage other countries in the control of EU borders. This is a building block of an array of EU instruments, such as Mobility Partnerships or migration and mobility dialogues. What is thus the place of legal migration in this conundrum? After all, for years the EU has stressed the importance of 'orderly migration flows' for an 'ageing workforce' and EU labour markets.

Legal migration seems to be less of an objective than a bargaining chip in negotiations to obtain cooperation on border management. Such an approach has been more successful in some parts of the world than in others, and probably for reasons not related to the packages actually negotiated. Unfortunately, legal migration seems to be an afterthought of EU cooperation on migration. There is little in sight that would suggest this can change. In the following sections, this chapter considers two factors that shape cooperation on legal migration with the non-EU countries post-2016:

the EU's negotiating power and the place of legal migration in the negotiated deals.

## 11.2 Negotiations: The EU's upper and lower hands

The EU's negotiating power lies in its soft power (Diez and Pace, 2011). This soft power has been used to build the European migration architecture since at least 1989, after the fall of the Iron Curtain. For nearly 30 years this architecture was designed in the form of concentric circles: at the core was the EU territory (whatever it looked like at any given moment), then circles of cooperation with the partner countries along its borders, then with partners farther afield. The building blocks of today's migration management approach were conceptualised then: safe third country, safe third country of origin and readmission agreements, but also programmes for temporary low-skilled workers from partner countries. The Germany–Poland agreement from the early 1990s looked a lot like the current EU–Turkey deal.

The EU has been able to exercise its power in negotiating migration management deals. The use of methods differed according to the proximity to the core.

The Western Balkans and Eastern Europe enjoy a special status in the EU external policy as countries with a so-called 'European prospect' (for the moment excluded for European Neighbourhood Policy countries). They also identify strongly with Europe as a geographical and cultural space. European integration has many motors on the European continent beyond the EU: the Council of Europe, OECD, Organization for Security and Co-operation in Europe and many other European organisations that are geographically relevant. In this space, the EU has been perceived as a normative power (Diez, 2005) offering valuable lessons in what it means to be European. It has used an effective mix of political and economic incentives to steer reforms and policy alignment (Diez and Pace, 2011; Börzel and Risse, 2009). This includes policy dissemination in the field of migration management. Cooperating on readmission or border management has been largely seen as 'what Europe wants', a small price to pay for getting closer to 'Europe' and becoming 'European'. The ambition of many of the countries in the neighbourhood and in the Balkans has also been to remove themselves from Russia's orbit. Visa facilitation or liberalisation has been a sweetener, which in the presence of all other instruments and in the geopolitical context

probably has not been a decisive factor in cooperating with the EU (Gawrich et al., 2010; Celata and Coletti, 2016).

The approach exercised towards the southern neighbours or sub-Saharan Africa has been different. The colonial ties have played a greater role than the EU, and have also meant more financial support or investment traceable to individual Member States than to the EU. This cooperation has always been reliant on asymmetric economic and political power, with no underpinning EU perspective (Van Hüllen, 2012; Del Sarto, 2016). Thus, the cooperation has been more challenging, requiring more negotiating skill and more bargaining chips. The changes brought by the subsequent versions of the Global Approach to Migration (and Mobility) (GAMM) have been incremental, but very slow. Even today, after the frenzy of EU activity on cooperation with the post-2011 Arab states, the progress on actual implementation of many cooperation tools (such as Mobility Partnerships) has been modest (Fakhoury, 2016; Seeberg, 2016; Den Hertog, 2016). The reluctance of the partners to cooperate on EU border management has only met with the reluctance of the EU to offer substantial legal migration and economic incentives.

In 2016, the fluctuations in the EU's negotiating power became clear: first, the recovery of the eurozone economy had been slow; second, the political support of a hard power (the US) began to look unstable and the EU found itself alone in the face of assertive Russian and Turkish stances. Today, the questioning of the liberal world order, which was the context that made the soft power approach possible, signals a possible end to the established ways of doing things.

In Eastern Europe and the Western Balkans, it is an assertive Russia that may influence any prospective cooperation with the EU, even on migration (Romanova, 2016). It is impossible to foresee the extent of sovereignty that will be retained by the countries in the Eastern Neighbourhood in the coming years. The underpinning European ideals hang by a thread: since 2014, the enchantment with the EU as a pursuer of democratic values has diminished in Eastern Europe. The way the EU deals with Russia over the coming months will be crucial for the future of any cooperation in the region.

In other places in the world, the EU's soft power and normative stance is challenged by a more prominent presence of China, an authoritarian Turkey and the unknown course of the US. The aftermath of the Arab Spring has complicated the EU's position: autocrats and those running failing states have little patience for norm-taking. They are more interested in economic

and trade support. In sub-Saharan Africa, China can easily outbid the EU without asking for investment in migration management or about uncomfortable human rights records.

### 11.3 The paradox of the great bargain

The EU has not been very successful in attaching the strings of labour migration or economic investment to cooperation on migration management. Both are aspects of national economic policies and thus cannot be kept hostage by EU-level border management negotiations. The spread of understanding of this principle has been slow among both the EU institutions and the EU's partners.

Legal migration in the EU context covers a variety of movements; their purposes differ as well as their duration. The EU mandate on legal migration (and mobility) covers such different issues as short-term visas and the integration of third-country nationals in EU Member States (Weinar, 2011). For the partners on the other side of the table, legal migration largely means open channels for labour migration (temporary or permanent) to the EU. Taking a rational approach, they expect that creating legal channels will have a positive effect on limiting the pool of candidates for illegal migration. This, however, is one field where the EU and its Member States have been reluctant to build a solid offer (Reslow, 2012). Also, the mobility element, i.e. visa-free entry to the Schengen zone, sometimes seems to be misunderstood as a way to get workers safely to the EU labour market. Any negotiation of legal migration instruments with non-EU partners are therefore preceded by lengthy conceptual adjustments.

Western Balkan and Eastern European countries have been socialised quite quickly to these political realities and can tap into the EU mobility frameworks (in addition to visa policies, there are many youth mobility programmes, student mobility frameworks, and exchanges of professional and trades people). They also benefit from their geographical proximity and social networks that support labour migration. 'Working tourists' from the Balkans and Eastern Europe have complemented the existing labour migration programmes of a majority of the Member States that privilege these countries. In comparison, only a handful have been interested in offering legal migration channels to African countries (both North African and sub-Saharan).

Legal labour migration is what the EU needs regardless of cooperation with third countries. Moreover, at a majority of skill levels, it needs

immigrants from countries other than those with which it wants to strike a deal on illegal migration. The EU cannot get a deal with a sub-Saharan African country to attract thousands of specialised IT workers. First, it would be an unacceptable brain drain; second, the working environment and skills needed at the destination can be so different from the country of origin that there is a risk of failed labour market integration and actual brain waste (a typical problem in, for example, Canada and Australia). We see it quite clearly now in Germany, where Syrian specialists undergo intensive (and expensive) training to even let them start working, for instance in a marketing section of a German company. Retraining is good, but it is costly.

The winning strategy for any country of destination is to assure that the levels of skill and experience of a migrant correspond closely to the available post and working environment. Realistically, from the point of view of the EU, such pairing is possible only with some countries of the world, and it is helped by existing professional and economic ties, not a deal on illegal migration.

What remains as a bargaining chip is low-skilled migration, the type of migration Europeans usually do not want, but which they also need. The EU has pushed hard for the Member States to open up such possibilities in the past (e.g. giving small quotas for certain nationalities for temporary seasonal work). There are two issues with this approach:

- First, the negotiating partners are less and less interested in small offers on labour migration, such as employment of 100 circular migrants in agriculture per year. They seek to obtain open labour access for their nationals. The expectations from both sides will not match easily.
- Second, since the eurozone crisis, the job market for low-skilled jobs has become volatile. Moreover, these jobs are most vulnerable to mechanisation and technological change (Boesl and Bode, 2016; Smith and Anderson, 2014; Song, 2016). Demand for workers in these sectors will decrease dramatically by 2025. So this is a bargaining chip that will lose its value sooner rather than later, while the need for medium- and highly skilled workers will persist.

How do the countries in the neighbourhood and beyond position themselves in such a context? Obviously, European partners, in both the Western Balkans and in Eastern Europe, have been helped to build their human capital according to the common European norms. The Bologna process, common recognition framework, twinning projects and building of the European Research Area have all contributed to common understandings and definitions of skills. Intensive investment by EU



industries employs and at the same time develops the human capital of the local workforce (Bartlett, 2013; Bhattacharya and Wolde, 2010). The differences persist, but they are less dramatic than in the case of countries that have not had this level of intense exchange. No wonder Polish employers worry about the EU visa-free policy towards Ukraine: they see it as opening the door to other EU markets to jobseekers from Ukraine, a situation in which Poland and other Central and Eastern European Member States will lose their competitive edge.

The southern neighbourhood has quite a different story to tell. Less EU-wide FDI has created fewer professional networks that could boost labour migration, not to mention the issues with access to EU territory. In addition, far fewer countries have active recruitment policies focusing on this part of the world. Also, the economic ties (FDI) are less developed (apart from FDI coming from only a handful of EU Member States, with France playing the major role). Where the Balkans and Eastern Europe are literally pinned to the EU-wide value chain, the southern Mediterranean is linked to a less encompassing one. This all has an impact on creating a qualified pool of potential immigrants who could ideally fit the labour market needs in the EU.

#### **11.4 Labour markets are not for negotiation**

In a post-2016 world, the EU must reconsider its approach. First, we should admit that the immigrant workers we want are not necessarily those who will come as a result of any deal with a country of transit or origin. This can explain why the labour migration offers have not been a real success story in the EU's external dimension. This is in sharp contrast to policies of individual Member States that have quite aggressively sought the skills they need. Indeed, legal labour migration that is beneficial for the labour markets is a policy the EU can pursue unilaterally, by opening migration channels by sector, thus supporting its Member States. This type of migration should not be bundled into any offer tied to cooperation on illegal migration, because the countries from which undocumented migrants flow are not ones that abound in the needed skills.

Second, the EU could use its trade policy more creatively, especially with countries farther afield. Trade policy is not migration policy but it can work wonders in creating a safe space for legal migration (and pushing for stricter cooperation on migration control), as we can see from the history of the European Communities.

Third, the changing world order has brought a new understanding to the EU that some hard power needs to be exercised after all. In the face of the adverse reality, as much as we Europeans do not like it, the EU normative power needs some more euros to pave the way and some metal teeth.

## References

- Bartlett, W. (2013), "Skill mismatch, education systems, and labour markets in EU Neighbourhood Policy countries", Search Working Paper No. WP5/20, Search Project ([www.ub.edu/searchproject/wp-content/uploads/2013/09/WP05.20.pdf](http://www.ub.edu/searchproject/wp-content/uploads/2013/09/WP05.20.pdf)).
- Bhattacharya, R. and H. Wolde (2010), "Constraints on Growth in the MENA Region", IMF Working Paper No. 10/30, International Monetary Fund, Washington, D.C. ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1555482](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1555482)).
- Boesl, D.B. and B.M. Bode (2016), "Generation 'R': Why our grandchildren will grow up as the first Generation of 'Robotic Natives'", in *Emerging Technologies and Innovative Business Practices for the Transformation of Societies (EmergiTech)*, IEEE International Conference, pp. 417-20 (<http://ieeexplore.ieee.org/abstract/document/7737377/>).
- Börzel, T.A. and T. Risse (2009), "The Transformative Power of Europe", in "The EU Promotion of Good Governance in Areas of Limited Statehood", Paper prepared for the ERD workshop in Florence, 16-17 April.
- Celata, F. and R. Coletti (2016), "Beyond Fortress Europe. Unbounding European Normative Power and the Neighbourhood Policy", *Geography Compass*, Vol. 10, No. 1, pp. 15-24.
- Del Sarto, R.A. (2016), "Normative empire Europe: The European Union, its borderlands, and the 'Arab spring'", *Journal of Common Market Studies*, Vol. 54, No. 2, pp. 215-232.
- Den Hertog, L. (2016), "Funding the EU-Morocco 'Mobility Partnership': Of Implementation and Competences", *European Journal of Migration and Law*, Vol. 18, No. 3, pp. 275-301.
- Diez, T. (2005), "Constructing the Self and Changing Others: Reconsidering Normative Power Europe", *Millennium Journal of International Studies*, Vol. 33, No. 3, pp. 613-636.
- Diez, T. and M. Pace (2011), "Normative power Europe and conflict transformation", in R.G. Whitman (ed.), *Normative Power Europe*, Palgrave Studies in European Politics, Basingstoke: Palgrave MacMillan, pp. 210-

225 ([http://link.springer.com/chapter/10.1057/9780230305601\\_11](http://link.springer.com/chapter/10.1057/9780230305601_11)).

- Eisele, K. and A. Wiesbrock (2013), "Reaching out: The external dimension of the EU's migration policy, A comparative study on India and Australia", Migration Policy Centre, European University Institute, San Domenico di Fiesole (<http://cadmus.eui.eu/handle/1814/29474>).
- Fakhoury, T. (2016), "Securitising Migration: The European Union in the Context of the Post-2011 Arab Upheavals", *International Spectator*, Vol. 51, No. 4, pp. 67-79.
- Fargues, P. and K. Lum (2014), "India-EU migration: A relationship with untapped potential", Migration Policy Centre, European University Institute, San Domenico di Fiesole (<http://cadmus.eui.eu/handle/1814/31305>).
- Gawrich, A., I. Melnykovska and R. Schweickert (2010), "Neighbourhood Europeanization through ENP: The case of Ukraine", *Journal of Common Market Studies*, Vol. 48, No. 5, pp. 1209-1235.
- Reslow, N. (2012), "Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships", *Journal of European Integration*, Vol. 34, No. 3, pp. 223-239.
- Romanova, T. (2016), "Russian Challenge to the EU's Normative Power: Change and Continuity", *Europe-Asia Studies*, Vol. 68, No. 3, pp. 371-390.
- Seeberg, P. (2016), "Jordan, the European Neighbourhood Policy, and Commonalities of Interest: Building a Security Partnership rather than a Security Community", in P. Rieker (ed.), *External Governance as Security Community Building*, Basingstoke: Palgrave MacMillan, pp. 163-186 ([http://link.springer.com/chapter/10.1057/978-1-137-56169-5\\_7](http://link.springer.com/chapter/10.1057/978-1-137-56169-5_7)).
- Smith, A. and J. Anderson (2014), "AI, Robotics, and the Future of Jobs", Pew Research Center, Washington, D.C. ([www.fusbp.com/wp-content/uploads/2010/07/AI-and-Robotics-Impact-on-Future-Pew-Survey.pdf](http://www.fusbp.com/wp-content/uploads/2010/07/AI-and-Robotics-Impact-on-Future-Pew-Survey.pdf)).
- Song, T. (2016), "Honey, Robots Shrunk My Wage! Native-Immigrant Wage Gaps and Skill Biased Technological Change", University of Connecticut (<http://taosong.me/docs/Job%20Market%20Paper%20-%20Tao%20Song.pdf>).
- Van Hüllen, V. (2012), "Europeanisation through cooperation? EU democracy promotion in Morocco and Tunisia", *West European Politics*, Vol. 35, No. 1, pp. 117-134.
- Weinar, A. (2011), "EU cooperation challenges in external migration policy", Migration Policy Centre, European University Institute, San Domenico di Fiesole (<http://cadmus.eui.eu/handle/1814/17756>).

## 12. IMPLEMENTING MOBILITY PARTNERSHIPS: DELIVERING WHAT? *LEONHARD DEN HERTOOG AND FANNY TITTEL-MOSSER*

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### 12.1 Introduction

EU Mobility Partnerships (MPs) are non-binding instruments concluded between the EU, interested Member States and a third country. They are considered to be the “main strategic, comprehensive and long-term cooperation framework for migration management with third countries”.<sup>1</sup> Widely presented in the literature as soft law instruments,<sup>2</sup> MPs are composed of a joint declaration and a list of projects in an annex meant to implement the MP. The annex is regarded as a living document evolving over time based on the interests of the different parties.

Since the first MPs with Cape Verde and Moldova in 2008, the EU has concluded seven further MPs, focusing initially on countries in the ‘eastern neighbourhood’. Following the Arab Spring developments in 2011, the Commission revitalised the MPs as an instrument for the southern Mediterranean countries as well, leading to MPs concluded with Morocco in 2013 and with Tunisia in 2014.<sup>3</sup>

Now is thus an appropriate moment to assess the implementation of these MPs. In this chapter, we consider the central question of ‘what’ they are concretely delivering so far. What kinds of projects are funded and implemented and what has been the contribution so far to the main element

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<sup>1</sup> See Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, 17024/09, Brussels, 2.12.2009, p. 61.

<sup>2</sup> See Carrera and Hernández i Sagrera (2009), p. 28; Carrera and Hernández i Sagrera (2011), pp. 97–115; Koutrakos (2011), pp. 164–65; and Van Vooren (2012), pp. 209–10.

<sup>3</sup> For an overview of concluded MPs, see European Commission, “Global Approach to Migration and Mobility” ([https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en)). In more detail, see Carrera et al. (2012).

of ‘mobility’? For the purposes of this chapter, we will examine the MPs concluded with Cape Verde, Morocco and Moldova.

These cases are selected as they present a relevant geographical variety across the east and the south. They also represent long-standing and well-developed MPs, thus guaranteeing a minimum level of available information on implementation. In particular, Cape Verde and Moldova represented ‘pilot’ MPs, thus meriting an evaluation at this point. Of course, in light of the foreseen length of this contribution, this does not constitute an in-depth audit or evaluation, but rather an attempt to sketch cross-cutting trends, dynamics and challenges.

## **12.2 The implementation of Mobility Partnerships: From thinking to doing**

The analysis of the MPs with Cape Verde, Morocco and Moldova is based on the ‘scoreboards’ of projects that follow from the MP annexes. Except for the case of Moldova, these are not public documents, but they have been obtained through requests by the authors. To gain an in-depth understanding of the implementation of MPs, it is essential to look at the specific content of the projects being implemented.

The number of projects varies widely from one MP country to another. The difference between the two pilot MPs is quite striking, with 75 completed and 25 ongoing projects for Moldova in comparison with 28 completed and 11 ongoing projects for Cape Verde. The MP with Morocco, which was concluded five years after the pilots, totals 10 completed and 62 ongoing projects.

### *Thematic trends in implementation*

MPs’ project topics are directly linked to the four pillars of the EU’s Global Approach to Migration (and Mobility, as added in 2011) (GAM(M)) and evolve according to existing policy orientations.

The first pillar of the GAMM<sup>4</sup> covers mobility, legal migration and integration. The notion of circular migration has been closely related to the

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<sup>4</sup> See European Commission, The Global Approach to Migration and Mobility, COM(2011) 743 final, Brussels, 18.11.2011.

MP tool.<sup>5</sup> Chou and Gibert (2012) argue that circular migration is at the heart of MPs. Circular migration was perceived as “an important shift in migration patterns” for countries of origin (GCIM, 2005, pp. 1, 31). The core of the debate on this issue related to labour and economic migration.<sup>6</sup> Circular migration was considered to be the perfect approach to guarantee a win-win situation (ibid., no. 16, p. 66). Ideally, receiving countries that needed workers would have access to foreign labour markets, thus filling their labour shortages thanks to legal labour-migration schemes. It should be noted that EU Member States maintain their competence over the volumes of labour migration and carefully guard this;<sup>7</sup> therefore, MPs represent a way to circumvent the lack of EU competences in this matter.

The issue of ‘legal migration’ in MPs can also be seen as the carrot favouring the negotiation of other acts, such as EU readmission agreements. Indeed, Member States can propose through MPs a whole set of initiatives, including migration, development and possibilities for legal migration, partly conceived as a counterbalance to the burden of a readmission agreement, especially where it includes a clause on third-country nationals.

Even though it seems in the annex of the scoreboards that a significant number of projects are related to legal migration, an analysis of the content of these projects shows otherwise. MPs to date have not led to any real legal migration opportunities (Andrade et al., 2015; IOM, 2012, p. 10). Projects under the heading of “legal migration” mostly involve initiatives to inform migrants about legal migration channels to the EU or the dangers of irregular immigration.

Cape Verde has 13 such projects, and almost half of the total projects proposed in the annex relate to legal migration. This goes in line with Cape Verdeans’ interests in favouring the mobility of their people and creating new channels for legal labour migration. In fact, 10 out of the 13 projects are related to “employment, management and facilitation of legal migration and integration”. These projects aim at meeting the following two aspirations: developing better legal migration opportunities for Cape Verdeans and

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<sup>5</sup> See European Commission, Circular migration and mobility partnerships between the European Union and third countries, COM(2007) 248 final, Brussels, 16 May 2007, 4.

<sup>6</sup> See European Commission, Policy Plan on Legal Migration, COM(2005) 669 final, Brussels, 21.12.2005, 1, 4.

<sup>7</sup> See Art. 79(5) TFEU; see also Andrade (2013), pp. 263–81 and Reslow (2012), pp. 223–24.

informing potential migrants of possibilities and risks related to migration. Clearly the second aspiration has gotten the most attention.

In the case of Cape Verde, Portugal and France proposed to promote the admission of certain groups of workers under specific legal schemes. In one project, Portugal proposes “the signing of a new Protocol on migration ... extending the scope of the Protocol on temporary migration of Cape Verdean workers to work in Portugal”. France proposes to conclude a bilateral agreement on concerted management of migratory flows with Cape Verde, including opening up its labour market for specific activities.

Compared with other countries, Moldova has a very high number of projects; over half of the implemented and ongoing projects come under this theme of mobility, legal migration and reintegration.

Finally, in Morocco, this category of projects was the second most important (in the number of proposed projects, not in terms of the allocated budget) at the time of concluding the MP and it became the main category within which new projects were proposed later on.

Concretely, none of these projects aim at developing new opportunities for legal migration from Morocco to Europe but instead aim at informing potential Moroccan migrants of the legal immigration channels and the risks of irregular migration. It is striking that relevant projects on legal migration are related to pre-existing deals or discussions at the bilateral level; they relegate MPs to ‘centralising’ the different initiatives without really offering further access to the EU labour market for third-country nationals.

The second pillar focuses on irregular migration and trafficking in human beings. It is under this pillar that most of the projects have been implemented and new projects have been added after the conclusion of the MPs. This general trend is true for Cape Verde and Morocco. Both MPs make a direct reference to “the promotion of an effective readmission and return policy”, stressing the central importance of readmission agreements in MPs. Negotiating an EU Readmission Agreement (EURA) and a Visa Facilitation Agreement are part of the political commitment embedded in the MP. The case of Moldova is peculiar, as it had concluded a readmission agreement before the conclusion of the MP. Moreover, and linked to this, it has a lower share of projects in this category.

The third pillar, “[p]romoting international protection and enhancing the external dimension of asylum policy”, is solely included in the MP with Morocco because at the time of concluding the MPs with Cape Verde and Moldova, only the GAMM existed. However, two projects related to

international protection were added to the scoreboards of Cape Verde and Moldova at a later stage.

The fourth pillar encompasses “maximising the development impact of migration and mobility, migrants’ rights and the empowerment of migrants”. At first, the MP with Moldova was dedicated to the fight against irregular migration. But, with the conclusion of the first collection of projects, the focus shifted towards migration and development.<sup>8</sup> Cape Verde is hoping to follow a similar pattern.<sup>9</sup> The number of ‘migration and development’ projects quadrupled after the conclusion of the MP, becoming the main theme in terms of projects proposed. In the case of Morocco, migration and development has an average weight in terms of proposed projects (24 out of 115).

### *Implementation dynamics*

Relations between the EU and the third country are often viewed as embedded in broader international relations, with instruments such as MPs putting forward an EU agenda of migration control that interplays with and at times influences cooperation on development aid, trade relations and visa policies.<sup>10</sup> It is also assumed in much of the literature that MPs put more pressure on the third country than on participating Member States.<sup>11</sup> Reslow (2012, pp. 323, 325) highlights the “take it or leave it” approach applied to the cases of Moldova, Cape Verde and Senegal, where the same MP text was unilaterally proposed by the EU to these third countries with little room for negotiation. One could assume that similar power structures persist during the implementation of the MP if the EU’s interest remains similar. In this case, the projects that are being implemented are largely influenced by the EU and Member States, as they are funding them.

The notion of ‘reversed conditionality’ would nonetheless challenge this assumption. Some scholars have observed that conditionality can also be “reversed” and tie the EU more significantly to the interests of the third country (Cassarino, 2007, p. 179). In other words, the relations between different parties to an MP may be more dynamic than what is often assumed (Tittel-Mosser, forthcoming). In practice, the application of conditionality by

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<sup>8</sup> Interview, 26 October 2016, DG for Migration and Home Affairs, Brussels.

<sup>9</sup> Interview, 23 February 2016, Ministério das Relações Exteriores de Cabo Verde, Praia.

<sup>10</sup> See Carrera et al. (2016); Carrera et al. (2012); and Brocza and Paulhart (2015), pp. 1–2.

<sup>11</sup> See Carrera and Hernandez I Sagrera (2009), p. 321; Carrera and Hernández i Sagrera (2011); and Limam and Del Sarto (2015).



the EU has been limited regarding southern Mediterranean countries (Balfour, 2012, p. 16). It seems far from straightforward to actually implement such EU conditionality (Qadim, 2015, ch. 3). This can be explained by the difficulty for the EU to adopt a strong position towards countries with which further strategic cooperation is needed (Cassarino, 2007, pp. 191–92). The increased reliance of the EU on third countries to address irregular migration and cooperation on border control has a price: third countries are gaining a strategic position that gives them the possibility to pose their own conditions to the EU and Member States.

What this means concretely for implementation of the MPs is that the projects are not static over time, they rather change according to shifting interrelationships between the Commission, Member States and the third country involved. This translates into the Scoreboard continually changing, with different versions circulating. ‘Implementation’ of the MP is thus not a rational or linear process, and neither is the annex or Scoreboard a clear roadmap towards implementation (Den Hertog, 2016a, pp. 294, 298).

### **12.3 The key element of (financial) accountability**

The sections above have given a brief overview of some of the implementation trends and dynamics of the MPs so far. It is important to recognise, however, that many questions and challenges persist related to the actual contribution these instruments make. There remains much work to be done, both within the EU institutions to monitor and evaluate the implementation of the MPs, and within academic research to gather evidence and develop understanding of the implementation trends and dynamics.

It is surprising that many years into the MP endeavour there is no comprehensive overview or in-depth evaluation available that can form the basis for future engagement with third countries. Especially in light of the currently proposed and implemented ‘Compacts’ under the EU’s Partnership Framework,<sup>12</sup> much could be learned from some of the pitfalls encountered in MP implementation.

As the authors themselves have discovered in their research at the Commission, international organisations and in third countries, it is often a

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<sup>12</sup> See European Commission, Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final, Strasbourg, 7.6.2016.

real challenge to obtain the relevant information on what the different funded projects under an MP have truly entailed or achieved. The multi-stakeholder field makes it difficult to piece the different parts of the puzzle together, and hard to obtain an overview. There are assorted versions of the MP Scoreboards circulating, leading to the question of whether they can actually function as a coherent tool to steer or monitor implementation (Den Hertog, 2016a, p. 293).

The European Court of Auditors completed a Special Report in 2016 relating to the spending on migration under two external funding instruments: the (former) European Neighbourhood Policy Instrument and the thematic programme on migration and asylum under the Development Cooperation Instrument. The Court of Auditors similarly found that an overview of the funded actions was lacking, and that a proper evaluation was sometimes difficult in light of the limited or unclear information available.<sup>13</sup>

Certainly, various useful projects have been completed and are underway today across the different MPs. For example, in the case of the EU-Morocco MP, the EU has funded a significant project (€10 million) with the aim of supporting Morocco's new regularisation and integration policies. At the same time, and as mentioned above, the main emphasis remains on irregular migration. Across the funds studied by the European Court of Auditors, a similar emphasis was found.<sup>14</sup> This would challenge the 'balanced' approach set out by the GAMM. More importantly, however, we need more information on what exactly is funded and implemented, as the different categories and descriptions of projects are often vague or overlapping (or both).

All of this points to the need for more (financial) accountability to enable a proper evaluation of MP implementation. In that regard, there is first of all an enhanced role to be played by the Commission itself, namely to devote more human and financial resources to monitoring and oversight of MP implementation, also at the delegation level. Second, the organisations implementing the MP projects, primarily international organisations and Member States' agencies, have a crucial role to play as they have detailed information about the implementation activities. Third, the European

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<sup>13</sup> See European Court of Auditors, *EU external migration spending in Southern Mediterranean and Eastern Neighbourhood countries until 2014*, Special Report No. 9/2016, Luxembourg, 2016.

<sup>14</sup> *Ibid.*, see figures 4 and 5 of the Special Report.

Parliament and the Court of Auditors could more actively monitor or commission analysis of MP implementation.

## 12.4 Conclusions and the way forward

This chapter shows that almost ten years into the MP endeavour, the level of implementation varies considerably among the different MPs concluded. This can partly be explained by the varying degree of political importance accorded to cooperation with a particular third country, as well as by the context and point in time at which the MP was concluded. Although this chapter does not constitute an in-depth comparative study, it is apparent that MP implementation shows divergent levels of importance accorded to the four thematic priorities of the GAMM.

Most projects fall under the area of irregular migration, especially for the MPs concluded with Morocco and Cape Verde. This is consistent with the broader findings of the European Court of Auditors about EU external migration spending in the EU neighbourhood countries. This category also covers return and readmission – crucial priorities for the EU and its Member States in the cooperation with third countries. Projects on international protection feature primarily in the MP with Morocco, in line with Morocco's own interests around its new migration policy (Den Hertog, 2016a). For Cape Verde and Moldova, this priority has limited salience in the MP projects.

The migration and development pillar has gained more importance over the years of MP implementation. More research would be needed to understand better how the link between migration and development is framed and applied in these projects. There appears to be a greater tension in this EU policy field, where some recent approaches, such as that of the EU Trust Fund for Africa, suggest a shift towards development over migration, i.e. the 'root causes' approach (Den Hertog, 2016b).

