22 Legal Issues of Harmonizing European Legal Migration

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22.1 Introduction

> There are a number of striking similarities in the challenges confronting European states: demand for skills in a knowledge-based economy, ageing populations, strains on welfare provisions, and public anxieties about the impacts of immigration.[1]

It is therefore no surprise that the European Union is trying to deliver common answers to such crucial challenges. An essential element of these answers is the harmonized admission of third-country nationals to the territory of the EU and thus, the creation of a European Legal Migration Policy benefiting both the Member States and the Union.

> States might be assumed to formulate their migration policies on the basis of attempting to maximize their economic and security interests. They attempt to attract 'desirable migrants' who meet the economy's labour market needs, while deterring 'undesirable migrants' who offer little economic benefit and who are perceived to be a threat to that society's security (conceived in the broadest sense). A heuristic starting point might then be to regard states' interests in international politics as being based on maximizing their economic and security interests. Where these interests are best met through international cooperation, one might expect a state to have a preference for cooperation; where they are best met through competition, one might expect as preference for competition.[2]

The core of the debate on when and how to act on a European level in the field of legal migration of third-country nationals is undoubtedly of mainly economic and political

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1 C. Boswell and A. Geddes, *Migration and Mobility in the European Union*, Palgrave Macmillan, Great Britain 2011, p. 81.

2 A. Betts, *Global Migration Governance*, Oxford University Press, Oxford 2012, p. 20.

nature. The Council is therefore primarily criticized for the stubbornness of Member States[3] assuming they are not willing to cooperate because of economic or political reasons. Yet, the negotiations within the relevant Working Group of the Council definitely show the importance of legal issues, for it is important to recall that the tools of harmonization in this field are legal acts, more specifically directives, which should not only contain clear provisions on European level, but must be interpreted by the 28 Member States when transposing them into their national laws and applying them to individual cases of applications.

This much forgotten legal aspect of harmonizing legal migration is what I intend to shed light on by discussing some legal questions which at times gave rise to heated discussions among the legal experts of the Member States in the relevant Working Group, but also enabled some friendly brainstorming with international colleagues.

The first legal question discussed in this study concerns the basic system of the directives on legal migration laying down a harmonised set of criteria for admission and the question on what competence the Member States rely on when deciding on such conditions on their own. Secondly, this paper also intends to describe presently existing intra-EU mobility rights under EU rules on immigration. Thirdly, the study discerns the limitations that still form obstacles in achieving the highest level of free movement of third-country nationals, especially migrant workers within the European Union. These three identified legal issues and the outcome of the respective debates definitely affect the way third-country nationals are admitted to first and second Member States and consequently determine the actual margin of manoeuvre when discussing the future of European legal migration policy.

22.2 A Summary of the Evolution of EU-Wide Harmonized Rules in the Field of Legal Migration of Third-Country Nationals

The European Commission primarily aimed at approaching legislation on legal migration of third country nationals from an economic point of view. Accordingly, the Commission proposed a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities on 11 July 2001.[4] No matter how noble the intention of the Commission was to create an EU-wide harmonised system for a very wide range of third-country migrants, i.e. to follow a

3 *See* e.g. Y. Pascouau, 'EU Immigration Policy: Act Now before It Is too Late', EPC Commentary, 20 June 2013, p. 3: 'First, a common policy in the field of legal migration should aim to overcome the current selective approach and adopt common conditions for the admission of migrant workers to the EU. While member states are highly reluctant to do so, several arguments make this move realistic and positive.'

4 Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities (COM/2001/0386 final – CNS 2001/0154).

horizontal approach in order to cover both the groups of employees and self-employed persons, the negotiation of the Directive revealed many problems. 'The proposal, which closely followed the 1999 Tampere Programme's milestones, was finally withdrawn because representatives of certain EU Member States expressed deep concern about the possibility of having 'more Europe' in these nationally sensitive fields.'[5]

Turning to other categories of migrants besides workers and entrepreneurs, the proposals of the Commission, launched according to the instructions set out by the Tampere European Council, on sets of harmonized rules on third-country nationals arriving for purposes such as family reunification, studies and research had been more successful and resulted in a number of directives adopted between 2003 and 2005. Directive 2003/86/EC[6] on family reunification adopted as the first legal migration directive harmonizes criteria for family reunification between third-country nationals and therefore embraces family reunification as a right of migrants. Directive 2003/109/EC[7] creates a European regime for acquiring EU long-term residence status after five years of legal residence in a Member State. Directive 2004/114/EC[8] focusing mainly on migrants arriving for study purposes and Directive 2005/71/EC[9] setting up a unique procedure for the admission of researchers reflect the EU's preference for knowledge-based migration.

The Hague Programme of November 2004, continuing the implementation of the initiatives of the 1999 Tampere Programme, stressed that legal migration plays an important role in strengthening the knowledge-based European economy, economic development and also contributes to the implementation of the Lisbon Strategy. In order to facilitate the adoption of a new draft Directive on economic migration, the European Commission initiated an extensive consultation with its 'Green Paper on an EU approach to managing economic migration'[10] with Member States, other European institutions, international organizations and NGOs, and other interested parties as to what would be the best type of legislation at Community level in relation to the reception of economic migrants from third countries.

The primary objective of the consultation launched by the Green Paper was to find the most appropriate form of regulation in the Community on the reception of migrants for

5 S. Carrera et al., 'Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020', *CEPS Policy Brief* No. 240, 5 April 2011, p. 3.

6 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3 October 2003, pp. 12-18.

7 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 January 2004, pp. 44-53.

8 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 December 2004, pp. 12-18.

9 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, 3 November 2005, pp. 15-22.

10 COM(2004)0811 final: Green paper on an EU approach to managing economic migration.

economic purposes from third countries, and to discover what would be the added value of the establishment of such a Community framework. The Hague Programme also referred to the Green Paper and the consultation, which would form the basis of a policy plan on legal migration including admission procedures capable of responding promptly to the changing labour market demand.

