

Intra-EU mobility: the ‘second building block’ of EU labour migration policy

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The entry into force of the Amsterdam Treaty in 1999 saw the EU acquire legislative competence to act in the fields of migration and asylum. Conclusions adopted by member states at the October 1999 European Council in Tampere called for the development of common policies on asylum and immigration.

However, the EU is currently a long way away from adopting so-called common policies. While the European Commission asserts that results achieved so far are “impressive”, they remain rather imbalanced. The management of external borders and the fight against irregular migration have been prioritised so far, to the detriment of asylum and legal migration.

The entry into force of the Lisbon Treaty in 2009 gave a new impetus to further develop EU policies and action in the fields of immigration, integration and asylum. Border management and irregular migration will remain high on the agenda and the main focus of attention. However, Brussels should now address legal migration, asylum and integration issues in a more structured and in-depth manner in order to achieve the goal of developing common EU policies.

Despite the economic crisis and growing evidence of anti-immigrant rhetoric, the challenge of developing EU-wide immigration, integration and asylum policy will remain a hot political topic in the years to come. Ongoing developments and the debate on the issues will be closely followed and scrutinised by the EPC team in the framework of our European Migration and Diversity Programme.

The European Migration and Diversity Programme also takes part in the migration and integration components of the EU-Asia Dialogue.

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Executive Summary

The development of a common EU immigration policy is a long and on-going process. Despite the adoption of an important set of legislation and operational tools, primarily in the field of irregular migration, labour migration has remained a field in which member states have proven to be reluctant to adopt common rules. The approach has been limited to the adoption of EU rules concerning the entry and residence of specific categories of workers, thus neglecting to develop a sound and comprehensive EU policy.

While forthcoming demographic and economic challenges call for a rethink of EU-wide migration policy, addressing the issue of common admission rules in the framework of the Single European Labour Market, current economic difficulties and the 'populist' political climate hamper the ability to take this further step. Put differently, EU labour migration policy is stuck in between what already exists - which we will call the 'first building block' - and what is needed in order to overcome future challenges - which we propose to conceptualise here as the 'third building block' - but which will not be put in motion now.

Given the serious challenges that the EU and its member states will have to face, or are already facing, with respect to labour shortages, it is necessary to move forward. For the time being, there is one politically-acceptable opportunity to move ahead based on the development of intra-EU mobility facilities for migrant workers already residing in the member states. This medium-term step can be considered to be the 'second building block' of EU labour migration policy.

This paper aims to explore how intra-EU mobility could be improved at EU level. In this regard, it firstly analyses the intra-EU mobility rules that already exist in EU law and concludes that the right to freedom of movement is awarded to limited categories of third-country nationals and under different regimes which do not make mobility attractive (Chapter 2). Given the inadequacy of such a situation, the paper then proposes solutions to enhance intra-EU mobility for migrant workers that already reside in the EU. Proposals address issues related to making better use of existing mechanisms as well as the development of new rules to incentivise the exercise of freedom of movement (Chapter 3).

INTRODUCTION

Post-Amsterdam

Since 1999 and the entry into force of the Amsterdam Treaty, the European Union (EU) has been given extensive competences to adopt rules in the field of migration¹. Since then, it has adopted an impressive number of regulations and directives². However, legislative and operational actions at EU level have primarily and principally focused on security-related issues. Border management, visa policy, irregular migration and readmission agreements have taken precedence in the joint actions of member states³.

More than 10 years after the entry into force of the Amsterdam Treaty, legal migration remains the "poor child"⁴ of the policy. In one respect, member states have agreed to tackle family reunification⁵ and the status of long-term residents⁶ at EU level in directives that have implications for the better integration of migrants. On the other hand, they have been very reluctant to adopt common rules regarding the admission of migrants. This reluctance was clearly demonstrated by member states when they refused to discuss the European Commission's 2001 proposal to establish common rules regarding the admission of third-country nationals for work and self-employment purposes⁷.

In the field of admission, member states have preferred to follow a selective and sectoral approach,⁸ adopting directives defining rules regarding the entry and residence of students⁹, researchers¹⁰ and

¹ Before the entry into force of the Amsterdam Treaty, i.e. on the basis of the Maastricht Treaty, the European Community had the competence to intervene in the field of short-term visa policy. On this, see in particular E. Guild & C. Harlow (edited by) 'Implementing Amsterdam', HART Publishing, Oxford and Portland, 2001 ; K. Hailbronner 'Immigration and Asylum Law and Policy of the European Union', Kluwer Law International, The Hague/London/Boston, 2000; Y. Pascouau 'La politique migration de l'Union européenne. De Schengen à Lisbonne', Fondation Varenne, LGDJ, Paris, 2011.

² See, S. Peers, E. Guild, D. Acosta Arcarazo, K. Groenendijk and V. Moreno-Lax 'EU Immigration and Asylum Law (text and commentary): Second Revised Edition', Volume 2: EU Immigration Law, Martinus Nijhoff Publishers, 2012; K. Hailbronner (edited by) 'European Immigration and Asylum Law', Hart Publishing, Oxford, 2010.

³ On this issue, see Y. Pascouau 'La politique migration de l'Union européenne. De Schengen à Lisbonne', *op.cit.*

⁴ Y. Pascouau 'La politique européenne d'immigration de travail. Etat des lieux et perspectives', Policy Paper, Fondation Roi Baudouin, 2012.

⁵ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003.

⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004.

⁷ 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, 11.07.2001.

⁸ Communication from the Commission, Policy Plan on Legal Migration, COM(2005) 669 final, 21.12.2005.

⁹ 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, 23.12.2004.

¹⁰ 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, 03.11.2005.

highly-skilled migrants¹¹. A directive on intra-corporate transferees¹² and a directive on seasonal workers¹³ are currently in the process of negotiation. Furthermore, a newly presented proposal plans to improve existing Directives regarding third country-national researchers, students, school pupils, unremunerated trainees and volunteers, and to develop common provisions for two new groups of third-country nationals: remunerated trainees and au pairs¹⁴.

Post-Lisbon

The entry into force of the Lisbon Treaty, in December 2009, offers new possibilities and perspectives with respect to EU labour migration governance, in particular regarding the issue of admitting migrant workers.

The Treaty announces that "the Union shall develop a common immigration policy". This means that the EU is not only responsible for tackling security-related issues, but also for ensuring "the efficient management of migration flows [and] fair treatment of third-country nationals residing legally in member states"¹⁵. While the objective of drawing up a "common immigration policy" had already been announced in October 1999 by the Tampere European Council, the Lisbon Treaty takes a further step as it "constitutionalises" that objective. Hence, actions at EU level should pursue the establishment of such a common policy.

Furthermore, the Treaty modifies procedural rules. In fact, from now on the whole field of migration-related rules, including legal migration, falls within the scope of the co-decision procedure. This means that the European Parliament is co-legislator and that decisions within the Council are taken by qualified majority vote and no longer by unanimity.

For its part, the European Commission, in an action plan adopted to implement the third multiannual programme, called the Stockholm Programme¹⁶, states how it plans "to develop a genuine common migration policy consisting of new and flexible frameworks for the admission of legal immigrants"¹⁷. Such a policy should enable the Union "to adapt to increasing mobility and to the needs of national labour markets, while respecting member-state competences in this area".

The Commission's agenda is also very ambitious, as it plans to publish in 2013 a proposal for an immigration code i.e. the consolidation of legislation in the area of legal immigration, taking into account the evaluation of existing legislation, the need for simplification and, where necessary, the extension of existing provisions to categories of workers currently not covered by EU legislation.

¹¹ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.06.2009.

¹² Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, COM(2010) 378 final, 13.07.2010. For an analysis of the negotiation process, see A. Lazarowicz "The Intra-Corporate Transferees Directive: time to break the deadlock", Policy Brief, European Policy Centre, April 2013.

¹³ Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals for the purpose of seasonal employment, COM(2010) 379 final, 13.07.2010.

¹⁴ Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing, COM(2013) 151 final, 25.03.2013.

¹⁵ Article 79, Treaty on the functioning of the European Union, OJ C 83, 30.03.2010.

¹⁶ The Stockholm Programme - An open and secure Europe serving and protecting citizens, OJ C 115, 4.5.2010.

¹⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Delivering an area of freedom, security and justice for Europe's citizens. Action Plan Implementing the Stockholm Programme', COM(2010) 171 final, 20.04.2010.

The legal framework, as well as political orientations, showed high expectations regarding the legal side of EU immigration policy at the end of 2009 and in early 2010. However, these orientations may only be implemented if and insofar as the general context allows for it. In other words, attention must be paid to the environment within which labour migration policy is taking place, which may or may not call for action.

Changing world and priorities

With these political and legal considerations in mind, societal challenges call for further investigation of the need to define a common policy at EU level regarding the admission of migrant workers. Firstly, these challenges are related to demographic shrinking. Some member states are already experiencing this, and a greater number of countries will be facing demographic problems in the next couple of years¹⁸. Secondly, the European population is growing older, which means that the EU is an ageing society. Finally, national labour markets are experiencing skill and labour shortages which in certain cases are quite severe¹⁹.

All of these challenges are intertwined. Demographic shrinkage goes hand in hand with an ageing society, and both have an impact on labour/skill shortages. Indeed, people who retire need to be replaced. At the same time, as ageing persons, they create new needs to be satisfied, particularly in areas related to personal care and assistance. The combination of these factors has an impact on existing and forthcoming labour and skill shortages in EU member states. Furthermore, despite the strong economic crisis, which had a major impact on employment and labour migration demand, these elements constitute robust pillars that should frame any attempt to address labour migration issues.

Currently, it is the responsibility of the member states, and not the EU, to address these challenges. Indeed, while the EU has been awarded competence to act in this field, member states have been reluctant to tackle these issues in a concerted manner, i.e. to develop a policy at EU level on the basis of legally-binding EU instruments. As a consequence, labour migration-related issues remain mainly within the remit of the member states themselves.

However, would a common EU policy on the admission of migrants help to provide solutions to these challenges? In theory, there are three chief reasons why this question should be explored. First, the entry and residence of migrant workers should not be disconnected from the objective of establishing an area of freedom of movement and a Single European Labour Market. Second, this cannot be disentangled from the current discourse of making the concept of 'mobility' the cornerstone of EU policies²⁰. Finally, the economic crisis has had an impact on labour migration to

¹⁸ R. Münz & A. F. Rieterer, 'Overcrowded world: global population and international migration', Haus Publishing, 2009; J. O. Karlsson & L. Pelling (eds.) 'Moving beyond Demographics. Perspectives for a Common European Migration Policy', Global Utmaning, 2011.

¹⁹ As explained by Commissioner Andor 'Despite high levels of unemployment (over 25 million people in the EU) there are still labour shortages and vacancy bottlenecks', IP/12/1262, 26.11.2012.