As the instruments we study here are called 'Mobility' Partnerships, it is surprising that the MPs have not created any serious mobility channels. There are a number of projects in this field, but they do not amount to creating such channels. It should be noted that Moldova has gone through the visa liberalisation dialogue and its citizens are now exempt from visa requirements for short-stay visits. We would also highlight that the implementation dynamics between the Commission, the Member States and third countries are shifting over time and that the implementation process is not static or unilaterally imposed or conditioned. This challenges a rational

or linear understanding of implementation – rather it is a continual back-and-forth about priorities, resources and actors.

There is a persistent need for more (financial) accountability in the MP implementation process. Specific project-level as well as overview data are often not publicly available and are difficult to obtain. A comprehensive, comparative and in-depth evaluation is crucial to understand how this key tool of EU external migration policy actually works. This is all the more important given the new approaches emerging in EU external migration policy that may risk falling into the pitfalls already encountered in the MP implementation process.

In particular, the EU's new Partnership Framework and its 'Compacts' with several third countries could benefit from a critical look at 'what works' and 'what does not work' in MP implementation. For example, the proposed compacts with African countries focus on return and readmission. The first progress reports indicate that cooperation on return and readmission remains difficult.<sup>15</sup> From the MP implementation process, lessons could be learned about the productivity of putting these priorities front and centre vis-à-vis third countries.

Moreover, a thorough evaluation of MP project implementation could inform the new funding instruments set up as a result of the 'refugee crisis', such as that in the EU Trust Fund for Africa in particular. The trend witnessed there towards larger projects managed more frequently by Member States' agencies should be evaluated against the success of 'large versus small' projects, and implementation modalities and actors in the MPs.

In light of these new instruments, the MPs are losing some of their salience as an instrument of EU external migration policy. That notwithstanding, in terms of implementation the MPs represent a tangible, albeit it varied, instrument in this field. Even though this chapter has highlighted that in implementation there is a lack of consistency, the MP does remain the instrument embedded in the four pillars of the GAMM.

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<sup>15</sup> See European Commission, Fourth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, COM(2017) 350 final, Strasbourg, 13.6.2017.

## References

- Andrade, P.G. (2013), "The Legal Feasibility of the EU's External Action on Legal Migration: The Internal and the External Intertwined", *European Journal of Migration and Law*, Vol. 15, No. 3.
- Andrade, P.G., I. Martin and S. Mananashvili (2015), "EU cooperation with third countries in the field of migration", PE 536.469, European Parliament, Brussels.
- Balfour, R. (2012), "EU Conditionality after the Arab Spring", European Institute of the Mediterranean, Barcelona.
- Brocza, S. and K. Paulhart (2015), "EU mobility partnerships: A smart instrument for the externalization of migration control", *European Journal of Futures Research*, Vol. 15, No. 3.
- Carrera, S., L. den Hertog and J. Parkin (2012), "EU Migration Policy in the wake of the Arab Spring - What prospects for EU-Southern Mediterranean Relations?", MEDPRO Technical Report No. 15, CEPS, Brussels.
- Carrera, S. and R. Hernández i Sagrera (2009), "The externalisation of the EU's labour immigration policy: Towards mobility or insecurity partnerships?", CEPS Working Document No. 321, CEPS, Brussels.
- Carrera, S. and R. Hernández i Sagrera (2011), "Mobility Partnerships: 'Insecurity Partnerships' for Policy Coherence and Migrant Workers Human Rights in the EU", in R. Kunz, S. Lavenex and M. Panizzon (eds), *Multilayered Migration Governance: The promise of partnership*, London/New York: Routledge, pp. 97-115.
- Carrera, S., J.-P. Cassarino, N. El Qadim, M. Lahlou and L. den Hertog (2016), "EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?", CEPS Papers in Liberty and Security in Europe No. 87, CEPS, Brussels.
- Cassarino, J.P. (2007), "Informalising Readmission Agreements in the EU Neighbourhood", *International Spectator*, Vol. 42, No. 2.
- Chou, M.-H. and M. Gibert (2012), "The EU-Senegal mobility partnership: From launch to suspension and negotiation failure", *Journal of Contemporary European Research*, Vol. 8, No. 4.
- Den Hertog, L. (2016a), "Funding the EU-Morocco 'Mobility Partnership': Of implementation and competences", *European Journal of Migration and Law*, Vol. 18, No. 3.
- Den Hertog, L. (2016b), "Money talks: Mapping the funding for EU external migration policy", CEPS Paper in Liberty and Security in Europe No. 95, CEPS, Brussels.

- Global Commission on International Migration (GCIM) (2005), "Migration in an Interconnected World: New Directions for Action", Report of the Global Commission on International Migration, 5 October.
- International Organization for Migration (IOM) (2012), *The European Union-Moldova Mobility Partnership 2008–2011: Evaluation Report*, Geneva ([www.mfa.gov.md/img/docs/eu-moldova-mobility-partnership-evaluation.pdf](http://www.mfa.gov.md/img/docs/eu-moldova-mobility-partnership-evaluation.pdf)).
- Koutrakos, P. (2011), *European Foreign Policy: Legal and Political Perspectives*, Cheltenham: Edward Elgar Publishing.
- Limam, M. and R. Del Sarto (2015), "Periphery under Pressure: Morocco, Tunisia and the European Union's Mobility Partnership on Migration", EU Working Paper RSCAS 2015/75, European University Institute, San Domenico di Fiesole.
- Qadim, N. El (2015), *Le gouvernement asymétrique des migrations. Maroc/Union européenne*, Paris: Dalloz.
- Reslow, N. (2012), "Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships", *Journal of European Integration*, Vol. 34, No. 3.
- Reslow, N. (2012), "The role of Third Countries in EU Migration Policy: The Mobility Partnerships", *European Journal of Migration and Law*, Vol. 14, No. 4.
- Tittel-Mosser, F. (forthcoming), "Reversed conditionality in EU external migration policy: The case of Morocco".
- Van Vooren, B. (2012), *EU External Relations Law and the European Neighbourhood Policy: A paradigm for coherence*, London/New York, NY: Routledge.

# 13. EU LEGAL MIGRATION POLICIES TOWARDS CHINA, INDIA, THE PHILIPPINES AND THAILAND: A STATISTICAL AND LEGAL APPRAISAL

*MARCO STEFAN*

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## 13.1 Introduction

Human mobility has progressively become an integral element of the external relations entertained by the EU with different (groups of) third countries. At the same time, the content of the external initiatives developed by the EU in order to regulate and manage transnational human mobility varies across different geographies, depending on substantive elements, which include the partners' physical proximity to the EU, their socioeconomic and geopolitical outlooks, and international relations status vis-à-vis the Union and its Member States (Carrera et al., 2015).

Most recently, external cooperation on legal migration (including visas, and the facilitation of economic, social and cultural investments of the diasporas) has focused on complementing and supporting the EU policy response to the increasing numbers of individuals moving from Africa, the Middle East and Central Asia, and heading towards Europe through often unsafe routes and irregular channels. In particular, the creation of regular migration channels is currently described as an essential incentive to be offered to a number of 'priority third countries' in exchange for their commitments in the fight against irregular migration.<sup>1</sup>

Human mobility also constitutes a component of the EU's relations with strategic partners and developing countries that are not directly associated with the so-called 'migration and refugee crisis'. Cooperation on legal migration with largely populated and rapidly industrialising nations, such as China and India, as well as developing countries like the Philippines

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<sup>1</sup> See European Commission, Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final, Strasbourg, 7.6.2016.

and Thailand, appears to be especially crucial from the perspective of addressing the mobility needs of third-country nationals (TCNs) and European citizens, attracting and retaining skills and talent, and fully reaping the benefits that the movement of persons can bring to both 'sending' and 'receiving' societies.

The present chapter reflects on how migration and mobility are currently incorporated into the EU's relations with these Asian countries. First, it provides a statistical appraisal of the main migration and mobility patterns of Chinese, Indian, Filipino and Thai nationals towards Europe. More specifically, official migration statistics<sup>2</sup> are used to describe the dynamics of these nationals' mobility across the EU's external borders, as well as the nature of and main reasons for their presence within the Member States' territories. The statistical analysis will then be coupled with an assessment of the normative regimes currently regulating the conditions of entry and stay of TCNs travelling from China, India, the Philippines and Thailand.

The statistical and legal appraisal will contribute to understanding of how inward mobility from major Asian sending countries is currently channelled through EU and national immigration laws and policies. Moreover, by developing an assessment of the wider framework for EU cooperation with the above-mentioned Asian countries, it will also be possible to assess the extent to which human mobility is actually fostered in the EU-Asia context.

## **13.2 Main migration and mobility trends in the EU-Asia context**

The analysis of Eurostat statistics reveals that China, India, the Philippines and Thailand do not constitute a significant source of irregular migration to Europe. In 2015, the year that marked the peak of the so-called 'EU migration crisis', only 27,110 Chinese, Indian, Filipino and Thai nationals were found to have irregularly entered or stayed in the EU. This figure constitutes less than 1.3% of the total 2,136,055 irregular migrants apprehended in the 28 EU Member States throughout that year.

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<sup>2</sup> See Regulation (EC) No. 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No. 311/76 on the compilation of statistics on foreign workers, OJ L 199/23, 31.7.2007.



Eurostat data also show that while the total number of irregular migrants apprehended in the EU saw a constant increase during 2012–15, the number of apprehended irregular migrants originating from China, India, the Philippines and Thailand remained mostly stable, and began to decrease from 2012 onwards (Table 13.1). The fact that these Asian countries have not been responsible for the sharp increase in irregular migration recently recorded in Europe (Figures 13.1 and 13.2) explains their exclusion from the group of ‘priority countries’ with which external cooperation on legal migration is currently deemed essential in order to address the most pressing issues of EU border control and migration management.<sup>3</sup>

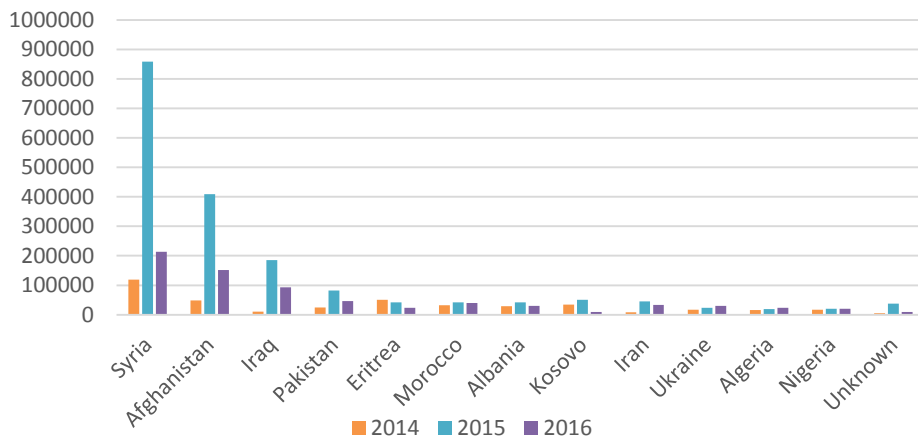
Table 13.1 Chinese, Indian, Filipino and Thai irregular migrants apprehended (2011–15)

Year		2011	2012	2013	2014	2015
Chinese nationals	Total	11,745	10,020	8,460	8,315	7,920
	< 14 years	285	280	275	335	315
	>14 to 17 years	70	60	80	50	50
	>18 to 34 years	5,965	4,755	4,075	3,785	3,645
	> 35 years	5,415	4,920	4,050	4,135	3,900
Indian nationals	Total	15,125	16,100	15,810	17,225	17,290
	< 14 years	305	350	440	1,010	1,060
	>14 to 17 years	230	210	210	255	245
	>18 to 34 years	10,415	11,380	10,845	11,400	10,645
	> 35 years	4,175	4,160	4,310	4,560	4,835
Filipino nationals	Total	2,075	2,065	2,430	2,110	1,940
	< 14 years	40	50	50	70	75
	>14 to 17 years	10	10	5	15	20
	>18 to 34 years	885	835	910	675	640
	> 35 years	1,140	1,175	1,465	1,350	1,205
Thai nationals	Total	630	550	535	685	560
	< 14 years	5	5	5	5	10
	>14 to 17 years	10	5	10	10	5
	>18 to 34 years	295	255	205	260	240
	> 35 years	320	290	315	410	305

Source: Author’s compilation based on data provided by Eurostat.

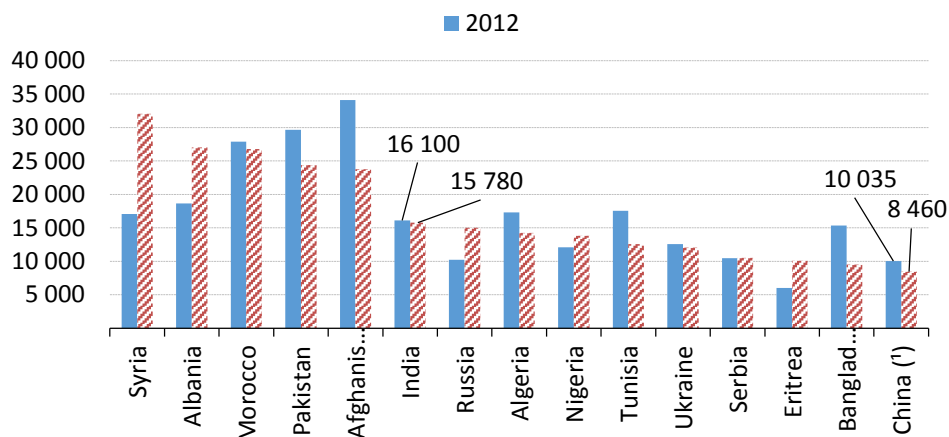
<sup>3</sup> See European Commission, COM(2016) 385 final (2016), op. cit.

Figure 13.1 Main citizenship of third-country nationals found to be irregularly present in the EU28 (2014–15)



Data source: Eurostat.

Figure 13.2 Main citizenship of third-country nationals found to be irregularly present in the EU28 (2012–13)



Data source: Eurostat.

On the other hand, the current inclusion of China, India, the Philippines and Thailand in the Schengen visa 'black list'<sup>4</sup> suggests that these countries are still perceived as a source of irregular migration to the EU (Guild and Bigo, 2003, pp. 89–95). As a consequence, their nationals are subject to visa obligations and a series of prior checks on the purpose of their travel and personal capacity.

The necessity for Chinese, Indian, Thai and Filipino nationals to undergo the documental, procedural and individual requirements set forth in the Schengen Visa Code<sup>5</sup> (as interpreted and implemented locally by the individual Schengen states), entails a series of practical challenges for travellers. In China or India, for example, all Member States have consulates in the capital and a robust presence in other major cities, but applicants from rural areas still have to travel long distances if they wish to lodge a visa request. Also, the absence of clear criteria for the identification of the competent Member State's consulate does not facilitate applicants who are planning to travel to several Member States on one visa.<sup>6</sup> Submitting all of the required and supporting documents might prove challenging as well. In fact, the requirements often differ from consulate to consulate in the same third country, even when the travel purpose is the same. If the visa application is lodged for specific purposes, such as study and scientific research, additional documental evidence also needs to be produced.<sup>7</sup> The lack of clearly defined eligibility criteria for Multi Entry Visas (MEVs), as well as the absence of a 'coherent implementation' of the Visa Code provisions on their issuance, are also likely to hamper the ease of travel to

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<sup>4</sup> See 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, OJ L 81, 21.3.2001.

<sup>5</sup> Ibid.

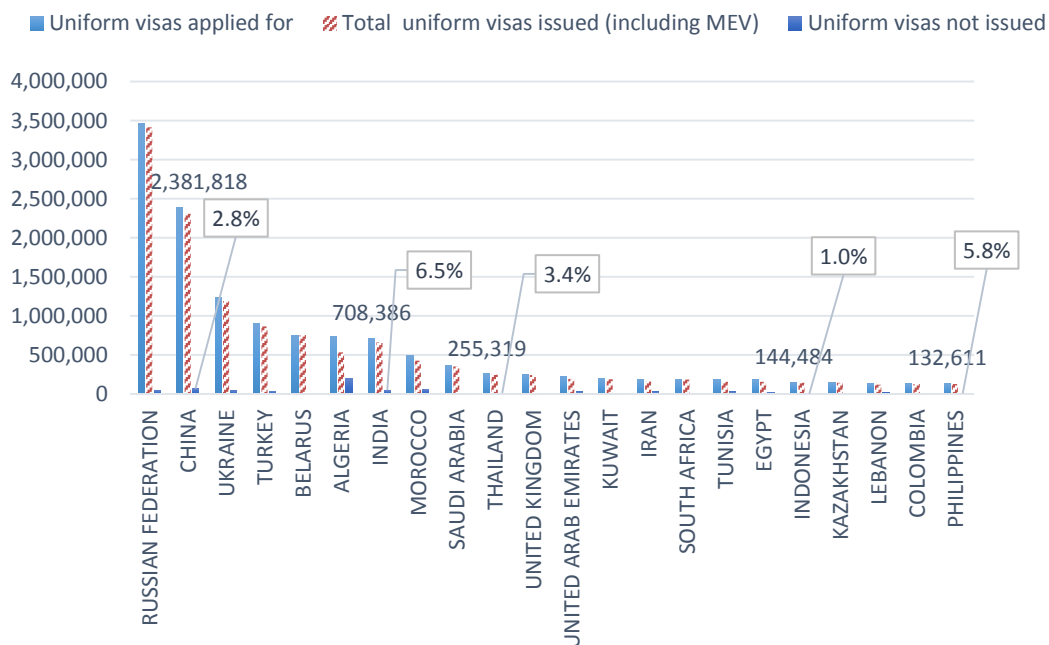
<sup>6</sup> A positive exception is constituted by the indication that when the main Member State of destination of a group of Chinese tourists cannot be identified *ex ante*, it is the embassy or consular office of the first entry into the EU that is competent for assessing their visa applications. See the Memorandum of Understanding between the European Community and the National Tourism Administration of the People's Republic of China, on visa and related issues concerning tourist groups from the People's Republic of China (ADS).

<sup>7</sup> See Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purpose of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375, 23.12.2004; and Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purpose of scientific research, OJ L 289, 3.11.2005.

the EU. The fact that irregular migration from China, India, the Philippines and Thailand barely decreased over the past years might be explained in light of the persisting restrictive visa and labour migration policies applying to their citizens.

If the EU's enduring concerns about irregular migration from the countries considered generate obstacles for Asian nationals wishing to travel to Europe for reasons including tourism and business, the increasing numbers of Schengen visas issued over the last years to TCNs travelling from China, India, the Philippines and Thailand clearly reflects a rise in Asian demand for mobility. As Eurostat's statistics show, these Asian countries are among those with the highest rates of Schengen visa applications and issuance (see Figure 13.3). Between 2013 and 2016, each of these Asian countries saw an increase in the number of Schengen visa (type C) applications and approvals.

Figure 13.3 Ranking of third countries with the highest rates of Schengen visa applications and issuance (2015)



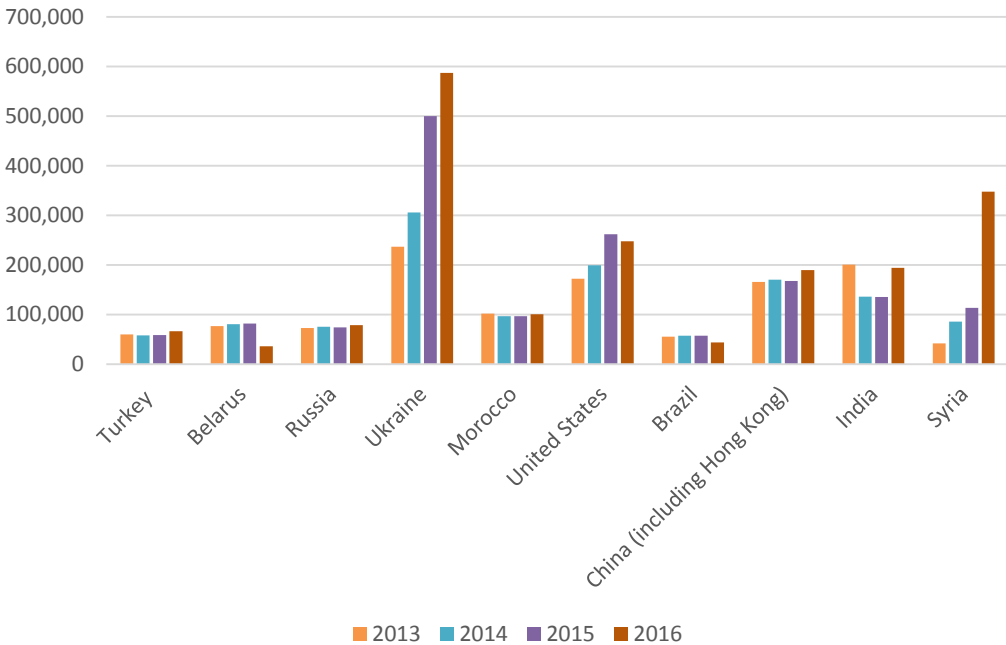
Note: MEV refers to multi-entry visa.

Source: Author's elaboration based on Eurostat statistics.

In this respect, it is also worth noting that during 2015, the rejection rates for Schengen visa applications submitted in these four Asian countries varied from a minimum of 2.8% of refused applications in China, to a maximum of 6.5% rejected in India. In comparative terms, these rates are noticeably lower than those recorded for applications submitted in countries from other regions, such as the southern Mediterranean and the Gulf, where higher rejection rates seem to be linked to the applicants’ failure to address Member States’ concerns about border security (Guild, 2010, pp. 367–84).

As for the longer-term mobility trajectories of TCNs from China, India, the Philippines and Thailand, the collation of official data on the number of long-term national visas and residence permits granted to TCNs shows that Chinese and Indians are among the top five nationalities to have received a first residence permit in the EU during 2014: respectively 169,657, and 134,881 (see Figure 13.4).

Figure 13.4 First residence permit by nationality (2015)



Data source: Eurostat.

However, a common negative trend emerges from the analysis of statistics on the overall number of residence permits granted to Chinese, Indian, Filipino and Thai citizens. During the past eight years, significant reductions can be observed, in particular with regard to the total number of residence permits granted to the Philippines' nationals (which decreased from 50,612 in 2008 to 25,273 in 2015), and Thailand's citizens (which went from 26,969 in 2008 to 18,939 in 2015).

The number of permits granted to Indian nationals also fell over the same period, although in a considerably less consistent fashion (from 154,058 in 2008, to 135,514 in 2015). The increase in the number of permits issued to Chinese nationals is mainly due to the positive trend in entries in the UK for education reasons. By contrast, an analysis of disaggregated data related to the permits issued to Chinese nationals by the remaining EU Member States reveals a reduction in the number of authorisations granted.

External factors, such as the evolving legal framework and economic outlook of the Asian countries involved in the immigration processes, may contribute to shaping the immigration trends of Chinese, Indian, Filipino and Thai nationals (Niyomsilpa et al., 2014, pp. 35–61). At the same time, the substantial disparity between the volume of visas and residence permits granted indicates that, under the current EU and national immigration policies, authorisations for short-term visits are easier to obtain for Asian nationals than grants of more stable stays for reasons such as work, education and family reunification (see Table 13.2).

*Table 13.2 Comparative overview: Number of visas and residence permits issued (2013–15)*

	2013		2014		2015	
	Visas	Residence permits	Visas	Residence permits	Visas	Residence permits
<b>China</b>	1,435,123	165,418	1,742,013	170,427	2,308,591	167,118
<b>India</b>	659,038	200,748	529,367	136,056	487,686	135,514
<b>Philippines</b>	124,071	107,501	117,787	35,058	104,775	27,057
<b>Thailand</b>	246,025	23,595	209,737	18,763	215,932	21,352

*Source:* Author's elaboration based on Eurostat and European Commission (DG HOME) statistics.

With regard to the impact of EU immigration law on the temporary mobility of Asian nationals, Eurostat statistics on the implementation of the Blue Card Directive show that, out of the 96 third-country nationalities concerned by the EU's mobility scheme for highly skilled migrants in 2012, the top countries for the number of migrants attracted were India (699) and China (324), followed by the US (313), Russia (271) and Ukraine (149).<sup>8</sup> Despite increasing throughout 2013 and 2014, the numbers of Chinese and Indian nationals granted a Blue Card remained altogether low as a share of the total number of work permits issued by national authorities during the same year.

### **13.3 Legal migration through external cooperation: Policy frameworks and related challenges**

A series of critical challenges emerge with regard to the substantive features of the EU's external migration policies implemented towards China, India, the Philippines and Thailand.

In the first place, no interregional framework is devoted to migration-related matters between the EU and Asia. While migration issues were discussed on the occasion of the EU policy dialogue with the Association of Southeast Asian Nations (ASEAN),<sup>9</sup> an overarching regional forum focusing on EU-Asia migration and bringing together EU and Asian countries is still lacking. At the bilateral level, the analysis of the Partnership and Cooperation Agreements (PCAs) currently in place between the EU and China, India and the Philippines respectively indicates that binding international agreements do not currently represent the instruments through which cooperation on legal migration is fostered in the EU's relations with its Asian partners. To the contrary, the absence of relevant developments in the negotiations on a 'second-generation' PCA with China (Zhang, 2014), the limited scope of cooperation in the field of human mobility in the new EU-China Investment Agreement (Ewert, 2016), and the deadlock in EU-India

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<sup>8</sup> See European Commission, Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, COM(2014) 287 final, Brussels, 22.5.2014.

<sup>9</sup> See the EU-ASEAN Policy Dialogue on Human Rights, Brussels, 23 October 2015 ([https://eeas.europa.eu/headquarters/headquarters-homepage/5980/eu-asean-policy-dialogue-on-human-rights\\_fr](https://eeas.europa.eu/headquarters/headquarters-homepage/5980/eu-asean-policy-dialogue-on-human-rights_fr)).

discussions on the new Broad-based Trade and Investment Agreement suggest that this approach is not set to change in the foreseeable future.

To date, no Visa Facilitation Agreement (VFA) has been concluded between the EU and the Asian countries considered. The possibility to conclude a VFA with India is foreseen in the Common Agenda on Migration and Mobility (CAMM) that the EU recently signed with that country.<sup>10</sup> The reference to visa facilitation therein included responds to the partner's repeated requests for a relaxation of the rules governing the entry of Indian nationals into Europe, and for the development of further people-to-people contacts with the EU. Still, the actual negotiation and conclusion of a VFA with India will depend on the acceptance and willingness of India's authorities to cooperate on preventing and combatting irregular migration. On the Chinese side, the recent signing of the agreement introducing a visa waiver for Chinese and EU diplomats, and the opening of the second phase of the Mobility and Migration Dialogue, are referred to as 'concrete steps' towards visa facilitation, and are expected to constitute an incentive towards further negotiation. However, the Union seems to be mainly concerned with capitalising on such progress to foster commitments by the Chinese authorities on the readmission of their nationals who are found to be irregularly present on EU territory.

Thus, it seems that the main function of the quasi-legal, political and diplomatic (non-legally binding) instruments designed to develop external cooperation on migration and human mobility with China and India is to persuade the strategic partners to interlink cooperation on legal migration with the advancement of the EU's readmission agenda. This is despite the fact that these countries do not represent a source of irregular migration to the EU, and that the rates of successful return of TCNs from China, India, the Philippines and Thailand are higher than those recorded on average for the overall population of irregular migrants apprehended on the Member States' territory and issued an order to leave the EU.

In the absence of visa facilitation agreements concluded at the EU level, several visa facilitation schemes have been activated between individual Member States and Asian countries, including India, China and the Philippines. These relaxed visa schemes target specific categories of

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<sup>10</sup> See the Joint Declaration on a Common Agenda on Migration and Mobility between India and the European Union and Its Member States, 29 March 2016 ([www.mea.gov.in/Images/attach/Migration\\_and\\_Mobility\\_between\\_India\\_and\\_the\\_European\\_Union.pdf](http://www.mea.gov.in/Images/attach/Migration_and_Mobility_between_India_and_the_European_Union.pdf)).



'legitimate' Asian travellers, such as Chinese tourists, highly skilled Indian workers, and Filipino and Chinese seafarers. These facilitation schemes reflect the highly selective approach of legal migration policy towards the Asian partners considered. A similar approach emerges with regard to the Commission's latest proposal for the amendment of the Schengen Visa Code.<sup>11</sup> The proposal envisages the introduction of mandatory criteria for granting a multi-entry visa to applicants whose data are already registered in the Visa Information System, and who have previously lawfully used at least two visas within the past 12-month period. Despite responding to the declared objective of facilitating movement for frequent travellers, the Commission's initiative seems to mainly target applicants who already benefit from the possibility of travelling to the EU.

### 13.4 Conclusions and recommendations

The promotion of human mobility represents an important factor for the EU's social and economic development (Peschner and Fotakis, 2013, pp. 28–30). It also constitutes a key objective of the EU's legal migration policy and one of the 'pillars' of its external migration policy under the framework of the Global Approach to Migration and Mobility (GAMM). However, when looking at the ways in which EU law and policies regulate the movement of persons in the EU–Asia context, a series of critical challenges and shortcomings emerge.

Regardless of the limited numbers of irregular migrants apprehended in the EU originating from China, India, the Philippines and Thailand, the main EU concern is still to prevent irregular migration. While security considerations currently affect the Schengen visa regime applying to the nationals of these Asian countries, the numbers of Schengen visa applications and authorisations issued to Chinese, Indian, Filipino and Thai nationals reflect an increasing demand for regular migration to the EU. Nevertheless, the ways in which EU and Member State visa and legal migration policies are designed and implemented towards the nationals of these Asian countries reflect a selective and utilitarian approach.

Visa facilitation is granted in a highly discretionary way, and only targets tourists with high purchasing power and other predefined categories of legitimate travellers (i.e. for business and intra-corporate transfers) who

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<sup>11</sup> See European Commission, Proposal for a Regulation of the European Parliament and of the Council for a Union Code on Visas, COM(2014) 164 final, Brussels, 1.4.2014.

are economically valuable for the EU. Very little or no consideration is given to the individual motivations for travelling to the EU. Indeed, the striking difference between the limited number of residence permits issued to applicants from China, India, the Philippines and Thailand, and the volume of Schengen visas issued to the nationals of these countries, reveals that short-term mobility trajectories are broadly preferred to longer-term mobility schemes.