The result of this consultation was the continuation of the sectorial, or more precisely selective approach of laying down migration rules for certain chosen groups of migrants instead of covering a wider scope of third-country nationals by a harmonised set of criteria. 'The main justification was that, by doing this, the common European policy would be in line with the political priorities and legal regimes applying in most EU Member States.'[11] The Political Plan on Legal Migration[12] was the basis upon which the Commission envisaged a framework directive – together with four further directives covering four specific groups of economic migrants. Carrera's view on the new Policy Plan clearly highlights the differences between the new perspective and the initial proposal of 2001: 'The main result of the approach advocated by the

> Policy Plan on Legal Migration' has been the emergence of a hierarchical, differentiated and obscure European legal regime on labour immigration which accords different rights, standards and conditions for entry and stay to different groups and countries of origin of TCN.[13]

The plan of five directives finally culminated in four proposals from the Commission among which the first to reach maturity for adoption was Directive 2009/50/EC[14] creating the so-called EU Blue Card. The framework directive (Directive 2011/98/EU[15]) not touching upon admission criteria, but definitely bringing about major changes in procedural rules as well as rights was only adopted two years later. Two more draft directives – the proposal for a Directive on intra-corporate transfers[16] and the proposal for a Directive

11 Carrera *supra* note 5, p. 4.

12 Communication from the Commission – Policy Plan on Legal Migration (SEC(2005)1680) (COM(2005)0669 final).

13 Carrera *supra* note 5, p. 3.

14 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 June 2009, pp. 17-29.

15 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343, 23 December 2011, pp. 1-9.

16 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)0378 final – COD(2010)0209).

on seasonal workers[17] – were proposed by the Commission in 2010. Their adoption has long been awaited as a result of the negotiations needed between the co-legislators Council and European Parliament under the ordinary legislative procedure that was extended to the field of legal migration by the Lisbon Treaty. Finally, the Directive on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers[18] was adopted on 26 February 2014, while the final compromise text of the Directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer was adopted on 15 May 2014.[19]

22.3 Legal Issues of Harmonizing Legal Migration of Third-Country Nationals

22.3.1 List of Criteria and the Use of Parallel Schemes

The EU Directives concerning legal migration following the approach of setting out harmonized provisions for certain groups of migrants arriving with specific purposes use the method of prescribing a harmonised list of criteria for the admission of third-country nationals to the territory of a Members State. Furthermore, such a closed list of entry and residence conditions are complemented by harmonized set of grounds for refusal, withdrawal and non-renewal in order to provide a single, unified approach on behalf of Member States concerning the targeted groups of migrants.

The need for such a method of legislation derives from the primary law of the EU, as it defines specific objectives in the field of home affairs, as Article 79 (1) of the Treaty on the Functioning of the European Union (TFEU) sets out that:

> The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

17 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 seasonal employment (COM(2010)0379 final – COD(2010)0210).

18 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28 March 2014, pp. 375-390.

19 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157, 27.5.2014, p. 1–22.

The creation of common immigration policy is the ultimate aim of harmonization in the field of home affairs and such a goal can only be successfully achieved in case the harmonization of the national laws of Member States is carried out on the basis of clear lists of criteria agreed at EU level, thus, creating transparent and simplified legislative procedures.

As the objectives of the Directives in the field of legal migration are to set up procedures for the admission of certain categories of third-country nationals, based on common definitions and harmonised criteria, and to define their conditions of residence as well as their rights. Unless the Directives contain an exhaustive list of criteria for admission and grounds for refusal, withdrawal or non-refusal, the legislative acts will entail extremely diverse implementation in the Member States and will not achieve the objectives set, basically depriving thereby the Directives of any effectiveness.

Consequently, any derogation from the provisions of the Directives must expressly be allowed by the relevant directive itself, either by the use of optional clauses or by including a specific article allowing for preferential provisions concerning specific paragraphs. Nevertheless, there are still voices[20] demanding the inclusion of a non-exhaustive list of criteria for admission in the presently negotiated Directives, meaning that the criteria included would only constitute a core list of conditions, while Member States would reserve the right to add further criteria under their respective national legislations. It is also occasionally suggested that even if the third-country national fulfils the criteria set forth, the Directive should not create an obligation on the part of the Member State to take a positive decision.

This problem has recently been raised[21] once again in a case[22] before the Court of Justice of the European Union, as Germany based its decision refusing the admission of a Tunisian citizen for purposes of study on grounds other than those set out in Directive 2004/114/EC.[23] The essence of the case lies therefore in the problem that the German legislation provided

20 *See* Amendment proposal No. 140 in document of EP Committee on Civil Liberties, Justice and Home Affair on Amendments 29-280 to Draft report on the 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.

21 The question referred to the Court of Justice of the EU: 'Does Council Directive 2004/114/EC 1 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 establish a non-discretionary right to a visa for the purposes of studies and the subsequent residence permit under Article 12 of the so called "Student Directive", if the "conditions of admission", namely those listed in Articles 6 and 7 of the directive, are met and there are no grounds for refusing the visa under Article 6(1)(d) of the directive?'

22 Judgment of the Court (Third Chamber) of 10 September 2014 – *Mohamed Ali Ben Alaya v. Federal Republic of Germany* (Case C-491/13).

23 Question referred: Does 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 establish a non-discretionary right to a visa for the purposes of studies and the subsequent residence permit under Art. 12 of the so called 'Student Directive', if the 'conditions of admission', namely those listed in Arts. 6 and 7 of the directive, are met and there are no grounds for refusing the visa under Art. 6(1)(d) of the directive?

discretion to the national administrative authority, as it could reject an application on the basis of reasons not listed in the Directive.

The question unfolded above has further consequences for the newly negotiated directive proposals. Keeping in mind that the method of using a close list of criteria prohibits Member States from automatically continuing to use their respective national rules, Member States have no other choice to maintain their established provisions, but to propose the extension of the negotiated draft directives' list of criteria or the set of grounds for refusal/withdrawal/non-renewal, which practically means the introduction of one (or more) national practices in European legislation, the success of which depends greatly on the number of Member States having similar national rules as well as the lobbying ability of the Member State making the proposal. Finally, what we end up with is a number of optional clauses in the directives, as it is usually a compromise solution not to force such provisions on every Member State, but to allow for their application by the Member States that choose to follow them.