²⁰ Mobility has increasingly been put forward in a series of documents published by the European Commission. See for instance the Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean', COM(2011) 200 final, 08.03.2011; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Communication on migration, COM(2011) 248 final, 04.05.2011; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A dialogue for migration, mobility and security with the southern Mediterranean countries', COM (2011) 292 final, 24.05.2011; Communication from the Commission to the

and within member states²¹ and calls for the development of further thinking regarding a common labour migration policy, including allowing a workforce that already resides on EU territory to move between member states.

At a moment when 'mobility' - both internal and external - is fast becoming the new mantra for EU institutions and actors, and in a fast-changing world in which demography, ageing societies, labour and skill shortages, and the economic crisis are redefining the landscape of movement of persons in Europe, a complete and new assessment of the EU's actions and methods is becoming more necessary than ever.

Task Force on Labour Migration Governance outcomes

This was the idea underlying the establishment of a Task Force within the framework of a joint project on labour migration governance in Europe called LAB-MIG-GOV²². The European Policy Centre, in cooperation with FIERI, organised a series of behind-closed-doors meetings involving EPC members and relevant stakeholders in order to exchange views on the manner in which - or not - the EU should design a labour migration policy.

Three meetings were organised, each dealing with one specific issue. The first meeting addressed the issue of the needs of migrant workers coming from outside the EU. The second meeting discussed which model should/could be established in order to manage labour migration in the EU. The last meeting took into consideration the external dimension of the policy, i.e. how to deal with third countries in this specific field.

While these meetings have enabled participants to vividly discuss and exchange views, key points have been highlighted which have shaped the content of this paper. On the one hand, it has clearly and repeatedly been underlined that labour migration is not *the* solution but one of the solutions that can be developed in order to overcome current and forthcoming challenges²³. On the other hand, the economic crisis and its impact was also put forward as a strong factor shaping the decision-making process, i.e. what is feasible in the short and medium term.

During the discussions, it quickly became apparent that an ambitious project addressing the development of a full common labour migration policy, addressing in particular admission issues, would not be affordable in the short to medium term. Indeed, too many obstacles are currently blocking the path towards an EU labour migration policy. They do not allow the establishment of a common policy regarding the admission of migrant workers. These obstacles are threefold.

European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'The Global Approach to Migration and Mobility', COM (2011)743 final, 18.11.2011.

²¹ See for instance, International Migration Outlook 2012, OECD, 2012.

²² LAB-MIG-GOV is a three-year project coordinated by FIERI. It is implemented with the support of the 'Europe and Global Challenges' Programme promoted by Compagnia di San Paolo, Riksbankens Jubileumsfond and VolkswagenStiftung. LAB-MIG-GOV has two overarching goals:

- a) to produce a detailed and dynamic analysis of the structure and functioning of European governance in the field of labour migration (also through analytical monitoring of its evolution in response to the different phases of the crisis);
- b) to suggest strategies and solutions that the different actors involved could enact in the medium and long term in order to strengthen the effectiveness of migration policies with respect to the goals of economic dynamism and social cohesion.

Website: www.labmiggov.eu/

²³ On options available, see for instance, 'Prospects for 2025: Skilled Workers for Germany', Bundesagentur für Arbeit/Federal Employment Agency, January 2011. See also H. Martens 'Demographics, the European welfare state and migration' in Think Global - Act European Project, forthcoming 2013.

The economic crisis certainly constitutes the major one and its impact on migrants has been twofold. From an economic perspective, migrant workers were the first ones to suffer as a result of the economic turmoil. As underlined by the OECD, "the economic downturn hit immigrants hard, and almost immediately, in most OECD countries. The evidence suggests that overall, the impact of the economic crisis on unemployment has been more pronounced for migrants than for native-born"²⁴.

From a political perspective, migrants have also had to face a strongly negative political climate. Proposals to restrict immigration flows have been supported in several countries, fuelled in some by the growing influence of populist parties. Denmark, the Netherlands, France and Finland have, among others,²⁵ experienced this mounting impact of extremist parties which consider immigration as a major threat to European societies and therefore call for massive restrictions. These parties have without any doubt influenced national - and to a certain extent European - debates on migration²⁶.

The effect of these two factors has played out differently among the member states. On the one hand, the economic crisis has not affected all EU member states with the same intensity. Some states have been hit heavily by and/or are suffering severely from the downturn, whereas others are not. On the other hand, the negative political climate is not experienced in the same way in every EU country. Xenophobic and racist reactions are not formulated with the same strength everywhere and sometimes simply do not exist in national political discourses. In the end, the problems faced by member states are different and call for the development of different priorities. The absence of converging needs and objectives does not create conditions conducive to the proper development of a common EU policy in this field.

The third obstacle is more of an institutional nature and is related to the division of competences. It is widely known that Interior Ministries take the lead on immigration-related issues. However, when it comes to labour migration issues, Ministries of Labour, or similar Ministries, are the best suited authorities to organise and manage the entry and residence of migrant workers. While some member states engage, to varying extents, their Ministry of Labour in the management of labour migration, the vast majority of others remain attached to the leadership of the Interior Ministry.

This division of views was also voiced during the second meeting organised in the framework of the taskforce. While some speakers have acknowledged the possibility of giving the lead on labour migration issues to Ministries of Labour²⁷, others opposed this idea.

The division of leadership also exists at the level of the European Commission, where guidance on the immigration field is given by the Directorate-General for Home Affairs. The Directorate-General for Employment, for its part, has not demonstrated a strong willingness to take action in this field. Consequently the legal migration file has been left to Commissioner Cecilia Malmström, who is responsible for Home Affairs.

It should nevertheless be underlined that a policy driven by Ministries of Labour would at the present time not lead to much better results *per se*. Indeed, the agenda of European Ministers of Labour is

²⁴ International Migration Outlook 2012, OECD, 2012, p. 23.

²⁵ For a bigger list, see L. Collett 'Future prospects for a common EU immigration policy' in J. O. Karlsson and L. Pelling 'Moving Beyond Demographics', Global Utmaning, 2011.

²⁶ The latest example to date is the approach taken by UK Prime Minister David Cameron towards the immigration and movement of EU citizens. On this issue, see for instance, A. Lazarowicz "A dangerous UK consensus on free movement of workers in the EU", Commentary, European Policy Centre, March 2013.

²⁷ Regarding such a proposal, see for instance L. Collett 'Beyond Stockholm: overcoming the inconsistencies of immigration policy', EPC Working paper n° 32, December 2009.

focused on exploring ways to reduce booming national unemployment rates resulting from the economic crisis. In this context, there is little room available for discussions and actions promoting the admission of migrant workers.

The overall picture does not appear to favour any action at EU level. In this respect, actions undertaken by the European Commission have been limited. Despite Commissioner Malmström's public positions in favour of the development of an EU-wide legal migration policy²⁸ and the organisation of meetings devoted to the theme²⁹, legislative proposals have not gone beyond the 2005 Action Plan on legal migration³⁰. The negative economic and political climate, the opposition of some member states to action at EU level in the field of admission of third-country nationals and to a certain extent the remaining culture of unanimous decision-making within the Council are sufficient to make any steps in the direction of an EU-wide policy on labour migration extremely difficult, not to say impossible to achieve.

To sum up, the development of any ambitious policy regarding legal admission of migrant workers is unforeseeable in the short and medium term. But this should not block any action in the field. Hence, a different and perhaps middle ground should be explored.

Finding ways to move forward: enhancing intra-EU mobility as a 'second building block' of EU migration policy

The situation may be portrayed as follows: while the economic crisis calls for further action to make EU labour migration more efficient for all kinds of migrant workers - low, middle and highly-skilled - to fill in jobs, member states tend to adopt a restrictive political discourse. Such a position could be harmful with regard to the EU's attractiveness, in particular with respect to skilled migrants.

In other words, a group of member states are not willing to go further ahead in the field of legal migration. The entry into force of the Lisbon Treaty - which makes the co-decision procedure applicable in this specific field - does not, for the time being, bring any major changes in this regard. Indeed, a group of several member states, among which the most influential are Germany, the Netherlands and Austria, are fiercely attached to keeping tight control over admission policies. In this regard, they repeatedly refer to Article 78.5 of the Lisbon Treaty which secures "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 indicates reluctance to provide for any further step in the field of admission.

Since some member states are in a position to politically block the process, the only way out is to propose an alternative or 'middle way' solution which they find acceptable. With respect to labour migration policy, the middle way is between what is currently in place and what should be done in order to tackle forthcoming challenges. At present, EU rules regarding the admission of migrant workers are very selective and concern selected categories of migrants such as students, researchers, highly-skilled workers and forthcoming rules on seasonal workers, intra-corporate transferees,³¹ and

²⁸ See for instance the article published on EurActiv.com in September 2001, entitled 'The EU needs more Legal Migration', www.euractiv.com/innovation-enterprise/eu-needs-labour-migration-analysis-507489

²⁹ See for instance the eighth meeting of the European Integration Forum devoted to 'The contribution of migrants to economic growth in the EU', Brussels, 16-17 October 2012.

³⁰ Communication from the Commission on a policy plan on legal migration, COM(2005) 669 final, 21.12.2005.

³¹ For an overview, Y. Pascouau "La politique européenne d'immigration de travail. Etat des lieux et perspectives", *op. cit.* For a comprehensive view, A. Wiesbrock 'Legal Migration to the European Union', Martinus Nijhoff Publishers, 2010.

remunerated trainees and au pairs³². This package of legislation is to be considered as the 'first building block'.

As regards future needs, they are driven by several factors calling for major steps forward to be taken and for greater integration of admission policies. Indeed, the "global war for talent"³³, the demographic situation, and recently experienced and forthcoming labour and skills shortages call for the development of an attractive, flexible and EU-based policy establishing common rules and procedures for the admission of migrant workers. This step is the 'third building block'. However, member states are not ready to follow this path now.

In between lies the 'second building block', i.e. what could be acceptable and put into motion in the short and medium term. The 'second building block' concerns improving intra-EU mobility for already residing third-country migrant workers. The current rules in place at EU level are far from satisfactory. They are underdeveloped and do not give migrant workers already residing in an EU member state full freedom of movement within the European Union.

Improving intra-EU mobility would be politically and practically acceptable. The crisis has divided the EU between countries that have been heavily affected by it and which are therefore experiencing a strong decrease in demand for migrant workers, and countries where demand for labour migration is still growing³⁴. In such a context, the reallocation of already-residing labour migrants could help absorb the effects of the crisis and have a positive impact on migrant workers, EU countries facing difficulties and the European Union as a whole. Improving intra-EU mobility rights would constitute a major step towards the realisation of the single European labour market. It would also contribute to making the EU more attractive for migrant workers. This is crucial in the short run with respect to qualified migrants and in the long run as soon as the EU has recovered from the crisis.

