

UACES 46th Annual Conference

London, 5-7 September 2016

Copyright of the papers remains with the author. Conference papers are works-in-progress - they should not be cited without the author's permission. The views and opinions expressed in this paper are those of the author(s).

www.uaces.org

Mobility and legal migration of third country nationals within EU – myth or reality?

Simona Sobotovičová

Department of Administrative Law, Constitutional Law and Philosophy of Law
University of the Basque Country, Spain and Université de Pau et des Pays de l'Adour,
France
simona.sobotovicova@ehu.eus

«In the flat world of maps, sharp lines show where one country ends and another begins. The real world is more fluid. Peoples do not have borders the way that parcels of land do. They seep from place to place, they wander, they migrate»¹

Abstract

Migration and mobility are now firmly at the top of the European Union's (EU) political agenda. The current EU legislation into force is facing new challenges in the Area of Freedom, Security and Justice. There is a clear need for further EU action to tackle with regular and irregular migratory flows. A new legal migration policy should help to find answers to ageing population, global competitiveness and growth, among others. The free movement of persons within EU as a part of legal migration policy is under pressure. On one side, the European single market is based on the mobility of persons. On the other side, there is no a significant «*Europeanization*» of mobility rights for all the beneficiaries at the same level. Younger and highly educated people tend to migrate more in other countries to pursue their professional career. But, the free movement is «*free*» only for certain categories of third country nationals. There is no more sense to deal with legal migration flows at national level, as Europe is part of a globalized and interconnected world where international mobility is expected to increase. Without question, a single economic market works best when its workers and citizens are mobile. However, the EU needs to look at how to marry many free movement limitations with the collective needs of the EU economy.

Keywords: Free movement, legal migration, mobility rights, third country nationals

¹ 'Weaving the world together' *The Economist* (Delhi, Enugu and Jakarta, 19 November 2001)

INTRODUCTION

By 2060 there will be only 2 persons aged 15-64 for every person over 65, compared to 4 today². The future EU immigration and asylum policies have to face many challenges in migration phenomenon³, among others, its impending demographic crisis and ageing population in Europe⁴. A forward-looking and comprehensive European migration policy, based on solidarity, is a key objective for the EU. Migration policy is intended to establish a balanced approach to dealing with both, regular and irregular immigration⁵. The importance of attracting talents and skills, while trying to meet the labour in Europe demand is acknowledged. More than 15 years after the entry into force of the Amsterdam Treaty, legal migration remains the poor child⁶ of the EU's immigration policy⁷. The European Council at Thessaloniki in June 2003⁸ reaffirmed that, there is a marked need for a more structured EU policy, which will explore legal migration channels, among others. Some years later, the European legislator established as one of the EU priorities, the effective and efficient access to Europe for businessmen, tourists, students, scientists, workers, etc.⁹ Due to lack of common legal EU migration policy, the legal immigrants must deal with many obstacles and conditions once they decide to enter into EU territory. As an area of 28 countries with more than 500 million inhabitants, the EU is currently the world's best research laboratory on legal, transnational migration. The EU must provide legal channel to make it easier for highly skilled migrants to come work and settle in the European territory.

²See, Active ageing report, (*Special Eurobarometer 378*, January 2012) <ec.europa.eu/public_opinion/archives/ebs/ebs_378_en.pdf>

³The Cambridge Advanced Learner's Dictionary defines «migration» as «moving from one place to another». According to Migration, Key terms in 23 languages (General Secretariat of the Council, February 2013), <<file:///C:/Users/793543/Downloads/QC3013223ENC%20.pdf>>, immigration is a process by which a non-national moves into a country and changes his or her country of usual residence, as seen from the perspective of the country of destination

⁴Paula Andrade García, Iván Martín, 2015. 'EU Cooperation with third countries in the field of migration' (*Directorate General for Internal Policies*, October 2015) <[www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU\(2015\)536469_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf)> accessed 16 November 2015

⁵Illegal immigration irregular immigration is a process by which a person moves into a country in order to change their country of usual residence in breach of immigration regulations. See, supra note 3.