Also, the promotion of human mobility does not emerge as a priority to be pursued through the external cooperation instruments framing EU relations with these Asian countries. To the contrary, the EU's main external efforts in the field of migration have been directed at finding the right interlocutors who could be persuaded to cooperate with the EU on its readmission agenda. Even in the relations with strategic partners such as China and India, EU visa facilitation prospects are systematically linked to commitments required in the fight against irregular migration, namely in the areas of readmission and return. The fact that the EU mainly frames external cooperation on migration with these countries in terms of border control and (irregular) migration management is confirmed by the scant or no consideration currently given to the promotion of EU citizens' mobility in China, India, the Philippines and Thailand.

The development of deeper and more comprehensive people-to-people contacts and the creation of new channels for regular migration could be envisaged instead, also through the EU's external action. The objection that the EU only has limited legal competence to act is only partially valid. In the relations entertained with other (groups of) third countries, human mobility issues are dealt with in a set of provisions that are included in legally binding international agreements (the Association Agreements concluded with Morocco, Tunisia, Georgia and Moldova, etc.), which have direct and indirect legal effects.

Through the development of cooperation on matters including the promotion of non-discrimination on the ground of nationality for Chinese, Indian, Filipino and Thai workers, the EU could well make use of its legal competences and contribute to facilitating the mobility and integration of Asian nationals in the Member States. This would also be in line with the objectives of the UN's New York Declaration on Refugees and Migrants of September 2016, which highlights the importance of developing regular and fair channels ('legal pathways') for economic migration at all skill levels.

## References

- Carrera, S., R. Radescu and N. Reslow (2015), "EU External Migration Policies: A Preliminary Mapping of the Instruments, the Actors and their Priorities", EURA-NET Deliverable 3.1, University of Tampere ([www.uta.fi/edu/en/research/projects/aura-net/publications/TASK%203.1%20REPORT\\_UM\\_CEPS\\_final\\_v4.pdf](http://www.uta.fi/edu/en/research/projects/aura-net/publications/TASK%203.1%20REPORT_UM_CEPS_final_v4.pdf)).
- Ewert, I. (2016), "The EU-China Bilateral Investment Agreement: Between High Hopes and Real Challenges", Security Policy Brief No. 68, Egmont Royal Institute for International Relations, Brussels.
- Guild, E. (2010), "When even Machiavelli's prince needs a visa: Migration, Euro-Mediterranean relations and intercultural dialogue", *European Foreign Affairs Review*, Vol. 15, No. 3.
- Guild, E. and D. Bigo (2003), "La mise à l'écart des étrangers- La logique di Visa Schengen", *Culture and Conflicts*, No. 49.
- Niyomsilpa, S., M. Asis and P. Sureeporn (2014), "Asian Countries' Policies on Temporary Migration", in P. Pitkänen and S. Carrera (eds), *Transnational Migration in Transition: State of-the-art Report on Temporary Migration*, Collected Working Papers from the EURA-NET Project, University of Tampere.
- Peschner, J. and C. Fotakis (2013), "Growth potential of EU human resources and policy implications for future economic growth", European Commission Working Paper No. 3/2013, Luxembourg: Publications Office of the European Union.
- Zhang, J. (2011), "The EU-China Relationship Arriving at a Bottleneck - A Look at the Ongoing Negotiation of the PCA", *EU-China Observer*, Issue 4.

# **14. MIGRATION IN A GLOBALISED WORLD: INDIA'S EXPERIENCE**

*NEELAM D. SABHARWAL*

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## **14.1 Introduction**

The movement of people from one place to another, be it within a country or internationally, has been part of the growth and evolution of societies. It has gained salience in today's globalising world with the transformation of countries into knowledge-based economies, the circulation of knowledge, its appropriation and use for production, the internationalisation of capital and uneven economic development. Migration according to this perspective is determined by the obstacles to development that are associated with such a global economic system and its uncertainties and opportunities. The improved transportation and communication links have further accelerated the movement of people across political boundaries. Human mobility in this globalised world is thus about political, economic and cultural contexts and social conditions, personal choices for education prospects and professional exposure.

## **14.2 An alternative perspective**

A distinguishing characteristic of the present wave of migration is the mobility of highly skilled human resources from developing countries to industrialised countries as a powerful vehicle for boosting growth in both countries of origin and destination. This has brought a paradigm shift in perceptions of the positive effects of skilled migration and thus the phenomenon of migration as a positive and dynamic process (Tejada et al., 2014). Governments are increasingly recognising migration as a productive asset in innovation and development, and the need to adopt appropriate policies to facilitate the international mobility of people.

The discourse on migration has hitherto ignored the benefits of educated and skilled workers, student migration, and the financial resources for the developed countries. It tends to focus mainly on the gains for the

sending countries, through remittances and return migration with enhanced skills ('brain gain'). The stereotype sees migration as a sign of crisis in situations of armed conflict, social and political turmoil, and economic hardship. Such migrants tend to be seen as intruders cutting into the national resources of the destination countries, whereas migrants usually fill vacancies where there are recognised skill shortages. Indeed, the post-Second World War period of rapid economic growth in Western economies saw an increased trend in south-north migration. However, according to Didar Singh and Irudaya Rajan (2016),

[d]ata in recent World Migration Reports shows that nearly 60% of all global migration takes place within the developed world and 40% within the developing countries. International migrants do not always originate in the poorest countries but from developing economies following structural transformation, environmental changes, and the resultant displacement creates sections of mobile population which [migrate] internally and internationally.

### 14.3 Migration as a global phenomenon

This phenomenon is not faced by the developed world alone. The political, ethnic and religious conflicts in various regions have confronted many countries with an influx of migrants. Take India's case, which receives 2.3% of the world's migration (UNDESA, 2013), with an estimated total of 5.4 million international migrants, ranked at eighth position in the list of migrant-receiving countries (UNDESA, 2009). Immigration in India is mostly a regional phenomenon from neighbouring countries because of contiguous and largely porous borders, and cultural and linguistic affinities (Khadria, 2009). Unofficially, the figures may be twice as much going by reports of daily issuance of nearly a thousand visas to Bangladeshis alone and free movement from Nepal under a bilateral agreement. At the time Bangladesh was created in 1971, ten million refugees migrated to West Bengal in India. There are still close to two million refugees from Tibet, Sri Lanka, Afghanistan, Pakistan and Myanmar residing in India.

### 14.4 Salience of migration in development

It is therefore not surprising that the movement of people across national borders is increasingly emerging as a key issue in the conversation on development. This was foreshadowed by the well-known economist, Jagdish Bhagwati (1999), when he advanced the argument that "if global

development was dominated by the movement of goods in the nineteenth century and by the movement of capital in the twentieth century, the development imperatives of the twenty first century will be dominated by the movement of people across national borders". Yet, while trade and capital flows have seen liberalisation, the movement of people has been constrained by geopolitical factors.

#### **14.5 Temporary labour migration: A flawed system in need of reform**

What then could be the way ahead? Battistella in his chapter in this book draws our attention to the temporary labour migration system as a choice that migrants have taken and a policy that countries have adopted. He mentions the precedent in the traditional countries of immigration – the US, Canada, Australia and New Zealand – which developed temporary labour migration arrangements, targeting highly skilled workers or agricultural workers, sometimes including conversion into permanent residence status. Western European countries also experimented with variants of temporary labour migration. Belgium, France, Switzerland and the UK began such short duration programmes in the mid-20<sup>th</sup> century followed by Germany, Austria and the Netherlands. These continued until the 1970s and comprised many small-scale, often seasonal, project-tied workers, trainees and border commuters. Some continue while others have been abandoned. The objective of these programmes was to ensure a rotation of workers, restrict their rights and limit family reunion. By using these arrangements, the countries were importing labour and not migrants.

Temporary labour migration has been recommended by global and competent UN institutions as a successful model that maximises the benefits for countries of destination, countries of origin and the migrants themselves. But this model could not stand scrutiny in Battistella's analysis in chapter 2 of case studies and experience of temporary immigrant labour in Asian economies. He finds it flawed and has reached the conclusion that the flaws are inherent in the system. He argues that the foremost flaw in temporary labour migration is that the temporariness of labour migration deprives the migrants of some fundamental rights and denies them the opportunity to accumulate social benefits. The objective of ensuring that migrants do not become permanent residents because the local societies are not willing to incorporate cultural minorities reduces migrants to labour providers.

## 14.6 Changing socioeconomic dynamics: Demand for highly skilled migrants

The policies of temporary labour migration with all their flaws may have worked as they were designed to recruit low-skilled workers, whereas today the demand for immigrants in the EU is for highly skilled workers, due to slowing economic growth, the ageing of the population, growing competition for skilled resources and the need to regulate migration. According to Eurostat (in 2012),<sup>1</sup> all Member States of the EU are facing the problem of ageing, which is expected to continue for at least another 50 years. The share of people aged over 65 is expected to increase from 17.1% to 30.0% by 2060, when the declining ratio of the working population will leave two working people (compared with four in 2008) for every EU citizen aged 65 or older (Gupta, 2013).

## 14.7 Circular migration: A variant of temporary labour migration

Recognising the potential benefits of skilled migrants, the EU and its Member States have adopted migratory policies to facilitate international skilled migration over the last few years. These have included legislative measures, Mobility Partnerships and bilateral agreements. The central principle is the concept of 'circular migration', formulated in 2007. In essence, it is a form of temporary migration as opposed to permanent settlement of migrants to ensure the rotation of workers and social cohesion of developed countries (Khadria, 2011).

In the absence of a pan-European, harmonised migration policy, the term means different things to different EU countries. Some are prepared to give circular migration rights to highly skilled migrants, while others feel the idea is best suited to seasonal migrants in the agricultural, construction and hospitality sectors. A number of experiments have been conducted by different Member States, such as Germany's seasonal workers programme, Spain and Colombia's temporary and circular migration model, the 'Blue Bird' pilot programme in the Netherlands (2009) to involve semi-skilled migrants, the issuance of 'golden visas' by the UK and Portugal, Latvia's immigrant investor visa, 'fast-track citizenship' in Cyprus and the indefinitely delayed 'instant citizenship' scheme in Malta.

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<sup>1</sup> See Eurostat, *The EU in the World 2013 – A Statistical Portrait*, Luxembourg: Publications Office of the European Union, November 2012.

The EU-wide Blue Card (which excludes Denmark, Ireland and the UK) for entry and residence for highly skilled employment aimed to establish common criteria and a fast-track procedure for issuing residence and work permits, based on the US Green Card. However, it met with a dismal fate, with only 13,852 work permits issued, of which 87% were granted by Germany.<sup>2</sup> It was originally proposed in 2007 and finally opened for application in 2012, only to be withdrawn shortly thereafter. In June this year, there were again reports from Brussels of EU plans to revive the Blue Card visa system and of voters' concerns over allowing a greater level of immigration.

### **14.8 India's emergence as a major source of workforce**

India has emerged as one of the major sources of the global workforce in the 21<sup>st</sup> century. Its experience as a country with the second largest diaspora, estimated at around 25 million, has seen a dramatic transition over the last two centuries, from forced migration of thousands of Indians as indentured labour to the colonies to meet the demand-supply gap in the plantation economies of the Caribbean, the Indian Ocean, South and Southeast Asia, Africa and the Pacific in late 19<sup>th</sup> and early 20<sup>th</sup> centuries, to voluntary migration to the metropolitan centres of the Commonwealth in the middle of the 20<sup>th</sup> century. This was followed on the one hand by movement of skilled technical professionals and students to the US and Europe, and on the other hand by the emigration of low- and semi-skilled Indians to the oil-rich Gulf countries, in the last three decades of the 20<sup>th</sup> century.

Since the turn of the century, India has drawn worldwide attention for the migration of knowledge workers and IT professionals to developed countries, radically transforming the image of the Indian diaspora in the West. The huge success story of the Silicon Valley and profile of Indian immigrants in the US, UK, Canada and Australia validates the assumption that the mobility of human capital through the migration of a highly skilled diaspora and matching migratory policies are interlinked processes best addressed by a holistic approach.

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<sup>2</sup> See Eurostat, "EU Blue Cards by type of decision, occupation and citizenship" ([http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_resbc1](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_resbc1)).



## 14.9 Movement of Indians to the EU: A recent phenomenon

Migration from India to the EU has not been particularly significant except to some Member States and in a few sectors. Two-thirds of the EU-based Indian diaspora resides in the UK and is one of the best-educated and highest-earning groups. More Indians have started looking to mainland Europe since the EU and its Member States have introduced policies to facilitate inward migration of skilled professionals. Although the movement is taking place to both the old and new EU Member States, a relatively significant and stable presence of the Indian diaspora is mainly found in France, Germany, the Netherlands, Italy and Belgium. The signing of a bilateral social security agreement with some EU countries has also been an encouraging development. Nevertheless, labour mobility restrictions and complex procedures for visas and work permits continue to deter easy movement to the EU even though India is a priority source country for tapping skilled immigrants from among non-EU countries.

India-EU dialogue to address issues on the movement of people has been underway since 2000. A regular, comprehensive and structured dialogue on migration issues has been on the agenda of the bilateral summits since 2012. Both sides have the shared objective to promote legal migration, discourage illegal migration and work together in the area of migration and development. In March 2016, at the 13<sup>th</sup> India-EU summit in Brussels a Common Agenda on Migration and Mobility (CAMM), the first of its kind, was signed for better organising and promoting regular migration at relevant skill levels and fostering well-managed mobility, including enhanced issuance of visas.

The establishment of the CAMM reflects the importance of India as a strategic partner of the EU in the field of migration and mobility. As a framework of cooperation, the CAMM is the start of a longer-term process that will lead to deeper cooperation and solid mutual engagement on migration, a key global policy area. Both sides, through a regular dialogue, will explore areas of concrete cooperation to exchange and compare information and statistics on labour and other regular migration flows and to enhance the efficiency and security of respective procedures for entry, residence and registration, while building the legal and administrative capacity to manage and monitor migration. They will also explore possibilities for attracting highly skilled workers, scientists and technologists under both circular migration and long-term visas, for enhanced mobility and exchange of business persons, students and researchers.

India reiterated its commitment to cooperate in facilitating the return of irregular migrants on the establishment of nationality by the competent authority and to seek to make the process swifter and more efficient. In practice, this concerns a negligible number of such migrants, and systems have been continually upgraded for verification procedures right down to the local level. The decision to merge the Ministry of Overseas Affairs with the Ministry of External Affairs in January 2016 is an indication of the high degree of importance attributed to issues concerning legal migration and the welfare of overseas Indians, and to building a good image of India through their skills, industry and ability to assimilate well in host countries.

### **14.10 Mismatch of approaches**

Although human mobility and the emigration of skilled professionals from developing countries is not a new phenomenon, it is never free of tensions due to the mismatch in the approaches of the source countries and the immigration policies of the host countries. The migrant expects stability of employment and an opportunity to settle down, with a view to improving his or her socioeconomic condition. The developed countries, viewing it as a short-term strategy to alleviate labour shortages, take a restrictive approach and would only like to promote temporary migration, discourage permanent residence, avoid disturbing existing patterns of society and project return migration as beneficial to the sending side. The uncertainties and cumbersome procedures for yearly renewal of work permits allowing only up to a maximum of four years end up in skilled migrants moving on to third countries.

Paradoxically, the socioeconomic dynamics in the destination countries that require migratory policies to facilitate the entry of such skilled workers also compel restrictive, discretionary and shifting policies, impeding the objective of rectifying skill shortages. The complexities in Europe are compounded by several contradictory forces at play at the same time. On one hand are the eurozone's problems of stagnation and unemployment, while on the other hand are developments in neighbouring regions that bring waves of refugees and economic migrants and raise fears of unmanageable migration pressures on Europe, which are creating the opposite reaction.

A well-considered, long-term migration policy – offering stability to the skilled migrants and consistent with Europe's own philosophy and its commitment to human rights – for the free movement of people is needed to

successfully harness the gains of skilled migrants as carriers of social capital and as a factor of production to contribute to innovation, development and economic competitiveness in the host countries.

## References

- Bhagwati, J. (1999), *A stream of windows: Unsettling reflections on Trade, Immigration and Democracy*, Cambridge, MA: MIT Press.
- Didar Singh, A. and S. Irudaya Rajan (2016), *Politics of Migration: Indian Emigration in a Globalized World*, New Delhi: Routledge.
- Gupta, P. (2013), *Facilitating Migration between India and the EU: A Policy Perspective*, CARIM-India Research Report 2013/06, European University Institute, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole.
- Khadria, B. (ed.) (2009), *India Migration Report 2009: Past, Present and Future Outlook*, International Migration and Diaspora Studies Project, New Delhi: Jawaharlal Nehru University and Cambridge University Press India Private Ltd.
- Khadria, B. (2011), "An Exploratory Study on Circular Migration from India to the European Union", Working Paper Series, Special Issue, International Migration and Diaspora Studies Project, Zahir Husain Centre for Educational Studies, Jawaharlal Nehru University, New Delhi, June.
- Tejada, G., U. Bhattacharya, B. Khadria and C. Kuptsch (eds) (2014), *Indian Skilled Migration to Europe and Back*, Dynamics of Asian Development Series, New Delhi: Springer India Private Ltd.
- UN Department of Economic and Social Affairs (UNDESA) (2009), *Trends in International Migrant Stock: The 2008 Revision*, Population Division, New York, NY (UN database, POP/DB/MIG/Stock/Rev.2008).
- UN Department of Economic and Social Affairs (UNDESA) (2013), *Trends in International Migrant Stock: The 2013 Revision*, Population Division, New York, NY (UN database, POP/DB/MIG/Stock/Rev.2013).

# **PART IV**

## **LEGAL MIGRATION AND EU TRADE POLICIES**

# 15. TRADE AND MIGRATION LINKAGES IN EU EXTERNAL MIGRATION POLICIES: RELIEF, ROOT-CAUSE REDUCTION OR RIGHTS PROTECTION?

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## 15.1 Introduction

Global regulation of various cross-border issue areas, including climate change, cultural diversity and human rights, is challenging because a consensus cannot be reached on the core issues, at least not in a first step (Cassese, 2016). Issue linkage to other policy categories, or put differently “embedding” into a related but more “mature” regulatory area, is one recipe for creating the bargaining space for gathering a global alliance before addressing, in a subsequent step, the hot topic (Betts, 2011).

This chapter looks at how the current crisis has transformed the trade and migration linkage from a target of perpetual criticism over commodifying migrants by undermining their rights (Hafner-Burton, 2005; Cholewinski and Taran, 2010) to becoming a humanitarian crisis-intervention mechanism that maximises compliance with non-refoulement guarantees and the right to asylum.

Since the massive movement of refugees and migrants starting with the Arab Spring and culminating in the Syrian displacement crisis, the EU has for the first time used its flexibility under its Generalised System of Preferences (GSP)<sup>1</sup> to lower export tariffs on goods produced in key transit

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<sup>1</sup> The GSP is one of the areas of flexibility towards developing countries foreseen by the GATT as part of the various ‘special and differential treatment’ regimes that the WTO codifies in its different agreements (the GATT, the General Agreement on Trade in Services (GATS) and the Trade-Related Aspects of Intellectual Property Rights) to help developing countries adjust to the WTO multilateral trading system. See WTO, “Differential and more favourable treatment reciprocity and fuller participation of

countries with refugee labour according to the enabling clause of the General Agreement on Tariffs and Trade (GATT).<sup>2</sup> It has done so to compensate such first-asylum countries outside Europe for their disproportionately high intakes of refugees and migrants, despite resettlement efforts by the UN High Commissioner for Refugees (UNHCR) towards effective burden-sharing. In the EU Association Agreement with Jordan, the so-called Jordan Compact,<sup>3</sup> the EU pioneered an advanced use of its GSP to ‘downgrade’ Jordan from GSP+ to GSP Everything-but-Arms (EBA) status, which in terms of export tariff rates is an ‘upgrade’ as it justifies an even lower tariff treatment than the GSP+ scheme, as a qualifying exemption from the Most-Favored Nation Treatment of the World Trade Organization (WTO) (Art. I GATT). The decision by the Council of the European Union on Jordan<sup>4</sup> thus compensates, through trade conditionality, for the high intake of Syrian refugees, and the European Commission has expanded the scheme together with the European Investment Bank, the World Bank and the British government, to Ethiopia this year.

Yet, tying the lowering of tariffs on exports to refugee employment might exacerbate the “chilling effect” on human rights, which the former UN Special Rapporteur on Human Rights has associated with trade agreements (Crépeau and Atak, 2016), as it comes at the cost of substandard labour rights.<sup>5</sup> In addition, the coupling of trade to refugee employment is linked to

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developing countries” ([www.wto.org/english/docs\\_e/legal\\_e/enabling1979\\_e.htm](http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm)). The GSP only exists for trade in goods, where it is justified by the GATT enabling clause.

<sup>2</sup> See the Decision of 28 November 1979 (L/4903) on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries adopted under the GATT.

<sup>3</sup> Ibid.

<sup>4</sup> See Council Decision (EU) 2016/2310 of 17 October 2016 on the position to be taken on behalf of the European Union within the Association Council set up by the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, as regards the adoption of EU-Jordan Partnership Priorities, including the Compact, OJ L 345, 20.12.2016, pp. 50–52.

<sup>5</sup> See European Commission, Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the Association Committee established by the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, as regards an amendment to Protocol 3 to that Agreement

the further commitment by the first-asylum country to cooperate on preventing irregular secondary movement of refugees to the EU. Such a linkage might negatively impact on the right to leave (Art. 13(2) of the Universal Declaration of Human Rights), since this commitment might be implemented through restrictive residency requirements for Syrian refugees and close-knit integrated border management, which risk violating the refugees' right to leave the first-asylum country for onward journeys to their country of choice.<sup>6</sup> Nonetheless, because of the powerful dynamics it triggers, issue linkage thus has the potential to overcome the "fragmented" (Chetail, 2016), "piecemeal" approach (Opeskin et al., 2012) dividing migration law and policy.

Drawing on the case of the Jordan Compact, we show how trade preferences compensate for refugee employment, but also for cooperation by Jordan to prevent secondary movement to the EU, whereas with other source countries, the EU GSP+ compensates for cooperating with the EU over readmissions of third-country nationals – notably Georgia and Algeria.

This chapter proposes that EU GSP trade preferences, in addition to being tied to standards on the environment, labour and corruption, are also tied to refugee protection standards, e.g. non-refoulement, in the cases of Ethiopia, Tunisia, Lebanon, Jordan and further countries with high intakes from Syria or the Horn of Africa.

Tying such preferences to respect for international standards of non-refoulement and the right to asylum might prevent a race to the bottom and enhance the protection of Syrian refugees employed in Jordan or Somali refugees in Ethiopia from being sent back to unsafe third countries.

This chapter contributes to understanding about how trade and migration linkages have transformed with the refugee and migration crisis, and explores the potential for a self-standing chapter of the Global Compact on Migration.<sup>7</sup> In the spotlight is how the linkage has gone from one of

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concerning the definition of the concept of 'originating products' and methods of administrative cooperation, COM(2016) 403 final, Brussels, 16.6.2016.

<sup>6</sup> See the UN Human Rights Council, "Report of the Special Rapporteur on the human rights of migrants on the impact of bilateral and multilateral trade agreements on the human rights of migrants", A/HRC/32/40, 4 May 2016.

<sup>7</sup> As has been discussed concerning deaths at sea off the coast of West Africa, and implying that Senegal's cooperation with the EU's externalisation of border control might hinder safe and regular journeys and be interpreted as a barrier to the right to leave.

“commodifying” the human rights of migrant workers as an indirect consequence of trade liberalisation (Cholewinski and Taran, 2010; Hafner-Burton, 2005) to trade offering a ‘humanitarian’ relief mechanism by facilitating refugee employment. It closes by suggesting that the EU GSP+ and EBA schemes might even become key guarantees against backsliding over non-refoulement.

## 15.2 The EU as a ‘linkage machine’

The EU has been a key driver of issue linkage in both external migration and trade policy. For one, the European Commission’s DG for Trade has a track record of issue linkage, using the GATT 1994 Enabling Clause to relax tariffs and rules of origin with a view to preventing backsliding over three main areas of international production standards: environmental (e.g. the Kyoto and Cartagena protocols, and the UN Framework Convention on Climate Change), corruption and labour. It either embeds such linkages in EU association agreements (AAs) (e.g. with Tunisia and Georgia), or incentivises, as of 2016, 14 of its trading partners<sup>8</sup> – outside a formal AA or trade agreement – to adhere to these various UN conventions, including also those on combatting drug trafficking, forced labour and torture (Guatemala, Pakistan, Panama and Peru).<sup>9</sup>

Second, EU external dimension of migration policy has also been an active ‘linkage machine’, conditioning the benefit of visa waivers on concluding EU-wide readmission agreements, including on third-country nationals (Trauner and Kruse, 2008). In the Eastern Neighbourhood (and in the EU–Turkey Statement of 2015), the European Commission has regularly offered such a package, but not towards African, Caribbean or Pacific countries so far.<sup>10</sup> As a norm entrepreneur of linkage techniques, within

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<sup>8</sup> A working group on trade and migration will be set up to facilitate the negotiations towards the global compact on regular, safe and orderly movement to be adopted at the Paris intergovernmental conference by the end of 2017.

<sup>9</sup> On 28 January 2016, the Commission published its first bi-annual report to the European Parliament and the Council on the effects of the reformed GSP.

<sup>10</sup> Regulation No. 978/2012 of the European Parliament and of the Council of 25 October 2012 (OJ L 301/1), applicable since 1 January 2014, is the EU’s new GSP regulation. It includes a list of products that are globally sufficiently competitive to be exempted from EU GSP support. It codifies the EU GSP, which grants developing countries relaxed tariff (GSP+) or zero duties (Everything but Arms) on their exports to the EU to enhance



justice and home affairs the EU features various ‘package deals’, including EU Mobility Partnerships, action plans under the European Neighbourhood Policy and AAs, which have been criticised as exacerbating rather than alleviating asymmetries (Reslow, 2015), because of their frequently “haphazard” connection to often contradictory policies (Collyer, 2016). A peak of packaging solutions was triggered by the Syrian displacement crisis, which calls for a “multi-policy” angle, rather than a single issue-based solution (Carrera et al., 2015, p. 18) as formally endorsed by the Valletta summit of 2015<sup>11</sup> and the ensuing European Agenda on Migration of 2015 and the Migration Partnership Framework of 2016<sup>12</sup> and its progress reports. The third such report called for “refocusing other policy tools”, i.e. to “take advantage of preferential trade agreements” to provide job opportunities for Syrian refugees.<sup>13</sup>

### 15.3 Linkages in global migration governance

Among the many linkages shaping global migration governance, including those to education, development and investment (Betts, 2011; Koslowski, 2008), trade delivers the most long-term livelihood opportunities.<sup>14</sup> Trade, similar to development aid, creates “opportunities” to lift countries out of poverty, disaster and political strife, and eventually reduces migration flows (Sutherland Report, 2017).<sup>15</sup> Compared with the migration and development

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economic growth by facilitating access to the EU’s single market. The GSP+ scheme conditions the duty-free, quota-free rate applicable to developing country EU trading partners on their commitment to sustainable development and good governance, among other international standards.

<sup>11</sup> Art. 13 of the Cotonou Agreement on readmission of EU and African, Caribbean and Pacific nationals does not link to any compensatory measure by the EU.

<sup>12</sup> See European Commission, Communication on establishing a new Partnership Framework for third countries under the European Agenda on Migration, COM(2016) 385 final, Strasbourg, 7.6.2016.

<sup>13</sup> *Ibid.*

<sup>14</sup> See the UN Sustainable Development Goals, 2030 Agenda, item 10.7; EU Agenda on Migration of 2015, p. 2, and the (UN) New York Declaration of September 2016, p. 7.

<sup>15</sup> See the Report from the Commission to the European Parliament, the European Council and the Council, Third Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, COM(2017) 205 final, Brussels, 2.3.2017.

nexus,<sup>16</sup> trade and migration builds on the notion of reciprocity implicit in the premise of a “level playing field” (Hoekman, 1998).

Flexibility in the WTO’s special and differential treatment under the enabling clause of GATT has been drawn upon by EU preferential trade agreements to incentivise cooperation on combatting the trafficking of drugs and terrorism, and more recently (in Georgia in 2016) have been tied to soliciting cooperation on preventing irregular migration and on readmissions. Such a “defensive” use of trade conditionality creates a level playing field among trading partners on internationally agreed labour, environmental and cultural standards, and prevents a race to the bottom over “non-trade issue[s]” (Milewicz et al., 2016) that cause a competitive disadvantage for the other trading partner.

The UN’s New York Declaration of 19 September 2016, the Sutherland Report of February 2017 and the EU’s Agenda on Migration of 2015, in a turnaround from the reluctant narrative of the Global Approach to Migration and Mobility (GAMM),<sup>17</sup> outline the benefits of linking migration to trade in goods and services. Earlier criticism linked to the “commodification” of migrants coming out of liberalising the movement of natural persons in the WTO have subsided (Guild and Grant, 2016; Martin, 2016). With the crisis becoming “protracted”,<sup>18</sup> the EU has introduced an even more far-reaching linkage, one between trade in goods and refugee employment, bypassing the repeated declaration of the WTO/GATS that “migration” ought to remain outside WTO jurisdiction (Carzaniga, 2008).<sup>19</sup>

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<sup>16</sup> See Crisp (2008), Nyberg-Sørensen et al. (2003), Monsutti (2008) and Chetail (2008).

<sup>17</sup> The GAMM of 2011 emphasised the link between diaspora investment and trade as a factor of development and thus delegated to the private sector and local levels the task of increasing trade as a way to manage migration. It was encouraged to increase ‘synergies’ between cultural exchange, trade, skills transfers, business and investment, and to support private-public partnerships that enhance efforts by migrant entrepreneurs and by small and medium-sized firms in source countries with a view to increasing the remittances flow as a contribution to source country development. See European Commission, Communication on the Global Approach to Migration, COM(2011) 743 final, Brussels, 18.11.2011.