Taking into account all of these elements, the purpose of this paper is to give an overview of existing rules at EU level, outline intra-EU mobility rights and prospects (Chapter 2) and, on the basis of this overview, propose solutions for further improvement in this specific field (Chapter 3).

³² Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing, COM(2013) 151 final, 25.03.2013.

³³ G. Hultin "The Global "War" for Talents: Labour Market Policies for Europe 2020" in "Europe 2020: delivering well-being for future Europeans", Challenge Europe, European Policy Centre, March 2010.

³⁴ "Very importantly, the social and employment trends are diverging significantly in different parts of the EU. A new divide is emerging between countries that seem trapped in a downward spiral of falling output, massively rising unemployment and eroding disposable incomes, and those that have at least so far shown some resilience - partly thanks to better functioning labour markets and more robust welfare systems, although there is also uncertainty about their capacity to resist continuing economic pressures", Employment and Social Development in Europe 2012, European Commission, DG Employment, Social Affairs and Inclusion, November 2012, p. 13.

CURRENT RULES GOVERNING INTRA-EU MOBILITY: A SCATTERED PICTURE

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Intra-EU mobility, i.e. the possibility for one person to move to another member state in order to seek a job, and reside there for this purpose, is available under two different schemes. The first scheme is a very open one and applicable to EU citizens who benefit from the full exercise of freedom of movement (2.1). The second scheme is less generous and limited to specific categories of third-country nationals, i.e. long-term residents, highly-skilled workers, researchers and students (2.2). These people may enjoy the possibility to move to another state, but under defined conditions (2.3). However, there is a paradox. EU citizens benefit from full rights to move, but do not exercise them to the expected extent. Conversely, migrants - for whom the potential to move may be important - face strong legal obstacles in exercising freedom of movement.

2.1 EU CITIZENS: FULL BENEFICIARIES BUT LIMITED USERS

Since the signature of the Treaty of Rome in 1957, freedom of movement of workers is one of the four freedoms attached to EU integration. According to the Treaty³⁵ and the rules adopted to

³⁵ Article 48 Treaty of Rome:

- "1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;

implement Treaty provisions³⁶, freedom of movement entails the right to accept job offers, the right to move freely within the territory of member states to seek a job, the right to reside in a member state for the purpose of employment and the right to remain in the territory of a state after having been employed in that state. Similar rules are also applicable to self-employment under the heading "right of establishment". Freedom of movement is not limited to EU workers but also includes their family members, whether they are EU citizens or third-country nationals, and is also extended to nationals of three non-EU countries: Switzerland, Iceland and Liechtenstein³⁷.

This open legal framework has been supported by the European Court of Justice, which has interpreted the rules in order to promote freedom of movement. Hence, the conditions under which free movement is exercised have always been interpreted rather widely. This concerns, *inter alia*, the scope of rules related to family members, the rules applicable to job-seekers, and the conditions requested for exercising freedom of movement, as well as return to the country of origin, the scope of social benefits, discrimination based on nationality, rules related to public order, etc.³⁸. The jurisprudence of the Court is impressive and has always tried to limit the obstacles to freedom of movement, sometimes in clear opposition to member states: as was the case in the *Metock Case Law*³⁹.

Alongside the Court's jurisprudence, the legal framework has also evolved. Beyond workers, rules regarding the entry and residence of persons holding the nationality of an EU member state were extended to students⁴⁰, retired persons⁴¹ and other persons with sufficient financial resources, also known in European circles as "playboys"⁴². These directives are of major importance as they have extended the restricted scope of freedom away from the boundaries of workers.

The Maastricht Treaty initiated even broader movement with the introduction of the concept of EU citizenship⁴³. EU citizens are entitled amongst other rights "to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect". Freedom of movement is therefore granted, under defined circumstances, to all EU citizens. This right was considered to be a direct effect by the Court

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission".

³⁶ See in particular, Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ, L 257, 19.10.1968. This regulation has since 2011 been repealed by regulation n° 492/2011 of the European Parliament and the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27.05.2011.

³⁷ On this see for instance A. Wiesbrock 'Legal Migration to the European Union', *op.cit.*

³⁸ On the jurisprudence, see for instance, J.Y. Carlier 'La condition des personnes dans l'Union européenne. Recueil de jurisprudence', Bruylant, 2012.

³⁹ The *Metock* case concerned the right of residence for family members of EU citizens. The Court of Justice, opting for an extensive interpretation, indicated that the right of residence for family members of a citizen of the European Union must be guaranteed, whether or not the person had previously resided lawfully in another member state, and whether or not the person entered that member state before or after the union. The lack of criteria concerning lawful residence was a major source of discontent among member states. ECJ, 25 July 2008, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, case C-127/08.

⁴⁰ Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, OJ L 317, 18.12.1993.

⁴¹ Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180, 13.07.1990.

⁴² Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ L 180, 13.07.1990.

⁴³ For a recent publication on EU citizenship, see in particular B. Fauvarque-Casson, E. Pataut et J. Rochfeld (sous la direction de) "La Citoyenneté européenne", Société de Législation Comparée, Coll. Trans Europe Experts, Paris, 2011.

of Justice in its *Baumbast* Case Law⁴⁴. This means that freedom of movement, which can be subject to conditions, is a right awarded to any person holding the nationality of a member state.

This evolving legal and jurisprudential framework was codified in April 2004 in a directive⁴⁵ defining the conditions under which freedom of movement of EU citizens and their family members is exercised.

Despite a legal framework offering generous opportunities for EU citizens to move, the exercise of freedom of movement has not been as great as expected. On the contrary, it has been described as a "weak" phenomenon. According to the European Commission, "around 3.4% of EU-born workers work in a member state other than that of their birth"⁴⁶. In comparison, the proportion of non-EU workers in the EU-27 workforce in 2008 was twice as high (over 6.6%) as that of foreign EU nationals⁴⁷.

The enlargement of the European Union in 2004 and 2007 to twelve new member states has been the opportunity for a large group of new citizens to move within the European Union. Whilst some member states have been keeping their labour market closed to new EU citizens for a while⁴⁸, the European Commission reported that the inflows from EU-12 countries to EU-15 countries were considerable between 2003 and 2010, numbering 3.6 million people. More particularly, there has been significant migration of Romanian workers to the EU states which opened their labour markets after Romania and Bulgaria's accession. Indeed, by the end of 2010, Romanian nationals represented more than 80% of all EU-2 (Romania and Bulgaria) nationals resident in another member state. They had moved mainly to Italy (41%), Spain (38%) and Germany (5%)⁴⁹. The significant presence of Romanian workers in Spain and the effects of the crisis led Spain to reintroduce in July 2011 temporary restrictions on new Romanian workers⁵⁰.

⁴⁴ "As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on Article 18(1) EC", ECJ, *Baumbast*, 17 September 2002, aff. C-413/99, point 84.

⁴⁵ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L158, 30.04.2004.

⁴⁶ 'Employment and Social development in Europe 2011', DG Employment, Social Affairs and Inclusion, European Union, 2012, p. 49.

⁴⁷ 'Employment and Social development in Europe 2011', DG Employment, Social Affairs and Inclusion, European Union, 2012, p. 49.

⁴⁸ Restrictions on the free movement of workers may apply to workers from EU member countries for a transitional period of up to seven years after they join the EU. For the moment this concerns workers from Bulgaria and Romania, which joined on 1 January 2007.

The individual governments of the countries that were already part of the EU can decide themselves whether they want to apply restrictions to the right to work to workers from these countries, and what kind of restrictions. Restrictions may be organised as follows:

- 1) For the first two years after a country has joined the EU, national law and the policy of the countries that were previously part of the EU determines access to the labour market of workers from that country, so they may need a work permit.
- 2) If a country wants to continue to apply these restrictions for three more years, it must inform the Commission before the end of the first two years.
- 3) After five years, countries can continue to apply restrictions for another two years if they inform the Commission of serious disturbances to their labour market. In any case, restrictions must end after seven years.

In turn, countries whose nationals face such restrictions may impose equivalent restrictions on workers from that country.

⁴⁹ Commission report on transitional arrangements regarding free movement of workers from Bulgaria and Romania, MEMO/11/773, 11 November 2011.

⁵⁰ B. Galgóczi and J. Leschke 'Intra-EU labour migration after Eastern enlargement and during the crisis', ETUI, Working paper 2012.13, p. 5.

Despite the considerable number of EU workers exercising their right to freedom of movement⁵¹, the Commission nevertheless underlines that this situation remains limited compared to migration flows coming from outside the EU⁵².

Therefore the figures suggest that EU workers are not taking full advantage of their right to freedom of movement. This can be explained by a series of social, economic, cultural or even personal factors, which are far more complex than the adoption of a legal framework incentivising freedom of movement⁵³. However, and despite the "success"⁵⁴ of forty years of freedom of movement of workers, EU citizens are "limited users" of freedom of movement.

This situation contrasts that applicable to third-country nationals already residing in an EU member state. The number of third-country nationals working in EU member states is higher than the number of EU nationals working abroad in another member state. Despite the lack of solid empirical evidence and knowledge, it is generally assumed that third-country nationals may have greater appetite to move from one country to another in order to seek or take a job. However, EU rules governing the freedom of movement of third-country nationals within the European Union are very limited and do not allow the full potential of freedom of movement of foreign workers to be exercised.

2.2 THIRD-COUNTRY NATIONALS: HUGE POTENTIAL BUT FEW OPPORTUNITIES

The development of a common EU immigration policy, called for by the Tampere Council conclusions (1999) and repeated by the Lisbon Treaty (2009), is an incomplete and ongoing process. This means that while some minor developments have been agreed upon, further steps need to be taken. This concerns the adoption of further common rules on the admission of selected groups of migrants, as well as the adoption of rules allowing admitted third-country nationals to benefit from intra-EU mobility. On this last point, EU rules are very limited as they address selective third-country nationals such as long-term residents (2.2.1); highly-skilled workers (also called EU Blue Card holders) (2.2.2); and researchers and students (2.2.3). Such a scheme restricts the opportunities for third-country nationals to make use of freedom of movement and consequently limits the potential positive effects that freedom of movement can have on societies and economies.

2.2.1 Long-term residents

Directive 2003/109/EC⁵⁵ concerning the status of third-country nationals who are long-term residents⁵⁶ pursues the objective of enhancing the rights of migrants with respect to the length of their stay in member states⁵⁷.

⁵¹ On this point, see also M. Benton and M. Petrovic "How Free is Free Movement? Dynamics and Drivers of Mobility Within the European Union", Migration Policy Institute Europe, March 2013.