In spite of all these efforts to reach a compromise solution that could be applied by all the Member States, there are certain interests and purposes that could not be achieved by applying the harmonised set of provisions, at least according certain Member States. Some authors have also acknowledged that

> a one-size-fits-all approach is unlikely to be appropriate. Instead, most EU states have their own complicated set of legislation and programmes in place to regulate the entry and employment of non-nationals, and can see little added value in granting a greater role to the EU.[24]

An outstanding example for this was when several chambers of national parliaments gave a reasoned opinion concerning the directive proposal on the entry and stay of seasonal workers in order to put an obstacle to the envisaged EU harmonization in this field. The national parliaments were of the view that no legislation was needed other than the relevant national legislation in force, therefore, they invoked the principle of subsidiarity against the plans of the Commission.

Consequently, certain Member States claim the right to maintain or even newly introduce national schemes existing in parallel with the harmonised EU regime of admission for a certain category of migrants. This happened in case of Austria, which decided to introduce a set of new national rules governing the so-called Red-White-Red card concurrently with the transposition of the EU Blue Card Directive, as Austria aimed to facilitate the immigration of qualified third-country workers and their families with a view to permanent settlement in Austria in a more flexible way than set forth under the EU Blue Card

24 Boswell and Geddes, *supra* note 1, p. 94.

Directive. Yet, this was possible, since Preamble (7) of Directive 2009/50/EC introducing the EU Blue Card clearly sets out that

> this Directive should be without prejudice to the competence of the Member States to maintain or to introduce new national residence permits for any purpose of employment. The third-country nationals concerned should have the possibility to apply for an EU Blue Card or for a national residence permit.

It is therefore a common experience that especially in the case of the EU Blue Card, the effectiveness of the Directive is compromised by competing parallel national schemes of immigration rules designed equally for highly skilled migrants.

Nevertheless, while the EU Blue Card Directive was adopted exclusively by the Council, the latest Directive proposals had to be passed by the Council and the European Parliament as a result of the extension of the co-decision procedure to the field of legal migration by the Lisbon Treaty. Consequently, if it is against harmonization and would provide a competing scheme for the application of the Directive's provisions, neither the Commission, nor the European Parliament will approve the possibility of parallel national schemes. This principle must be followed even if the intention of Member States to keep or even newly introduce national parallel schemes for the very same groups of migrants covered by the new Directives is simply to provide a possibility for admission in cases where the Directive would be more restrictive.

In line with this push for exclusive EU rules Article 2(3) of the Directive on intra-corporate transferees sets out that 'this Directive shall be without prejudice to the right of Member States to issue residence permits, other than the intra-corporate transferee permit covered by this Directive, for any purpose of employment for third-country nationals who fall outside the scope of this Directive.' Contrary to the permissive formulation of this provision, it actually sets out a clear prohibition of applying national schemes for those migrants to whom the provisions of the Directive are to be applied.

22.3.2 EU Instruments Governing the Mobility of Third-Country Nationals

> When combined with the increasing importance given by the EU to the 'freedom of movement' or 'cross-border situations' of TCNs (intra-EU mobility) in the EU Directives on long-term residents' status, the blue card, researchers and students, the answer to the question of who are the 'citizens' to be empowered by the Stockholm Programme and Action Plan takes us beyond the individual categorised as 'national' and towards unexpected venues and political subjectivities. […] Such an argument would be naïve without duly acknowledging

> the existence of limitations and (legal) conditions that still apply in the EU legal system to TCNs when having access to and enjoying these European citizenship-like and citizenship-related freedoms, benefits and rights.[25]

There are numerous possible definitions or notions of what mobility means, especially when compared to the phenomenon of migration. As an everyday term, mobility can simply mean the ability to move freely, but the latter contains no indication of the movement's actual extent in terms of time and distance. EU terminology tends to define mobility in a somewhat narrow context, that is, as intra-EU mobility – the ability to move freely within the European Union, as originally provided exclusively for citizens of the EU for employment purposes. The right has its origins in the Founding Treaties of the European Communities, but at that time of course, the notion of intra-EU mobility was conceived within very narrow boundaries – that is, exclusively for worker citizens of the Member States and their family members.

Based on the aim of creating a common market, Community rules originally guaranteed free movement only to job seekers and workers. However, it was then recognized that guaranteeing these mobility rights is essential also for persons residing in a Member State for other purposes such as for trainees and students. The rules, therefore, were modified to cover a wider group of people, and, as a result, free movement and residence rights were expanded to cover further EU migrants. This process continued until the point was reached where, in fact regardless of purpose, and subject only to certain conditions, such as sufficient resources and health insurance, all EU citizens and their family members (regardless of nationality) currently enjoy the right to free movement and residence. 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[26] summarised and re-regulated earlier EU legislation, and created a single directive on the rules on entry and residence for various purposes of EU citizens and their family members in another Member State.

> Thus, through successive Treaty amendments, the adoption of secondary legislation and the case law of the European Court of Justice, free-movement rights

25 S. Carrera and A. Wiesbrock, 'Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU', 12 *European Journal of Migration and Law* (2010), pp. 337-359.

26 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 (text with EEA relevance), OJ L 158, 30 April 2004, pp. 77-123.

> were gradually decoupled from 'market citizenship' and extended to non-economically active EU citizens.[27]

There are major differences between the mobility rights of EU citizens and their family members, and the intra-EU mobility rights of third-country nationals as regards the personal scope as well as the conditions for exercising such rights.

Short-Stay Mobility of Third-Country Nationals

We have to distinguish between rules regulating the stay of third-country nationals on the territory of the EU for up to three months and stays exceeding three months. Uniform Schengen visas[28] for stays up to 3 months ('short stays') – or more precisely 90 days within a 180-day-long period – are issued on the basis of the rules set out in the Visa Code[29] and are, in general, valid for travel to and within the Schengen Area.[30] Since the objective of these provisions, namely the establishment of the procedures and conditions for issuing visas for transit through, or intended stays in the territory of the Member States not exceeding three months in any six-month period, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Visa Code was adopted in the form of a regulation.

As a regulation provides full harmonisation of the applicable law, Schengen States issue visas according to completely harmonised rules with the ambition that, regardless of which Member State takes the decision, it is based on the same set of criteria and the same procedure. Such unified rules can create mutual trust even to the extent that certain Member States establish Common Application Centres for receiving visa applications on behalf of more Member States.[31]

Fully harmonized conditions enable Member States to mutually recognise the other's decisions, a key precondition for free movement within the Schengen Area made possible by a visa issued by any of the Schengen States. This achievement of free movement can be

27 A. Wiesbrock, 'Free Movement of Third-Country Nationals in the European Union: The Illusion of Inclusion', 35 *European Law Review* (2010), p. 456.