⁶Yves Pascouau, 2012. 'La politique européenne d'immigration de travail. Etat des lieux et perspectives', Policy Paper, Fondation Roi Baudouin

⁷On progress achieved in the field of immigration, asylum and integration, see, among others, Yves Pascouau, 2011. 'La politique migration de l'Union européenne. De Schengen à Lisbonne', Fondation Varenne, LGDJ, Paris

⁸See, Thessaloniki European Council (Presidency Conclusions 19 and 20 June 2003) 2

⁹An open and secure Europe serving and protecting citizens (the Stockholm programme 2010/C 115/01)

Migrants actively contribute to the economic, social and cultural development of European societies. Their successful integration into society in the host country is the key to maximising the opportunities of legal migration and making the most of the contributions that immigration can make to EU development. Europe should continue to be a safe haven for those fleeing persecution as well as an attractive destination for the talent and entrepreneurship of students, researchers and workers¹⁰. The legal migration of third country nationals is directly linked to the EU free movement provisions. But, the current EU legal migration policy is based mainly on the following three questions: *Who you are? What you can offer to us? Why you want to live and work in EU?*

So, which kind of migration policy offers the EU to attract the third country nationals to establish the European market as their work and/or life destination? The present paper discuss below who are the legal immigrants according to the EU immigration policy. The large part of the current into EU migration flows are characterized by the search for economic survival, accompanied by substantial «brain drain» phenomena. The data from last enlargement show that EU Member States are increasingly attractive to two types of migrants: a larger, better-educated, better skilled group, and a smaller, but not insignificant, uneducated, unskilled group of people¹¹. Having all of these challenges in mind, the article brings together an overview of current EU legal and policy documents relating to the entry, stay and/or intra-EU mobility of third country nationals within EU, without entering into further details of every Member State national regulation, pointing out that decision as a challenge or as an opportunity for migrants.

¹⁰ Keynote Speech by Commissioner Avramopoulos at the 2016 Harvard European Conference: *Europe at the Crossroads of the Migration and Security Crises*, (Cambridge, 20 February 2016) <http://europa.eu/rapid/press-release_SPEECH-16-365_en.htm>

¹¹ Patrick Basham, 'Home, sweet home? Balkan Migration, the EU & Liberal solutions', 2013. A Democracy Institute Economic Risk Series Paper. <<file:///C:/Users/793543/Downloads/DI+EU+migration+paper.pdf>> accessed 12 May 2015.

I. WHO ARE THE BENEFICIARIES OF LEGAL MIGRATION UNDER EU LAW?

In the European territory, the European citizens¹² live together with the persons coming from third countries. The immigrants, legally speaking, third country nationals¹³ living in EU represent important group of people in the current European society. However, the third country nationals established within EU are not only the immigrants who entry into EU through legal channels. They look for legal pathways, but they risk also their lives, to escape from political oppression, war and poverty, as well as to find family reunification, entrepreneurship, knowledge and education. The selection between different legal statuses of third country nationals is a policy practice within many years under EU law. Firstly, it must be said that not all the third country nationals are covered under the legal migratory status. The EU law differentiates between who are allowed to entry and reside within the EU territory and who not¹⁴. The EU treaties into force establish the same differentiation, pointing out *who is who*, once the person tries to entry and reside in EU legally. In the current called «refugee crisis», more than half of the asylum seekers coming to Europe are not fleeing from war and northern Africans but they are leaving their home countries for economic reasons¹⁵. Many economic migrants¹⁶ are skilled, they count with professional experience and good educational background, but this group of migrants is not recognised under legal migration policy.

¹² According to article 20 of the Treaty on the Functioning of the European Union (TFEU), every person holding the nationality of a Member State shall be a citizen of the Union

¹³ Under the EU terminology, the third country nationals are the persons, who are not holders of nationality of any Member State of the EU regarding every Member State national law provisions. Third country national means any person who is not a Union citizen within the meaning of the article 20 (1) of the TFEU. So, the nationality represents the main core for this reason, and the States are still the main actors in this policy. See, Irene Blázquez Rodríguez, *Los nacionales de terceros países en la Unión Europea* (Universidad de Córdoba 2003) 44

¹⁴ One practice of this policy in field of irregular migration represents the HotSpots approach. Following the words of Claude Calame, «*the Hotspots will be the main centres where an economic migrant will be separated from the real asylum seekers*». Claude Calame, 'Vague de réfugiés' et «crise des migrants»: les lourdes responsabilités européennes', (*Mediapart*, 8 September 2015) <<https://blogs.mediapart.fr/claude-calame/blog/080915/vague-de-refugies-et-crise-des-migrants-les-lourdes-responsabilites-europeennes>> accessed 4 February 2016

¹⁵ The speech by Frans Timmermans, Vice-President of the European Commission. Read more at DutchNews <60% of refugees are economic migrants: Dutch EU commissioner <http://www.dutchnews.nl/news/archives/2016/01/60-of-refugees-are-economic-migrants-dutch-eu-commissioner/>>

¹⁶ Find more about the economic migrants at Elspeth Guild, 2009. 'Security and migration in the 21st century, Polity Press', Cambridge, 140. Economic migration is a process by which a person changes their country or place of usual residence in order to improve their living conditions, see, supra note 3.