⁵² "Generally speaking, the post-accession labour mobility flows have been limited, compared to the total resident population and the arrivals of third-country nationals (in 2010, EU-12 nationals living in other member states represented slightly more than 1% of the total population in EU 27, compared to almost 4% for the third-country nationals)" in 'Employment and Social development in Europe 2011', DG Employment, Social Affairs and Inclusion, European Union, 2012, p. 15.

⁵³ On this issue, see for instance 'EU Citizenship Report 2010. Dismantling the obstacles to EU citizens' rights', COM(2010) 603 final, 27.10.2010.

⁵⁴ K. Groenendijk 'Forty Years of Free Movement of Workers: Has It Been A Success and Why?' in P. Minderhoud & N. Trimikliniotis (eds.) 'Rethinking the Free Movement of Workers: the European Challenges Ahead', Wolf Legal Publishers, 2009.

⁵⁵ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.01.2004.

The directive determines the conditions according to which third-country nationals legally residing in a member state may acquire, upon application, long-term resident status. In broad terms, this status is granted when the applicant:

- has resided in a member state for five years immediately prior to the application;
- has stable, regular and sufficient resources;
- has sickness insurance;
- complies, where requested by member states, with integration conditions, and;
- does not constitute a threat to public policy or public security.

Long-term resident status is accompanied by a set of rights - mainly equal treatment - which aim to enhance the integration of third-country nationals in the host member state with respect to employment, education, vocational training, social protection and assistance, as well as enhanced protection against expulsion. Among these improved rights, the directive opens up the possibility for long-term residents to exercise the right of freedom of movement.

According to Article 14 of the directive, "a long-term resident shall acquire the right to reside in the territory of member states other than the one which granted him/her the long-term residence status, for a period exceeding three months, (...)". The provision adds that such a possibility is open to those pursuing an economic activity in an employed or self-employed capacity; for the pursuit of studies or vocational training; or for any other purposes.

This right constitutes an innovation in EU law. Indeed, prior to the adoption of the directive, a third-country national worker having resided for a long period of time in one member state and wishing to reside in another had to go through the 'normal' immigration procedure, i.e. he/she was considered as a first migrant despite their long period of residence on EU territory.

The directive further defines the conditions under which long-term residents are entitled to reside in other member states. This principally concerns procedural aspects covering documentary evidence and conditions to be fulfilled by the applicant with respect to resources or integration capacities⁵⁶. It should, however, be underlined that the directive contains two specific provisions which allow member states to limit the right to move and reside in the second state.

According to Article 14, Paragraph 3, the second member state may, if a long-term resident wants to pursue an economic activity in an employed or unemployed capacity, apply a labour-market test and implement national procedures regarding the requirements for filling a vacancy or exercising this economic activity. The second member state may also give preference to EU citizens or third-country nationals who reside legally and receive unemployment benefits in that member state or who are entitled to preferential treatment under Community law.

Article 14, Paragraph 4 provides for the possibility for member states to limit the total number of people entitled to be granted right of residence on the basis of a quota system. However, such a rule

⁵⁶ For deep analysis of the directive, see in particular D. Acosta 'The Long Term Residence Status as a Subsidiary Form of EU Citizenship. An Analysis of Directive 2003/109', Martinus Nijhoff Publishers, Leiden-Boston, 2011. See also, S. Boelaert-Suominen 'Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals who are Long Term Residents: Five Paces Forward and Possibly Three Paces Back', C.M.L.R., 2005, vol. 42.

⁵⁷ K. Groenendijk, E. Guild, R. Barzilay "Le statut juridique des ressortissants de pays tiers résidents de longue durée dans un Etat membre de l'Union européenne", Commission européenne, Direction générale de la justice et des affaires intérieures, OPOCE, Luxembourg, 2001.

⁵⁸ Article 15 of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents.

should exist at the time of adoption of the directive. According to the Commission report, only one country (Austria) implements such a provision. As this provision is accompanied by a standstill clause, i.e. the rule should exist before the adoption of the directive, further use of it is now forbidden. This limits the possibility for member states to restrict the effects of the directive.

According to the directive's preamble, intra-EU mobility should "contribute to the effective attainment of an internal market as an area in which the free movement of persons is ensured. It could also constitute a major factor of mobility, notably on the Union's employment market"⁵⁹. But in practice, this objective has not been reached.

More precisely, the report on member states' application of the directive, published in September 2011 by the European Commission⁶⁰, states that the transposition of rules related to intra-EU mobility has fallen short of meeting the objectives.

This is due firstly to the margins of manoeuvre left to member states when putting into effect the directive. Many of the directive's provisions are accompanied with a "may" clause, which entitles member states to implement the provisions of the directive - or not. A striking example of this is the possibility for member states to use the labour-market test provision. According to the Commission's implementation report, only seven member states did not transpose the 'labour-market test' provision. This means in turn that the vast majority of EU member states may use this provision and limit intra-EU mobility on the basis of national law. This considerably weakens the directive's potential.

Secondly, the member states have not, or at least have not properly, implemented the provisions of the directive, thus hampering the possibility for individuals to make use of the right to free movement. This point is highly problematic as it concerns the entire scope of the directive. More precisely, the problem does not occur at the stage of granting the right to mobility, but even earlier, at the moment of granting long-term residence status in the first member state. The Commission's report, based on Eurostat data, states that at the end of 2009 about four fifths of third-country nationals holding EU long-term resident status were living in four member states. In comparison, while Estonia granted 187,400 people long-term residence status and Austria some 166,600, the number of long-term residence permits issued in France and Germany over the same period was... 2,000⁶¹. The number of statuses issued in Finland was 16⁶². This situation affects the rationale of the whole directive as it restricts the opportunities for third-country nationals to use the right to free movement, which is dependent on long-term resident status⁶³. Consequently, and as underlined by the Commission, fewer than fifty long-term residents per member state have moved to another one⁶⁴.

In May 2011, the scope of the directive was extended to beneficiaries of international protection, i.e. refugees and beneficiaries of subsidiary protection⁶⁵. While this could increase the number of long-

⁵⁹ Point 18 of the preamble of Directive 2003/109/EC.

⁶⁰ Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2011) 585 final, 28.09.2011.

⁶¹ *Ibidem*.

⁶² See also, S. Peers, E. Guild, D. Acosta Arcarazo, K. Groenendijk and V. Moreno-Lax "EU Immigration and Asylum Law (text and commentary): Second Revised Edition", *op. cit.*

⁶³ According to Article 14, Paragraph 1 of the Directive, the right to move is awarded to "long-term residents", i.e. individuals having already been granted that status.

⁶⁴ Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2011) 585 final, 28.09.2011, p. 10.

⁶⁵ Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, OJ L 132, 19.05.2011.

term residents exercising their right to move and reside in other member states, current implementation of intra-EU mobility has proven to be rather disappointing.

The reluctance of some member states to fully play the game has produced a situation where the exercising of intra-EU mobility is rather low, not to say a 'failure'. It is the European Commission's task to continue monitoring the implementation of the directive in the member states and to make sure that intra-EU mobility for third-country nationals is guaranteed. This could help to address labour shortages in the EU labour market and help the EU as a whole to become an attractive area to go to.

2.2.2 Highly-qualified workers

Highly-qualified workers are a second category of third-country nationals who enjoy the right to free movement. Directive 2009/50/EC⁶⁶, also known as the 'Blue Card Directive', pursues two purposes. Firstly it sets the conditions for third-country nationals of entry and residence of more than three months on the territory of EU member states for the purposes of highly-qualified employment as EU Blue Card holders, and of their family members. Secondly, it determines the conditions for entry and residence of highly-qualified workers and of their family members in member states other than the country of first admission.

The right to free movement is organised in Chapter V entitled "residence in other member states". The principle of intra-EU mobility is enshrined in Article 18, which states: "after eighteen months of legal residence in the first member state as an EU Blue Card holder, the person concerned and his family members may move to a member state other than the first member state for the purpose of highly-qualified employment".

The provision defines the procedure and conditions to be fulfilled by the applicant in the second member state. It also determines the rules under which national authorities process the application in the second member state, and which rights are granted to the applicant during this process.

In this framework, member states enjoy considerable leeway. On the one hand, the conditions that have to be fulfilled in the first member state are requested in the second. This means that the second member state may refuse to issue the EU Blue Card" for a host of reasons based on mismatching salary requirements, a labour-market test, ethical recruitment or because the employer had been sanctioned for undeclared work. On the other hand, the directive does not affect the right of the second member state to determine the volume of admission of highly-qualified workers. In the end, member states retain extensive discretionary powers, which may be used in order to limit and even deny highly-skilled workers the possibility of intra-EU mobility.

The 'Blue Card Directive' constitutes a step forward in the recognition of intra-EU mobility. Nevertheless, it is just a small step⁶⁷. Indeed, freedom of movement depends on a series of conditions which can make this right hard to exercise. The first and major obstacle is to obtain in the first member state the Blue Card. Provisions governing applications for and the issuing of Blue Cards sometimes give member states enormous leeway. This includes the definition of salary thresholds,

⁶⁶ 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, 18.06.2009.

⁶⁷ For a general comment, see A. Wiesbrock 'Legal Migration to the European Union', *op. cit.*; S. Peers, E. Guild, D. Acosta Arcarazo, K. Groenendijk and V. Moreno-Lax 'EU Immigration and Asylum Law (text and commentary): Second Revised Edition', *op. cit.*

the possibility to define volumes of admission, the possibility to verify whether the vacancy could be filled by other workers, the possibility to reject an application for ethical reasons, etc.

At the end of the day, the chances of third-country nationals being granted Blue Cards may be extremely low. Their subsequent right to freedom of movement may be hampered as well. Moreover, a Blue Card holder's right to move and reside in another state may be refused by the second member state because they do not meet the national requirements implementing the directive, or because pre-existing admission quotas have already been reached.

It is unlikely that the Blue Card Directive will open the door to an elevated rate of highly-skilled workers using the possibility to move to another member state for the purpose of highly-skilled employment. Bearing this in mind, the directive is likely to fall short in attracting highly-skilled migrants to EU member states to fill gaps in terms of skill shortages and mobility as underlined in the preamble⁶⁸. In this regard, the exclusion from the scope of the directive of beneficiaries of international protection makes the positive impact of the directive less telling. This is particularly the case when taking into account the fact that refugees are often overqualified for the job they are employed in⁶⁹. Offering refugees or beneficiaries of subsidiary protection proper freedom of movement may help EU countries to respond to the effects of the crisis, filling in skill shortages and avoiding qualification mismatches.

2.2.3 Researchers and students

Both the 'Students Directive'⁷⁰, adopted in 2004, and the 'Researchers Directive'⁷¹, adopted in 2005, open new possibilities for persons admitted in one member state to move to another. However, this possibility is strictly framed by the directives, which may limit its effect in practice.