28 Visa Code Art. 2(2) a): 'visa' means an authorisation issued by a Member State with a view to transit through or an intended stay in the territory of the Member States of a duration of no more than three months in any six-month period from the date of first entry in the territory of the Member States.

29 Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) OJ L 243, 15 September 2009, pp. 1-58.

30 The Schengen area and cooperation are founded on the Schengen Agreement of 1985. The Schengen area represents a territory where the free movement of persons is guaranteed. The signatory states to the agreement have abolished all internal borders in lieu of a single external border.

31 It is noteworthy that for example in Chisinau (Moldova) the Hungarian embassy established in April 2007 a Common Visa Application Centre (CAC) where Hungary issues visas on behalf of Austria, Bulgaria, Croatia, Denmark, Estonia, Finland, Greece, Latvia, Luxembourg, The Netherlands, Slovakia, Slovenia, Sweden, and Switzerland.

enjoyed not only by Schengen visa holders, but also by long-stay visa holders[32] and residence permit holders, as well, who are also allowed to travel to other Member States for 90 days in any 180-day-long period.

Based on the above, it is clear that in the case of decisions concerning entry and stay of third-country nationals for short stays within the Schengen Area complete mutual recognition exists. This is due to the fact that full harmonisation is secured by the regulations setting out provisions on visa decision-making and border crossing. Yet, even in this case Member States ensured that, in certain cases, they are consulted,[33] even if the decision-making lies within the competence of another Member State. Nonetheless, from time to time certain Schengen States use the possibility of temporarily restoring internal border checks when certain migration trends seem likely to threaten public security.

Long-Stay Mobility of Third-Country Nationals

Contrary to provisions governing short stays, provisions concerning migration exceeding three months are laid down by directives at Union level, since Member States need certain flexibility to be able to adapt their national provisions to EU rules. This is to take into account their already existing system of residence permits and long-term residence permits which evolved reflecting the Member States' respective historical background, cultural and economic ties as well as institutional systems. Several directives concerning legal migration lay down, among other rules, the conditions under which these categories of third-country nationals and their family members may reside in a Member State other than the one where they first acquired immigrant status, yet these directives only cover certain groups of third-country national migrants.

Consequently, the different directives concerning the legal migration of third-country nationals contain diverging rules on intra-EU mobility, and even if they contain such provisions, not all of these directives set out mobility rights.

The First Directives Laying Down Provisions on Mobility

According to Council Directive 2003/109/EC on third-country national long-term residents a long-term resident shall acquire the right to reside in the territory of a Member State other than the one which granted him/her the long-term residence status, for a period exceeding three months, provided that the conditions set out in Chapter III are met. The Long-term Residence Directive therefore creates a *sui generis* status for third-country

32 Regulation (EU) No. 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No. 562/2006 as regards movement of persons with a long-stay visa OJ L 85, 31 March 2010, pp. 1-4.

33 Visa Code Art. 22(1) A Member State may require the central authorities of other Member States to consult its central authorities during the examination of applications lodged by nationals of specific third countries or specific categories of such nationals.

nationals choosing long-term migration with rights attached to such strong status, approximating their status to that of nationals of the host Member State.

Yet certain aspects of the rules hinder the effective application of mobility rights attached to the EC long-term status. Although there is a preferential route for long-term residents to receive residence status in another Member State, this is subject to certain conditions. The second Member State can actually check almost all the admission criteria. Furthermore, in cases of an economic activity in an employed or self-employed capacity, Member States may even, during the first twelve months, examine the situation of their labour market and apply their national procedures regarding the requirements for, respectively, filling a vacancy, or for exercising such activities.

Skordas criticised these provisions very firmly:

> The LTR Directive cannot, however, be considered a milestone in the European integration process, because, in fact, the Member States have retained substantial authority to regulate the access of long-term residents to their respective labour markets. The Directive is inherently discriminatory because it excludes long-term residents from the Community freedom of the movement of persons in the internal market. Only 'marginal' mobility between two Member States is foreseen and even that can be further restricted and regulated by the second Member State utilising various methods, including the application of a quota system. The denial of this economic freedom, which is one of the fundamental pillars upon which the Community is based, deprives immigrants of the opportunity to possess an 'EU Green Card'. This card would enable immigrants to move freely in the EU in search of work and to participate, on an equal footing with EU citizens, in the various self- organisational structures, networks and entrepreneurial activities that characterise the essence of European integration. The lack of full economic integration of immigrants in the Community is likely to increase their reliance on the welfare safety net of the Member States, which is exactly what the LTR Directive intends to avoid.[34]

This early critique later on proved to be true, especially if we compare the situation of mobile EU citizens to mobile third-country nationals.[35]

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34 A. Skordas, 'Leg. dev.: Immigration and the market: the Long-term Residents Directive', *Columbia Journal of European Law* (2006), p. 201, www.cjel.net/print/13_1-skordas.

35 European Migration Network study on intra-EU mobility of third-country nationals in 2013 pointed at several obstacles that exist in practice when a long-term resident third-country national practices his/her intra-EU mobility right, as they have to apply for a new residence permit, during the application of which the second Member States apply labour market test, conditions for proving level or resources or housing, and certain Member States even apply integration measures as a second Member State. *See* EMN synthesis report: *Intra-EU Mobility of Third-Country Nationals*, 2013, p. 23.

Furthermore, due to the fact that it only provides mobility for those possessing a long-term resident status after five years of residence in a Member State, this may prove to be disadvantageous in the light of certain national provisions, since, for example, in Finland such a duration of stay already entitles foreigners to apply for citizenship. Furthermore, almost all countries have their parallel national long-term residence permits, and national rules usually offer more preferential conditions of application, especially for certain special groups of migrants. Therefore, many of the long-term migrants choose to apply for national long-term residence permits,[36] which, by contrast, do not secure the right to intra-EU mobility.