<sup>18</sup> See the Council of the European Union Decision 2016/2310 of 17 October 2016 on Jordan, *op. cit.*

<sup>19</sup> This might change with India’s complaint over the US raising the visa fee for the H1-B1 visa, an issue considered to potentially fall within the WTO’s jurisdiction.

Since the onset of the large movements of refugees and migrants, the EU external migration policy has sought more intra-EU solidarity based on binding relocation quotas and the reform of the common asylum system. Meanwhile, it has bolstered trans-regional support for first-asylum countries (Lebanon, Turkey, Jordan and Iraq) for those affected by Arab Spring upheavals (Tunisia) and population movement in the Horn of Africa (Ethiopia) by deploying “humanitarian, stabilisation and development” efforts amounting to €3.6 billion.<sup>20</sup> For such economies, enforcing non-refoulement, while absorbing UNHCR resettlement quotas in addition to preventing irregular (secondary) movement to the EU comes at a high cost, and the influx of refugees is more than many such economies can digest unless new jobs are created. Hence, a new initiative, set out in the Jordan and Ethiopia compacts, uses the EU GSP to incentivise employment creation and thus marries financial relief with longer-term livelihood creation.

#### **15.4 Trade, visa waiver and readmission in EU Association Agreements with Eastern Partnership countries**

EU agreements with the Eastern Neighbourhood, being Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine, compared with the Euro-Med (limited to trade in goods), feature second-generation trade chapters, including ‘meaningful’ trade in services. These liberalise the movement of natural persons in the categories of business sellers, graduate trainees, independent professionals, contractual service suppliers and intra-corporate transferees (Arts. 88-90 EU–Georgia AA; Arts. 92-102 EU–Ukraine AA). In addition, entry under the Schengen visa has been liberalised (visa waiver) for residents of Georgia and Ukraine (and outside the Eastern Partnership countries for Kosovo and Turkey) and moved from Annex I to Annex II under Council Regulation (EC) No. 539/2001, which means that if persons from these countries qualify for categories of entry liberalised by certain EU directives, including on researchers, their entry is facilitated.

In return, the AAs require eastern countries of the European Neighbourhood Policy to cooperate on integrated border management and other border securitisation measures, including interagency networking with EU migration agencies, the European Asylum Support Office, Frontex

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<sup>20</sup> See European Commission, Communication on a European Agenda on Migration, COM(2015) 240 final, Brussels, 13.5.2015.

and Europol, on prevention of irregular movements, and on combatting trafficking and smuggling (Art. 14 EU–Georgian AA, 2016).

Art. 14 of the EU–Moldova AA of July 2016 features a “migration and mobility” provision, which is also applicable to the ones with Georgia, Ukraine and Moldova. These Deep and Comprehensive Free Trade Areas (DCFTAs) use the pan-Euro-Mediterranean preferential rules of origin (PEM). The PEM rules mean that products produced in non-originating countries, but processed or worked on in the cumulation area formed by Euro-Med countries (including the EU and all countries in the European Free Trade Association except Switzerland), can label themselves as “originating” (Donner Abreu, 2013).

Similarly, Art. 14 of the EU–Georgia AA commits Georgia to enforcing returns and to signing a readmission agreement with the EU to prevent irregular overstays of persons whose movement the AA has liberalised, including through the visa waiver.<sup>21</sup> In the EU–Turkey Statement, which exchanges resettlement for the visa-free travel of Turkish citizens into Europe, Turkey must fulfil even more requirements, for example cooperation on readmissions, data protection and criminal matters.<sup>22</sup>

The Japan–Philippines and the Japan–Indonesia free trade agreements contain similar return conditionalities, albeit linked to trade as opposed to visa policy, where the movement is for the medium-skilled: travel for nurses and caregivers (to Japan) is liberalised, in lieu of the Philippines or Indonesia signing up to return obligations. Lavenex and Jurje (2014) have shown how the EU uses “market power Europe” to pay back Algeria for securing the EU’s border.

In all these DCFTAs, migration management, i.e. cooperation on preventing irregular migration and readmission, is linked first and most importantly to the visa waiver and not to trade facilitation, even if these DCFTAs liberalise the movement of natural persons, which Euro-Med AAs notably do not. Nonetheless, this movement of persons is limited to the highly skilled, and thus has no direct connection to the categories of persons or the migration and mobility clauses that the DCFTAs target. Since Eastern Neighbourhood countries have so far not been affected by the refugee crisis in the most extreme ways of other EU neighbourhood countries,

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<sup>21</sup> A similar deal has not been offered to Euro-Med countries, since these remain opposed to signing readmission agreements.

<sup>22</sup> See European Commission, Fifth Report on the Progress made in the implementation of the EU–Turkey Statement, COM(2017) 204 final, Brussels, 2.3.2017.

incentivising adherence to non-refoulement guarantees through trade preferences is not at stake.

*'Humanitarian' trade and ... linkages? Everything-but-Arms preference in the Jordan Compact*

The Jordan Compact, initiated on 4 February 2016 at the Syria donor conference in London, requires the EU to relax the EU's GSP+ status, which would normally apply the pan-European rules of origin to a Euro-Med country like Jordan, to an Everything-but-Arms EBA status, normally reserved for the least developed countries. This grants Jordan an even more preferential export tariff for its goods than it would normally benefit from under GSP+ treatment. It does so by modifying Art. 39 of Protocol 3 of the EU AA, and applying instead the EU EBA rules of origin, which tolerate up to a 70% as opposed to 40% threshold of non-originating materials in industrial products of the EU partner country, if it wants to benefit from EU tariff preferences (Jordan Strategy Forum, 2016). Jordan's time-limited transformation - from a GSP+ country to a GSP EBA country - comes under the condition that Jordan employs, in production places it is free to specify, during the first year 15% of Syrian refugees, adding up to 25% from year three onwards. The derogation, which is valid until 31 December 2026 with a mid-term review foreseen, required both a decision of the Council of the EU and a joint decision of the EU-Jordan Association Committee. Jordan was not held accountable in the actual Council of the EU and Joint Committee Decisions modifying Art. 39 of Protocol 3 of the AA to respect core labour standards of the International Labour Organization (ILO) and human rights when implementing the refugee employment scheme, an oversight that was heavily criticised. However, Jordan was politically encouraged to continue to cooperate with the World Bank's Better Work programme, despite some incongruence with ILO conventions on labour standards.<sup>23</sup>

The reason behind the preference is to compensate Jordan's economy, which has suffered from the Syrian refugee crisis (Jordan Strategy Forum, 2016). The EU trade benefits come with strings attached: Jordan obtains a further relaxation of rules of origin for products manufactured with at least 15% of refugee employment, if it cooperates with the EU to prevent secondary movement to the EU, and concludes an EU readmission

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<sup>23</sup> See H. Mellinger and P. van Berlo, "The Jordan Compact: Turning the Syrian Refugee Crisis into a Development Opportunity", Leiden Law Blog, posted on 20 August 2016.

agreement in addition to implementing UNHCR resettlement quotas. Similar deals using GSP+, but not EBA, were signed with Lebanon (which is not a WTO member country) and most recently with Ethiopia.<sup>24</sup>

Whereas in principle, the GATT enabling clause of 1979, the foundation for the GSP, is to be applied ‘non-reciprocally’, i.e. without extracting any counter-concessions from the developing country counterpart, it has been common practice for preference-giving countries to unilaterally determine which countries and which products are included in their scheme. Thus, most EU GSP schemes require the partner country to commit to internationally agreed, not EU, standards of production, including environmental, labour and human rights-related standards, in order to benefit from tariff reductions or relaxed rules of origin on exports to the EU.<sup>25</sup>

In that sense, it could be well justified to require Jordan or Ethiopia or other frontline first-asylum countries to enhance their compliance with non-refoulement obligations and the right to asylum, so as to prevent refugees on their soil being sent back to unsafe third countries. Adding respect for international refugee protection to labour, environmental and anti-corruption standards could take out the chilling effect that such joint cooperation on migration management could have on human rights. It would also provide more legitimacy for joint border operations, preventing secondary movement or implementing readmissions.

### **15.5 Tying EU GSP+ in Euro-Med Association Agreements to non-refoulement?**

So far, no EU GSP+ scheme has mentioned compliance with international standards on refugees and asylum – non-refoulement guarantees – for the reason that these are not linked directly to the production processes of goods. Where refugee labour is used for goods production, the labour standards,

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<sup>24</sup> The Ethiopia compact involves the European Investment Bank, the British Department for Work and Pensions and the World Bank, in addition to the EU, and is equally committed to exchanging job creation with refugee settlement.

<sup>25</sup> A similar enabling clause does not exist for trade in services. For services, the only way to prevent backsliding on labour, environmental and now refugee protection standards, is to inscribe non-refoulement clauses into the “additional commitments” section of a migrant or refugee receiving country’s GATS schedule, or to insert a “blanket reference” in the market access column of that schedule, which refers to international standards via the detour of national immigration law. See Sieber-Gasser (2016).

e.g. the risk of exploitation relating to wages, have a bearing on the price of a good but do not reflect the risks or the potential expulsion of a person. Restrictive residency permits for Syrian refugees, a lack of access to labour standards by female workers and all other types of post-establishment rights covered by the ILO conventions could put 'like products' produced in the EU at a competitive disadvantage vis-à-vis products manufactured with lower labour, environmental and human rights standards of production (which are thus cheaper) from Mediterranean countries.

The EU–Algeria and EU–Tunisia AAs (2014 and 2016) offer access to the EU's GSP+ scheme under condition that both countries adhere to internationally recognised labour and environmental protection standards when processing goods for exports. But Euro-Med countries like Algeria (hosting the Sahrawi refugee camps) or Tunisia and Egypt (hosting large Libyan refugee populations) could now additionally be asked to respect non-refoulement guarantees and the right to asylum when employing refugees. This would ensure that refugees are not returned to unsafe third countries, where they would face serious risks of torture, the death penalty, inhumane detention or encampment in contravention of Art. 33 of the Geneva Refugee Convention and the UN Anti-Torture Convention.

A temporary suspension of the GSP+ scheme by the EU<sup>26</sup> could be attached to sanctions for failing to respect non-refoulement guarantees by forcibly sending back refugees from Syria, Somalia and Eritrea, to countries like Nigeria or Senegal and Mauritania, thereby denying rights of entry for asylum.

Speaking against this packaging of non-refoulement, despite vulnerability considerations, with GSP+ is that it carries perhaps too a high cost for Euro-Med countries to pay, also in light of high unemployment rates. And, it would diminish rather than increase "joint ownership" of EU Mobility Partnerships or cooperation programmes (Cardwell, 2013, p. 127).<sup>27</sup>

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<sup>26</sup> See Human Rights Watch, "Submission on the Lebanon–EU Partnership Priorities and the EU–Lebanon Compact", New York, NY, 2016.

<sup>27</sup> See also the European Agenda on Migration of 2015 (COM(2015) 240 final), op. cit., p. 15.

## 15.6 Conclusion

There are several shades of grey to the linkage of trade and migration. Like all policy packaging, the more distant the non-trade issue at stake is from the regulatory agenda, the more difficult implementation will be.

The EU has a long-standing practice of using trade conditionalities within its EU GSP schemes to extract commitments on non-trade interests, such as combatting corruption, compulsory labour or drug trafficking. With deaths at sea on the rise and Syrian displacements to Jordan, Lebanon, Iraq, Turkey and Egypt taking a toll on transit economies, the EU is taking the binding of tariff relaxations to non-trade interests to new heights. In its compact with Jordan, the Council of the EU agreed to compensate Jordan for hosting large refugee populations within or outside UNHCR resettlement quotas, paying off this crisis economy for preventing irregular onward movement to Europe by ‘upgrading’ it to the status of a least developed country, so as to make it eligible for EBA preferences.

Such ‘compensatory’ use of trade agreements pioneers a new era of ‘multi-focused’ issue linkage between trade and migration policy in the EU, which so far has been limited to labour and the environment. It could also prevent backsliding over EU and European Convention on Human Rights guarantees on expulsions of refugees in situations of real risk of ill-treatment.

In sum, it seems that trade ‘can do it all’. Through the case of the Jordan Compact, we have demonstrated how trade preferences can maximise rather than undermine respect for human rights. We have advanced how the trade and migration nexus has evolved from a ‘post-humanitarian’ livelihood strategy to a frontline ‘humanitarian’ intervention mechanism, potentially shifting paradigms of relief, rights protection and responsibility for root causes, which the UN’s New York Declaration has been pioneering.

## References

- Betts, A. (2016), “International Relations and Forced Migrations”, in E. Fiddian-Qasmiyeh, G. Loescher, K. Long and N. Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford: Oxford University Press, pp. 60–74.
- Betts, A. (ed.) (2011), *Global Migration Governance*, New York: Oxford University Press.
- Cardwell, P.J. (2013), “New Modes of Governance in the External Dimension of EU Policy”, *International Migration*, Vol. 51, No. 3, pp. 54–68.



- Carrera, S., L. den Hertog and J. Parkin (2012), "EU Migration Policy in the wake of the Arab Spring: What prospects for EU-Southern Mediterranean Relations?", MEDPRO Technical Report No. 15, CEPS, Brussels, August.
- Carrera, S., S. Blockmans, D. Gros and E. Guild (2015), "The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities", CEPS Essay No. 20, CEPS, Brussels.
- Carzaniga, A. (2008), "A warmer welcome? Access for natural persons under PTAs", in J.A. Marchetti and M. Roy (eds), *Opening Markets for Trade in Services*, Cambridge, MA: Cambridge University Press, pp. 475-502.
- Cassese, S. (2016), *Research Handbook on Global Administrative Law*, Cheltenham: Edward Elgar Publishing.
- Chétail, V. (2008), "Paradigm and Paradox of the Migration-Development Nexus: The New Border for North-South Dialogue", *German Yearbook of International Law*, Vol. 52, pp. 183-215.
- Chétail, V. (2016), "Migration and International Law: A Short Introduction", in *International Law and Migration*, Cheltenham: Edward Elgar Publishing, pp. i-xxiii.
- Cholewinski, R. and P. Taran (2010), "Migration, Governance and Human Rights: Contemporary Dilemmas in the Era of Globalization", *Refugee Survey Quarterly*, Vol. 28, No. 4, pp. 1-33.
- Collyer, M. (2016), "Geopolitics as a migration governance strategy: European Union bilateral relations with Southern Mediterranean countries", *Journal of Ethnic and Migration Studies*, Vol. 42, No. 4, pp. 606-624.
- Crépeau, F. and I. Atak (2016), "Global Migration Governance Avoiding Commitments on Human Rights, Yet Tracing a Course for Cooperation", *Netherlands Quarterly of Human Rights*, Vol. 34, No. 2, pp. 113-146.
- Crisp, J. (2008), "Beyond the nexus: UNHCR's evolving perspective on refugee protection and international migration", *New Issues in Refugee Research Paper No. 155*, UNHCR, Geneva.
- Donner Abreu, M. (2013), "Preferential Rules of Origin in Regional Trade Agreements", WTO Staff Working Paper ERSD-2013-05, World Trade Organization, Geneva, 22 March.
- Guild, E. and S. Grant (2016), "Migration Governance in the UN: What is the Global Compact and What does it Mean?", Queen Mary School of Law Legal Studies Research Paper No. 252/2017, Queen Mary University of London.
- Hafner-Burton, E. (2005), "Trading human rights: How preferential trade agreements influence government repression", *International Organization*, Vol. 59, No. 3, pp. 593-629.

- Hoekman, B.M. (1998), "Determining the need for issue linkages in multilateral trade negotiations", *International Organization*, Vol. 43, No. 4, pp. 693-714.
- Jordan Strategy Forum (2016), "Relaxing the Rules of Origin for Jordanian Industries, A Necessary Step Towards Expanding Jordanian Exports", Amman, July.
- Koslowski, R. (2008), "Global Mobility and the Quest for an International Migration Regime", in J. Chamie and L. Dall'Oglio (eds), *International Migration and Development: Continuing the Dialogue, Legal and Policy Perspectives*, International Organization for Migration, Geneva.
- Lavenex, S. and F. Jurje (2014), "The Migration-Trade Nexus: Migration Provisions in Trade Agreements" in L. Talani and S. McMahon (eds), *Handbook of International Political Economy of Migration*, Cheltenham: Edward Elgar Publishing, pp. 259-284.
- Manger, M.S. (2009), *Investing in protection: The politics of preferential trade agreements between north and south*, Cambridge, MA: Cambridge University Press, pp. 1-26.
- Martin, S. (2016), "The Global Refugee Crisis", *Georgetown Journal of International Affairs*, Vol. 17, No. 1, pp. 5-11.
- Milewicz, K., J. Holloway, C. Peacock and D. Snidal (2016), "Beyond Trade: The Expanding Scope of the Non-Trade Agenda in Trade Agreements", *Journal of Conflict Resolution*, pp. 1-31.
- Monsutti, A. (2008), "Migration und Entwicklung: eine Debatte zwischen Zwist und Annäherung", *Schweizerisches Jahrbuch für Entwicklungspolitik*, 27-2, pp. 25-46.
- Nyberg-Sørensen, N., N. Van Hear and P. Engberg-Pedersen (2003), "The Migration-Development Nexus: Evidence and Policy Options", *International Migration*, Vol. 40, No. 5, pp. 49-73.
- Opeskin, B., R. Perruchoud and J. Redpath-Cross (2012), *Foundations of International Migration Law*, Cambridge MA: Cambridge University Press.
- Reslow, N. (2015), "Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships", *Journal of European Integration*, Vol. 34, No. 3, pp. 223-239.
- Sieber-Gasser, C. (2016), *Developing Countries and Preferential Services Trade*, Cambridge: Cambridge University Press.
- Trachtman, J.P. (2009), *The International Law of Economic Migration: Toward the Fourth Freedom*, W.E. Upjohn Institute for Employment Research, Kalamazoo, MI.
- Trauner, F. and I. Kruse (2008), "EC visa facilitation and readmission agreements: A new standard EU foreign policy tool?", *European Journal of Migration and Law*, Vol. 10, No. 4, pp. 411-438.

# 16. TRADE COMMITMENTS IN GATS, EU-CARIFORUM AND CETA, AND THE INCLUSION OF BLANKET REFERENCES TO ENTRY, STAY, WORK AND SOCIAL SECURITY MEASURES

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## 16.1 Introduction

In 1996, the EU Member States adopted a series of so-called ‘Mode 4’ commitments within the General Agreement on Trade in Services (GATS) framework.<sup>1</sup> While the intention was to progressively liberalise trade in services through multilateral negotiations, up to the time of writing, this has not happened. The difficulties surrounding the Doha Round negotiations have led the EU to channel its momentum in service trade liberalisation into various bilateral or plurilateral Free Trade Agreements (FTAs). While the legal rules included in the GATS are copied in such FTAs, there are variations. In essence, FTAs have a tendency to go further in breadth, including more service sectors or more categories of service providers, as well as in depth, leading to more openness.<sup>2</sup>

The EU Mode 4 GATS commitments can be summarised as follows. The specific categories of service providers and service sectors that were negotiated during the Uruguay Round are listed in the commitments. The

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<sup>1</sup> Although the Uruguay Round had finished by that time, developing countries were unhappy with the poor result in relation to Mode 4 commitments, which did not reflect a fair balance with commitments interesting to developed countries, such as Mode 3 commitments. See GATT, Decision on Movement of Natural Persons, MTN/FA III-7(h) ([www.wto.org](http://www.wto.org)); see also Trebilcock et al. (2013), p. 481.

<sup>2</sup> While various publications have addressed FTAs from the perspective of GATS-Plus, attention is now also on the issue of GATS-Minus, or less preferential treatment in FTAs – see for instance Adlung and Morrison (2010), p. 1103.

commitments also contain all the specific conditions that apply to these service providers. Thus, an accountancy firm based in a World Trade Organization (WTO) member country may send its employees to an EU Member State to provide services to clients in the EU host state. This form of mobility, referred to as Contractual Service Suppliers (CSS), is conditional on the worker being regular staff of the accountancy firm, and thus a prior employment condition of one year is included in the EU GATS commitment. Moreover, the commitment specifies that this accountant can stay for a maximum of three months, in a twelve-month period (the cooling-off period).<sup>3</sup>

One major uncertainty with this specific form of reciprocal agreement on international trade liberalisation lies in the inclusion of a 'blanket reference'. It is quite understandable that the EU has chosen not to include all the legislative details that may apply to the accountant in the just provided example. For instance, the national legislation of several Member States will not accommodate full access to social security, or will impose a minimum wage, maximum work hours and other similar conditions. The blanket reference, which is part of the GATS EU commitment itself, provides a solution, avoiding the inclusion of these details in the commitments through this statement: "All other requirements of [Union] and Member States' laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements."<sup>4</sup>

The inclusion can certainly be seen as a clear answer to the question of which labour law and social security measures are applicable in situations involving cross-border service provision. Due to the temporary nature of service provision, the country-of-home principle would apply in such situations; however, the matter is more complicated than that. As explained by Engblom et al. (2016, part II), Mode 4 covers a wide range of activities that do not neatly classify as typical service provision. The GATS provisions are silent on the matter, yet the question of which set of such rules is applicable (home or host state) should be resolved by the EU in light of the inclusion of the blanket reference. Note that commitments are an integral part of the

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<sup>3</sup> See WTO, Council for Trade in Services, Communication from the European Communities and its Member States Consolidated GATS Schedule, 9 October 2006, S/C/W/273, horizontal commitment Mode 4 ([www.wto.org](http://www.wto.org)).

<sup>4</sup> See the EU's horizontal commitment, Mode 4.

GATS.<sup>5</sup> The blanket reference also avoids having to address changes made in relation to the types of measures addressed by the reference. Thus, entry, stay and work conditions continue to apply.

Despite the clarity provided in the blanket reference itself, this chapter will put forward the argument that this clarity is likely false. The main question addressed is how to accommodate changes at the national level relating to the legislative sectors listed in the blanket reference. The relevance of this question specifically lies in the fact that some EU Member States have consistently tightened the conditions relating to entry for migrants in general.<sup>6</sup> Clearly, if the commitments provide specific conditions, such as the right for CSS to reside for three months in an EU Member State, the issue is not problematic. If national legislation were to limit that right to two months, such a measure would violate the commitment. Yet, the matter is far from straightforward in relation to requirements not specifically addressed by the commitments, such as a general refusal ground for authorities on the basis of prior criminal convictions.

The blanket reference is also part of various FTAs of which the EU is a party. Interestingly, in for instance the EU-CARIFORUM<sup>7</sup> Agreement and the Comprehensive Economic and Trade Agreement (CETA), the blanket reference can be found in the form of a provision, which has important ramifications in comparison with the blanket reference in the GATS commitments.

To support this position, it is first necessary to provide an overview of the manner in which GATS and other trade agreements addressing Mode 4 operate. To test the blanket reference, some typical national measures that can be found in rules on migration and access to the labour market of EU Member States will be described and held against the light of the international obligations. The conclusion will compare the GATS version of the blanket reference with those to be found in the selected FTAs, and provide an analysis of the legality of newly introduced, stricter access conditions. From the outset, it must be made clear that this analysis is new

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<sup>5</sup> See Art. XX:3 GATS.

<sup>6</sup> The author has investigated this matter in Dutch and British legislation and both Member States are an example of this tightening of entry conditions, see extensively Tans (2015), ch. 7. The author has also investigated Swedish legislation, and there this problem does not seem to arise, as the Swedish entry conditions have in fact become more liberal since the inscription of the GATS commitments in 1996 – see Tans (2017).

<sup>7</sup> CARIFORUM refers to the Caribbean Forum of African, Caribbean and Pacific States.

ground. As such, the author will limit this analysis to a warning that the matter should be investigated by negotiators and relevant national authorities. More is simply not possible given the absence of case law and additional literature on this matter.

## **16.2 The international framework liberalising Mode 4 trade in services**

As a starting point, the GATS addresses measures affecting trade in services. Although much can be written on the scope of the GATS, there is little doubt that the measures addressed in this contribution indeed fall within the scope of the GATS.<sup>8</sup> Three key obligations play a role in relation to the inscribed commitments. If a certain service sector is addressed by the commitments, obligations relating to market access, national treatment and domestic regulation will apply. Market access addresses typical forms of barriers to service trade, such as economic needs tests and other forms of quotas. The domestic regulation provision in essence addresses qualification requirements, licensing procedures and technical standards if the conditions imposed in such measures are unnecessarily restrictive. Finally, the national treatment obligation ensures equal treatment between foreign services or service providers and national services or service providers.<sup>9</sup> In addition to these three core obligations, the GATS aims at transparency and several of its rules provide publication requirements and conditions, such as that admission procedures must be transparent, not unnecessarily time consuming and subject to review.<sup>10</sup> At the same time, certain measures that breach these obligations can be excepted based on the general exception grounds, security exception grounds and a specific Mode 4 carve-out for “measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders”.<sup>11</sup>

As these agreements concern service trade liberalisation, measures on seeking access to the employment market or measures concerning

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<sup>8</sup> See for instance Trebilcock et al. (2013), pp. 475–76 and Leal-Arcas (2008), pp. 35, 39. The GATS aims at the reduction of barriers to trade in services due to governmental measures (Krajewski, 2003, p. 62).

<sup>9</sup> Feketekuty (2000, p. 101) refers to the approach as a “three-legged stool”.

<sup>10</sup> See Kruger (2011), pp. 7, 2; Krajewski (2003), pp. 124–25 and Delimatsis (2008), pp. 93–95.

<sup>11</sup> See the GATS Annex on the Movement of Natural Persons.

citizenship, residence or employment on a permanent basis are exempted from the GATS as well. In this author's view, the main concern with blanket references is that they could be used to deviate from the national treatment obligation in a manner unintended at the time the commitments were made.

### **16.3 Tightening immigration control and restricting access to the labour market**

Both the Netherlands and the UK have introduced two new hurdles to be overcome by migrants in general. The wording of the previous sentence certainly has to do with the openly provided reason behind these new hurdles, as both EU Member States clearly indicate that migration needs to be selective, restrictive for unwanted migration and simple, with fast-track procedures for migrants beneficial to the host states.<sup>12</sup> This is simply a legitimate choice of these Member States, and it is implemented in the general entry conditions applying to most, if not all forms of regular (labour) migration. The problem is that if such conditions apply in general, they will also apply to sectors and migrants addressed by international trade commitments. Obviously, this regulatory freedom is limited to the extent that the international commitments must be observed.

Since the inscription of the GATS commitments, the Netherlands and the UK have both introduced a generally applying sponsorship system. Those that have an interest in the migrant need to serve as the sponsor of that migrant. This entails acceptance of sponsorship duties, which include information duties and reporting obligations. The least that can be said of sponsorship is that it adds formal requirements, as sponsors need to submit information relating to themselves and the sponsored migrant to the government.<sup>13</sup> This introduces additional obligations.

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<sup>12</sup> For the Netherlands, see Dutch Parliament, *Kamerstukken II*, 2008/09, 32 052, Nr 3 (Memorie van Toelichting), para. 1. See also Groen et al. (2013, p. 184), referring to the Dutch Parliament, *Kamerstukken II*, 2009/10, 32 052 D, p. 1; and Dutch Ministry of Safety and Justice, government notice (2007), "Naar een modern migratiebeleid", ve06000709. For the UK, see Clayton et al. (2016) p. 21 and pp. 24–25; and Seddon (2010), pp. 11–12 and 19. Specific UK examples are the raising of earnings thresholds, more restrictive employment conditions and a more onerous resident labour market test. This language is also reflected in the UK Coalition Programme for government, 20 May 2010, immigration paragraph, p. 21 (<https://www.gov.uk>).

<sup>13</sup> See extensively Tans (2015), paras 5.2.2.3. and 6.2.2.4.

Similarly, general entry conditions notably introduce a bias against those who have committed criminal offences. The UK imposes a general refusal ground related to prior imprisonment. Depending on the length of the imprisonment, the migrant may be refused entry, and thus effectively utilising Mode 4 commitments, for five years since the end of the sentence. A one- to four-year sentence may lead to refusal for ten years. Longer imprisonment will lead to refusal.<sup>14</sup> This imposes another condition for Mode 4 service suppliers as well, namely that the service supplier may be refused based on prior imprisonment.

## 16.4 Mode 4 commitments and changes in national legislation

The GATS specifically provides a clear indication of regulatory freedom. The GATS is not intended to deregulate; it is intended to remove barriers to international service trade. The question now becomes just how far this regulatory freedom applies in relation to the examples provided above.<sup>15</sup> To conclude that these measures are still part of the regulatory freedom, two distinctive aspects need to be investigated. First, these measures should not run counter to one of the GATS obligations. Second, if a measure does indeed breach a GATS obligation, it can still fall within the scope of an exception ground or these measures may be part of the carve-out provided in relation to Mode 4. Note that the Mode 4 carve-out is not an exception ground, rather the GATS does not apply to such measures.

As to the breach that sponsorship and prior imprisonment conditions may cause, these measures are not part of the market access commitment, as the types of measures listed there are different.<sup>16</sup> Moreover, in the author's

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<sup>14</sup> See the UK Immigration Rules, para. 320(2)(b).

<sup>15</sup> The GATS Preamble indicates that the agreement will give due respect to national policy objectives and specifically recognises the right of members to regulate trade in services on their territory. On the right to regulate, see Jackson (2006), pp. 57, 62.