The Students Directive introduced an innovation under the heading "Mobility of students". According to Article 8, "a third-country national who has already been admitted as a student and applies to follow in another member state part of the studies already commenced, or to complement them with a related course of study in another member state, shall be admitted by the latter member state within a period that does not hamper the pursuit of the relevant studies, whilst leaving the competent authorities sufficient time to process the application (...)". However, the exercising of this right is subject to conditions. The general and specific conditions that must be fulfilled in the first member state apply in the second one. Moreover, the applicant must have been studying in the first state for at least two years, or must have participated in an exchange programme, unless the study period abroad is a mandatory part of the chosen study programme⁷².

⁶⁸ As stated in point seven of the preamble of Directive 2009/50/EC: "This Directive is intended to contribute to achieving these goals and addressing labour shortages by fostering the admission and mobility - for the purposes of highly qualified employment - of third-country nationals for stays of more than three months, in order to make the Community more attractive to such workers from around the world and sustain its competitiveness and economic growth. To reach these goals, it is necessary to facilitate the admission of highly qualified workers and their families by establishing a fast-track admission procedure and by granting them equal social and economic rights as nationals of the host Member State in a number of areas (...)"

⁶⁹ This question was addressed in a colloquium organised by the UNHCR and the Council of Europe end September 2012 in Strasbourg on "The Right to Work for Refugees". On this occasion, Olivier Beer, the UNHCR's representative to the Council of Europe, said "paradoxically, many European governments have a need for a highly skilled workforce, but the qualifications that refugees bring to their asylum countries remain largely untapped" - www.unhcr.org/5064579d6.html

⁷⁰ 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, 23.12.2004.

⁷¹ 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, 03.11.2005.

⁷² For an overview, see A. Wiesbrock 'Legal Migration to the European Union', *op. cit.*

With respect to researchers, and as a principle, Article 13 of the directive states that "a third-country national who has been admitted as a researcher under this directive shall be allowed to carry out part of his/her research in another member state". The procedure differs according to the length of stay planned in the second member state. For a short stay, i.e. up to three months, a researcher is able to move on the basis of the hosting agreement concluded in the first member state⁷³. He/she has also to prove that he/she has sufficient resources and holds a residence permit or a visa (for researchers holding a residence permit issued by a state outside of the Schengen area). For periods of research longer than three months, a new hosting agreement may be required. In this case, the second member state may refuse to admit the applicant because he/she does not fulfil the conditions related to content of the hosting agreement (Article 6) and/or general conditions for admission (Article 7), as they are applicable in the first state.

The implementation of both directives by the member states was assessed by the European Commission⁷⁴. With respect to intra-EU mobility, the Commission's assessment demonstrates that there are still problems with transposition in some member states. However, both reports highlighted the importance of being able to attract students and researchers to the EU, in particular regarding the 'global war for talent'. In this regard, intra-EU mobility appears to be a major incentive which should be more significantly addressed and put forward in dialogue with third countries. The Commission underlined that this point should be addressed in the near future, with proposals to modify Directives 2004/114/EC and 2005/71/EC.

The proposals were published in March 2013⁷⁵. But instead of tabling several proposals addressing different groups of people, the Commission presented a single document on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing. Following previous statements, the proposal aims to facilitate and simplify intra-EU mobility for students and researchers.

For researchers, the period for which they are allowed to move to a second member state on the basis of the hosting agreement concluded in the first member state has been extended from three to six months (Article 26). For students and remunerated trainees, new provisions allow them to move to a second member state for a period of up to six months on the basis of the authorisation granted by the first member state. The condition of having been admitted as a student in the first member state for no less than two years has disappeared from the Commission's proposal (Article 26).

The right to move between member states has also been reinforced for researchers and students admitted under EU mobility programmes, for example the current Erasmus Mundus or Marie Curie programmes. When the full list of member states where the researcher or student intends to go is known prior to entry into the first member state, authorisation covering the whole duration of their stay in the member states concerned shall be granted. According to the Commission, this rule will

⁷³ According Article 6 of Directive 2005/71/EC: "A research organisation wishing to host a researcher shall sign a hosting agreement with the latter whereby the researcher undertakes to complete the research project and the organisation undertakes to host the researcher for that purpose (...)." According to Article 7, the hosting agreement should be included in the application for admission submitted to national authorities.

⁷⁴ Report from the Commission to the Council and the European Parliament on the application of Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, COM(2011) 587 final, 28.09.2011; Report from the Commission to the Council and the European Parliament on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research, COM(2011)901, 20.12.2011.

⁷⁵ Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing, COM(2013) 151 final, 25.03.2013.

limit the number of situations in which third-country nationals who qualify for scholarships or fellowships under EU mobility programmes cannot take them up because they cannot enter the territory of the member state concerned. In addition to this, and in line with the provisions of the Blue Card Directive, researchers' family members can move between member states together with the researcher.

The new proposal presents some interesting steps to enhance intra-EU mobility for students and researchers. In order to make intra-EU mobility for these categories of persons more effective, the proposal plans to request member states to establish contact points for receiving and transmitting the information needed to implement intra-EU mobility. This would follow the example of the contact points already established under existing migration *acquis*, such as the Blue Card Directive and the proposal for a Directive on intra-corporate transferees.

While, the proposal should be welcomed as it seeks to make intra-EU mobility more prominent for researchers and students, it has now to be agreed upon by the Council and the European Parliament. Given the current climate, it is difficult to predict how the proposal will be received by relevant players, how long the negotiation process will last, and the extent to which extension provisions related to intra-EU mobility will be maintained or undermined.

2.3 INTRA-EU MOBILITY IN EU RULES FOR THIRD-COUNTRY NATIONALS: A PATCHWORK

When considering existing rules providing for intra-EU mobility, one should acknowledge that provisions governing mobility in EU directives differ from each other and offer a patchwork or a scattered picture. This ranges from the intensity of movement rights awarded (2.3.1) to the prior length of legal residence requested (2.3.2) and the margins of manoeuvre retained by the member states, which may seriously undermine mobility (2.3.3).

2.3.1 Right or possibility to move?

A first question that may be raised is: as a third-country national legally residing in an EU member state, am I entitled to move? While the answer is 'yes', a closer look to the directives' provisions shows that the picture is quite intricate, as this possibility is not open in the same way for all migrants.

Provisions providing for the possibility to move are not worded in the same manner. Indeed, where long-term residents "shall acquire the right to move", students "shall be admitted" to another member state and researchers "shall be allowed to carry out part of his/her research in another member state". EU Blue Card holders "may move" to another member state.

From a legal point of view, this has a major impact as a 'shall clause' is mandatory whereas a 'may clause' is not. In other words, a 'may clause' leaves important margins of manoeuvre to the member states to grant the right to move or not. On the contrary, a 'shall clause' obliges governments to grant the right if the applicant fulfils the conditions requested. In such a situation, long-term residents, researchers and students have the right to move, whereas highly-skilled workers may only enjoy this as a possibility.

The wording of the directives reveals the extent to which member states agree to grant the right to free movement. It is striking to underline that 'shall clauses' were introduced in the first series of instruments adopted in the field of legal migration, i.e. before 2005. The selective approach based on the European Commission's policy plan published in December 2005⁷⁶ is also accompanied by less liberal provisions with respect to intra-EU mobility. This clearly derives from the EU Blue Card Directive but also from the directive currently being negotiated on intra-corporate transferees. Whereas the Commission proposed that intra-corporate transferees "shall be allowed to work" in another member state⁷⁷, the text currently under negotiation between the Council and the European Parliament states that the transfer "may take place"⁷⁸. Furthermore, and whereas the Commission proposed for simple procedure to be followed, the Council has modified the proposal into a very heavy and bureaucratic procedure. In this view, it will also be interesting to see whether or not the provision regarding intra-EU mobility for researchers, students and remunerated trainees will be changed during the forthcoming negotiations.

Alongside the wording, the conditions to be fulfilled as well as the member states' margins of manoeuvre are highly relevant to assessing the extent of the rights awarded to third-country nationals.

2.3.2 Prior length of legal residence

The directives define a series of conditions for exercising the right to move in another member state which may be different. This is particularly the case with respect to the length of legal residence requested before being entitled to move.

Researchers are entitled to move "immediately" to carry out part of their research in another member state. Highly-skilled workers may exercise this possibility after 18 months. Long-term residents get the right to free movement after a period of five years of legal residence.

In practice, few people benefit from accelerated access to freedom of movement, i.e. researchers and Blue Card holders. The vast majority of third-country nationals have to wait for a longer period of time, i.e. five years, provided that they meet the requested conditions. Hence, the category within which a migrant falls defines whether or not he/she enjoys a preferential status.

Given these differences, one could ask whether it is justified to award more favourable treatment to some migrants and not to others. What justifies preventing 'normal' third-country national workers, i.e. those who do not fall for instance within the scope of Directive 2009/50/EC on highly-qualified workers, from exercising the right to free movement before five years of legal residence?

From a legal perspective, such differences are based on the status awarded to migrants and not on the basis of nationality. Hence, the prohibition of discrimination on the basis of nationality⁷⁹ is not applicable there. However, such a differentiation is hard to defend from an economic point of view, as shortages are experienced mainly with respect to middle-skilled jobs. Hence, middle-skilled workers who might be needed in some specific EU labour sectors are not entitled to exercise their

⁷⁶ Communication from the Commission, Policy Plan on Legal Migration, COM(2005) 669 final, 21.12.2005.

⁷⁷ Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, COM(2010) 378 final, 13.07.2010.

⁷⁸ See Article 16, Paragraph 1 of proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, Doc. 10618/12, 6 June 2012.

⁷⁹ According to Article 18 TFUE: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

right to free movement before completing the requested five years of legal residence. While such a situation might not help to address the current effects of the crisis in making the allocation of labour in another member state easier, it also does not help to make the EU attractive in the medium term.

2.3.3 Member states' margins of manoeuvre

With respect to conditions requested for exercising the right to move, the directives' provisions enable member states to keep strong control. As an initial point, member states may destroy any perspective to exercise the right to move by preventing third-country nationals from acquiring the appropriate status. As already underlined, some states do not deliver the EU long-term residence status, which constitutes a barrier to exercising the right to move. The same situation may apply to applicants for EU Blue Card status under two different schemes. On the one hand, member states may make acquisition of that status very difficult or even impossible. As a consequence, freedom of movement may be hampered, as Article 18 of the Highly-skilled Workers Directive clearly states that movement may take place "after eighteen months of legal residence in the first member state *as an EU Blue Card holder*"⁸⁰. On the other hand, member states may use the opportunity granted by the Directive to issue different residence permits than the EU Blue Card. But such national permits do not include any right to movement within the EU⁸¹. Hence, using 'parallel systems' of national residence permits for highly-skilled workers limits the effect of intra-EU mobility.