Since student mobility benefits global economic development by promoting the circulation of knowledge and ideas, the mobility of students who are third-country nationals studying in several Member States must be facilitated, as must the admission of third-country nationals participating in Community programmes to promote mobility within and towards the Community.[37] Member States should, therefore, facilitate the admission procedure for those third-country nationals who participate in EU programmes, enhancing mobility towards or within the Union.[38] In the case of students, the conditions for pursuing a part of their studies or complementing the studies carried out in the first Member State with related courses in another Member State, is governed by Article 8 of Directive 2004/114/EC. According to this, a third-country national who has already been admitted as a student and applies to continue in another Member State a part of the studies already commenced, or to complement them with a related course of study in another Member State is to be admitted by the latter Member State. This should take place within a period that does not hamper the pursuit of the relevant studies, whilst leaving the competent authorities sufficient time to process the application, if the applicant meets both the general and specific conditions set out in the Directive. The Commission in its report[39] on the implementation of the Directive revealed a crucial need for amendments to the Directive, especially as regards, among other factors, the strengthening of mobility clauses and the stimulation of synergies with EU programmes that facilitate third country nationals' mobility into the EU.

Mobility provisions concerning researchers are governed by Article 13 of Directive 2005/71/EC. Provided that the researcher stays only up to three months in the second

36 Even if national and EU long-term statuses may be held parallel by a third-country nationals, when deciding about which one to apply as a first (and many times only) long-term residence status, applicants usually value more preferential conditions of national schemes than the intra-EU mobility right attached to the EU long-term resident status.

37 Directive 2004/114/EC Preamble (16).

38 Directive 2004/114/EC Art. 6(2).

39 Report from the Commission to the European Parliament and the Council 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)0587 final).

Member State, the research may be carried out on the basis of the hosting agreement concluded in the first Member State, yet if the researcher stays longer than 3 months, Member States may require a new hosting agreement. Therefore, the 'preferential' provisions for researchers' mobility rights do not go any further than those of the Schengen mobility rights provided for any category of residence permit holders. The only special condition which it sets out is that no additional hosting agreement is needed in the second Member State. Regardless of how small a step it is towards real intra-EU mobility rights, the report[40] of the Commission revealed that mobility provisions of researchers has been incorporated into national legislation by only 17 Member States. In the other Member States national legislation does not explicitly stipulate that researchers who have been issued a permit in another Member State can work in their territory without an additional work permit, which may result in legal uncertainty, hindering even this minor right to intra-EU mobility.

The Commission reports, therefore, reveal a crucial need for amendments to the Directives on the migration of students and researchers. Consequently, the European Commission launched its proposal to recast the Directive 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.[41] This proposal is based on the outcome of a public consultation[42] launched online by the Commission, employed to identify gaps as well as to indicate the direction according to which the Commission finally proposed modifications.

Articles 26 and 27 of the draft recast directive set out the conditions under which not only researchers and students, but also remunerated trainees can acquire residence rights in a territory of another Member State in a facilitated procedure. In the case of researchers, the period for which they would be allowed to move to a second Member State on the basis of the hosting agreement concluded in the first Member State is proposed to be extended from 3 to 6 months. For students, provisions were introduced in the new proposal that also allow them to move to a second Member State for a period of up to 6 months on the basis of the authorisation granted by the first Member State. Furthermore, specific rules apply to third-country nationals who come under the scope of EU mobility programmes, for example the current Erasmus Mundus or Marie Curie programmes, in order to simplify the exercise of mobility rights. According to Article 28 of the proposal, researchers' family members can move between Member States accompanying the researcher, in line with the provisions of the Blue Card Directive.

40 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)0901 final.

41 Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing [Recast] (COM(2013)0151 final – COD(2013)0081).

42 http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/consulting_0024_en.htm.

Mobility Provisions of Migrant Workers

One of the objectives of Directive 2009/50/EC on the EU Blue Card (created specifically for highly skilled migrants) is to ensure their mobility between the Member States. According to Chapter V of the Directive, 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. Yet, even in the case of the preferred highly skilled migrants, mobility provisions are far removed from the ambit of mutual recognition. As soon as possible, but no later than one month after entering the territory of the second Member State, the EU Blue Card holder and/or his employer must present an application for an EU Blue Card to the competent authority of the second Member State. All documents proving the fulfilment of the conditions set out in Article 5 in relation to the second Member State must also be presented. The second Member State may decide, in accordance with its respective national law, not to allow the applicant to work until a positive decision on the application has been taken by its competent authority.

This may be evaluated rather simplistically as:

> Significantly, after a stay of eighteen months in one EU country, under certain conditions a Blue Card holder may travel to another country to seek employment without going through the usual national procedures for admission.[43]

However, is it really true that it is a significant step forward? Collett perceives the situation more realistically by stating:

> The Blue Card scheme, proposed in late 2007 amid much fanfare, is intended to help the EU win the 'global battle for talent'. But what does it offer the potential high-flier from outside the EU? The short answer is: not as much as it could.[44]

Can we talk about mutual recognition or any preferential treatment in respect of the admission criteria based on the very fact that the third-country national already possess an EU Blue Card in one of the Member States? Not really. Gyeney says points out that instead of following the original concept and creating one single document that would be valid in all the Member States, providing the right to stay and work, the Directive basically

43 Boswell and Geddes, *supra* note 1, p. 95.

44 E. Collett, 'Blue Card and the "Global Battle for Talent"', *EPC Commentary*, 28 May 2009, p. 1.

sets out the provisions for issuing a second Blue Card in the discretion of a second Member State.[45]

Therefore, the simple truth is that the second Member State can – literally – check every single criterion for admission once again. Furthermore,

> as long as recognition of qualifications, salary levels and labour demand continue to vary so greatly between Member States, the right of mobility offered under the Blue Card scheme will remain insubstantial in real terms.[46]

On an even more pessimistic note, one might even say that the EU Blue Card not only not stipulates intra-EU mobility of highly skilled migrants, but even forbids it in the first 18 months of stay. On the other hand, holding a residence permit issued according to a Member State's national admission scheme does not forbid its holder to apply for another residence permit in a second Member State at any time. It is, of course, true that in this case, the years spent separately in the different Member States cannot be added together when applying for EU long-term residence status. What do the mobility provisions of the EU Blue Card Directive actually entail? What they really provide, apart from preferential rules for gaining EU long-term residence, is the possibility to submit an application from the territory of the EU, either from the first or from the second Member State.