<sup>16</sup> If a measure does not take the form listed in Art. XVI, it is not covered by that provision, as the list is exhaustive. See Pauwelyn (2005), p. 159; Krajewski (2005), pp. 431–32; and Zleptnig (2008), p. 393. See also the WTO's US – Gambling Panel Report (United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling) WT/DS285/R, 10 November 2004), paras 6.298 and 6.318. This Panel finding seems to be implicitly confirmed by the Appellate Body in the US – Gambling Appellate Body Report (WTO, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling) WT/DS285/AB/R, 20 April 2005), para. 215. The exhaustive nature of the list was confirmed by the Panel in the Argentina –



opinion, even though sponsorship takes the form of a licence, sponsorship is not addressed by the domestic regulation provision either. Art. VI GATS does address qualification requirements and procedures, technical standards and licensing requirements (QTLs), yet these measures relate to the standards and quality of the service provided. Sponsorship does not address the quality of the service provider; it essentially entails a shift in migration control from the government to employers.<sup>17</sup> However, it is argued here that both measures breach the national treatment obligation.

National treatment requires no less favourable treatment of foreign services and foreign service providers in comparison with domestic services or service suppliers. A condition is that the foreign and domestic service are 'like', which is essential to any non-discrimination provision as equal treatment requires similar conditions for similar situations.<sup>18</sup>

Are domestic Mode 4 service suppliers like their counterparts in other WTO member countries? Taking the accountant as an example (relying on CSS), a domestic company providing accountancy services to a domestic client will use its employees to provide the service. Clearly, such employees will be nationals, or others with access to the domestic labour market. The conditions of no prior imprisonment and sponsorship will not apply.<sup>19</sup> If, however, a non-EU accountancy firm will provide the service it will use its own third-country national personnel, and compliance with the sponsorship

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Financial Services Panel Report (WTO, Argentina – Measures Relating to Trade in Goods and Services (Argentina – Financial Services) WT/DS453/R, 30 September 2015), paras 7.418-7.419.

<sup>17</sup> In relation to Dutch sponsorship, see Lange (2011).

<sup>18</sup> A useful overview of this obligation is provided by Muller (2016). For case law addressing the GATS national treatment provision, see the WTO's China – Publications and Audiovisual Products Panel Report (China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products) WT/DS363/R, 12 August 2009), para. 7.975; see also the WTO's Argentina – Financial Services Appellate Body Report (Argentina – Measures Relating to Trade in Goods and Services (Argentina – Financial Services) WT/DS453/AB/R, 14 April 2016), paras 6.38-6.45.

<sup>19</sup> Note that the GATS does not facilitate domestic companies hiring third-country nationals to perform a service contract, and to such situations national law would apply. The GATS applies to international trade in services and cannot be used to 'circumvent' national law, that is, using GATS commitments to provide services in the home state through foreign employees. See WTO (CTS) 2009 (Presence Natural Persons), para. 19; see also Engblom et al. (2016), p. 73.

and prior imprisonment conditions will be required. Note that the entire purpose of CSS is exactly that of non-EU service providers being allowed to bring their own personnel to provide a service. Under EU law, this form of service provision is referred to as the posting of workers, and on many occasions the Court of Justice of the European Union (CJEU) has held that not being able to bring one's own personnel to provide a service is a competitive disadvantage in comparison with domestic companies that can use their own personnel. Needing to work with host state personnel leads to a disadvantage, if only due to the company needing to work with unknown employees.<sup>20</sup> Given the purpose of CSS, there can be little doubt that domestic service providers using their own personnel to provide a service are in a like situation as foreign service providers using their own personnel.

As these measures introduce additional hurdles, the conditions of competition are upset as well. Sponsorship obligations and refusal grounds based on prior imprisonment make it more difficult for the foreign service provider to work in the EU host state than without these requirements.

## 16.5 Can the measures be exempted?

Of the various GATS exception grounds, in this author's opinion the logical ground to exempt the no-prior-imprisonment condition is the invocation of the public order. As is clear from the footnote included with this ground, this requires that a "genuine and sufficiently serious threat is posed to one of the fundamental interests of society". Unfortunately, case law on this matter is badly needed but unavailable. An analogy with EU law is not going to help either. Although the phrase is similar to the criterion adopted by the CJEU in the *Adoui* case, the intention to create an internal market is simply far more ambitious than the liberalisation provided under the GATS.<sup>21</sup> This leaves the following question: Is a one-day prior imprisonment sentence a logical refusal ground for a migrant, otherwise allowed entry on the basis of Mode 4, as that person constitutes a genuine and sufficiently serious threat to public order? Posing the question itself can be viewed as providing the answer as well, be it that this exemption becomes far more logical in relation to those having prior criminal convictions of more than four years. Still, the

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<sup>20</sup> See Case C-113/89 *Rush Portuguesa Lda mot. Office national d'immigration* ECLI:EU:C:1990:142, para. 11; and Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* ECLI:EU:C:1994:310.

<sup>21</sup> See Joined cases C-115/81 and 116/81 *Adoui and Cornuaille v Belgian State* ECLI:EU:C:1982:183.

measure includes one-day sentences as well. In any case, the analysis in relation to sponsorship is even more clear, as a shift in migration control from the government to those having an interest in the migrant does not address a genuine and sufficiently serious threat related to the public order. The other grounds provided in Art. XIV are less likely to provide an exception for these two types of measures.

This leaves the Mode 4 GATS carve-out. Are these measures needed to “regulate entry, or temporary stay, including measures necessary to protect the orderly movement of natural persons across, its borders”? This immigration carve-out may indeed, with a little creativity be relevant to refuse the entry of those having a criminal past. Nevertheless, this ground can be viewed as really being concerned with border measures, as the one example provided by the GATS Annex on the Movement of Natural Persons is a visa requirement. Sponsorship may indeed fall within this definition. Yet, studying the extent of sponsorship obligations, again it seems highly doubtful that all the conditions imposed by that system are genuinely imposed to regulate the orderly movement of persons across borders. Some conditions, such as reporting that a migrant is no longer working for the company concerned, indeed will relate to this ground. But surely using a licensing system of sponsorship with all the conditions imposed by it is beyond the scope of the carve-out.

This author believes that these additional obligations do indeed breach the GATS obligation of national treatment, and are not covered by exceptions or carve-outs. This interim conclusion allows us to return to the initial problem pointed out in this chapter.

## 16.6 Regulatory freedom and blanket references

The no-prior-imprisonment condition and sponsorship are imposed as entry conditions. They are formulated as general refusal grounds applying to most migrants wishing to enter the Netherlands and the UK. In both national legal orders, they are part of the rules on immigration and on access to the labour market. As the blanket reference is part of the commitments, these conditions can simply be imposed on Mode 4 service providers. As indicated in the reference, despite the provided commitment, these measures continue to apply. The problem is not whether such conditions may be imposed, the problem is which version of these conditions is intended with the phrase “shall continue to apply”? Put differently, does the phrase refer to the

conditions as they stood at the time the commitments were inscribed, or as they exist today?

As indicated earlier, no guidance in case law or examples from the General Agreement on Tariffs and Trade framework are available. It then comes down to the intention that those involved in the negotiations that have led to these commitments had. It must be stressed that this is quite different from the EU's intention, as negotiations are reciprocal. A prime example is the US and the gambling case. It is clear that the US never intended to be bound by a cross-border commitment relating to (Internet) gambling services, yet such services are part of the "other recreational services (except sporting)" sector, and that sector was indeed subject to a Mode 1 commitment of the US.<sup>22</sup>

Although other positions can surely be adopted, to the author the question boils down to the following: Do the conditions that continue to apply refer to those conditions as they stood in 1996 (the time of the inscription of the GATS Mode 4 conditions) or as they stand today? Here it is argued that it should be the former, thus the conditions as existed at the time of inscription continue to apply. In essence, this means that the GATS commitments do allow the imposition of these additional requirements, yet at the same time the GATS commitments entail a standstill clause, limiting the regulatory freedom of the WTO member country. The author adopts this position *a contrario*, as the other option comes down to the possibility to introduce additional barriers to Mode 4 movements. In fact, this is exactly what has happened since 1996. This author does not believe that this will be acceptable to those who have pushed for Mode 4 commitments, in particular as the GATS negotiations on Mode 4 continued due to unsatisfactory results during the Uruguay Round itself.<sup>23</sup>

It must be clarified here that this author does not have the answer to the question of whether the blanket reference covers the newly introduced conditions. The main purpose of this contribution is to bring this matter to the attention of service trade liberalisation negotiators, from both the EU and its trading partners, as this matter is unresolved in relation to the GATS, and it continues to play a role in other FTAs, which consistently include blanket references.

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<sup>22</sup> See WTO, US – Gambling Panel Report (op. cit.), paras 6.136-6.137; see also Krajewski (2005), p. 426.

<sup>23</sup> See the GATT Decision on the Movement of Natural Persons; see also Trebilcock et al. (2013), p. 481 and J. Bast (2008), pp. 576-577.

## 16.7 Comparison with other FTAs

The blanket reference can be found in other FTAs as well. In the EU-CARIFORUM Agreement, which has entered into force, the EU has included a blanket reference in relation to commitments on CSS and independent professionals in Annex IV(D):

The list below does not include measures relating to qualification requirements and procedures, technical standards and licensing requirements and procedures, and measures regarding employment, work and social security conditions when they do not constitute a discriminatory limitation within the meaning of Arts 83(2) and (3) of the Agreement. Those measures (e.g. need to obtain a licence, need to obtain recognition of qualifications in regulated sectors, need to pass specific examinations, including language examinations, need to have a legal domicile where the activity is performed, need to comply with national regulations and practices concerning minimum wages and with collective wage agreements in the host country), even if not listed, apply in any case to contractual services suppliers and independent professionals of the other Party.<sup>24</sup>

Note that this provision also contains the counterpart of the GATS domestic regulation provision, be it that QTL measures apply.<sup>25</sup> The provision explicitly provides examples of the measures addressed by the blanket reference, which is a great improvement over the uncertainty of the reference in the GATS commitments.

In the draft CETA, Art. 10(2) included in the chapter on the temporary entry and stay of natural persons for business purposes<sup>26</sup> provides:

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<sup>24</sup> See the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part (EU-CARIFORUM) Annex IV(D), para. 3 ([http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc\\_137971.pdf](http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf)).

<sup>25</sup> The GATS system is still incomplete, as disciplines on domestic regulation are under negotiation. The outcome of those negotiations is unclear, yet a version of a necessity test is intended, which is more intrusive than non-discrimination as provided in the EU-CARIFORUM Agreement; for more on these negotiations, see extensively Tans (2015), para. 2.5.4.3.

<sup>26</sup> See the CETA between Canada of the one Part, and the European Union and its Member States, of the other part (<http://trade.ec.europa.eu/doclib/docs/2016/>

4. To the extent that commitments are not taken in this Chapter, all other requirements of the laws of the Parties regarding entry and stay continue to apply, including those concerning period of stay.

5. Notwithstanding the provisions of this Chapter, all requirements of the Parties' laws regarding employment and social security measures shall continue to apply, including regulations concerning minimum wages as well as collective wage agreements.

6. This Chapter does not apply to cases where the intent or effect of the temporary entry and stay is to interfere with or otherwise affect the outcome of a labour or management dispute or negotiation, or the employment of natural persons who are involved in such dispute or negotiation.<sup>27</sup>

A major difference with the GATS blank reference is the fact that the EU-CARIFORUM Agreement and the CETA have not included the blanket reference in the commitment itself. This avoids the oddity described above that a GATS commitment includes a flexible limitation in the form of the measures addressed by the blanket reference. As explained, a measure regulating entry that would nullify the substance of the GATS commitment leads to a circular argument, as the option to nullify this commitment is inherent to the commitment itself.

Moreover, for example the CETA consistently refers to the substance of the blanket reference. Art. 10(3), para. 1 indicates: "Each Party shall allow temporary entry to natural persons for business purposes of the other Party who otherwise complies with the Party's immigration measures applicable to temporary entry, in accordance with this Chapter." Art. 10(6), para. 1 provides: "This Agreement does not impose an obligation on a Party regarding its immigration measures, except as specifically identified in this Chapter and in Chapter Twenty Seven (Transparency)."<sup>28</sup> Finally, the CETA intends to abolish work permits, or similar prior approval procedures, in

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[february/tradoc\\_154329.pdf](#)); chapter 10 includes CSS, independent professionals, business visitors and intra-corporate transferees.

<sup>27</sup> See CETA Annex IV(D), Art. 10(2).

<sup>28</sup> Art. 10(6), para. 3 CETA provides that the market access provision and the national treatment provision apply to Mode 4 financial service suppliers; however, the provision again explicitly indicates that these obligations do not apply to measures granting temporary entry of natural persons of a Party or of a third country.

relation to business visitors for investment purposes and for short-term purposes.<sup>29</sup>

It is beyond the scope of this chapter to provide a full analysis of these provisions included in the EU-CARIFORUM Agreement and the CETA. In any case, both FTAs are much more informative on the content of the blanket reference, which is the main problem with the GATS blanket reference. However, the main problem is not addressed by these references. Rules concerning entry and stay, where the discussed examples of no prior imprisonment and sponsorship can be found, clearly continue to apply. It is unclear whether this is a reference to the rules at the time the FTAs enter into force, or the rules as they stand today. For business visitors relying on CETA (for short-term purposes and investment purposes), the matter has become moot in relation to conditions attached to work permits, as CETA prohibits this. That notwithstanding, the no-prior-imprisonment condition is part of the general entry conditions, and thus not part of a work permit.

## 16.8 Conclusion

As will be apparent from this chapter, it is not easy to provide clear conclusions in relation to the topic under discussion here. This has to do with the lack of literature dealing with the question of what the international obligations will specifically mean in relation to the conditions included in national immigration rules. Moreover, case law on GATS is rare, and no cases exist dealing with Mode 4. The intention of this chapter is twofold. First, a case can be made that the EU GATS Mode 4 commitments are no longer observed by the Netherlands and the UK. It is not possible to draw a conclusion due to the blanket reference being part of the commitment itself, which complicates the matter. Still, the author is of the opinion that reciprocal negotiations cannot have led to the possibility to undermine or nullify a commitment via immigration rules. While one may disagree with the above analysis of sponsorship and no-prior-imprisonment measures, that is not the point. Even if the current national rules do not nullify the commitments, nothing prevents the EU Member States from including more restrictions in their immigration rules. The second conclusion is that at first glance, the EU-CARIFORUM Agreement and CETA demonstrate improvement, owing to the inclusion of the blanket reference in the form of provisions and to added detail. Nevertheless, the issue remains that it is not

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<sup>29</sup> See Art. 10(7), para. 3 and Art. 10(9), para. 2 CETA.

clear what happens when signatory states add conditions to the rules referred to in blanket references.

## References

- Adlung R. and P. Morrison (2010), "Less than the GATS: 'Negative Preferences' in Regional Service Agreements", *Journal of International Economic Law*, Vol. 13, No. 4.
- Bast, J. (2008), "Annex on Movement of Natural Persons Supplying Services Under the Agreement", in R. Wolfrum, P.T. Stoll and C. Feinäugle (eds), *Max Planck Commentaries on World Trade Law, WTO – Trade in Services*, Leiden: Martinus Nijhoff Publishers.
- Clayton, G., C. Sawyer, R. Moffatt, G. Firth and H. Wray (2016), *Textbook on Immigration and Asylum Law*, Oxford: Oxford University Press.
- Delimatsis, P. (2008), "Article III GATS", in R. Wolfrum, P.T. Stoll and C. Feinäugle (eds), *Max Planck Commentaries on World Trade Law, WTO – Trade in Services*, Leiden: Martinus Nijhoff Publishers.
- Engblom, S., N. Kountouris and A. Odin Ekman (2016), "Temporary Labour Migration and the Trade in Services: European and Global Perspectives in an Age of Economic Integration", in J. Howe and R. Owens (eds), *Temporary Labour Migration in the Global Era – The Regulatory Challenges*, Oxford: Hart Publishing.
- Feketekuty, G. (2000), "Regulatory Reform and Trade Liberalization in Services", in P. Sauvé and R. Stern (eds), *GATS 2000, New Directions in Services Trade Liberalization*, The Brookings Institution, Washington, D.C.
- Groen, S., T. de Lange, K. Grootfaam, N. Kruidenberg and G. Leeuwis (2013), "Wet Modern Migratiebeleid: Overheid en Referent", *Asiel & Migrantenrecht*, Vol. 4, No. 4.
- Jackson, J. (2006), *Sovereignty, the WTO and Changing Fundamentals of International Law*, Cambridge: Cambridge University Press.
- Krajewski, M. (2003), *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy*, The Hague: Kluwer Law International.
- Krajewski, M. (2005), "Playing by the Rules of the Game? Specific Commitments after US – Gambling and Betting and the Current GATS Negotiations", *Legal Issues of Economic Integration*, Vol. 32, No. 4.
- Kruger, P. (2011), "Managing the process of services liberalization", Trade Brief No. S11TB09/2011, Trade Law Centre for Southern Africa, Stellenbosch ([www.tralac.org](http://www.tralac.org)).



- Lange, T. de (2011), "The Privatization of Control over Labour Migration in the Netherlands: In Whose Interest?", *European Journal of Migration and Law*, Vol. 13, No. 2.
- Leal-Arcas, R. (2008), "The GATS in the Doha Round", in K. Alexander and M. Andenas (eds), *The World Trade Organization and Trade in Services*, Leiden: Martinus Nijhoff Publishers.
- Muller, G. (2016), "National Treatment and the GATS: Lessons from Jurisprudence", *Journal of World Trade*, Vol. 50, No. 5.
- Pauwelyn, J. (2005), "Rien ne va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS", *World Trade Review*, Vol. 4, No. 4.
- Seddon, D. (ed.) (2010), *Guide to the Points-Based System*, Joint Council for the Welfare of Immigrants, London.
- Tans, S. (2015), *Service Provision and Migration, EU and WTO Service Trade Liberalization and Their Impact on Dutch and UK Immigration Rules*, dissertation, Enschede: Ipskamp Drukkers.
- Tans, S. (2017), European Commission study on CSS and IP, forthcoming.
- Trebilcock, M., R. Howse and A. Eliason (2013), *The Regulation of International Trade*, London: Routledge.
- Zleptnig, S. (2008), "The GATS and Internet-Based Services: Between Market Access and Domestic Regulation", in K. Alexander and M. Andenas (eds), *The World Trade Organization and Trade in Services*, Leiden: Martinus Nijhoff Publishers.

# 17. CAN THE EU USE TRADE AGREEMENTS TO FACILITATE REGULAR MIGRATION? EXAMPLES FROM THE WESTERN BALKANS

*ELSPETH GUILD*

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A clear and well implemented framework for legal pathways to entrance in the EU (both through an efficient asylum and visa system) will reduce push factors towards irregular stay and entry, contributing to enhance security of European borders as well as safety of migratory flows.<sup>1</sup>

## 17.1 EU trade agreements with the Western Balkans

The EU concluded trade agreements with all of the Western Balkan states, which entered into force between 2004 (Macedonia) and 2015 (Bosnia). All of the trade agreements, entitled Stabilisation and Association Agreements, have provisions on establishment, which include two rights that are relevant to the issue of the role of trade agreements in providing routes for migration. The first is the right of companies based in each of the parties to send key personnel to the other to achieve the establishment of the company on the territory of the other party. This can be classified as a form of intra-company transfer but the rules that cover this right (as defined in the agreements) are more favourable than in the Directive on Intra-Corporate Transfer (ICT) (2014/66/EU). For example, Art. 55 of the EU–Albania Agreement states that from the date of entry into force of the Agreement (1 April 2009) Albanian companies are entitled to employ or have employed by one of its subsidiaries (in accordance with the legislation of the host state) employees who are nationals of Albania and who are key personnel of the company. Their work and residence permits must cover the period of their employment by the Albanian company in the EU Member State. Similar provisions exist in the Stabilisation Agreements concluded with the other Western Balkan states.

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<sup>1</sup> See European Commission, A European Agenda on Migration, COM(2015) 240 final, Brussels, 13.5.2015.

Second, the Albania Stabilisation Agreement provides that five years after entry into force of the Agreement(s) the Association Agreement shall establish the modalities to extend the above provisions to the establishment of nationals of both parties to take up economic activities as self-employed persons (on the territory of the other) (Art. 50(4) EU–Albania).

The Albania Agreement has a delay of five years after its entry into force for the modalities for Albanian nationals to be self-employed in the Member States, which means that the deadline passed on 1 April 2014. The modalities referred to in the Agreement have not been adopted by the Association Council. Yet, as the provision is obligatory – the modalities shall be established – there are strong arguments in EU law that the failure of the Association Council to adopt the necessary modalities, and thus frustrate the objective of the Agreement and nullify and impair one of its benefits, must result in the provision having direct effect notwithstanding this failure.

The relevant delay for the application of the self-employment right in the Bosnia Agreement is four years after entry into force, the date of which will arrive on 1 June 2019. For Macedonia, the wording is slightly different and only requires the Council to examine the matter; thus, the argument of direct effect is weakened. However, the date when this was supposed to have happened was five years after entry into force, that is to say by 1 April 2009. Regarding Montenegro, the delay is four years but the wording is obligatory as in the Albania and Bosnia Agreements. The date when the right should have taken effect is 1 May 2014. For Serbia, once again the obligation is a prescription and the date for the right to take effect is 1 September 2017.

The use of a right of establishment for businesses to send their key personnel and for individuals to be self-employed in EU trade agreements is not new. It was inserted into all the agreements with the Central and Eastern European countries (CEECs) from 1990 onwards and as it was used by nationals of those states who came to EU states to work, it provided a very important mechanism to meet the demand for mobility and circulation of economic migration. While interior ministries of a number of Member States challenged and opposed the exercise of the rights by individuals, the Court of Justice of the European Union consistently interpreted the agreements in accordance with the intentions of the negotiators in recognition of the importance of the obligation to open up their respective markets. The right of companies to send their key personnel to a Member State is included in the agreement with Russia and other successor states of the Soviet Union.

Was the experience with the right of self-employment in the association agreements with the CEECs important for trade and did it relieve

irregular migratory pressure? These are critical questions and ones for which little direct data have been collected. Certainly, from the issues that came before the courts of those states resisting the exercise of the right of self-employment of CEEC nationals under the agreements, it is evident that for them the agreements provided very important mechanisms to achieve economic ambitions across borders. In a number of the cases, the applicants were persons whom the Member State had designated as irregularly present and the possibility of the claim to self-employment under the agreements transformed their positions into that of regularly present. In some cases (*Barkoci and Malik* for instance), the applicants were asylum seekers whose asylum applications had been rejected and who had stayed irregularly thereafter in the Member State establishing businesses that were economically successful. Only the provisions of the agreements saved them from economic ruin and expulsion from the Member State.

## **17.2 Is there migratory pressure from the Western Balkans that could be resolved by the Stabilisation Agreements?**

This question will be examined by taking Albania as an example. According to the most recent information available from Frontex (second quarter, 2016),<sup>2</sup> Albanians were the second highest nationality of persons refused entry to the EU: 4,733 Albanians were refused entry in that quarter. Albanians were ninth in the list of nationalities of persons applying for asylum in the EU (5,102 applications). In respect of document fraud, Albanians came in fourth with 94 claims in the second quarter of 2016. Finally, as regards expulsion decisions, Albanians once again were the fourth nationality in the number of decisions taken in that quarter (5,192). The most expensive form of expulsion is forced return, where the Member State has to assume the high costs of transport, escorts and logistics, which can include detention. Albanians were the top nationality of persons subject to forced returns in the second quarter of 2016 at 5,450. For voluntary returns, they came fourth with 1,406 such returns.

Considering the size of the population of Albania, these statistics are surprising if not shocking. Compared with the competition on expulsion decisions, in first place was Afghanistan followed by Iraq and Ukraine. All of these countries have substantially larger populations than Albania.

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<sup>2</sup> See Frontex, "FRAN Quarterly", Quarter 2, April-June 2016, Warsaw, 2016 ([http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/FRAN\\_2016\\_Q2.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_2016_Q2.pdf)).

Ukraine is also a neighbouring country to the EU, though the other two, Afghanistan and Iraq, are refugee-producing countries.

What do these figures tell us about migratory pressure from Albania? It would seem that relative to its population there is a quite a lot of interest among Albanians to improve their life chances by moving to and exercising economic activities in the EU. It is also evident that the current possibilities for them to do so do not correspond to their economic or educational profiles or family situations. Thus, for many of them it seems there is no alternative to migrate irregularly. What has been the policy response of the EU? For the moment, the response has been coercion and expulsion. There is some frustration in the interior ministries of a number of Member States regarding Albanian asylum seekers. Increasingly they are placed on the safe country-of-origin lists, which means that the examination protections of the Procedures Directive (2011/95/EU) can be dispensed with unless the applicant can displace the presumption that Albania is a safe country for him or her. This is rare and usually occurs only where there are serious claims by victims of trafficking.

### **17.3 What does the European Commission's report reveal about possible causes of migratory pressure from Albania?**

The Commission published its latest report on Albania in the context of the EU's enlargement policy in November 2016.<sup>3</sup> It provides a fairly clear picture of why there is migratory pressure regarding Albanians seeking economic opportunities abroad. Youth unemployment stood at 40% in 2015, an increase from 20% in 2007. The general unemployment rate in 2015 was approximately 17% (compared with 14% in 2007). Youth unemployment has risen dramatically since 2007, while general unemployment has risen much more slowly and it began to drop in 2015. According to the report, and perhaps part of the explanation for the high youth unemployment, "the quality of education needs to be raised at all levels to better equip people with skills and knowledge in line with labour market needs". The lack of alignment of skills and opportunities in Albania for its young people is a classic concern regarding migratory pressure. The Commission's report is not particularly optimistic about the process in the fight against corruption and notes in particular the need for more efforts to tackle corruption at high

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<sup>3</sup> See European Commission, Albania 2016 Report, SWD(2016) 364 final, Brussels, 9.11.2016 ([https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2016/20161109\\_report\\_albania.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_albania.pdf)).

levels. It is equally disappointing with respect to the fight against organised crime, stating that “cooperation between police and prosecution needs to be strengthened to dismantle criminal networks more effectively”. Further, there is a need for greater independence of regulatory authorities and public broadcasters. The living conditions of Roma are also highlighted as unacceptable, as is the level of protection of children and the lack of efforts to tackle gender-based violence.

The picture is not a particularly sunny one, especially for young people, women, children and minorities in Albania. The general picture is one of rapid degradation of educational and employment opportunities for young people over the past ten years accompanied by a political and economic situation still characterised by corruption at high levels and inadequate action against organised crime. These are all factors that make it difficult for young people to engage in economic activities either in employment or as self-employed individuals, as they face a dearth of formal jobs and a hostile environment for youth entrepreneurship, which is particularly vulnerable to negative externalities related to corruption and organised crime.

#### **17.4 Using trade agreements to provide solutions?**

The question posed at the start of this chapter is what role is there for trade agreements to provide solutions to incoherence between demand and opportunities in economic migration to the EU. The approach adopted in the Stabilisation Agreements has also been examined, which follows a respected tradition in EU agreements with its neighbours of including provisions on the establishment of companies and rights for companies to send their key personnel to their establishments on the territory of the other party. These agreements add also a well-used mechanism to support economic migration by individuals – a right to movement for the purpose of self-employment. The delay periods for this right have passed in most of the Stabilisation Agreements (only the delay period in the Serbia Agreement remains to expire in September 2017).

However, this opportunity to use trade agreements to achieve better outcomes in economic migration has been shunned by a number of EU interior ministries. As far as we are aware, no Member State has made provision in its national immigration law to give effect to the entitlement of companies based in the Western Balkan countries to send their key personnel to their subsidiaries in the EU. Instead, where the issue has even been

addressed, lawyers and their client companies have been shunted off into the national, generally applicable immigration rules, which are frequently less favourable than the provisions of the agreements. The right of individuals to exercise self-employed activities has been greeted by relevant interior ministries with even less enthusiasm than the rights of companies. The consequence is the frustration of the objectives of the trade agreements, the nullification of rights promised to people and the creation of a hostile environment for regional cooperation and development.

Instead of clearly set out (and circumscribed) economic migration possibilities in trade agreements being used to assist neighbouring countries to deal with what may be temporary economic turmoil (as in the case of Albania and its youth unemployment issue), Member States' interior ministries have been left free to use exclusively coercive, *non-entrée*, refusal of admission and expulsion measures to block economic migration in the region. Perhaps it is time to address the prejudices within these ministries against economic migration and use the trade agreements already in existence with provisions for movement of persons for economic activities in the way they were intended to operate when negotiated. This would be a much less expensive option for the Member States than coercion and would have a very positive effect on diminishing irregular economic migration to the EU. It might even reduce the number of asylum applications from nationals of the Western Balkans in the EU if nationals of those states were able to access the economic movement rights they were promised in the trade agreements.

# **PART V**

## **RECONSIDERING THE RESEARCH AND POLICY NEXUS ON MIGRATION AND WAYS FORWARD FOR THE EU**



# 18. RESEARCH-POLICY DIALOGUES ON MIGRATION AND INTEGRATION AT THE EU LEVEL: WHO TELLS WHOM WHAT TO DO? *RINUS PENNINX*

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## 18.1 Introduction

Good governance is based on a sound analysis of the issues to be governed; good policies are ‘evidence based’. Research has an important task to provide data and analysis to politicians and policy-makers. Politicians and policy-makers should use such scientific input for better policy decisions and practices. Scientific research funded by DG Research of the European Commission must be relevant for politics and society. These are the mantras of Eurospeak on how research should relate to politics and policy-making, and vice versa.<sup>1</sup>

But what does the practice of research-policy dialogues (RPDs) actually look like? Is there a dialogue, implying reciprocity between independent, autonomous bodies? Or is there a one-way communication in which Policy tells Research what to deliver and picks and chooses from scientific knowledge what suits the Policy cause?

This chapter will examine three questions. What silent assumptions are behind these slogans, and how could we best look analytically at the research-policy relation? How in actual practice does research relate to politics and policies and vice versa? What recommendations can we deduce from an analysis of RPDs to improve them?

The analysis that follows is based on my long personal involvement in research and in policy-making as a researcher, a policy-maker (in a Dutch ministry) and a policy adviser (Penninx, 2005; 2013). I will also heavily lean on a recent book, *Integrating Immigrants in Europe: Research-Policy Dialogues*,

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<sup>1</sup> See European Commission, *Migration and Mobility, Research and Innovation Projects in support to European Policy: The European Union’s Research Framework Programme*, Luxembourg: Publications Office of the European Union, 2016.