Secondly, member states may deny freedom of movement on the basis of various grounds. The possibility to deny movement as a result of the labour market situation exists in the Long-term Residence and Blue Card Directives. In the Long-term Residence Directive, member states may prefer to award a job position to an EU citizen or third-country national who resides legally and receives unemployment benefits in the country⁸². In the Blue Card Directive, member states may verify whether vacancies can be filled from the national or Community workforce, by third-country nationals already residing and employed in the labour market, or by long-term residents who wish to move⁸³.

Another justification for restricting intra-EU mobility is based on the capacity to adopt quotas limiting the number of persons entitled to move. While this provision is accompanied in the Long-term Residence Directive by a standstill clause - i.e. the quota system should have been established in national law before the adoption of the directive⁸⁴ - the Blue Card Directive does not contain any provision of that kind. This means that member states are always able to adopt a quota system limiting the possibility for highly-skilled workers to move within the EU. The possibility for states to adopt and modify quotas makes it difficult to establish a common market. However, in deciding on the volume of highly-qualified workers admitted, member states keep control.

Safeguarding member states' stranglehold over admission was particularly important in the Blue Card Directive. Indeed, the grounds for refusing applications for status and movement have been

⁸⁰ Italics added.

⁸¹ Article 3, paragraph 4, states "this Directive shall be without prejudice to the right of the Member States to issue residence permits other than an EU Blue Card for any purpose of employment. Such residence permits shall not confer the right of residence in the other Member States as provided for in this Directive."

⁸² Article 14, Paragraph 3, of Directive 2003/109/EC.

⁸³ According to Article 18, Paragraph 4, a) of Directive 2009/50/EC, Article 8, Paragraph 2, of Directive 2009/50/EC is applicable where the second member state processes the application to move.

⁸⁴ Article 14, Paragraph 4, of Directive 2003/109/EC: "By way of derogation from the provisions of paragraph 1, Member States may limit the total number of persons entitled to be granted right of residence, provided that such limitations are already set out for the admission of third-country nationals in the existing legislation at the time of the adoption of this Directive."

extended to two additional and specific fields. The first one deals with “ethical recruitment”⁸⁵. Aimed at fighting against the phenomenon of so-called ‘brain drain’, this provision applies to applications for EU Blue Cards and the possibility to move to another member state⁸⁶. The second instance deals with situations in which employers have been sanctioned for undeclared work and/or illegal employment⁸⁷. In such a situation that has nothing to do with the applicant, the issuing of the Blue Card and the possibility to move may be refused.

These examples illustrate a series of problems linked to the core concept of intra-EU mobility. Firstly, the legal scheme is more like a patchwork and consequently lacks coherence. While the Researchers and Students Directives define the administrative requirements for movement to be exercised, the Long-term Residence and in particular the Blue Card Directives establish criteria to restrict the possibility to move. The extension of the grounds to refuse intra-EU mobility in the Blue Card Directive goes hand in hand with the ever-growing reluctance of member states to act in unison in the field of legal migration. In practice, member states possess the weaponry to kill the intra-EU mobility of long-term residents and highly-skilled workers. The labour-market test provision is one of the most powerful tools in this regard.

Secondly, the wide margin of manoeuvre granted to member states does not allow for any kind of harmonisation in the field. As a consequence, migrants willing to move to the EU and wishing to exercise the right to freedom of movement face a fragmented legal landscape. This makes the system hard, if not impossible, to understand. It does not provide any incentive to choose the EU as a destination. This is problematic considering the need to attract not only highly-qualified but also medium-skilled migrants to the EU.

Finally, and more importantly, such a legal ‘patchwork’ scheme will not help to address needs deriving from the crisis. Indeed, the crisis makes it imperative to lift barriers to the free movement of people within the Union in order to allocate the workforce more effectively, taking into account the changing nature of labour demand among member states. For the time being, there is no answer of that kind available in EU law and practice. On this last point, the European Commission’s reports show that low numbers of people have been admitted under the schemes provided for by the directives, and consequently a low number of them have taken up the opportunity to move within the EU.

In the end, there is no common response to this collective challenge. Significant changes are required to make intra-EU mobility a reality that can help with the response to challenges deriving from the crisis and help to boost the prospect of attracting migrants from outside the EU. In other words, intra-EU mobility should become a priority and must be improved. This could take the form of developing various actions, from including the issue in dialogue with third countries - so as to make sure that the ‘mobility dimension’ of external relations does not merely remain a *motto*⁸⁸ - to the development of new mechanisms and rules at EU level.

⁸⁵ Article 8, Paragraph 4, of Directive 2009/50/EC: "Member States may reject an application for an EU Blue Card in order to ensure ethical recruitment in sectors suffering from a lack of qualified workers in the countries of origin."

⁸⁶ Article 18, Paragraph 4, a) of Directive 2009/50/EC.

⁸⁷ Article 8, Paragraph 5, of Directive 2009/50/EC: "Member States may reject an application for an EU Blue Card if the employer has been sanctioned in conformity with national law for undeclared work and/or illegal employment."

⁸⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "The Global Approach to Migration and Mobility", COM (2011) 743 final, 18.11.2011.

WAYS TO IMPROVE INTRA-EU MOBILITY

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There are three main ways of improving intra-EU mobility. The first one is to make sure that existing rules are correctly implemented (3.1). The second is to adapt existing mechanisms in order to enhance the intra-EU mobility of third-country nationals (3.2). Finally, a third way could be to adopt new EU legislation aimed at improving intra-EU mobility for third-country nationals and graduates (3.3).

3.1 IMPROVING THE IMPLEMENTATION OF EXISTING RULES

Making such an improvement implies ensuring that current EU rules are being implemented properly in the member states. This mission falls within the remit of the European Commission through infringement procedures. As 'guardian of the treaties', the Commission has the power to launch an infringement procedure before the European Court of justice against a failing member state⁸⁹.

This has already been the case with respect to Directive 2003/109/EC. The Commission has requested the Court of justice to declare that by requiring third-country nationals and their family members who apply for long-term resident status to pay high and unfair fees, the Kingdom of the Netherlands has failed to fulfil its obligations under Directive 2003/109/EC⁹⁰. In practice, the charges levied under Dutch legislation on third-country nationals vary between 188 and 830 euros. The Court has recognised that the Dutch legislation is *per se* disproportionate and liable to create an obstacle to the exercise of the rights conferred by Directive 2003/109/EC.

⁸⁹ According to Article 258 of the TFEU, "if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

⁹⁰ ECJ, 26 April 2012, European Commission v. Kingdom of the Netherlands, case C.-508/10.

This case law is, for the time being, the only one introduced by the European Commission against one member state in the field of immigration and asylum. In other words, despite the Commission having identified several infringements, it has never taken the next step of bringing member states before the Court of Justice for non-implementation or poor implementation of EU rules at national level.

There are numerous examples of infringements which have an impact on intra-EU mobility. The Commission's report on the implementation of Directive 2003/109/EC concludes that there are still many deficiencies in the transposition of it⁹¹. It underlined in particular that access to long-term residence status is not always guaranteed for third-country nationals. As a consequence, this has the effect of depriving some third-country nationals of benefiting from the subsequent right to freedom of movement.

The report on the implementation of the Researchers Directive also indicates that the "mobility of researchers has been incorporated into national legislation by 17 member states. In other member states, national legislation does not explicitly stipulate that researchers who have been issued a permit in another member state can work on their territory without an additional work permit. This may result in legal uncertainty which will hinder the right to intra-EU mobility and may qualify as not compliant"⁹². The assessment by the European Commission was clear enough to lead the institution to take action before the Court of Justice.

The report on the implementation of the Highly-skilled Workers Directive has not been issued for the time being. Nevertheless, there is unfortunately no reason to believe that the Highly-skilled Workers Directive would not be affected by implementation problems in particular with respect to the possibility to move to another member state.

Under EU law, it is the responsibility of the European Commission to monitor member states implementation of EU rules and to table infringement procedures where national rules do not fulfil the requirements and objectives of EU directives. The evaluation of national transposition concerns all provisions of the directives, including in the present case questions related to obstacles to intra-EU mobility. In practice, judicial actions could help to put pressure on 'failing' member states and consequently enhance the implementation of intra-EU mobility provisions.

However, this would require some courage on the part of the European Commission, because such action is rarely taken in the field of immigration-related issues. This reluctance to table infringement procedures in the field of migration policies derives from a series of reasons⁹³ which underline the difficulties facing the European Commission in terms of suing a certain member state and asking the same state to agree to the legislative proposals presented by the Commission. In other words, the Commission is stuck between a rock and a hard place, where it has to be strong with but also nice to member-state governments. This is one reason - along with others including the high sensitivity of the domain - why the Commission is not taking such a course of action.

This situation is far from satisfactory and leaves member states 'free' to block the proper implementation of individual rights, including freedom of movement. The European Commission

⁹¹ Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2011) 585 final, 28.09.2011.

⁹² Report from the Commission to the Council and the European Parliament on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research, COM(2011)901, 20.12.2011.

⁹³ For a more developed approach, see Y. Pascouau "Human Rights Violations in the Field of Migration: A Collective responsibility", Policy Brief, EPC, 2012.

must show the political will, and courage, to upset governments and table infringement procedures. If it refrains from doing so, intra-EU mobility rights will in some cases remain a dream.

3.2 USING EXISTING TOOLS FOR GREATER MOBILITY

This section seeks to highlight areas where improvement could lead to better organisation of intra-EU mobility for third-country national workers already residing in an EU member state. This covers in particular access to job opportunities (3.2.1) and recognition of qualifications (3.2.2).

3.2.1 Enhancing access to the EURES Network for third-country nationals

One step forward could concern the opportunity for third-country nationals to access the existing EURES network⁹⁴ in order to enjoy wider access to job opportunities across the European Union.

EURES - the European Employment Services - is a cooperation network designed to facilitate the free movement of workers within the European Economic Area and Switzerland. The purpose of EURES is to exchange vacancies and applications for employment ("clearance"), provide information, advice and recruitment/placement (job-matching) services for the benefit of workers and employers as well as any citizen wishing to benefit from the principle of free movement for workers in the European Union and the European Economic Area (EEA). The main target populations of EURES are, in accordance with the right to freedom of movement, EU citizens and their families, EEA citizens and their families, and Swiss citizens and their families. EURES has two pillars: a Job Mobility Portal (one million vacancies; "online services") and a human network of more than 850 EURES Advisers in 31 countries ("personalised or mediated services").

With regard to intra-EU mobility, the efficiency of the EURES network could be improved in two main ways. The first one relates to the possibility to provide better access to and services from the EURES Network for migrant workers legally residing in an EU member state⁹⁵. Indeed, and while it is commonly acknowledged that the EURES Network primarily covers EU citizens and workers from EEA countries, some third-country workers fall within the scope of EURES services. This is the case for third-country nationals with EU long-term resident status. According to Article 11 of Directive 2003/109/EC, long-term residents shall enjoy equal treatment with nationals as regards "access to employment". In other words, where nationals have access to the EURES Network in order to exercise their right to freedom of movement, long-term residents have the same right⁹⁶.