Not only the second admission procedure, but also certain circumstances in the first Member State actually function as obstacles to gaining the first EU Blue Card and, accordingly, to exercising mobility rights in a second Member State. In countries with a weak economic situation, the salary threshold which all Member States are obliged to apply in the case of Blue Card holders can be considered to be so high that highly qualified third-country nationals can rarely fulfill this admission condition. In other Member States, it can be the parallel national status which hinders the use of the EU Blue Card scheme, just as in the case of an EU long-term residence permit. If national schemes for highly qualified migrants offer more preferential rules, third-country nationals might finally choose not to apply for an EU Blue Card and will not be afforded mobility rights either. The system is, therefore,

> complementary: it does not replace Member States' own schemes for attracting high-skilled workers, or prevent them from offering more advantageous terms of entry on a national basis. This was a key issue in the negotiations, and reflects

45 L. Gyeney, 'Jó lépés, jó irányba? A Tanács 2009/50/EK irányelve a harmadik országbeli állampolgárok maga szintű képzettséget igénylő munkavállalás céljából való belépésének és tartózkodásának feltételeiről', VII(1) *IustumAequumSalutare* (2011), p. 79.

46 Collett, *supra* note 44, p. 2.

> the fact that EU Member States are increasingly competing against each other for the most talented workers.[47]

Even if an EU Blue Card is submitted in the first Member State, the condition for exercising intra-EU mobility rights is that an 18-month period should elapse before doing so. Unfortunately, many of the Member States failed to transpose the Directive in time and this resulted in a high number of non-notification infringement procedures initiated by the Commission. A further result was also that, in these 'lazy' Member States, migrants were deprived of the right to apply for an EU Blue Card immediately after the transposition deadline (19 June 2011) of the Directive. This meant that calculating the 18 month period and also exercising the mobility rights, commenced later. Consequently the question arises: can a migrant be derived of his/her right to exercise mobility rights because of the late transposition of the Directive in certain Member States? If we say that the migrant had fulfilled the admission criteria and would thus have been granted an EU Blue Card in due time, the second Member State must still face the question who decides whether that migrant actually fulfilled all the criteria – including the labour market assessment – or did not pose a threat to public order?

Sánchez emphasizes that 'this situation is likely to change with the Reform Treaty, which has followed the path opened by the Charter of fundamental rights. Although it could be regarded as an insignificant amendment in the wording, the fact that the Article 79 of the Treaty on the Functioning of the European Union refers expressly to the 'conditions governing freedom of movement and of residence in other Member States', might have an impact in the margin of appreciation to develop this legal basis. Indeed, the explicit reference to free movement establishes a direct link with the dynamics of the internal market.'[48] Two new Directives have recently been adopted, with implications for two categories of third-country nationals, namely the intra-corporate transferees and seasonal workers. The latter is not intended to set out provisions on mobility, since it covers only short-term migration of third-country nationals.

The proposal for a Directive on intra-corporate transferees foresaw geographical mobility for intra-corporate transferees[49] (ICTs) in accordance with Mode 4 of the World Trade Organisation's General Agreement on Trade in Services (GATS). The idea behind the new proposal was that managers and experts of multi-national companies, who possess unique knowledge and therefore are exempted from the labour market test for their

47 Collett, *supra* note 44, p. 1.

48 S. Iglesias Sánchez, 'Free movement of Third Country Nationals in the European Union? Main Features, Deficiencies and Challenges of the New Mobility Rights in the Area of Freedom, Security and Justice', 15(6) *European Law Journal* (2009), p. 797.

49 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)0378 final – COD(2010)0209).

admission to the national labour markets, should be provided with a specific set of admission criteria and rights including the right of intra-EU mobility. Under the Directive, intra-corporate transferees would be allowed to work in different entities of the same transnational corporation located in different Member States and this category of third-country national would have the right to reside and work in one or more second Member States on the basis of a residence permit obtained in the first Member State, as long as the duration of the transfer does not exceed twelve months.

The proposal of the Commission revealed only a few procedural rules on how decision-making concerning the ICT permit that is meant to provide a real mobility right within twelve months is supposed to take place. According to the proposal, the applicant would submit to the competent authority of the second Member State(s), before his or her transfer to that Member State, the documents relating to the transfer to that Member State and provide evidence of such submission to the first Member State. Apart from the fact that this envisaged procedure seemed rather cumbersome, the proposal did not deal with the question of what the role of the second Member State would be in this procedure other than receiving the documents submitted. Furthermore, it did not provide for the division of competences between the first and the (at times several) second Member States concerned in case of an ICT entrusted with work to be carried out in several Member States even within twelve months.

Therefore, the negotiations in the Council's relevant Working Party led to Member States opposing such vague rules. They took into account practical aspects and used the already existing mobility schemes to formulate a tailor-made scheme for intra-corporate transferees. This unique scheme consists of, firstly, the short-term scheme (which is close to mutual recognition as set out by the Schengen rules) and the Directive for stays in another Member State not exceeding 90 days in any 180-day period in each second Member State, and, secondly, the long-term mobility scheme (basically, the EU Blue Card scheme in which the second Member State can actually recheck all the admission criteria) if the stay exceeds 90 days in the second Member State concerned. As a concluding remark it can be stated that the Member States would be reluctant to use the tool of mutual recognition of decisions in residence permit cases and would only accept the mobility rights laid down by the already existing mobility provisions scattered in the different EU legislative acts on migration.

This tailor-made complexity of rules is also unique in a way that it creates an autonomous intra-EU mobility scheme since an Annex was also attached to the Directive in the course of its adoption. In a joint statement the European Parliament, the Council and the Commission acknowledged the fact that this new Directive on intra-corporate transferees establishes an autonomous mobility scheme providing for specific rules, adopted on the basis of points (a) and (b) of Article 79(2) TFEU, regarding the conditions of entry, stay and free movement of a third-country national for the purpose of work as an intra-

corporate transferee in Member States other than the one that issued the intra-corporate transferee permit, which are to be considered as a *lex specialis* with respect to the Schengen *acquis*.