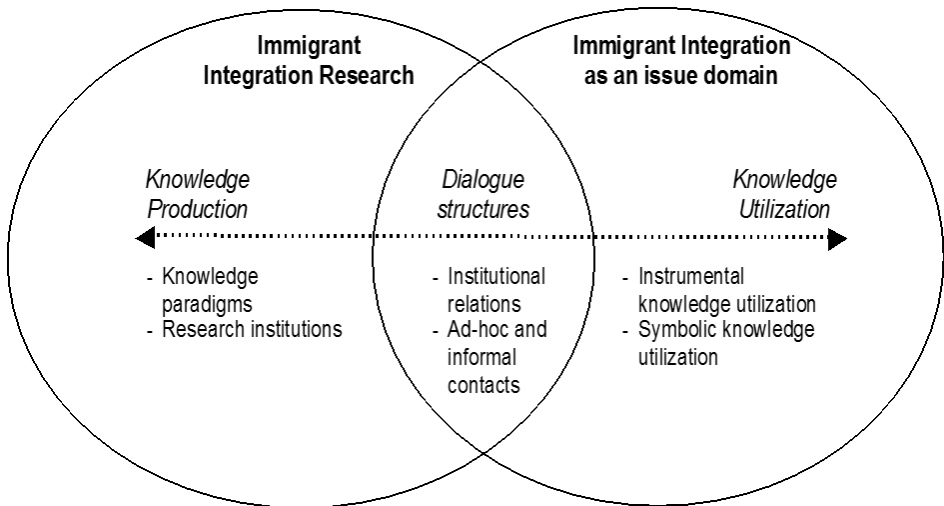
which I co-edited with Peter Scholten, Han Entzinger and Stijn Verbeek (2015). That study analyses RPDs in the EU, in seven of its Member States, and at the local level of cities during the past two decades. In this contribution, I focus on the EU level.

## 18.2 What questions to ask on RPDs?

In the above-mentioned book (Scholten et al., 2015, p. 3), RPDs are defined as all forms of interaction between researchers and policy-makers. We use the term dialogues to refer to the reciprocal nature of research-policy relations: we are not just looking at how research is used in policy-making, but also how (the) policy (context) influences what is researched and how.

Analytically, three aspects of RPDs can be distinguished, as diagrammed in the figure below.

*Figure 18.1 Research Policy Dialogue*



First, there are the concrete structures of RPDs, i.e. the formal and informal arrangements that exist through which knowledge itself, decisions on knowledge production and the relevance of knowledge for policy are communicated and exchanged. Second, there are cultures and practices of knowledge utilisation in policy processes. Here the key question is what role is attributed to knowledge and research by policy-makers in the process of

policy-making. Third, focusing on the researchers' primary task, there are cultures of knowledge production in the field of migration research. A key question here is whether the production of knowledge is autonomous within the scientific world or (slightly or heavily) influenced by its policy users (and funders).

### **18.3 The nature of science versus policy-making and assumptions of RPDs**

RPDs are exchanges between two worlds that have basically different tasks, attitudes and ethics in relation to migration and integration. The essential task of researchers is to build scientific knowledge on the movement of people across national borders and on the process of their entry and possible settlement in a society. They try to understand these phenomena by developing theories that ideally are able to predict the course of migration and processes of integration. While working towards such theories, they (should) develop their own specific scientific concepts, definitions and analytical models (i.e. autonomous and independent from political and policy definitions).

Policy-making and implementation of policies in the field of migration and integration is a fundamentally different work and process. The essential characteristic of a policy is that it intends to steer processes in society. Policies are normative in nature: they define a problem and design policy action to solve that problem. (If there is no problem, there is no need for a policy.) In democratic societies, policies are defined politically by majorities in society. In the case of migrants and minorities this complicates things significantly: migration and integration policies represent expectations and demands of (majorities in) this society rather than those of immigrants. This is particularly the case when these issues are politicised. Politicisation reinforces the interests of the majority in the host society and increases demands on immigrants. In the process of making and implementing policies, specific concepts, categorisations and assumptions are developed that follow from the initial problem definition. These concepts, categorisations and assumptions may differ significantly from the ones used in scientific work.

These differences of tasks and in the nature of research and policy lead to quite different expectations on what the contribution of researchers to policy-making should be, and what use the policy-maker should make of available or commissioned research. In the scientific study of policy, a

number of idealised models of research-policy relations have been defined. The enlightenment model (“speaking truth to power”; Wildavsky (1979)) comes close to the ideal typical image that outsiders of both worlds have of the role that scientific research has in relation to policy-making. Enlightenment assumes sharp boundaries between research and policy, but at the same time there is a great confidence that scientific knowledge will eventually become part of the policy-making process and of the policy-makers’ interpretation of the policy problems (Weiss, 1977). In contrast to this, Hoppe (2005) formulates a technocratic model of research-policy relations, where researchers (‘experts’) are more directly involved in policy-making. In this model, researchers do not just provide knowledge, but they also frame policy problems and develop solutions. They come close to taking over the role of policy-makers themselves.

In the enlightenment and the technocratic models research is given a primary role in all phases of policy-making, from conceptualisation to evaluation. But other models, such as the bureaucratic model and the engineering model, are built on the primacy of politics in policy-making. The latter two models assume that research contributes to policy-making and political decisions, but that the scientific input is only one element: policy-making is also – and often more – determined by values, norms and power. The bureaucratic model assumes a sharp Weberian fact-value dichotomy between research and politics: research is supposed to provide data (‘facts’) that policy-makers need to develop policies and reach decisions. The engineering model allows researchers a more influential role in policy, but preserves the primacy of politics, particularly when it comes to the conceptualisation and framing of policies; policy-makers are at liberty to select (‘pick and choose’) those strands of expertise that fit their conceptualisation.

With the foregoing key questions and analytical ideas on research-policy relations in mind, the next two subsections will look at RPDs at the EU level. Concretely, the first considers the question of how the European Commission has stimulated the scientific world to come up with research results that are relevant for EU policies. The second subsection offers some observations about how scientific input is used at the EU level. In answering these two questions, RPD structures will be mentioned *en passant*.

## 18.4 The demand for (specific) knowledge for EU policies and EU funding

### *Large-scale investment in (funding of) research on migration and integration*

Within the European Commission, the DG for Research & Innovation is the most prominent funder of research on migration and integration. The website of the Migration Research Platform of the DG mentions that not less than 80 large-scale projects have been financed since the beginning in 1994. Singleton (2009) has described 50 of these comparative research projects funded by the Research Framework Programmes (FPs) 4, 5 and 6 up until 2009. One of these early projects was the IMISCOE Network of Excellence (financed in the period 2004–10), which was meant to (and actually did) build an infrastructure for research at the European level. As a follow-up of Singleton's overview, King and Lulle (2016) have recently analysed 17 large-scale comparative research projects of FP7. A recent listing of projects by the European Commission<sup>2</sup> adds to these overviews of direct FP-funded projects another 20 projects that DG Research co-funded with national funding agencies in the ERA-Net NORFACE programme on migration in Europe and the ERA-Net programme on welfare state futures.

The funding of research in FPs and FP-related programmes is done according to institutionalised procedures. The size and the general topics of each FP research programme are proposed by DG Research after internal (with the policy DGs) and external consultation on importance and relevance, and decided upon politically by the European Council and Parliament. General FP programmes are specified later in time, in line with available funding and according to more specific issues in work programmes. The research world is given the opportunity to react to open calls by making specific research proposals for specific elements/issues of the work programmes. The societal relevance of the proposals is an important element in the evaluation and allocation.

Apart from DG Research, there is sizeable funding of research by DGs that are directly responsible for migration and integration policies, particularly by the DG for Migration and Home Affairs (DG HOME). Two ways of financing research by this DG can be distinguished. The first is financing policy-oriented research as a structural part of the policy programme. This started with the INTI programme 2003–07, which funded research projects related to (often local) integration of third-country

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<sup>2</sup> Ibid.

nationals. From 2007 onwards, such research became part of the European Integration Fund (EIF). Numerous research projects – again selected in open competition – were funded by the community action programme of the EIF between 2007 and 2013. Of these, 69 are described by Bruquetas Callejo (2015).

Apart from the EIF, DG HOME has funded an uncounted number of short-term, policy-defined research projects. These are more instantly planned, short-term projects in which the research question stems directly from policy practice and is narrowly described. The research institutes (in this stream more often based in the commercial bureaus than in universities and academic institutions) are again chosen in open competition.

### *More 'open' integration research as compared with 'closed' migration research*

All in all, the first question can be answered unequivocally: the European Commission has invested in research on migration and integration since 1994 and these investments have become sizeable since 2003. Both DG Research and DGs in charge of migration and integration policies have contributed to this. DGs have been explicit on their motivation to generate knowledge relevant for European societies and for EU policies. DG Research has done this in a somewhat more open way, by only selecting the relevant issues for funding and leaving the task of how to research these issues to scientists. DG HOME (and recently other policy directorates) have done this by defining more precisely the research aims, questions and contexts. Within this general conclusion, however, some observations can be made that differentiate this general picture.

An important observation is that there are significant differences in how the topic of migration appears in EU-commissioned research as opposed to the integration issue. Migration research was dominant at the beginning and its commissioning has always been more 'closed', i.e. the issues have been narrowly described and from a policy perspective. Integration research started later (in 2003), but became more dominant than migration research; integration research is relatively stronger in the more 'open' forms of research commissioning (by FPs and the EIF). Where do these differences stem from? Let us look back on these different tracks of policy-making and how they shape 'demand'.

Migration policy has been a first pillar, communitarian policy since the Amsterdam Treaty of 1997. Policy-making in this field entails the politically sensitive balancing of making binding common regulations both for internal

free movement (mobility) and for controlled external movement (international migration of third-country nationals). In such a context, there is little room or demand for external knowledge or for alternative framing. Indeed, there is a strong inclination on the part of the Member States to keep procedures in policy-making closed and data collection internal. This is well illustrated by the rejection in the late 1990s of the European Commission's proposal to establish a European migration observatory, an external and independent data-collecting institution, such as those existing in a number of other areas (Salt et al., 1998). After this rejection, a long internal debate followed on how to organise data collection and research, ending with the establishment of the European Migration Network (EMN) in 2003. The national EMN teams are under the direct management of national governments, and in most cases within ministries. In the Dutch case, for example, the EMN team is located within the IND, the Immigration and Naturalisation Service of the Ministry of Justice.

Integration policy at the EU level started later than migration policy. The EU integration concept as defined initially in the 1999 Tampere programme is strictly legal: citizens of non-EU states are integrated at the moment that their formal rights are the same as those of national citizens. It was only in the 2003 Communication on Migration and Integration<sup>3</sup> that a more comprehensive concept of integration was announced (still only for third-country nationals and not applicable to EU citizens who were supposed to be integrated by definition!). But the policy-making on integration is not communitarian, as in the case of migration, but intergovernmental. It has to be based on a consensus of nation-states and their voluntary cooperation; no binding legislation or directives underpin integration policies, but only soft instruments, such as the Common Basic Principles for Integration.<sup>4</sup> The strategy for developing such a policy is the open method of coordination. In such an open context of non-binding policy-making that involves furthermore several levels (the city, the region, the state and the EU) and multiple stakeholders (migrants, civil society and government) systematic data collection, evaluation and research have become important tools of policy-making in this open method of coordination.

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<sup>3</sup> See European Commission, Communication on Immigration, Integration and Employment, COM(2003) 336 final, Brussels, 3.3.2003.

<sup>4</sup> See European Commission, Common Basic Principles for Integration, adopted by the Justice and Home Affairs Council on 19.11.2004.

The explanation for the explosion of research funding on integration research since 2003 and its dominance over migration research over the whole period is to be found in the specific position of the European Commission in policy-making in the two domains of respectively migration and integration. In the migration domain, external autonomous scientific input was not in demand, but it was rather seen by Member States as a threat to (communitarian) policy-making. In the integration domain, research was drawn into multi-level and multi-stakeholder (non-binding) policy-making as a tool to build consensus. No wonder that most of the FP-funded research projects were on topics of integration rather than migration. And no wonder that the large European Integration Fund had a structural part earmarked for integration research, while a comparable fund for migration research does not exist; the European migration observatory was stillborn.

### **18.5 Knowledge utilisation in policy-making**

Boswell (2009) claims that there are different ‘cultures’ of knowledge utilisation. These are built on the function that research has for policy-making. The most basic function involves the instrumental utilisation of knowledge and expertise. In this case, research is effectively taken as content input into policy-making; research is an instrument for policy-making. It is this type of knowledge utilisation that is assumed in the notion of ‘evidence-based policy-making.’

In addition to such instrumental use of knowledge, Boswell distinguishes two more symbolic types of knowledge utilisation. The first is that knowledge provides authority to policy decisions already taken by substantiating these policy decisions with relevant (and supportive) knowledge and expertise. The second symbolic type of knowledge utilisation is legitimatisation of policies and policy institutions. This legitimatising function of research and expertise goes beyond substantive research findings: it refers to the mere symbolic act of having knowledge and expertise to claim authority over a particular policy.

#### *Knowledge utilisation in the EU*

Boswell’s (2009) landmark work on knowledge utilisation in migration policy-making in the UK, Germany and the EU indicates various important contextual factors that may help explain why, where and when a specific type of knowledge utilisation emerges. For instance, her examination of the EMN revealed that this organisation primarily served to substantiate EU



migration policies in the context of the fierce politicisation of this issue at the European level. In addition, her UK and German case studies point to the relevance of the organisational structure of the policy domain. She claims, for instance, that the fragmented and contested nature of the migration policy domain in Germany helps explain why the role of the BAMF (the Federal Agency for Migration and Refugees) was mostly substantiating rather than instrumental or legitimating.

Unfortunately, there have been only a few attempts to study knowledge utilisation at the EU level in terms of Boswell's cultures of knowledge utilisation. Furthermore, some have a broader scope, such as Geddes and Achtnich (2015) and Singleton (2015), who cover the wider field of science–society dialogues – which include more stakeholders than RPDs. Others use different concepts and methodologies, such as Pratt (2015), who uses the case study method to analyse RPDs around the preparation of two policy documents. There is thus still a lot of systematic work to do to establish firm conclusions. For now, I will make a few preliminary observations.

My first observation is that there is certainly a significant part of EU-funded research that has had – at least partly – an instrumental function for policy-making. This is particularly the case with projects that made inventories and comparisons of existing, national statistical data on migration and integration, such as the COMPSTAT, PROMINSTAT and THESIM projects. In the same vein, there have been many research projects that made inventories and comparisons of existing national regulations and policy practices in the legal–political domain (such as naturalisation and political participation), in the socioeconomic domain (such as work, labour market regulation and immigrant entrepreneurship; migrants in housing, education and health systems) and in the domain of culture and religion (the regulation of the position of culture, language and worldview of immigrants). The comparative character of these projects made them informative, in terms of both the facts and the analytical insights on the societal processes that led to these facts. The instrumental use of these facts and insights, however, is mostly indirect (partly through use at levels other than the EU) and is not easy to recognise immediately in policy-making and documents.

There is certainly a strong symbolic use of research by the European Commission. This symbolic use refers not so much to the substantiating role of research: if the European Commission were to use knowledge to substantiate its own political stances, we would expect far more references

to research and scientific work in the many policy documents that have been produced at the EU level in the last two decades. The symbolic use seems to have predominantly been the function of legitimising the role of the European Commission. The huge investments of the European Commission (through DG Research and policy departments) can best be explained by the fact that it sees a good knowledge base and research as important instruments for policy-making in a context in which the Commission itself is dependent on the cooperation of national (and local) authorities. This dependence is different for migration and integration policies, as I have outlined above.

## **18.6 New directions for policy–research relations and dialogues**

We concluded in the foregoing paragraphs that the European Commission has (had) a strong influence on migration research in Europe through (the way of) funding it. The Commission does not just influence the extent of the research efforts, but also its content, the framing of issues, the choice of research topics and the concepts used are shaped by the European Commission’s research policies. We have also seen that at the EU level the use of knowledge in general and of commissioned research in the policy-making process is seldom directly visible. A certain indirect, instrumental use of part of the commissioned research can be made plausible, but the dominant use appears to be symbolic, particularly legitimising the European Commission’s position as a policy-maker in two politicised fields. This picture is not in line with the mantras that we mentioned at the beginning of this chapter. What could be done to improve this situation? I formulate two directions in which we should look to make RPDs at the EU level more fertile and healthy.

The first relates to the protection and preservation of the autonomy of commissioned scientific work. One can accept to a certain extent that policy DGs feel the need to commission strongly predefined, short-term, policy-oriented research projects to solve problems of policy-making (rather than problems with the content of policies). But if a serious contribution of science is expected from structural research funding, such as in the FP programmes of DG Research or the EIF (or its successor), researchers should be involved much earlier and more closely in the formulation of research questions. Concretely, the academic world should have more influence on the programming and selection of research funded by DG Research. Procedures for programming and selection should be more open for argumentation

based on the state of the art of knowledge and theory building than for policy definitions and pressure.

The second relates to the role that politicians and policy-makers assign to scientific knowledge and research. If a serious quality contribution of the scientific world to policy-making is expected, policy-makers should not only expect such a contribution from research they commission and fund. Policy-makers should also be more receptive to and more serious about developing ways of collecting knowledge that is relevant for their issues in the broad sense. RPD frameworks that bring academics and policy-makers together in a structured way may have beneficial effects for direct instrumental use of available knowledge as well as for programming new – policy-relevant – research.

## References

- Boswell, C. (2009), *The political uses of expert knowledge: Immigration policy and social research*, Cambridge: Cambridge University Press.
- Boswell, C. (2016), *Understanding and Tackling the Migration Challenge: The Role of Research*, Conference Report of the International Conference in Brussels, 4–5 February, DG for Research and Innovation, European Commission, Brussels.
- Bruquetas Callejo, M. (2015), *Projects of the European Integration Fund (Community action programmes 2007–2013), Final Report*, Luxembourg: Publications Office of the European Union.
- Garcés-Mascareñas, B. and R. Penninx (eds) (2016), *Integration processes and policies in Europe: Contexts, Levels, Actors*, Dordrecht: Springer.
- Geddes, A. and M. Achtnich (2015), “Research–Policy Dialogues in the European Union”, in P. Scholten, H. Entzinger, R. Penninx and S. Verbeek (eds), *Integrating Immigrants in Europe: Research–Policy Dialogues*, Dordrecht: Springer Open, pp. 293–314.
- Hoppe, R. (2005), “Rethinking the science-policy dialogue structure: From knowledge utilisation and science technology studies to types of boundary arrangements”, *Poiesis & Praxis: International Journal of Technology Assessment and Ethics of Science*, Vol. 3, No. 3, pp. 199–215.
- King, R. and A. Lulle (2016), *Research on Migration: Facing Realities and Maximising Opportunities, A Policy Review*, Luxembourg: Publications Office of the European Union.
- Penninx, R. (2005), “Bridges between research and policy? The case of post-war immigration and integration policies in the Netherlands”, *Special Thematic*

*Issue of the UNESCO/International Journal on Multicultural Societies*, Vol. 7, No. 1, pp. 33–48.

- Penninx, R. (2013), “Research on Migration and Integration in Europe: Achievements and Lessons”, Valedictory Lecture held on 29 August 2012 in the Aula of the University of Amsterdam, Vossiuspers UvA, Amsterdam.
- Penninx, R. (2015), “European cities in search of knowledge for their integration policies”, in P. Scholten, H. Entzinger, R. Penninx and S. Verbeek (eds), *Integrating Immigrants in Europe: Research–Policy Dialogues*, Dordrecht: Springer Open, pp. 99–116.
- Pratt, S. (2015), “EU Policymaking and Research: Case Studies of the Communication on a Community Immigration Policy and the Common Basic Principles for Integration”, in P. Scholten, H. Entzinger, R. Penninx and S. Verbeek (eds), *Integrating Immigrants in Europe: Research–Policy Dialogues*, Dordrecht: Springer Open, pp. 117–130.
- Salt, J., P. Densham, V. Chell, H. Prophet, J. Hogarth, A. Singleton, J. Clarke, R. Penninx, J. Doomernik, C. Wihtol de Wenden and V. Vuddamalay (1998), *Feasibility Study for a European Migration Observatory, Final Report*, Luxembourg: Office for Official Publications of the European Communities.
- Scholten, P., H. Entzinger, R. Penninx and S. Verbeek (eds) (2015), *Integrating Immigrants in Europe: Research–Policy Dialogues*, Dordrecht: Springer Open.
- Singleton, A. (2009), *Moving Europe: EU research on migration and policy needs*, Luxembourg: Office for Official Publications of the European Communities.
- Singleton, A. (2015), “Speaking truth to power? Why civil society, beyond academia, remains marginal in EU migration policy”, in P. Scholten H. Entzinger, R. Penninx and S. Verbeek (eds), *Integrating Immigrants in Europe: Research–Policy Dialogues*, Dordrecht: Springer Open, pp. 131–142.
- Weiss, C. (1977), “Research for policy’s sake: The enlightenment function of social research”, *Policy Analysis*, Vol. 3, No. 4, pp. 531–545.
- Wildavsky, A. (1979), *The art and craft of policy analysis: Speaking truth to power*, London: Macmillan.

## 19. EU LEGAL MIGRATION TEMPLATES AND COGNITIVE RUPTURES: WAYS FORWARD IN RESEARCH AND POLICY-MAKING

*DORA KOSTAKOPOULOU*

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The evolution of the Area of Freedom, Security and Justice (AFSJ) exemplifies the visionary template for European integration enshrined in the Schuman Declaration (9 May 1950): “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.”<sup>1</sup> Through consistent action in variable, and often unpredictable, environments as well as through processes of trial and error, European institutional actors have designed legal templates for migration governance that can better address the needs of European societies and polities, along with citizens, residents and admission seekers. There is a lot to commend ‘Europe’ for in this area. Hardly anyone would have predicted the adoption of so many legal migration directives in the early 1990s when the intergovernmentalist pillar of justice and home affairs (JHA) was established by the Treaty of European Union (in force on 1 November 1993).<sup>2</sup>

Transcending their fears about possible sovereignty losses and learning to trust each other and the common European Community institutions they had designed, national executives agreed on the partial communitarisation of the JHA pillar at Amsterdam (the Amsterdam Treaty entered into force on 1 May 1999) and finally on its full communitarisation by the Treaty of Lisbon ten years later (in force on 1 December 2009).<sup>3</sup> The first decade of the new millennium saw the adoption of the first five legal

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<sup>1</sup> See the Schuman Declaration ([https://europa.eu/european-union/about-eu/symbols/europe.../schuman-declaration\\_en](https://europa.eu/european-union/about-eu/symbols/europe.../schuman-declaration_en)).

<sup>2</sup> See the Treaty on European Union, 7 February 1992, OJ C 191/1, 29.7.1992.

<sup>3</sup> See the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, OJ C 306/1, 17.12.2007.

migration directives: the Long-Term Residence Directive; the Family Reunification Directive; the Directive on the Conditions of Admission of Students, Pupils, Unremunerated Trainees and Volunteers; the Directive on a Specific Procedure for Admitting Third-Country National Researchers; and the Blue Card Directive.<sup>4</sup> Shortly afterwards, the Single Permit Directive, the Seasonal Workers Directive and the Intra-Corporate Transfer Directive were adopted.<sup>5</sup> True, the processes of negotiating and agreeing on the legal content of the directives have not been smooth. But it is equally true that discontent, rival national interests and the prevailing ideological lenses did not stall the institutional journey of the AFSJ. After all, short-term opposition and temporary obstacles can delay and frustrate regulatory choices but these eventually become absorbed in long-term processes of continuous feedback loops of learning, trust-building and searching for better and more efficient policy designs.

What has also been remarkable in this institutional journey is the depth of the institutional change that has taken place. More openness and accountability was infused into the AFSJ, effective parliamentary supervision and judicial scrutiny provided improvements in the governance of legal migration, and the one-sided prevailing belief in restricting, controlling and securitising migration was supplemented by a more liberal

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<sup>4</sup> See Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003; 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, OJ L 375/12, 23.12.2004; Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289/15, 3.11.2005; 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, OJ L 155/17, 18.6.2009. For an analysis, see Wiesbrock (2010).

<sup>5</sup> See 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 common set of rights for workers, OJ L 343/1, 23.12.2011; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on conditions of entry and stay of third-country nationals for the purposes of employment as seasonal workers, OJ L 94/375, 28.3.2014 and 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, OJ L 157/1, 27.5.2014, respectively.

approach and a stronger focus on the rights of the individual. The EU citizen has also been placed at “the heart of the project”.<sup>6</sup> Such a liberal approach characterised the Tampere and Stockholm programmes.<sup>7</sup> In this respect, although ideology and security challenges led to a restrictive and security-based discourse and policy on external migration,<sup>8</sup> political pragmatism, a more positive frame for labour migration and the situation of European migration policies, which the global dynamics of human mobility and a rights-based focus fuelled by the binding EU Charter of Fundamental Rights, also played an important role in shaping the EU’s legal migration *acquis* (Fletcher et al., 2016). In fact, it would not be an exaggeration to say that the latter has effected a cognitive change in how human mobility is perceived and should be regulated, thereby enriching the policy menu of the EU and of national governments.

To this end, the European Commission has played a remarkable role by providing forward-thinking, creative approaches and often an audacious reappraisal of some of the underlying assumptions that underpin policy selection in the migration field. Its numerous Communications have enriched the cognitive menu of national institutional actors and have prompted them to view migration as a resource and an opportunity for economic regeneration and societal enrichment. They have also emphasised the need for a flexible and proactive migration policy and consistently promoted the vision of a “Europe of rights”<sup>9</sup> and a ‘Europe of citizens’. In reality, this vision of Europe was no other than the Schuman Declaration’s vision of a Europe of solidarity. Promoting a more integrated social space and a Europe of solidarity was a political priority of the Stockholm programme. To this end, the Commission at that time called for a dynamic

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<sup>6</sup> See European Commission, Communication on an Area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment, COM(2009) 262/4, Brussels, 10.6.2009, p. 2.

<sup>7</sup> See European Council, Presidency Conclusions of the Tampere European Council, SN 200/99, Brussels, 15-16 October 1999 and Council of the European Union, The Stockholm Programme – An Open and Secure Europe serving and protecting the citizens, 17024/09, Brussels, 2.12.2009; see also Guild and Carrera (2009) and Kostakopoulou (2007), pp. 153–191.

<sup>8</sup> This was evident in The Hague programme, which was agreed by the European Council in November 2004; see European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53/1, 3.3.2005.

<sup>9</sup> See European Commission, COM(2009) 262/4, op. cit., p. 7.

and comprehensive migration policy, which consolidates the Global Approach to Migration and is anchored on responsibility and solidarity.<sup>10</sup>

But a 'Europe of solidarity' needs to be a Europe of comprehensive solidarity and not of EU national solidarity. In other words, solidarity cannot be confined to nationals of the Member States. It has to embrace all residents in the EU and all those seeking sanctuary or admission to it. This, in turn, requires a positive commitment to the ideal of partnership and cooperation among the Member States and the EU's neighbours and third-country partners and to fundamental rights. Such a positive commitment to fundamental rights was exemplified very recently in Advocate General (AG) Paolo Mengozzi's opinion in *X and X v Belgium*.<sup>11</sup> He argued that the Member States have a positive obligation to issue humanitarian visas to Syrian applicants under Art. 25(1)(a) of the Visa Code and Art. 4 of the Charter of Fundamental Rights, which protects individuals against inhuman and degrading treatment. Such an obligation exists where there are serious grounds to believe that the refusal to issue a visa would lead to the applicants being subjected to treatment prohibited by Art. 4 of the Charter of Fundamental Rights and would prevent them from the only legal recourse to enjoy their right to apply for international protection.<sup>12</sup> A positive commitment to partnership, on the other hand, rules out both attitudes of insularity and national centrifugalism.

Social scientific research could aid policy-making in this area by studying the rise of neo-nationalism and populism in Europe and the serviceability of such discourses. At first sight, one might be tempted to view these discourses as regressive steps and a return to ethno-nationalism. However, as the political environment is undergoing change, ideology cannot but adapt to it. In this respect, one might find new elements in them or new articulations that draw and redraw boundaries among human beings and create 'othering'. Social scientists could add valuable knowledge to how conservative forces exploit economic uncertainty in order to arouse fears and prejudice among Europe's citizens and residents. Research on racism, xenophobia, the rights of hate crime victims and processes of othering is thus needed. For othering is essentially about distancing, that is, about creating barriers that keep human beings apart. These might be physical – that is,

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<sup>10</sup> Ibid., Priority 5, p. 23.

<sup>11</sup> See Case C-638/16 PPU *X and X v Belgium*, Opinion of AG Mengozzi of 7 February 2017.

<sup>12</sup> Ibid.



manifested in practices of ‘walling’ which separate ‘ins’ from ‘outs’ – or social or psychological. The latter happens when individuals share the same public space but are made to feel that they do not belong to it. It also happens when the other’s empirical presence is denied in law and she or he is kept apart by policies that posit obstacles to full inclusion. Access to citizenship, for example, has become more difficult in Europe and civic integration policies have exclusionary effects. It would be interesting to map the scope and organisational structure of the integration policies of the Member States and to juxtapose these with the scope and structure of their anti-discrimination and anti-marginalisation policies. How much input do migrants have in the design and implementation of integration policies and what scope is there for achieving societal integration via a non-discrimination and citizenship-driven agenda?

Notwithstanding the work of social researchers, these are difficult times and the EU needs to avoid the capture of its values and policies by centrifugal nationalism and populism. It has to stand firm, affirm its values and defend its achievements. If it fails to do so, it will compromise its operation, the ethos of internationalism and connectivity among peoples, societies and states, as well as its principles of fundamental rights protection and non-discrimination. It also has to defend internal mobility and to extol its benefits for economies, societies, politics and individuals. And of course, the defence of mobility has to take place within a paradigm characterised by a positive appraisal of migration. For both internal mobility and external migration are transformative. Even during these challenging times, progressive forces need to challenge vigorously the negative and security-based narrative about migration and to defend both the experience of relating to one another and the openness of societies.