Despite the possibility being legally open to third-country nationals, the practical use of the EURES system is low. Indeed, according to some officials the number of third-country users is small and the focus of the system is not geared towards EU and EEA citizens. In this context, one step forward

⁹⁴ Commission Decision (2003/8/EC) of 23 December 2002 implementing Council Regulation (EEC) n° 1612/68 as regards the clearance of vacancies and applications for employment, OJ L 5, 10.01.2003.

⁹⁵ From a legal point of view, Article 74 TFEU allows for such administrative cooperation between the relevant national authorities. The article states that "the Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament".

⁹⁶ The same opportunity does not appear to apply to other third-country nationals entitled to intra-EU mobility. As regards students and researchers, they have the right to move but only to pursue specific tasks: studies for the former and research for the latter. Regarding highly-skilled workers, the Blue Card Directive ensures equal treatment with regard to working conditions but not access to employment. A provision deals with access to the labour market, but does not deal with access to employment.

would be to broaden EURES' priorities. The Network could be more active in raising awareness that this category of migrant workers has the right to move and also to access the EURES Network. This could at the same time help to fulfil the Commission's objective of better informing third-country nationals about their rights⁹⁷.

The second improvement regarding the intra-EU mobility of third-country nationals could reside in using the opportunities offered by EURES reforms launched in 2012 to improve the potential of the network to match jobseekers to job openings across borders. The aim is to transform EURES into an employment instrument that enables member states to offer mobility services to jobseekers, job changers and employers in a flexible, demand-driven manner, according to the specific needs of the national labour market and employers.

Hence, and alongside public and specific private employment services having access to the Network, a decision adopted in 2012 extends the scope of the EURES Network to new actors, i.e. "associated EURES Partners"⁹⁸. These comprise organisations "that do not provide all the obligatory Universal services,"⁹⁹ but which provide information and advice, such as intermediaries and social partners.

According to this definition, migrants' organisations may also apply to become "associated EURES partners" and participate in the provision of services (advice, information and mediation) regarding mobility, thereby supporting the machinery at EU level on "the exchange of vacancies as well as applications for employment by jobseekers interested in working in another member state"¹⁰⁰. In other words, a new space is potentially available for migrants' organisations to enable them to play a greater role in the promotion of intra-EU mobility. However, this opportunity will be governed by criteria and conditions developed by each member state in this regard¹⁰¹. Discussions taking place in 2013 may nevertheless lead to the inclusion of some common principles and criteria about the associated partners in the "EURES Charter". This could take the form of a common guidance document for the implementation of the 2012 Decision.

The EURES Network offers significant opportunities to enhance the intra-EU mobility of migrant workers entitled to freedom of movement. In practice, however, this potential is not fully realised, due in particular to a lack of information. Raising awareness about mobility rights and the opportunity to access the EURES Network should therefore be a key priority.

This could be the basis of a sound system in which the available workforce residing on EU territory could be invited to fill labour and skill shortages without having to resort to 'external' labour

⁹⁷ "Moreover, long-term residents should be better informed about their rights under the Directive. The Commission will make the best use of existing websites, mainly via the future Immigration Portal, and is considering preparing a simplified guide for long-term residents. The Commission could also encourage and support Member States in launching awareness-raising campaigns to inform long-term residents of their rights", Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2011) 585 final, 28.09.2011, p. 11.

⁹⁸ Article 3 of Commission implementing decision of 26 November 2012 implementing Regulation (EU) No. 492/2011 of the European Parliament and of the Council as regards the clearance of vacancies and applications for employment and the re-establishment of EURES, OJ L 328, 28.11.2012.

⁹⁹ Commission Staff Working Document "Reforming EURES to meet the goals of Europe 2020", SWD(2012)100, 18.04.2012.

¹⁰⁰ Article 6, paragraph 4, of Commission implementing decision of 26 November 2012 implementing Regulation (EU) No 492/2011 of the European Parliament and of the Council as regards the clearance of vacancies and applications for employment and the re-establishment of EURES, OJ L 328, 28.11.2012.

¹⁰¹ "Member States could envisage developing different criteria and modalities for the participation of associated EURES Partners to reflect the national, territorial and institutional set-up and competences and build up the best possible composition of the national EURES network", Commission Staff Working Document "Reforming EURES to meet the goals of Europe 2020", SWD(2012)100, 18.04.2012.

migration. Such an option would also bring the Single European Labour Market to a dimension that it has not reached so far.

3.3.2 Exploring ways to enhance recognition of qualifications and skills

This issue is linked to the previous one, as the proper allocation of workers should be accompanied by a clear system of recognition of qualifications and/or skills. At EU level, and in order to avoid obstacles to the movement of people, rules have been adopted to facilitate the mutual recognition of professional qualifications between member states. However, the system is quite intricate as it implies an important set of directives covering specific sectors¹⁰² or a general system which is applicable to all professions that are not covered by a specific directive. The general system is organised by Directive 2005/36/EC on the recognition of professional qualifications¹⁰³.

A short insight into the general system covered by Directive 2005/36/EC illustrates how complex the system is. It is so complex that a specific "user's guide"¹⁰⁴ has been published by the European Commission in order to help citizens to 'find their way'.

As a first rule, the Directive is primarily applicable to nationals of the 27 EU member states and nationals of Iceland, Norway and Liechtenstein. In this regard, third-country nationals should be excluded from its scope. This is not the case, as according to the Commission's "user's guide"¹⁰⁵, a select group of third-country nationals may fall within the scope of EU rules and in particular of Directive 2005/36/EC. These people are: family members of an EU citizen exercising his/her right to free movement; long-term residents; refugees and highly-skilled workers holding an EU Blue Card.

Secondly, and because Directive 2005/36/EC targets primarily "Europeans", it does not apply where qualifications have been obtained in a third country. In this case, recognition remains dealt with by national law. However, the Directive indicates in Article 3, Paragraph 3, that "evidence of formal qualifications issued by a third country shall be regarded as evidence of formal qualifications if the holder has three years' professional experience in the profession concerned on the territory of the Member State which recognised that evidence of formal qualifications in accordance with Article 2(2), certified by that Member State". Hence, the general rule covers qualifications obtained outside the EU as well.

But here again, the picture is not very clear. Indeed, this system remains in the full control of the member states, as it is applicable insofar as the first country has recognised the migrant's qualifications. As explained by the user's guide, Directive 2005/36/EC applies only as of the second application for recognition if the conditions for benefiting from this recognition are met. In other words, if member state A has recognised the foreign qualifications of M. X, member state B should recognise this qualification like member state A did. But if member state A did not recognise M. X's qualifications, member state B is not bound by this and is free to decide whether or not to recognize the qualification. In practice, individual member states have a strong influence on the system,

¹⁰² As explained by the European Commission in the User Guide on Directive 2005/36/EC, "if you are a Slovenian air traffic controller who wants to work in Italy, the recognition of your professional qualifications is covered by Directive 2006/23/EC; if you are a Czech airline pilot and you want to work in Poland, you come under Directive 91/670/EC; several professions in the maritime sector are covered by Directives 2005/45/EC and 2008/106/EC".

¹⁰³ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255, 30.09.2005. The Directive has been amended several times.

¹⁰⁴ Available: http://ec.europa.eu/internal_market/qualifications/docs/guide/users_guide_en.pdf

¹⁰⁵ Available: http://ec.europa.eu/internal_market/qualifications/docs/guide/users_guide_en.pdf

because some of them may recognise qualifications acquired in the third country whereas others might not. There is then a risk of discrepancy between member states, which may have a significant impact on the exercise of intra-EU mobility.

One must recognise that the system is highly intricate. It is even more so when trying to identify which rules are applicable from the perspective of intra-EU mobility. Let's take the example of a Canadian citizen living for four years in one member state. Upon arrival, the host member state recognised his/her qualifications. Under EU law (Directive 2005/36/EC), this qualification must be recognised by every other state after three years. In practice, the Canadian citizen may under EU rules exercise this profession in another member state after three years of residence. However, the right for the Canadian citizen to have access to another member state's labour market is governed by national law. The person is neither a highly-qualified worker, nor a long-term resident. Hence, before acquiring long-term resident status, access to the labour market in the second member state is defined by domestic law. At the end of the day, the system as currently applicable is absolutely unreadable as the Canadian citizen's situation is governed by two different rules.

This legal situation does not help to make the European labour market attractive. On the contrary, the legal complexity may act as a deterrent for some categories of migrant. With respect to the recognition of qualifications, some further steps should be taken in order to facilitate the recognition of qualifications acquired in third countries.

One solution to overcome this situation would be to make the system of recognition more flexible and to recognise skills and qualifications after three years of exercising the profession in one member state, notwithstanding the existence of formal recognition of the qualification by the state.

Another way would be to entrust the European Commission with a mandate to negotiate with third countries a list of qualifications acquired in third states and recognised in all EU member states. While this solution would appear to be the clearest one, achieving it would take decades. Consequently, this option should not be the primary focus.

An alternative would be to take the pragmatic approach of using existing frameworks to discuss questions related to recognition of skills and qualifications. The Global Approach to Migration and Mobility forms the framework within which further steps regarding the recognition of diplomas and skills could be achieved. The European Commission mentioned it in its Communication of November 2011, where it recommended focusing on "twinning between higher education and training institutions, to encourage cross-border cooperation and exchanges on aligning curricula, certification and qualifications and ensuring efficient recognition thereof (through effective quality assurance, comparable and consistent use of EU transparency tools and linking qualifications to the European Qualifications Framework) with a view to improving long-term labour market complementarity"¹⁰⁶.

While questions related to recognition of skills and qualifications are part of discussions taking place between the EU and its partners over legal migration issues, progress in this regard has so far been limited and will take time to achieve. There is, however, a field in which this issue could be addressed to the benefit of third countries, migrants and hosting countries alike. Indeed, the framework of

¹⁰⁶ Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "The Global Approach to Migration and Mobility", COM(2011) 743 final, 18.11.2011, sp. 15.

'Mobility Partnerships'¹⁰⁷ might today constitute one of the most efficient forums in which to the issue of recognition of qualifications could be seriously discussed and implemented.

'Mobility Partnerships' should enable the development of in-depth discussions regarding the recognition of qualifications acquired in the country subject to the partnership. This could take the form of concluding agreements between member states and third countries regarding a list of qualifications as well as diplomas delivered in specific schools, universities or institutions. This recognition scheme would first be applicable to member states that have engaged voluntarily in the partnership. It could later be extended to other member states or form the basis of an agreement between the EU and the third country concerned.