The autonomous nature of it therefore lies in the fact that in order to provide for an effective and preferential mobility scheme for intra-corporate transferees, visa-free entry and stay shall be provided in any second Member State even for those ICTs that hold an ICT permit issued by a Member State not applying the Schengen *acquis* in full, and the short stay of 90 days within any 180-day period shall be provided for in all the second Member States to which the ICT is further transferred.

Nevertheless, taking into account the complexity of such newly introduced rules and consequently the envisaged challenges of their practical application, the Parliament and the Council also take note of the Commission's intention to examine whether any action needs to be taken in order to enhance legal certainty as regards the interaction between the two legal regimes, namely the ICT Directive and the Schengen acquis, and in particular to examine the need for updating the Schengen Handbook.

22.3.3 Obstacles to Labour Migration

Labour migration can be one of the potentially important means to solve the problem of the EU's ageing population and the increased demand for certain types of skills, even though the global economic downturn has impacted on the demand for labour across the EU.[50] Yet, besides the specific mobility rights provided to certain categories of third-country nationals under the EU's migration Directives described above, the EU *acquis* contains a number of additional provisions which may affect the migrant's decision to reside in another Member State, especially if their purpose is to enter a Member State's labour market. The most recently transposed directive on the EU Blue Card also sets out that 'it is also necessary to take into account the priorities, labour market needs and reception capacities of the Member States.'[51]

Member States also enjoy discretion as regards regulating access to the labour market. All Member States make use of specific approaches to identify and manage labour demand, by using a combination of tools. These include drawing up occupation lists, analysing employer needs on a case-by-case basis, that is labour market tests and the setting of quotas or limits.[52]

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50 Section 6 of Stockholm Programme, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF.

51 Directive 2009/50/EC Preamble (7).

52 EMN Synthesis report: Satisfying labour demand through migration, 2011, p. 53, www.statewatch.org/news/2012/feb/ep-study-labour-demand-and-migration.pdf.

Volumes of Admission

Managing access to national labour markets is a Member State competence, entailing for instance, that Member States have the right to determine the number of immigrants entering their territory for the purpose of employment. This right is even set out in primary law since the Lisbon Treaty, namely in Article 79(5) of the TFEU. This affirms that

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

As such, it only refers to migrants who arrive from outside the EU and not those already exercising their mobility rights. Consequently, as primary EU law remains silent on volumes of admissions or quotas applied to third-country nationals arriving from another Member State, this area of legislation still belongs to the field of shared competence, meaning that as long as EU law does not harmonise this field, Member States remain free to act according to their preferences.

Even in the field covered by primary law related to volumes of admission there are further questions that have been raised. It has been much debated in what ways Member States are free to determine quotas. While the EU Blue Card Directive (2009/50/EC) sets out detailed provisions on the application of quotas and allows Member States to determine them by differentiating between migrants in many ways and even applying zero quotas, at the time of its adoption there was no provision in the primary legislation setting out the right of the Member States regarding volumes of admission. However, since the adoption of the TFEU, Article 79(5) acknowledges this right preserving it as a national competence. EU law cannot regulate matters that belong to national competence, it is up to the Member States to decide how they implement at national level the notion of 'volumes of admission', even if it is an autonomous term of the Union law that should therefore be interpreted in a harmonized way. Nevertheless, it should be borne in mind that certain universal principles laid down in international agreements can have an effect on the application of this right. As a result it is up to the Member States to decide on the actual implementation of the volumes at national level, however, Member States should bear the consequences of failing to meet the international standards, especially international and EU rules prohibiting discrimination, as well as the requirement of not jeopardizing the purpose of the EU law, as applying zero quotas may have this unintended outcome.

It was also disputed whether the exhaustion of quotas would result in considering an application inadmissible, or whether it would be the basis for rejection. It was also suggested during the debates in the Council's Working Party to have both kinds of provisions in the text of the debated directive as considering an application inadmissible would be applied in case the overall quotas are exhausted and the application in question is left unchecked

by the relevant authorities, while e.g. as for quotas valid for certain sectors authorities should first take a closer look at the application and only while adjudicating the application can they arrive at the conclusion that the specific application falls under the field where the quotas are already exhausted and therefore the application can no longer be considered inadmissible but would be rejected as the actual adjudication has already started.

As for the application of quotas not only the differences between the practices of Member States concerning their use of volumes and quotas remain an issue for further elaboration.[53] It is still up to the representatives of the legislative institutions of the EU to agree upon how quotas or volumes of admission could be used when renewing or extending a residence permit or when granting admission to a second Member State, as such issues are not covered by primary law provisions on volumes of admission, therefore it could emerge as a point of discussion and compromise in the case of every single newly negotiated directive.

Union Preference and the Use of Labour Market Test

Based on Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment,[54] Member States are allowed to

> consider requests for admission to their territories for the purpose of employment only where vacancies in a Member State cannot be filled by national and Community manpower or by non-Community manpower lawfully resident on a permanent basis in that Member State and already forming part of the Member State's regular labour market.

Yet, the principles set out in this Council Resolution are not legally binding for the Member States and do not afford grounds for action by individual workers or employers. Nevertheless, principles laid down as a result of the Council having recognized that the then high levels of unemployment in the Member States require appropriate measures, are presently applied by many of the Member States,[55] carrying out labour market tests upon the basis of this principle.

This general Union employment preference is not to be confused with the principle of preference for Union citizens set out by the Treaty of Accession, which is strictly related

53 The European Migration Network Inform about the different interpretations and use of quotas in the different Member States: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn-informs/emn_inform_application_of_quotas_en_version_final.pdf.

54 OJ C 276, 19 September 1996, p. 3.

55 The European Migration Network is presently summarizing the practices of Member States on the application of labour market test.

to the transitional periods during which the 'old' Member States at the period of accession may maintain some restrictions regarding the access to their labour market by workers of the new Member State(s). Recent case-law[56] also dealt with both principles and stated that

> the second subparagraph of that paragraph[57] enshrines the principle of preference for citizens of the European Union, pursuant to which the Member States are required, with the exception of measures taken during the transition period, to give preference, for access to their labour markets, to nationals of the Member States over workers who are nationals of third countries.[58]

The so-called 'principle of preference for citizens of the European Union' therefore generally applies, if the relevant Member State decides to apply it, except for citizens of the newly joined Member States during the transition period immediately after the new accessions.