As the architectural foundations of the legal migration governance have been established, the reappraisal of the legal migration *acquis* could assess the implementation of the directives mentioned above. This is a perfect time for reflection and for improvements in the implementation of the existing instruments with a view to ensuring a fundamental rights-compliant implementation. Given the existing configuration of political forces, the robust defence of what has been adopted and the correction of gaps in implementation in ‘old’ and ‘new’ Member States are advisable. And as the Charter becomes more prominent in the EU legal order, social scientific research could aid policy-making by examining the extent to which the implementing measures adopted by the Member States affirm migrants’ rights, including the right to health, education, family reunification and political participation.

An important aspect of the EU's institutional framework on legal migration would also be the drafting of an immigration code, which would incorporate the existing sectorial directives and provide a uniform level of rights. The Commission proposed this in 2009, but the Council sought to close the conversation about the immigration code by excluding it from the Stockholm programme. The Commission's "Action Plan Implementing the Stockholm Programme" resurrected this mandate, which national executives had left out of the Stockholm programme.<sup>13</sup> The code would provide "a uniform level of rights and obligations for legal immigrants" and further contribute to the aim of designing a common migration and asylum policy "within a long-term vision of respect for fundamental rights and human dignity".<sup>14</sup> But the Council was not open to this idea. A few months later, it reacted by noting that "some of the actions proposed by the Commission were not in line with the Stockholm Programme" and it urged the Commission to "take only those initiatives that are in full conformity with the Programme".<sup>15</sup>

The vision of the Commission and the Stockholm programme of a 'dynamic and fair migration policy' in the 21<sup>st</sup> century was interrupted by the economic crisis in the eurozone, the rise of Eurosceptic and neo-nationalist political parties in Europe and a sudden increase in the number of migrants and refugees seeking admission. Although the political environment continues to be restrictive, the long-term goal of an EU immigration code should remain on the agenda. For such a code would integrate all the existing instruments, eliminate inconsistencies and unjustified variations among them, and provide an opportunity for clarity, simplification and raised standards in rights protection. Such an institutional template would lead to a changed cognitive menu, since migrants would be viewed as rightful participants in practices of economic cooperation. In this respect, a future immigration code would not be a subtraction from, but an important addition to the EU's legal migration architecture.

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<sup>13</sup> See European Commission, *Delivering an area of Freedom, Security and Justice for Europe's citizens - Action Plan Implementing the Stockholm Programme*, COM(2010) 171 final, Brussels, 20.4.2010, 7.

<sup>14</sup> *Ibid.*, 7.

<sup>15</sup> See Council of the European Union, *Council Conclusions on the Commission's Communication "Delivering an area of freedom, security and justice for Europe's citizens - Action Plan implementing the Stockholm Programme"*, COM(2010) 171 final, Luxembourg, 3.6.2010, p. 2.

## References

- Fletcher, M., E. Herlin-Karnell and C. Matera (eds) (2016), *The European Union as an Area of Freedom, Security and Justice*, Abingdon: Routledge.
- Guild, E. and S. Carrera (2009), "Towards the Next Phase of the EU's Area of Freedom, Security and Justice: The European Commission's Proposals for the Stockholm Programme", CEPS Policy Brief No. 196, CEPS, Brussels, 20 August.
- Kostakopoulou, D. (2007), "The Area of Freedom, Security and Justice and the European Union's Constitutional Dialogue", in C. Barnard (ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*, Academy of European Law, European University Institute, Oxford: Oxford University Press.
- Wiesbrock, A. (2010), *Legal Migration to the European Union*, Leiden/Boston: Martinus Nijhoff.

## 20. CONCLUSIONS AND RECOMMENDATIONS: TOWARDS A FAIR EU AGENDA FACILITATING LEGAL CHANNELS FOR LABOUR MOBILITY *SERGIO CARRERA, ANDREW GEDDES AND ELSPETH GUILD*

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The collection of chapters making up this book have provided a detailed and multidisciplinary examination of the main issues and challenges associated with legal migration policies in the EU as well as in the context of EU cooperation with third countries. The book has studied the extent to which EU legal migration policies, and the concepts substantiating their rationales, are well suited to capture the social characteristics and changing trajectories of individuals exercising cross-border mobility. Special attention has been paid to the relationship between the policies and the international and EU standards on fair working and living conditions of third-country workers.

A first cross-cutting finding emerging from the various chapters is that current frameworks on migration policy in the EU often lead to a 'mismatch' between the law/policy, their underlying working notions and expectations, and the actual features of people's cross-border movements, their changing life courses and motivations. The chapters also address the complex relationship between labour migration (patterns and policies) and economic/social changes in the EU and beyond.

The book has also investigated the interactions between research and migration policy. While there is much to gain in basing EU policies on the best social science and humanities knowledge, EU lawmaking has generally preferred a kind of 'knowledge' that uncritically substantiates political decisions already taken, or which is aimed at the legitimation of EU institutional actors' interests and pre-set agendas.

This chapter identifies and explores the main findings that have emerged from the analysis. In light of these, it puts forward policy

recommendations for the EU to consider in the current Legal Migration Fitness Check (REFIT Initiative), which was originally included in the 2016 Commission Communication “Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe”.<sup>1</sup> The REFIT Initiative aims at “improving existing rules as far as possible also in light of the need to prevent and combat labour exploitation”.<sup>2</sup> This chapter concludes by calling for the adoption of **a fair EU agenda facilitating legal channels for migration** to guide the next phases that result from the Fitness Check.

## 20.1 EU labour immigration policy and law: The state of play

The last 15 years have witnessed an increased ‘EU dimension’ and a gradual process of ‘Europeanisation’ of labour migration policies in the Union (Geddes and Niemann, 2015). They also show that Europeanisation is not a linear process and that there can be bumps on the road as well as, at times, resistance by different actors.

The development of a common EU policy and approach in this domain remains by and large a long-standing political goal. The existing EU policy and legal framework dealing with the conditions of legal entry and residence of third-country nationals (TCNs) – legal immigration – and specifically those dealing with employment, has been said to be characterised by fragmentation, legal uncertainty and multi-layered migratory statuses across the Union (Carrera et al., 2011 and 2014).

Originally the European Commission tried to implement a ‘horizontal’ harmonisation approach through a unique legal act in the form of the 2001 proposal for a directive covering conditions of entry and residence for employment/self-employment of all categories of third-

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<sup>1</sup> See European Commission, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197 final, Brussels, 6.4.2016, p. 18. See also European Commission, “Regulatory Fitness and Performance Programme (REFIT) – State of Play and Outlook – REFIT Scoreboard”, Commission Staff Working Document, SWD(2015) 110 final, annexed to the Communication on Better Regulation for Better Results – An EU agenda, COM(2015) 215 final, Strasbourg, 19.5.2015.

<sup>2</sup> Ibid., p. 18.

country workers.<sup>3</sup> The proposal, however, was withdrawn in March 2006 without ever reaching any necessary accord among Member State representatives within the Council rooms.

The Commission followed up with the launch of a public consultation on the 2004 Green Paper on an EU approach to managing economic migration. The Green Paper addressed the ‘added value’ of, and the most appropriate form for, EU rules governing the admission and residence of TCNs in the field of employment.<sup>4</sup> Several respondents to the open consultation procedure expressed concerns about the sectorial step, featuring a worker-by-worker approach. At that time this included the European Parliament, which was of the opinion that “this legislation should define an overall regulatory framework of reference”.<sup>5</sup>

The Commission then embarked on what has been considered a ‘partitioning strategy’, consisting of splitting its original proposal into various drafts focused on particular categories of labour migration (Geddes and Niemann, 2015). The resulting picture was delineated by the Commission in the 2005 Policy Plan on Legal Migration,<sup>6</sup> which followed an open consultation procedure on the way forward. The 2005 Policy Plan consisted of the implementation of a worker-by-worker normative approach guiding the shapes of EU labour immigration policy.

The official justification offered by the Commission for taking this approach was that Member States had not shown sufficient support for a horizontal strategy. According to the 2005 Policy Plan, the package of sectorial directives aimed at developing “non-bureaucratic and flexible tools to offer a fair, rights-based approach to all labour immigrants on the

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<sup>3</sup> See European Commission, Proposal for a Council Directive on the conditions of entry and residence for the purpose of paid employment and self-employment activities, COM(2001) 386 final, Brussels, 11.7.2001.

<sup>4</sup> See European Commission, Green Paper on an EU approach to managing economic migration, COM(2004) 811 final, Brussels, 1.11.2005. See also Carrera and Formisano (2005).

<sup>5</sup> See the European Parliament Resolution on an EU approach to managing economic migration (COM(2004)0811 - 2005/2059(INI)), point 26.

<sup>6</sup> See European Commission, Policy Plan on Legal Migration, COM(2005) 669, Brussels, 21.12.2005. See also Carrera (2007).

one hand and attracting conditions for specific categories of immigrants needed in the EU, on the other".<sup>7</sup>

The policy framework that has emerged since then has therefore been one deeply embedded in what can be called 'systemic fragmentation'. As Guild underlines in chapter 6 of this volume, this fragmentation relates to both the territory to which labour migration is permitted and the basis of the type of employment/specific sector for which the TCNs are admitted. There is indeed a very high degree of diversity of EU legal instruments and statuses, which include not only a large body of EU secondary legislation but also a body of international agreements, and political instruments and policy tools lacking legally-binding force.<sup>8</sup>

Chapter 6 by Guild provides an account of existing EU legal acts on labour migration. These cover common rules on entry and residence of highly qualified workers (EU Blue Card), seasonal workers and intra-corporate transferees, as well as researchers, trainees and students. These have been complemented by a Single Permit Directive, which foresees a single application procedure and single permit for access and residence for employment-related reasons in the EU. Yet this package of directives falls short in securing a common EU policy on labour migration.

The above-mentioned Communication, "Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe", called for ensuring a more "effective enforcement of the relevant EU acquis to ensure the protection of the rights of the migrants who are working in the EU, in particular to prevent labour exploitation, irrespective of their legal status".<sup>9</sup> The Commission could additionally pay attention to identifying and addressing any potential counter-productive effects at the various stages of implementation of EU labour migration legislation.

Chapter 9 by Kroes observes some of the paradoxes that the domestic implementation of the Directive on Intra-Corporate Transfer (ICT) has posed in the Netherlands in comparison with the national scheme on mobility programmes that existed beforehand. Kroes shows how this has led to a high degree of confusion among key stakeholders in the country

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<sup>7</sup> Ibid., p. 5.

<sup>8</sup> For a detailed analysis of how these EU legal instruments define the room for manoeuvre by EU Member States, refer to Verschuere (2016), pp. 373–408. See also Peers et al. (2012).

<sup>9</sup> See European Commission, COM(2016) 197 final (2016), op. cit., p. 18.

and to companies trying to ‘legitimately’ avoid the application of the directive.

## 20.2 EU migration policy goes abroad: The external dimensions

The ‘internal’ framework of EU law and policy on legal and labour immigration discussed above has developed alongside a body of multiple instruments delineating the EU’s cooperation with third countries. EU external migration law and policy are characterised by a similarly patchy picture of instruments that differ in objectives, scope, nature and effects, as well as in the involvement of EU and domestic actors.

These include for instance international agreements with direct and indirect relevance for the treatment and rights of third-country workers migrating from those countries to the EU and which have taken the following forms: Partnership and Cooperation Agreements, Association Agreements with the Maghreb countries (Morocco, Tunisia and Algeria) and with Turkey (Eisele, 2014). The fact that these international agreements deal with some aspects of legal and labour migration debunks the myth that the EU has no competence to deal with these domains in its external relations in accordance with the Treaties.

The Union has also actively developed non-legally binding instruments and tools of a predominantly ‘political’ (non-legally binding) nature aimed at covering labour and circular migration schemes, i.e. Mobility Partnerships (MPs) and the Common Agenda for Migration and Mobility (CAMM) (Carrera et al., 2015b). These have been part of the EU’s Global Approach to Migration and Mobility (GAMM), and are now among the instruments implementing the EU Migration Partnership Framework with third countries under the European Agenda on Migration and the so-called EU compacts.<sup>10</sup>

EU external migration policies have provided new venues and fields for actors to pursue their interests and have developed in ways that often escape accountability or democratic and judicial ‘checks and balances’ similar to those in the domestic arenas (Stefan, 2016). EU external migration policies too often relegate or subsume the rights of individuals to interstate

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<sup>10</sup> See European Commission, Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final, 7.6.2016, Brussels.



or inter-actor interests and priorities. The flexible nature and multi-purpose functions of these instruments have important repercussions for principles of legal certainty, transparency, accountability and human rights protections. EU MPs constitute a case in point.

As chapter 12 by Den Hertog and Tittel-Mosser points out, MPs have a very complex and multi-actor implementation structure that blurs scrutiny and their democratic, legal and financial accountability. The analysis provided by chapter 12 of MP projects with Cape Verde, Moldova and Morocco confirms that, despite their actual name, Mobility Partnerships have contributed very little to fostering 'mobility' or 'circular migration' to the EU. The overwhelming priority of the envisaged projects has instead been on security and irregular immigration.

Chapter 13 by Stefan argues that one of the main functions pursued by EU external policy instruments is to persuade third countries to interlink cooperation on legal migration (e.g. visa facilitation deals) with the advancement of the EU's readmission agenda. This includes strategic partners such as China and India, which paradoxically do not represent a source of irregular migration to the EU. Stefan adds: "Very little or no consideration is instead given to the individual motivations for travelling to the EU."

As Weiner further explains in chapter 11, "[l]egal migration seems to be less of an objective than a bargaining chip in negotiations to obtain cooperation on border management". Legal migration is, in her opinion, "more like an afterthought", which is particularly absent in cooperation frameworks with African countries. It has certainly taken a long time for EU actors to finally realise that these issues are deeply ingrained in national economic policies, where the interests of all the actors involved simply do not match and cannot be kept hostage by EU border management and readmission agendas.

This book has equally explored the relationship between migration and trade policies. The exact shape and implications of that nexus call for careful consideration and analysis. Chapter 15 by Panizzon indicates that "there are several shades of grey" in the increasing linkages between migration and trade. The risks include commodifying migrants by

undermining their rights and labour standards, and facilitating their exploitation and abuse.<sup>11</sup>

It is clear from chapter 16 by Tans that some EU Member States do not always comply with their commitments to apply equality of treatment for foreign service providers in line with domestic service providers, and instead tend to apply more protective and restrictive policies as regards access to the labour market, which are incompatible with international trade commitments. There are also interesting opportunities, however. Panizzon argues in chapter 15 that there is still positive potential to be explored on how trade preferences may compensate for refugee employment and better secure refugee protection standards.

Trade agreements additionally offer interesting potential as mechanisms for legal migration and relieving irregular immigration to the EU. Guild's chapter 17 shows that trade agreement provisions on a right to move for self-employment and ICTs can provide solutions to address the inconsistencies between demand and opportunities for labour migration to the EU. Immigration possibilities in trade agreements could also be used to assist neighbouring countries, such as those in the Western Balkans, to deal with economic difficulties and reduce the number of asylum seekers from these countries.

The prevailing, *interior ministries-led* approach driving Union and Member State policies on migration constitutes a central obstacle to achieving better outcomes in labour immigration to the EU.

### **20.3 Legal migration: Whose legal competence?**

Discussions on EU migration policy have been characterised by legal competence issues and struggles as regards 'how much EU' there can be in this domain in light of the powers conferred by the Treaties to the EU. One of the most controversial issues regarding Member States' control relates to labour immigration into the EU, covering not only access to the labour market, but also residence conditions and labour rights/protection. Still, as Kostakopoulou's chapter 19 underlines, rival national interests have not stalled the institutional journey of EU immigration policies, and few would

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<sup>11</sup> See the UN Human Rights Council, "Report of the Special Rapporteur on the human rights of migrants on the impact of bilateral and multilateral trade agreements on the human rights of migrants", A/HRC/32/40, 4 May 2016.

have predicted the dynamism that has driven the emergence and development of this policy area.

The 2009 Lisbon Treaty states that migration policy issues are under ‘shared legal competence’ between the EU and its Member States. Determining the conditions of entry and residence for purposes of employment are no longer in the exclusive hands of the Member States. The ‘Lisbonisation’ of EU migration policy has meant the consolidation and full application of the Community method of cooperation in this field internally, and the adoption of a dynamic EU legal framework in these areas. As Geddes and Niemann (2015) have pointed out, the EU as an ‘institutional venue’ has become thicker over time.

Art. 79 of the Treaty on the Functioning of the European Union (TFEU) lays down the main legal basis for the Union to develop a common immigration policy. This competence includes measures dealing with aspects related to conditions of entry and residence, and common standards on long-term visas and residence permits, as well as family reunification. It also expands towards the definition of rights of TCNs residing legally, including conditions for them to move and reside in the EU. The only express limitation to the exercise by the EU of this shared legal competence is laid down in Art. 79(5) TFEU: “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 has often been alluded to in order to set limits as regards what the EU can do within and abroad (in cooperation with third countries) when dealing with matters related to migration for reasons of employment and self-employment. It is also often used to justify the slow and sometime inexistent progress in developing legal channels for third-country workers into the EU. This article, however, means that the EU can legislate on every other aspect pertaining to legal migration except determining volumes of admission.

The idea of an ‘EU immigration code’ has been proposed and recommended by the European Commission on a few occasions since 2009. The Commission Communication on “An area of freedom, security and justice serving the citizen: Wider freedom in a safer environment” states:

The EU must strive for a uniform level of rights and obligations for legal immigrants comparable with that of European citizens. These rights, consolidated in an immigration code, and common rules to

effectively manage family reunification are essential to maximise the positive effects of legal immigration for the benefit of all stakeholders and will strengthen the Union's competitiveness.<sup>12</sup>

The code reappeared in the Commission Communication on "Delivering an area of freedom, security and justice for Europe's citizens: Action Plan Implementing the Stockholm Programme" of April 2010.<sup>13</sup> This Communication highlighted that

[f]urther 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.<sup>14</sup>

The idea of the code has not seen the light of day as originally planned. Instead the European Commission called for the above-mentioned Legal Migration Fitness Check. Continuing the discussion on a future codification seems to be inevitable given the challenges affecting the current configurations of EU labour migration policy and law, in both their internal and external dimensions. Similar experiences have already been had in the context of Schengen, with the adoption of the Schengen Borders Code<sup>15</sup> and the EU Visa Code.<sup>16</sup>

Kostakopoulou in chapter 19 considers that the adoption of an immigration code incorporating all sectorial EU directives, and providing a uniform level of rights to third-country workers, would be an important step in building a common EU migration policy. This view has been previously shared by Peers, who has called for establishing a more

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<sup>12</sup> See European Commission, *An area of freedom, security and justice serving the citizen: Wider freedom in a safer environment*, COM(2009) 262, Brussels, 10.6.2009.

<sup>13</sup> See European Commission, *Delivering an area of freedom, security and justice for Europe's citizens: Action Plan Implementing the Stockholm Programme*, COM(2010) 171 final, Brussels, 20.4.2010.

<sup>14</sup> *Ibid.*, p. 4.

<sup>15</sup> See Regulation (EU) No. 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016.

<sup>16</sup> See 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, OJ L 81, 21.3.2001.

ambitious level of harmonisation of existing rules, which would be a central component in the development of a common immigration policy (Peers, 2012 and 2014). The consolidation and simplification of the existing EU legislative instruments in the domain of legal and labour migration, however, seems to be an inevitable way forward. Any codification of the existing rules should indeed focus on addressing the gaps and challenges raised above that reflect the fragmented and discriminatory legal framework.

#### **20.4 Consequences of sectorial policies and fragmentation: Incoherence, obscurity and discrimination**

A first direct consequence of the present shape and dispersed matrix of legal and policy instruments that EU policy comprises is inconsistency and incoherence. The existence of parallel legal and policy schemes constitutes a major obstacle to the coherency and added value of the EU in these domains, as well as to ensuring consistency in their compatibility with EU Treaty-based principles and objectives in both letter and implementation.

A second effect is that the existing legal framework results in a high degree of obscurity and a lack of transparency, which in turn makes access to information difficult for those individuals wanting to move to the EU. There are still hugely diverse priorities, regulations and systems across the EU in respect of the legal and labour immigration of TCNs. An illustrative example of that complexity and legal uncertainty is the above-mentioned EU Blue Card Directive, which runs in parallel with national schemes offering varying conditions for admission and residence for highly skilled/qualified migrants (Eisele, 2013).

A third consequence relates to inequalities and discrimination in the treatment granted to various groups of third-country workers under EU law. The sectorial legal framework and approach leads *de jure* to the setting-up of a model built on a hierarchy of rights, labour and living conditions that differ according to the extent to which the worker is deemed to be more 'highly qualified/skilled' and 'useful' to EU Member States. The scope and specific manifestations of inequality of treatment among third-country workers under the EU directives is studied in chapter 7.

The current arsenal of EU labour migration directives puts emphasis on guaranteeing equal treatment of migrant workers with nationals of the receiving Member States, including as regards employment and social

security rights. This has resulted, as Guild reflects in chapter 6, from the influence of civil society organisations, such as trade unions. It has also stemmed from the input of the Employment and Social Affairs Committee at the European Parliament, in negotiations as co-legislator in EU labour migration directives, that third-country workers must not be used to undercut the wages and working conditions of those already in the labour force of the Member States.

That notwithstanding, inequality among third-country workers emerges clearly when zooming away from the broader EU legal and policy setting. This is particularly the case with respect to the rights conferred on third-country workers who fall under statuses considered to be ‘temporary’, which usually correspond to those not categorised as ‘highly qualified’, i.e. seasonal workers. For instance, the limitations of the equal treatment approach in the Seasonal Workers Directive has led to criticism of it not being fit for purpose for effectively preventing labour and social exploitation of seasonal migrant workers (Fudge and Herzfeld Olsson, 2014).

Another legal category of third-country worker that is framed as ‘temporary’ in EU labour migration law concerns those involved in intra-corporate transfers. The ICT Directive includes special provisions for EU Member States to ensure or enforce the ‘temporariness’ of these workers, so they will not stay at the end of the assignment. Nor are they granted the possibility to cross the bridge towards long-term residence status in the receiving Member State.

Inequality of treatment also manifests itself in more difficult conditions for family members of these workers to join them in the EU and have equal access to fair working and living conditions (refer to chapter 1 by Korpela and Pitkänen). This approach (as Fridriksdottir in chapter 7 also demonstrates) is reflected in the ways in which EU labour immigration directives dealing with “temporary migration” include express derogations to family reunification and to equal working and living conditions in comparison with EU nationals.

Guild (2011, p. 216) has underlined that the sectorial approach of EU labour migration law is significant when ascertaining the ways in which labour migration control is viewed by EU Member States; the allocation of rights and different degrees of equality is driven by migrants’ perceived value to labour markets, as well as factors like qualifications and attributed skill levels.

‘Highly qualified’ third-country workers are granted more rights and better conditions than ‘low-skilled’ migrant workers. As the above-mentioned EU Blue Card scheme shows, they are also given more ways to become permanent residents and bring their families to the EU. Controversially, the principle is one whereby the economically weaker third-country worker can justifiably be deprived of rights and have fewer administrative avenues for entry and residence.

EURO-NET project research has shown how categories of third-country workers labelled as ‘temporary migrants’ are often exposed to slower and complicated bureaucratic processes related to visas and residence/work permits in the EU (Pitkänen, 2017). Chapter 13 by Stefan shows that the necessity for Chinese, Indian, Thai and Filipino nationals to undergo the documental, procedural and individual requirements for access to a Schengen visa entails a series of practical challenges for travellers. This finding is corroborated in chapter 14 by Sabharwal on India’s experience.

The external dimensions of EU migration policies are not exempt from similar concerns. Chapter 5 by Weinar points out that the lack of proper monitoring instruments covering the implementation of concluded agreements is especially problematic for ‘temporary workers’ because “the lower the skill level, the more abuse there is” of their rights. Fridriksdottir in chapter 7 argues that discrimination is higher the less qualified and less economically desired a group of migrants is.

The discriminatory treatment underlying the current EU legal framework was an issue raised by the European Economic and Social Committee (EESC) during the above-mentioned open consultation launched by the European Commission. The EESC Opinion on the European Commission Green Paper underlined that such a sectorial approach “would be discriminatory in nature”.<sup>17</sup> The categorisation of third-country workers by distinct legal acts covering different worker statuses leads to economic and human rights inequalities among individuals falling within the scope of EU legal migration legislation and policy.

Securing equal access to fundamental and socioeconomic rights protection remains a major challenge for the current and next generation of

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<sup>17</sup> See EESC, Opinion on the Green Paper on an EU approach to managing economic migration (COM(2004) 811 final), OJ C 286/20, 17.11.2005, point 2.1.4.

EU legal migration policies. More research is needed on the gaps and barriers that create inequalities, as well as on the actual costs of these inequalities and the added value that having 'more EU' could bring to legal migration policies.

## **20.5 Temporariness as inequality, injustice and insecurity**

Concepts play a fundamental role in framing migration policy priorities and agendas. They also have profound implications for the allocation of rights and protection of third-country workers and their families. The notion of 'temporary migration', and its assumptions, calls for critical re-examination. The EURA-NET project has actively engaged in that scientific process and provided in-depth analysis of this concept in the EU-Asia context.

A key finding emerging from the EURA-NET project is that migration policy frameworks in the EU often lead to a mismatch between the law/policy and the social characteristics of people's mobility (Aksakal and Schmidt-Verkerk, 2016). The temporary cross-border mobility of people is an increasingly common phenomenon that is more complex than existing policies tend to assume. There are various kinds of phenomena that could be viewed through the lens of 'temporary migration'.

There is no consensus on a definition of what temporary migration actually is (Geddes, 2015). Neither policy-makers nor academics have reached a commonly agreed and clear understanding of this phenomenon and inherently ambiguous notion. Historical experiences have shown that temporary migration schemes have been unable to capture and deal with the dilemmas raised by the mobility of people (Carrera et al., 2015a). Still, temporary labour migration programmes (TLMPs) have continued to exist and have proliferated in several world regions.

Battistella argues in chapter 2 that TLMPs are often flawed, and that these flaws are in fact inherent to the system. 'Temporariness' is often fictitious: "It originates from a permanent demand for labour, met through temporary workers whose migration experience is extended for many years, but always under a temporary status." Controversially, temporary schemes for labour migration go hand-in-hand with sub-standard living and working conditions and issues with the fundamental rights of third-country workers.



Temporary migration schemes are also intimately related to ‘irregular migration’. Irregular channels may become the only option for people in light of the restrictions embedded in migration policies. Limited legal channels of migration lead to irregular entry and stay, and prevent security of residence. Tayah’s chapter 4 further illustrates that when countries of origin sanction abuses resulting from restrictive temporary schemes at destination, this has often led to an increase in human trafficking, smuggling and exploitation. Tayah also underlines the importance of taking into account the role of ‘transit countries’, where migrants may be compelled to stay for a long time taking up jobs in informal sectors.

Korpela and Pitkänen conclude in chapter 1 of this volume that the status of a temporary migrant means insecurity. This is closely linked to uncertainty over the time one may be allowed to stay in a particular country and thus the impossibility of future planning. Their contribution notes that the concept of temporariness needs to be understood from the perspective of the receiving state, in terms of both security concerns and perceived economic needs. Temporary migration policies are designed as a means of managing migration and justifying the limitation of migrants’ rights in the destination country.

Korpela and Pitkänen argue that temporary migration policies are seen as “convenient solutions” for temporary labour shortages, and the assumption is that when migrant workers are no longer needed they will depart. Temporary migration can therefore not exist without return or expulsion policies. Furthermore, they remind us of how the veil of temporariness in migration management policies and schemes often hides low-skilled jobs and measures looking for cheaper sources of labour that are tied to lower labour standards, fewer rights and exploitation.

This is equally emphasised in chapter 3 by Marti. She concludes that temporary migrants are not granted access to permanent residency and citizenship and thus some become “permanently temporary” migrants. She asserts that the ‘win-win-win’ framing behind the use of TLMPs fails to acknowledge that there is no evidence showing that they have actually contributed to sustainable development, notably when it comes to remittances. In her opinion, “that low-skilled, temporary migrant workers should bear the responsibility of reducing poverty and developing the Global South by way of their remittances seems profoundly unjust”.

Conceptually framing migration merely as temporary human flows across borders can be highly misleading. The EURA-NET project results

show that these policies are too often mismatched and fail to take into account that people's intentions and life situations alter over the course of time and in practice. People's motivations, ideas and intentions are known to be ever-changing and often irrational. Several chapters in this book and research findings from the EURA-NET project have underlined that 'normative temporariness' and labour migration policies that constrain rights increase individuals' vulnerability and insecurity. They also generate downward pressure and unfair competition on wages, employment and living conditions.

On the other hand, Herzfeld Olsson points out in chapter 8 that if not dealt with in a careful way, attempts to inculcate the idea that third-country workers should not work under conditions inferior to those of nationals can lead to counter-productive results. The Swedish system, for instance, shows that if the required level of working conditions has not been upheld, a highly qualified TCN may lose the authorisation to work and the right to stay in a given Member State. This leads to a situation that does not encourage the third-country worker to try to enforce the required working conditions at the risk of expulsion.

Herzfeld Olsson argues that all the risks connected to upholding the admission requirements related to working conditions are often borne by the labour migrant and not the employer. She argues that it is of central importance to develop mechanisms encouraging the employer to fulfil the prescribed working conditions. In her view, the model of protection and sanctions for employers laid down in the Seasonal Workers Directive could provide an interesting approach to mainstream across all the other EU categories of third-country workers.

## **20.6 International labour standards and the EU's fairness approach**

*Are there any international or EU standards guiding legal migration policy?* The Tampere European Council Conclusions of 15–16 October 1999<sup>18</sup> laid down the first political guidelines for the EU to follow in implementing the new provisions enshrined in the Amsterdam Treaty. Under the heading of "A

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<sup>18</sup> See European Council, Presidency Conclusions of the Tampere European Council, SN 200/99, 15–16 October 1999, para. 18 ([http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)).