In any case, the question of mobility of third-country nationals into and within the EU cannot disregard the issue of recognition of skills and qualifications. Hence this topic should primarily be addressed by third countries invited to discuss these issues with the EU and its member states. It is also a solution to develop in order to make the EU more attractive and competitive in the global war for talent.

3.3 DEVELOPING NEW RULES FOR EXTENDING INTRA-EU MOBILITY

Some EU rules already exist which help migrant workers to exercise their right to freedom of movement. Alongside rules enshrined in the above-mentioned Directives, this is particularly the case with rules related to the coordination of social security rights. A regulation adopted in 2011 allows third-country nationals legally resident in the European Union and in a cross-border situation to be treated as if they were EU citizens in the same situation¹⁰⁸. However, new legislative proposals should be presented and adopted in order to further facilitate intra-EU mobility for third-country nationals already residing in EU member states. This perspective could concern the adoption of a general regime of intra-EU mobility (3.3.1). It could also concern a specific category of third-country nationals, i.e. students (3.3.2).

3.3.1 Establishing a general regime of intra-EU mobility

Currently, intra-EU mobility is awarded to specific categories of people under different conditions. It is open immediately to students and researchers for the purpose of studies or research, after 18 months of legal residence for EU Blue Card holders, and after five years of legal residence for long-term residents. In other words, and with the exception of highly-skilled workers, the right to move to another member state is basically open after five years of legal residence. This situation does not seem to be very helpful in terms of looking at intra-EU mobility as a tool to respond to the effects of the crisis and/or labour mismatches between member states.

¹⁰⁷ Mobility Partnerships are concluded between the EU, its member states and third countries. These partnerships deal with a series of issues including irregular migration, development policies and legal migration. So far, two Mobility Partnerships have been concluded with Moldova and Cape Verde and two others are in the process of being negotiated with Morocco and Tunisia. Mobility Partnerships are specific tools as they are not legally binding and do not involve all EU member states. The latter may engage in a partnership on a voluntary basis.

¹⁰⁸ Regulation (EU) n° 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, OJ L 344, 29.12.2010.

Hence, it might be worth adopting a new rule on the basis of Article 79, Paragraph 2, b) of the TFEU¹⁰⁹ in order to grant mobility rights to legally-residing migrants before five years of legal residence. Such a rule would have the sole objective of opening mobility rights to certain categories of migrants. It would not have the objective of reinforcing the legal status of third-country nationals, as this aim is covered and achieved by the Long-term Residence Directive.

In this context, the new EU rule should determine the conditions under which third-country nationals legally residing in an EU member state should have the right to move to another member state. The right to move should be open after a defined period of legal residence. In order to introduce some coherence at EU level, a period of three years - corresponding to the period after which the recognition of qualifications is automatic - could be established. Secondly, conditions for exercising the right to move should be linked to employment purposes, i.e. the applicant should have a job opportunity or a firm job offer. In this context, this category of migrant workers should also have access to the EURES Network. Enabling intra-EU mobility under such a scheme would help to reallocate the workforce whenever needed and consequently help to complete the Single European Labour Market. Finally, the rights under which migrants workers would exercise freedom of movement are those defined by the Single Permit Directive¹¹⁰, i.e. the right to have access to work¹¹¹ and the right to equal treatment¹¹².

The EU institutions should keep in mind that making intra-EU mobility easier for a greater number of third-country nationals could constitute a win-win situation. As already underlined, it would help to avoid labour mismatches by enabling legally-residing migrant workers to apply for vacancies in another member state. This could alleviate the burden of unemployment in some countries and fill in shortages in others. Furthermore, having recourse to an already-residing workforce makes it less necessary to recruit people from outside of the Union. In other words, this solution does not touch upon admission policies.

3.3.2 Improving students' access to the labour market

Another area for further development could concentrate on students. In this domain, EU legislation is limited to the definition of conditions for entry and residence. Directive 2004/114/EC¹¹³ does not go beyond the restricted scope of studies and does not contain rules related to the right for students to access the labour market after completing their studies. This narrow approach is counterproductive and worrying.

Currently, member states do not approach the issue in the same way. Germany has implemented programmes to retain foreign students by removing the labour-market test for foreign graduates

¹⁰⁹ This provision states that the European Parliament and the Council shall adopt measures on "the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States".

¹¹⁰ 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, 23.12.2011.

¹¹¹ Article 11 Directive 2011/98/EU.

¹¹² Article 12 Directive 2011/98/EU.

¹¹³ 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, 23.12.2004.

from German universities if they take up a job in their field¹¹⁴. Prior to the 2012 presidential elections, France pursued the opposite policy, aimed at sending students back to their country of origin after graduation¹¹⁵.

These contrasting national examples highlight the absence of any EU common policy with respect to students. The lack of a common approach enables member states to develop policies which could lead to competition between themselves. Indeed, some countries may develop smart policies in order to attract foreign students and be more competitive than others. From the perspective of the establishment of a Single European Labour Market, such competition between EU member states is considered to be the worst-case scenario.

While an isolated approach from one member state may contribute to making that country attractive, such a strategy is limited to that state and simultaneously undermines the attractiveness and potential of the Single European Labour Market. The absence of a strategy based on the Single EU Labour Market has the effect of weakening member states' capacities to compete with other regions of the world in the global war for talent. Last but not least, the inability of member states to retain foreign graduates constitutes a loss in terms of investment and profits non-European destinations.

In this regard, the recent proposal presented by the European Commission dealing, *inter alia*, with researchers and students should be welcomed¹¹⁶. It proposes that after graduation or after their research contract has come to an end, both students and researchers "shall be entitled to stay on the territory of the member state for a period of 12 months in order to look for work or set up a business" (Art. 24). This facility will be subject to the enduring fulfilment of the general conditions for admission. Furthermore, the provision states that in a period of more than three and less than six months, member states could ask non-EU nationals to provide documentation that they are genuinely looking for a job or are in the process of setting up a business. The provision indicates that after six months, the states could also ask the non-EU nationals to provide evidence that they have a genuine chance of being hired or of launching a business.

This proposal should be taken into serious consideration for several reasons. Firstly, the possibility for students to have access to the labour market is a strong incentive to study in the EU. It is also a 'gain' for member states. Secondly, whilst supporting the cost of study, member states benefit from graduates who are qualified workers already integrated into the receiving society. Finally, the adoption of common rules in this regard diminishes the risk of competitive policies emerging between member states. In all cases, granting access to the labour market looks like a win-win scenario.

However, the negotiation process should be looked at carefully. Indeed, the Commission proposes a provision establishing a principle accompanied with a 'light' procedure. As was the case in negotiations on the Intra-corporate Transferees Directive, there is a risk that member states will only grant this new right once a number of administrative and bureaucratic conditions have been fulfilled. Hence, having begun as a very general provision, the final version of the directive may involve a

¹¹⁴ See on this, F. Hübner & C. Klein: "The German Labour Market. Preparing for the Future", OECD, Economics Department, Working Papers n° 983, Sept. 2012. See also, B. Laubenthal "Labour Migration Governance in Contemporary Europe. The Case of Germany", LAB-MIG-GOV Project "Which Labour Migration Governance for a More Dynamic and Inclusive Europe?", FIERI Working Papers, April 2012 (Working paper available here: www.labmig.gov.eu/wp-content/uploads/2012/05/laubenthal_case-study_-Germany_17.05.pdf)

¹¹⁵ On France and four other states, see "Mobile Talent? The Staying Intentions of International Students in Five EU Countries", Migration Policy Group & Sachverständigenrat deutscher Stiftungen für Integration und Migration, 2012.

¹¹⁶ Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing, COM(2013) 151 final, 25.03.2013.

detailed procedure enabling member states to retain control over researchers and students' entitlement to remain in order to seek a job or set up a business.

While the proposal presented by the Commission constitutes an interesting step forward, the attractiveness of the EU may be further improved with the possibility, after a defined period of time, to offer this category of new workers intra-EU mobility rights. Hence, a third-country national worker who graduated in Germany and who wishes to apply for a job in France could be awarded the right to move after a short period of time, i.e. 18 months to two years. Here again, it is in the interests of the Single European Labour Market to organise mobility schemes for graduates who had access to the labour market of a member state.

As shown, there are additional means available for EU decision-makers to make intra-EU mobility more of a reality.

CONCLUSIONS

EU member states have proven reluctant to adopt common rules in the field of labour migration, especially with respect to rules governing the admission of third-country nationals. As a result, the approach adopted at EU level is fragmented and insufficient. Moreover, the economic crisis has provided a strong additional argument to exclude any move towards a more comprehensive labour migration policy.

However, and given the outstanding demographic and economic challenges the EU and its member states are facing and will have to face in the near future with respect to labour shortages, a waiting strategy will be difficult to maintain. While a move forward is needed, the economic and political situation acts as an obstacle to progress on addressing admission policies. Hence, one of the sole politically acceptable opportunities at the disposal of the EU is based on further facilitating intra-EU mobility for migrant workers already residing in the member states.

While such possibilities already exist in EU law, the right to intra-EU mobility is awarded to limited categories of third-country nationals and under different regimes. Given the inadequacy of the situation, this paper proposes solutions in order to enhance the intra-EU mobility of already-residing migrant workers. There are various options for setting into motion the attainment of greater mobility, but sometimes they are far from easy to implement. This is particularly the case regarding accompanying measures, such as recognition of qualifications.

However, attaining a higher degree of intra-EU mobility for third-country nationals remains difficult due to the current economic and political situation and the lack of political leadership on legal migration-related issues. Despite this negative climate, several arguments may convince EU stakeholders to seriously take into consideration the proposal to develop intra-EU mobility schemes as part of the 'second building block' of EU labour migration policy.

- ✓ Enhancing the movement of already-residing third-country nationals reduces the need to admit similar groups of migrants from outside of the EU. In this view, improving freedom of movement reduces - temporarily at least - the pressure to discuss the adoption of an EU scheme regarding the admission of third-country national workers for employment purposes, a topic which is perceived as a political minefield,
- ✓ Free movement of persons is at the core of the EU integration project. It is now time to take the next step regarding the completion of the Single Market and to deepen the Single European Labour Market by giving third-country nationals greater rights to free movement.

- ✓ Intra-EU mobility plays a key role in overcoming the effects of the economic crisis, as it allows the labour force to be properly allocated between member states.
- ✓ Intra-EU mobility provides a strong incentive for attracting migrant workers to the EU, as they will be entitled to take up jobs in a wider area.
- ✓ In the long run, this further step towards enhanced mobility of migrant workers within the EU will constitute a strong basis to move forward and build the third and last building block of EU labour migration policy.

If no progress is made in this particular field, there is a chance that the EU will not be able to take on forthcoming challenges, in terms of shortages and demography, and that it will still lag behind the high attractiveness and dynamism of emerging countries.