The basic procedure for the issuance of a work permit is also outlined in this Council Resolution: 'third-country nationals may, if necessary, be admitted on a temporary basis and for a specific duration to the territory of a Member State for the purpose of employment where: such an offer is made to a named worker or named employee of a service provider and is of a special nature in view of the requirement of specialist qualifications (professional qualifications, experience, etc.);[59] an employer offers named workers vacancies only where the competent authorities consider, if appropriate, that the grounds adduced by the employer, including the nature of the qualifications required, are justified in view of a temporary manpower shortage on the national or Community labour market which significantly affects the operation of the undertaking or the employer himself.'

Both the creation of occupation lists, as well as the more direct case-by-case assessment of employer needs may be perceived as a form of labour market situation analysis. As a result, we may say that there is no single labour market, for even those who have gained residence rights in one Member State will have to face labour market tests when trying to move within the territory of the EU. Wiesbrock, therefore, argues that,

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56 Case C-15/11, judgment of the Court (Fourth Chamber) of 21 June 2012 – *Leopold Sommer v. Landesgeschäftsstelle des Arbeitsmarktservice Wien*, OJ C 250, 18 August 2012, p. 4.

57 Para. 14 of that Point 1 of Annex VI to the Admission Protocol of the Treaty between the Member States of the European Union and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union.

58 *Sommer* case, Para. 33.

59 Although 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 sets out single application procedure without allowing for a separate work permit to be issued, the employment aspects of the application are still usually considered according to such rules, yet the decision-making is done within the single application procedure.

> by subjecting third-country nationals to numerous nationally determined requirements, the very *raison d'être* of the mobility provisions is undermined. Rather than enjoying free-movement rights on the basis of a status acquired under Union law, third-country nationals continue to be subject to national discretion when intending to move to another Member State.[60]

22.4 Conclusions

The crisis seems to have led to a more cautious approach on behalf of Member States. Therefore the priorities and needs produce the various tools which serve the special interests of Member States, e.g. the protection of labour opportunities for their own nationals. 'In this context, it is not surprising that a key paradox persists within the EU: skills shortages and bottlenecks coexist with areas of persistent high unemployment. Differing levels of economic growth and employment create simultaneous shortages and excesses of labour across Europe, which is due in part to heavily regulated labour markets and low labour market mobility. For this reason releasing the potential of labour mobility is one of the key issues in the Lisbon process and the European Employment Strategy. The Integrated Guidelines for Growth and Employment (2005-2008)[61] calls upon Member States to

> improve the matching of labour market needs through the modernisation and strengthening of labour market institutions, […] removing obstacles to mobility for workers across Europe within the framework of the EU treaties.[62]

Legal experts of governments working with legal migration issues therefore easily find themselves in a situation where they are not only requested to act according to the economic and political interests of their Member State but also to find a solution, which can equally serve the common good of the European Union. All the legal aspects of these crucial issues seem to bring up innumerable legal questions as the harmonization extends to further groups of migrants.

Getting close to the point when the Stockholm Program shall be superseded by the next political program, the question is whether legal experts should continue dealing with the legal questions generated mostly by the selective method of harmonizing legal migration at a European level, or should the post-Stockholm processes take a different direction and

60 Wiesbrock, *supra* note 27, p. 455.

61 Council Decision 2005/600/EC of 12 July 2005 on guidelines for the employment policies of the Member States, OJ L 205, 6 August 2005, pp. 21-27.

62 www.iza.org/en/webcontent/publications/reports/report_pdfs/iza_report_19.pdf.

consider the presently followed path to be outdated, since it seems to receive more critique than appreciation.[63]

'The current legislation lacks the flexibility required to address the realities of the modern labour market.'[64] It is true that other provisions within the EU *acquis* may also influence migrants' decisions, such as the portability of social security rights[65] and the recognition of degrees and diplomas.[66] As for directives on legal migration it is clearly the adoption of less bureaucratic and less burdensome admission rules and providing rights close to those of Union citizens including real mobility rights that are set out as goals to be achieved. Therefore

> *the status quo is not an option*. With growth, and more Europeans in more productive jobs, we can achieve the outcomes which meet Europeans' expectations and values. By acting in the areas that matter most, we can advance European integration. Growth and jobs is a truly European agenda.[67]

In its Communication[68] the Commission envisaged not only an evaluation of current legislation on legal migration that would help identifying prevailing gaps, improving consistency and assessing the impact of the existing framework, but also proposed further steps to be taken in order to codify and streamline the substantive conditions for admission, as well as of the rights of third-country nationals. In the Commission's view this would be a step towards a 'single area of migration', with the aim of facilitating intra-EU mobility of third country nationals, through mutual recognition of national permits. Yet, in the present situation where Member States face the task of transposing two new Directives, while still trying to manage the procedural reforms brought about by the 2011/98/EU Single Permit Directive, I doubt that Member States would be too willing to promote this vision put forward by the Commission. Instead they might just put their efforts into implementing

63 The word 'old-fashioned' for characterising the present situation was even used by director General Stefano Manservisi (EU dG of Home Affairs) in his opening presentation at Metropolis 2013 conference.

64 Collett, *supra* note 44, p. 2.

65 The social security rights of mobile third-country nationals are regulated by Council Regulation 1231/2010 which extended EU social security coordination regulations to third-country nationals.

66 The migration Directives 2011/98/EU (Single Permit), 2009/50/EC (Blue Card), 2003/109/EC (Long Term Residents) and 2004/114/EC (Researchers) all provide for equal treatment in regard to the recognition of diplomas. This right to equal treatment makes Directive 2005/36/EU (plus later amendments on the recognition of professional qualifications) applicable to third-country nationals in two situations: when moving to a second Member State and seeking recognition for a diploma acquired outside the EU but recognised in the first Member State; and, more generally, if they have EU qualifications.

67 Commission Communication on European Values in a Globalised World, at 3, COM(2005)525 final/2 (March 1, 2005).

68 Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions, An open and secure Europe: making it happen (COM(2014)0154 final).

existing EU rules on admission of migrants and on their rights in an effective and, as it is urged by the Commission and the Court of Justice, coherent way by all Member States.