Union of Freedom, Security and Justice: The Tampere Milestones” the Council held that

[t]he European Union has already put in place for its citizens the major ingredients of a shared area of prosperity and peace: a single market, economic and monetary union, and the capacity to take on global political and economic challenges. The challenge of the Amsterdam Treaty is now *to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all*. It is a project which responds to the frequently expressed concerns of citizens and has a direct bearing on their daily lives. *This freedom should not, however, be regarded as the exclusive preserve of the Union’s own citizens.* (Emphasis added)

The 1999 Tampere Council Conclusions also expressed, for the first time, the fair-treatment paradigm for TCNs who reside legally in Member States’ territories (Wiesbrock, 2009; Carrera, 2009). The European Council emphasised the need to approximate national laws “on the conditions for admission and residence of third-country nationals” and “the legal status of third-country nationals”. Para. 21 states:

A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State *a set of uniform rights which are as near as possible to those enjoyed by EU citizens*; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence. (Emphasis added)

The *principles of fair and equal treatment and non-discrimination* enshrined in the Tampere milestones were directly reflected in the Treaties and became codified in the 2009 Lisbon Treaty. Art. 79(1) TFEU stipulates that “[t]he Union shall develop a common immigration policy aimed at ensuring, at all stages, fair treatment of third-country nationals”. This brings us back to the question of what ‘fairness’ means in the context of legal immigration, particularly that for employment and related purposes. What are these “working and living conditions” referred to in the EU Charter of Fundamental Rights (hereinafter EU Charter)? And how can fairness be understood in light of international, regional and EU standards?

EU and international labour standards call for all workers – irrespective of their nationality – to be treated equally in comparison with

EU citizens once admitted to the Union's territory. International socioeconomic rights are codified in the International Covenant on Economic, Social and Cultural Rights, and in ILO conventions and recommendations. An issue of specific concern is that the number of Member State ratifications remain by and large very low.<sup>19</sup>

In light of these international and regional standards, Fridriksdottir in chapter 7 argues that third-country workers already working in the EU should be entitled to equal treatment in relation to nationals. All the EU legislation regarding TCNs must therefore comply and be compatible with these established standards. Chapter 7 shows how the inequality of treatment characterising EU labour migration law and policy stands in stark contradiction with international and EU labour standards.

The ILO has also taken up the issue of addressing discrimination in the labour markets. It has underlined the importance of guaranteeing a rights-based approach in debates on this matter, which is firmly rooted in the universal values of equal treatment and non-discrimination (ILO, 2014, para. 42):

Migrant workers must enjoy equal pay for work of equal value and they must be able to exercise their fundamental rights, including trade union rights. This is a basic issue of human rights, and it is also the best way of ensuring that migration is not misused for the purpose of undercutting existing terms and conditions of work.

The Expert Committee on the Application of ILO Conventions and Recommendations has recently emphasised the need for states to repeal and modify legislative measures, administrative instructions or practices that are discriminatory (ILO, 2016, para. 627). The Committee highlighted the importance of such an approach to effectively address the vulnerability of migrant workers to various forms of discrimination and prejudices in the labour market on grounds of nationality, and which often intersect with other grounds such as race, ethnicity, colour, religion and gender. The Committee stressed in para. 626 (*ibid.*, p. 190) that

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<sup>19</sup> Out of 186 Member States of the ILO, 49 have ratified Convention No. 97 and 23 have ratified Convention No. 143. Only 17 States have ratified both conventions. As regards EU Member States, Cyprus, Italy, Portugal and Slovenia have ratified both conventions. Italy, Portugal, Slovenia and Sweden have ratified Convention No. 143, and Belgium, Cyprus, France, Germany, Italy, the Netherlands, Portugal, Slovenia and the UK have ratified Convention No. 97.

Member States should actively develop and pursue a *national equality policy for migrant workers*, in collaboration with employers' and workers' organizations. Such national equality policies should be composed of varied measures designed with the objective of *effectively protecting and promoting the rights of migrant workers* in a regular situation to equality of opportunity and treatment, taking into account national circumstances. Member States should ensure that national equality policies are coherent with other national policies, including employment policies. The Committee believes that the existence of effective national policies in this regard would *contribute to an improvement in the global governance of labour migration*. (Emphasis added)

## 20.7 Intra-EU mobility and the single market template: Towards a single EU area of migration

The foreword by Ruete raises a very important and pertinent question: *What would it mean for this policy field if the focus were only on the single market?* The EU's specificity of free movement of workers is part of the logic of the internal market<sup>20</sup> and the EU as a de-securitisation project for the labour migration of EU nationals, which is closely tied to the abolition of border controls of persons (Guild, 2011).

Art. 26(2) TFEU states that "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties". What is original in this EU labour mobility system, as Guild explains, is that it is based on reducing to the point of vestigial the labour migration controls of Member States and leaves in the hands of EU nationals the choice of whether to move (Guild, 2011).

Art. 45(3) of the EU Charter, relating to the objective of granting freedom of movement to third-country nationals who legally reside in the territory of a Member State, should be activated in order to complete the construction of a single market encompassing intra-EU mobility of temporary and permanent migrant workers. Similarly, Art. 79(2)(d) TFEU lays down an aspect that takes the single market logic - free movement within the Union's territory - to the heart of the EU's migration policy. This provision establishes that the EU has the legal competence to adopt legal

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<sup>20</sup> See ch. 17 on "The Single Market" in Craig and de Búrca (2011), pp. 581-610.

acts covering “the definition of 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”.

The Lisbon Treaty brought the EU Charter to the heart of the EU constitutional system by turning it into a legally binding instrument for both Member States and European institutions. Art. 15 of the EU Charter stipulates the “[f]reedom to choose an occupation and right to engage in work”, and its para. 3 envisages that “[n]ationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union”. The material and personal scope of the notion of ‘*equivalence*’ mentioned in this provision must find its answer in the international and EU standards addressed in section 20.6 above.

Title IV of the EU Charter, which deals with ‘solidarity’, covers several workers’ rights, such as those to information and consultation, collective bargaining and action, and access to placement services. These apply to “workers”, “every worker” or “everyone”, irrespective of nationality or migration status. Of particular relevance is Art. 31, which envisages “[f]air and just working conditions”, and states that “every worker has the right to working conditions which respect his or her health, safety and dignity”. Art. 33 of the EU Charter lays down the right to family and professional life to “the family” and “everyone”. Kostakopoulou argues in chapter 19 that “a Europe of solidarity needs to be a Europe of comprehensive solidarity ... [which] cannot be confined to nationals of Member States. It has to embrace all residents in the EU.”

During the last 15 years the EU has already applied the single market template to some of the labour migration directives. Several of these EU directives include the freedom of TCNs to move (intra-EU mobility) to a second EU Member State and to enjoy there, subject to a number of conditions and requirements, ‘near equality’ of treatment and non-discrimination in comparison with nationals of the receiving state.

The Commission has often argued that high barriers to geographical mobility for highly qualified third-country workers represent a specific weakness of the EU labour market and, more generally, of EU policy on

economic immigration.<sup>21</sup> This argument is replicated in chapter 10 by Barslund and Busse, who remind us that the EU's added value lies in ensuring coordination on rights at the EU level – in particular those related to EU mobility – in a way that makes each Member State more 'attractive' for TCNs than similar national schemes would.

Indeed, "[t]he role that the freedom for EU-intra mobility has in the promotion of Europe's role (and added value) and to a certain extent identity in this process remains central" (Carrera and Wiesbrock, 2010). An illustrative example is the EU Blue Card Directive, which presents 'intra-EU mobility' as an important element to ensure the added value of the Union's legal system. The European Commission's original proposal was clear when expressly stating that "intra-EU mobility" constitutes one of the strongest incentives for "third-country highly qualified workers" to enter the EU labour market.<sup>22</sup> The intra-EU mobility dimension has also been further facilitated and liberalised in the latest Commission proposal for a directive revisiting the EU Blue Card of 7 June 2016,<sup>23</sup> which is currently under negotiation.

Another example of this same approach is the ICT Directive,<sup>24</sup> which includes an intra-EU mobility scheme (Recital 25), whereby the holder of a valid ICT permit is allowed to enter, stay and work in one or more of the Member States in accordance with short-term mobility (up to 90 days) and/or long-term mobility (more than 90 days in a period of 180 days).<sup>25</sup>

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<sup>21</sup> Refer for instance to European Commission, Accompanying document to the proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment – Impact Assessment, Commission Staff Working Document, SEC(2007) 1403, Brussels, 23.10.2007, pp. 14–15.

<sup>22</sup> See European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637 final, Brussels, 23.10.2007. For an analysis, refer to Guild (2007).

<sup>23</sup> See European Commission, COM(2016) 378, (2016), op. cit.

<sup>24</sup> See 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, OJ L 157, 27.5.2014 (transposition date, 29 November 2016).

<sup>25</sup> Refer to Arts 21 and 22 of the ICT Directive.

## 20.8 Conclusions and way forward: Towards a fair EU agenda facilitating legal channels for migration

The European Commission should move forward by implementing a ‘beyond crisis’ policy agenda, in keeping with the political guidelines set by President Jean-Claude Juncker in 2014.<sup>26</sup> There could be a potential rationale for a move beyond crisis in the EU’s economic performance and evidence of recovery of the eurozone.<sup>27</sup>

Immediate priority should be given to developing a **fair EU agenda facilitating legal channels for migration**. Such an agenda would need to be firmly rooted in existing international, regional and EU standards and the principles laid down in EU Treaties as well as international and regional labour standards, chiefly those envisaged in ILO instruments.

Voices referring to the lack of public support for such policies in the EU are not well-founded. It is a myth that there is some kind of tidal wave of hostility to immigration sweeping across Europe. There are clearly some segments of the population that oppose immigration, but – as recent 2014 European Social Survey data illustrate<sup>28</sup> – there is also evidence that views on immigration are more nuanced and that there is support for approaches that target certain kinds of labour migration.

All too often EU policy documents differentiate between ‘short-term’, ‘medium-term’ and ‘long-term’ priorities. The 2015 European Agenda on

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<sup>26</sup> See J.C. Juncker, “A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the Next European Commission”, Opening Statement in the European Parliament Plenary Session, Strasbourg, 15 July 2015. In his political guidelines, he underlined that:

I want to promote a new European policy on legal migration. Such a policy could help us to address shortages of specific skills and attract talent to better cope with the demographic challenges of the European Union. I want Europe to become at least as attractive as the favourite migration destinations such as Australia, Canada and the USA.

<sup>27</sup> See *Financial Times*, “German GDP growth accelerates to 0.6% at start of 2017”, 12 May 2017.

<sup>28</sup> See European Social Survey, “Immigration” (<http://www.europeansocialsurvey.org/data/themes.html?t=immigration>); refer also to the Observatory of Public Attitudes to Migration, part of the Migration Policy Centre within the Robert Schuman Centre for Advanced Studies at the European University Institute, San Domenico di Fiesole (<http://www.migrationpolicycentre.eu/observatory-of-public-attitudes-to-migration/>).



Migration is a case in point. Legal migration policies always end up under the heading of ‘long-term’ planning. This illustrates that EU priorities are still driven by ‘the politics or policies of the now’ and not a long-term vision. These politics of the now are predominantly framed by *an interior ministries or policing approach to migration*. Such an approach overemphasises and gives immediate priority to issues related to expulsions of irregular immigrants and border controls. In turn it underestimates and neglects the opportunities and potential of legal pathways for human mobility to the EU.

EU policy responses need to move from a *home affairs-centric focus* towards a ‘*multi-sector policy approach*’ (Carrera et al., 2015c) guaranteeing a balanced setting of priorities across all relevant policy sectors. The single market template is already present in some of the EU labour migration directives. It could prove to be a decisive component for EU migration policy to further nurture and develop in the near future. Special emphasis could now be given to incentivising and ensuring intra-EU mobility and equality of treatment of third-country workers in comparison with EU citizens, as well as robust protection of labour rights and safe and secure working environments for all third-country workers within the EU.

Coming back to the question put forward by Ruete in the foreword of this book, *do we need more comprehensive rules on legal migration, and particularly on labour migration?* This book has answered in the positive. A central objective to guide the stages that will follow the Commission’s Legal Migration Fitness Check should be streamlining and harmonising the substantive conditions for admission, as well as a uniform framework of rights and standards for all third-country workers in the EU.

The adoption of an EU immigration code seems to be an inevitable step forward in European integration in this domain. It would be a way to effectively address the challenges affecting the current configurations delineating the EU legal and policy framework on labour migration, while using the Union single market template as its foundation.

The options foreseen in existing trade agreements (as well as in association and partnership agreements with third countries), in the set of ILO standards on working and living conditions, and in the EU Charter of Fundamental Rights, should be fully exercised and applied by EU Member States. The use of legal acts and international agreements laid down in the EU Treaties should be given priority over policy tools – such as Mobility

Partnerships and the CAMMs – which lack proper democratic, financial and judicial scrutiny and accountability.

In the *Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility* issued by the UN Human Rights Council in April 2017, the former UN Special Rapporteur called for “a fact-based response” in this policy domain. In his view, authorities should recognise “real labour needs and open up considerably more visa opportunities or visa-free travel programmes for migrant workers at all skill levels”. The former Special Rapporteur also emphasised that “with appropriate selection and organization, the numbers would be entirely manageable”, and that “[f]acilitating increased mobility and matching skills to labour needs, as in an accessible, regular, safe and affordable labour market, with appropriate visa systems and security controls, would ensure that most migrants would use regular mobility channels”.

The EU should set out an ambitious agenda that would make a difference and vigorously integrate EU Treaty values into current UN discussions. In 2016, the UN’s New York Declaration on Migration and Refugees<sup>29</sup> highlighted the need to develop regular and fair channels (‘legal pathways’) for access to international protection and economic migration (at all skill levels). The EU should insist during these UN processes that the global compacts are built firmly on international human rights standards (Guild and Grant, 2017).

The EU should become a more active promoter of international and regional standards on labour and fundamental human rights. A priority should be to avoid a ‘race to the bottom’ in the working and living conditions of workers by EU Member States and to promote effective and full implementation by EU Member States of ILO and EU standards. The EU should develop *concerted partnerships* with regional and international

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<sup>29</sup> See the UN’s New York Declaration for Refugees and Migrants, General Assembly, 13 September 2016 ([http://www.un.org/ga/search/view\\_doc.asp?symbol=A/71/L.1](http://www.un.org/ga/search/view_doc.asp?symbol=A/71/L.1)). Para. 57 states:

We will consider facilitating opportunities for safe, orderly and regular migration, including, as appropriate, employment creation, labour mobility at all skills levels, circular migration, family reunification and education-related opportunities. We will pay particular attention to the application of minimum labour standards for migrant workers regardless of their status, as well as to recruitment and other migration-related costs, remittance flows, transfers of skills and knowledge and the creation of employment opportunities for young people.

actors – particularly the ILO – so as to encourage Member State ratifications, and join forces in ensuring effective compliance with their commonly shared standards.

*What role could research be expected to play in a fair EU agenda facilitating legal channels for migration?* EU action and law-making in migration policies has generally preferred ‘policy-driven’ research. EU migration policies have often been based on ‘knowledge’ that is expected to uncritically substantiate political decisions already taken (which has been referred to as ‘policy-based evidence making’) (Geddes, 2015), or aimed at providing legitimisation of EU institutional actors’ interests. This kind of uncritical knowledge tends not to be provided by academic institutions and scholars.

In chapter 18, Penninx has illustrated and examined the complex research–policy articulation on migration and integration policies at the EU level. There are indeed different uses or functions that academic knowledge can have when interacting with policy venues and actors (Boswell, 2009). These frequently take us beyond a simplistic understanding of the instrumental or rational use of academic research by policy-makers in European institutions. EU institutions have accorded particular value to supporting external academic knowledge on migration.

A case in point has been the framework programmes supported by the DG for Research & Innovation of the Commission. Social science and humanities knowledge is often criticised for being ‘policy irrelevant’ for the daily needs of EU lawmakers. Yet the contributions of many projects under the framework programmes, such as EURA-NET, show a different and more complex picture.<sup>30</sup> As Penninx explains, there are many ‘impacts’ or functions that research can have beyond instrumental or ‘evidence-based’ understanding, which should not be overlooked.

Even research that may be considered by some to be policy irrelevant for addressing perceived or ‘current needs’ of policy-makers or not proving

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<sup>30</sup> See European Commission, “Understanding and Tackling the Migration Challenge: The Role of Research”, Conference Report, Brussels, 2016. See also European Commission, *Migration and Mobility, Research and Innovation Projects in support to European Policy: The European Union’s Research Framework Programme*, Luxembourg: Publications Office of the European Union, 2016; ([http://ec.europa.eu/research/social-sciences/pdf/project\\_synopses/ki-na-27-592-en.pdf](http://ec.europa.eu/research/social-sciences/pdf/project_synopses/ki-na-27-592-en.pdf)) and King and Lulle (2016) ([https://ec.europa.eu/research/social-sciences/pdf/policy\\_reviews/ki-04-15-841\\_en\\_n.pdf](https://ec.europa.eu/research/social-sciences/pdf/policy_reviews/ki-04-15-841_en_n.pdf)).

to have an immediate or direct use, can in fact be extremely relevant and influential when identifying new policy challenges or illustrating the unintended social consequences of present policies. Social science and humanities research can also prove particularly powerful when developing or re-framing the concepts underpinning EU policies and bringing about new notions that better capture changing dynamics and developments. The interactive use of knowledge between scholars and policy-makers, and the role played by think tanks as platforms bringing together all the relevant communities of actors, should not be underestimated.

This book, and the policy workshop that led to it, co-organised by CEPS and the DG for Migration and Home Affairs of the Commission, are manifestations of the various uses and potential of critical social science and humanities knowledge in EU migration policies.

## References

- Aksakal, M. and K. Schmidt-Verkerk (2016), “Conceptual Framework on Temporary Migration”, EURA-NET Report, University of Tampere.
- Boswell, C. (2009), *The Political Uses of Expert Knowledge: Immigration Policy and Social Research*, Cambridge, MA: Cambridge University Press.
- Carrera, S. (2007), “Building a Common Policy on Labour Immigration – Towards a Comprehensive and Global Approach in the EU?”, CEPS Working Document No. 256, CEPS, Brussels, February.
- Carrera, S. (2009), *In Search on the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Leiden: Martinus Nijhoff Publishers.
- Carrera, S. and A. Wiesbrock (2010), “Whose Citizenship to Empower in the Area of Freedom, Security and Justice? The Act of Mobility and Litigation in the Enactment of European Citizenship”, CEPS Liberty and Security Series, CEPS, Brussels.
- Carrera, S. and M. Formisano (2005), “An EU Approach to Labour Migration – What is the Added Value and the Way Ahead?”, CEPS Working Document No. 232, CEPS, Brussels, October.
- Carrera, S., A. Faure Atger, E. Guild and D. Kostakopoulou (2011), “Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020”, CEPS Policy Brief No. 240, CEPS, Brussels.

- Carrera, S., E. Guild and K. Eisele (2014) (eds), *Rethinking the Attractiveness of EU Labour Immigration Policies – Comparative Perspectives on the EU, the US, Canada and beyond*, CEPS Paperback, CEPS, Brussels.
- Carrera, S., K. Eisele and E. Guild (2015a), “European and International Perspectives and Standards on Temporary Migration”, in P. Pitkänen and S. Carrera (eds), *Transnational Migration in Transition: State of-the-art Report on Temporary Migration*, Collected Working Papers from the EURA-NET Project, University of Tampere, pp. 8–33.
- Carrera, S., R. Radescu and N. Reslow (2015b), “EU External Migration Policies: A Preliminary Mapping of the Instruments, the Actors and their Priorities”, EURA-NET Deliverable 3.1, University of Tampere ([www.uta.fi/edu/en/research/projects/eur-net/publications/TASK%203.1%20REPORT\\_UM\\_CEPS\\_final\\_v4.pdf](http://www.uta.fi/edu/en/research/projects/eur-net/publications/TASK%203.1%20REPORT_UM_CEPS_final_v4.pdf)).
- Carrera, S., S. Blockmans, D. Gros and E. Guild (2015c), “The EU’s Response to the Refugee Crisis Taking Stock and Setting Policy Priorities”, CEPS Essay No. 20, CEPS, Brussels.
- Craig, P. and G. de Búrca (2011), *EU Law: Text, Cases and Materials*, Fifth Edition, Oxford: Oxford University Press.
- Eisele, K. (2013), “Why come here if I can go there? Assessing the ‘Attractiveness’ of the EU’s Blue Card Directive for ‘Highly Qualified’ Immigrants”, CEPS Paper in Liberty and Security in Europe No. 60, CEPS, Brussels.
- Eisele, K. (2014), *The External Dimension of the EU’s Migration Policy: Different Legal Positions of Third Country Nationals in the EU, A Comparative Perspective*, Leiden: Martinus Nijhoff Publishers.
- Fudge, J. and P. Herzfeld Olsson (2014), “The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights”, *European Journal of Migration and Law*, Vol. 16, No. 4, pp. 439–466.
- Geddes, A. (2015), “Temporary and Circular Migration in the Construction of European Migration Governance”, *Cambridge Review of International Affairs*, Vol. 28, No. 4, 571–588.
- Geddes, A. and A. Niemann (2015), “Introduction: Conceptualising EU policy on labour migration”, *Cambridge Review of International Affairs*, Vol. 28, No. 4, pp. 523–535.
- Guild, E. (2007), “EU Policy on Labour Migration: A First Look at the Commission’s Blue Card Initiative”, CEPS Policy Brief No. 145, CEPS, Brussels, November.

- Guild, E. (2011), "Equivocal Claims? Ambivalent Controls? Labour Migration Regimes in the European Union", in E. Guild and S. Mantu (eds), *Constructing and Imagining Labour Migration: Perspectives of Control from Five Continents*, Farnham: Ashgate, pp. 207–228.
- Guild, E. and S. Grant (2017), *What role for the EU in the UN negotiations on a Global Compact on Migration?*, CEPS Research Report, CEPS, Brussels.
- International Labour Office (ILO) (2014), *Fair Migration: Setting an ILO Agenda*, Report of the Director General, International Labour Conference, 103<sup>rd</sup> Session, Geneva.
- International Labour Office (ILO) (2016), *General Survey concerning the migrant workers instruments*, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 105<sup>th</sup> Session, Geneva, 22 February.
- King, R. and A. Lulle (2016), *Research on Migration: Facing Realities and Maximising Opportunities, A Policy Review*, Luxembourg: Publications Office of the European Union.
- Peers, S. (2012), "An EU Immigration Code: Towards a Common Immigration Policy", *European Journal of Migration and Law*, Vol. 14, No. 1, pp. 33–61.
- Peers, S. (2014), "An EU Immigration Code: Towards a Common Immigration Policy", in S. Carrera, E. Guild and K. Eisele (2014) (eds), *Rethinking the Attractiveness of EU Labour Immigration Policies – Comparative Perspectives on the EU, the US, Canada and Beyond*, CEPS Paperback, CEPS, Brussels, pp. 100–110.
- Peers, S., V. Moreno-Lax, M. Garlick and E. Guild (2012), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Volume 2: EU Immigration Law, Leiden: Martinus Nijhoff Publishers.
- Pitkänen, P., M. Korpela, M. Aksakal and K. Schmidt (eds) (2017), *Characteristics of temporary migration in European–Asian transnational social spaces*, Dordrecht, Heidelberg, New York, London: Springer, forthcoming.
- Stefan, M. (2016), *Migration versus Mobility in EU External Action towards Asia: A closer look at EU relations with China, India, the Philippines and Thailand*, CEPS Research Report No. 2017/1, CEPS, Brussels.
- Verschueren, H. (2016), "Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection", *European Journal of Migration and Law*, Vol. 18, No. 4, pp. 373–408.
- Wiesbrock, A. (2009), *Legal Migration to the European Union – Ten Years after Tampere*, Nijmegen: Wolf Legal Publishers.

# LIST OF ABBREVIATIONS

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AA	Association agreement
AFSJ	Area of Freedom, Security and Justice
ASEAN	Association of Southeast Asian Nations
CAMM	Common Agenda on Migration and Mobility
CARIFORUM	Caribbean Forum of African, Caribbean and Pacific States
CEEC	Central and Eastern European country
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CSS	Contractual service suppliers
DCFTA	Deep and comprehensive free trade areas
DG	Directorate-general
EBA	Everything but Arms
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIF	European Integration Fund
EMN	European Migration Network
FDI	Foreign direct investment
FP	Framework programme
FTA	Free trade agreement
GAMM	Global Approach to Migration and Mobility
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GSP	Generalised System of Preferences
HSM	Highly skilled migrant

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	Intra-corporate transfer
ILO	International Labour Organization
IND	Immigration and Naturalisation Service (Immigratie en Naturalisatiedienst)
IOM	International Organization for Migration
MDW	Migrant domestic worker
MoU	Memorandum of understanding
MP	Mobility Partnership
OECD	Organization for Economic Co-operation and Development
PCA	Partnership and cooperation agreement
QTLs	Qualification procedures and requirements, technical standards and licensing requirements
RPD	Research-policy dialogue
TCN	Third-country national
TFEU	Treaty on the Functioning of the European Union
TLMP	Temporary labour migration programme
UNHCR	United Nations High Commissioner for Refugees
VFA	Visa facilitation agreement
WTO	World Trade Organization



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# ANNEX. PROGRAMME OF THE POLICY WORKSHOP CO-ORGANISED BY CEPS AND DG HOME

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## **Reappraising the EU Legal Migration *Acquis*: Legal pathways for a new model of economic migration and the role of social science research**

**27 January 2017**

**08:30 – 09:00 Registration**

**9:00 – 9:30 Introduction to the Workshop**

- **Welcome Words:** Daniel Gros and Sergio Carrera (CEPS)
- **The Legal Migration Fitness Check:** Laura Corrado, DG HOME B1: Legal Migration and integration, Head of Unit
- **The Role of Social Sciences and Humanities Research for EU Migration Policy:** Philippe Keraudren, DG Research and Innovation, Open and inclusive societies, Deputy Head of Unit

**09:30 – 11:00 Challenge I: The EU Legal Migration *Acquis*: Taking Stock and Main Challenges**

**Chair:** Helene Calers, DG HOME B1: Legal Migration and Integration

### **Speakers:**

- **Mari Korpela**, University of Tampere, Faculty of Social Science
- **Bjarney Fridriksdottir**, Radboud University, Faculty of Law, Centre for Migration Law
- **Petra Helzfeld Olsson**, Uppsala University, Department of Law
- **Mikkel Barslund**, CEPS, Economy and Finance Section

### **Discussants:**

- **Mauro Gagliardi**, DG HOME C1: Irregular Migration and Return Policy
- **Andrew Geddes**, European University Institute, Migration Policy Centre, Director

**11:00 – 11:30 Coffee break**

**11:30 – 13:00 Challenge II: Migration and Cooperation with Third Countries**

*Chair:* **Myriam Watson**, DG HOME A3: International Cooperation

**Speakers**

- **Marco Stefan**, CEPS, Justice and Home Affairs Section
- **Claudia Finotelli**, Universidad Complutense de Madrid, Department of Sociology, Human Ecology, and Population
- **Agnieszka Weinar**, European University Institute, Migration Policy Centre
- **Christiane Timmerman**, University of Antwerp, Centre for Migration and Intercultural Studies (CeMIS)

**Discussants:**

- **Basudeb Chaudhuri**, DG Research and Innovation, Social Science and Humanities Integration in Horizon 2020, Open and Inclusive Societies
- **Elizabeth Collett**, Migration Policy Institute Europe, Director

**13:00 – 14:00 Lunch**

**14:00 – 15:30 Challenge III: Migration and Trade**

*Chair:* **Jan Saver**, DG TRADE B1: Services

**Speakers:**

- **Simon Tans**, Radboud University Nijmegen, Department of International and European Law
- **Elsbeth Guild**, Queen Mary University of London, Faculty of Law
- **Marion Panizzon**, University of Bern, Institute of Public Law

**Discussants:**

- **Andres Garcia Bermudez**, DG TRADE B1: Services
- **Fabian Lutz**, DG HOME B1: Legal Migration and Integration

**15:30 - 15:45 Coffee break**

**15:45 - 17:15 Closing Session: Ways Forward in Research and Policy-Making**

*Chair:* **Laura Corrado**, DG HOME B1: Legal Migration and Integration, Head of Unit

**Speakers:**

- **Rinus Penninx**, University of Amsterdam, Coordinator of the European Commission-funded Network of Excellence IMISCOE
- **Theodora Kostakopoulou**, University of Warwick, Faculty of Social Sciences

**Discussants:**

- **Angela Liberatore**, European Research Council Executive Agency (ERCEA), Head of Social Sciences and Humanities Unit
- **Raffaella Greco-Tonegutti**, DG Research and Innovation, Open and inclusive societies, Migration and mobility

**Open Discussion**

**17:15 - 17:30 Closing Remarks** by **Sergio Carrera** (CEPS) and **Laura Corrado** (DG HOME).



Are EU policies on legal migration fit for managing and governing the movement of people across borders? Over the last 15 years, the 'Europeanisation' of policies dealing with the conditions of entry and residence of third-country nationals has led to the development of a common EU *acquis*. However, questions related to policy consistency, legal certainty and fair and non-discriminatory treatment in working and living standards still characterise the EU's legal framework for cross-border mobility.

This book critically explores the extent to which EU legal migration policies and their underlying working notions match the transnational mobility of individuals today. It addresses the main challenges of economic migration policies, both within the EU and in the context of EU cooperation with third countries. Special consideration is given to the compatibility of EU policies with international labour standards along with the fundamental rights and approach to fairness laid down in the EU Treaties.

The contributions to this book showcase the various uses and potential of social science and humanities research in assessing, informing and shaping EU migration policies. Leading scholars and experts have brought together the latest knowledge available to reappraise the added value of the EU in this area. Their reflections and findings point to the need to develop a revised set of EU policy priorities in implementing a new generation of legal pathways for migration.



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