The legal migration into EU is closely linked to the free movement and residence rights under EU law. On the other hand, the legal migration mainly offer response to the labour migration needs. The free movement of people within EU has been one of the biggest achievements of European integration. For this reason, it is important to highlight that the material scope of free movement provisions is different according its personal scope. We normally associate the EU with the possibility to travel, work and live «freely» within the EU. But, when we speak about the free movement of persons in EU territory, as the main part of European integration in the Area of Freedom, Security and Justice, we refer to different facts. The current EU law distinguishes between different categories of persons regarding the free movement in EU. For this reason, the fundamental right of free movement and residence under EU law is regulated in different legal provisions¹⁷. The Treaty on European Union (TEU) provides that «*The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured...*»¹⁸. The former article mentions the free movement of persons without any more details on «types of persons». Under the EU law, there is very clear differentiation between the third country nationals and the European citizens, when they decide to enter and/or reside legally in EU territory under free movement provisions¹⁹. Today, the third country nationals count with the «theoretical» free movement right. We see below, why «theoretical». But not all the third country nationals are allowed to be addressees of free movement rights, only the «legal immigrants»²⁰. The European citizens may exercise the «full» material scope²¹ of free movement right, while the free movement of third country national legally established within the EU is limited. This limitation may cause the difficulty according to its link with European legal migration policy.

¹⁷ The regulation of free movement and residence in the EU law we find in the following provisions. The article 3(2) of the TEU, the articles 20(2) (a), 21(1) and 67 of TFEU. The article 21 of the TFEU refers to the free movement and residence of the European citizens. Next, the Title V of the TFEU, the Area of Freedom, Security and Justice, in chapters I and II, the articles 76 – 80 as well establish the legal provisions for free movement and residence within the EU for third country nationals.

¹⁸ See, the article 3 (2) of the TEU

¹⁹ The possibility of third country nationals to move and reside freely in EU depends on many factors, mainly of the legal status of third country national. According to the article 77(2) of the TFEU, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: (c) the conditions under which nationals of third countries shall have the *freedom to travel within the Union for a short period*

²⁰ Raymond-François Le Bris, 'L'étranger et ses métamorphoses: quelques considérations contemporaines' [1994] *L'Internationalisation du Droit* 242. See also, Julia Ruiloba Alvarino, '¿Hacia un status jurídico armonizado de los nacionales de terceros Estados en la Unión Europea? ',1999. *La armonización legislativa de la Unión Europea* 206

²¹ As material scope of free movement right we considered the right to entry, right to stay, right to intra-UE mobility and right not to be expelled from UE territory. On this issue, see for instance, Jean-Yves Carlier, 2012. 'La condition des personnes dans l'Union européenne. Recueil de jurisprudence', Bruylant,

While there are, clearly, complex factors at play in any decision to migrate, the primary reason given by most persons is work. Further, the family reunification is the second most important reason taken by migration flows²². The European legislator recognises as beneficiaries of the European legal migration specific categories of third country nationals coming to the EU for the purpose of work; family reunification; study, research or training and third country nationals who are long-term residents²³. These certain categories of third country nationals may exercise the «limited» free movement right, once they comply with all conditions.

II. A NEW MODEL OF LEGAL MIGRATION

The European Agenda on Migration²⁴ is mainly known as a legal instrument to tackle with the ongoing «refugee crisis». Currently, the EU tries to find many responses for irregular migration, what does not mean at the same time that the future steps in field of legal migration are not needed. For this reason, a new policy on legal migration is one of the four pillars to manage migration better under that Agenda. The changes in the skills required by the EU between 2012 and 2025 are expected to show a sharp increase in the share of jobs employing higher-educated labour by 23%²⁵. The shortages have already been seen in key sectors such as science, technology, engineering and healthcare. Europe needs to build up its own skills base and equip people for inclusion in today's labour market. Furthermore, without migration the EU's working age population will decline by 17.5 million in the next decade²⁶. As we see below, the current EU framework dealing with legal migration does not fit with the purpose of European single market based on the mobility of persons. Greater mobility brings with it opportunities, challenges and the added advantage of making a valuable contribution to the EU's economic development and performance in the long term²⁷. The European

²² Milica Petrovic, Meghan Benton, 'How free is free movement? Dynamics and drivers of mobility within the European Union' (2013) 18 Migration Policy Institute Europe <file:///C:/Users/793543/Downloads/MPIEurope-FreeMovement-Drivers.pdf> accessed 20 April 2015

²³ These certain categories of immigrants are allowed to be recognised as legal immigrants. See, Legal migration, Directorate General of Migration and Home Affairs, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/legal-migration/index_en.htm.

²⁴ Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, Brussels, 13.5.2015 COM(2015) 240 final, p. 14

²⁵ Descy, Pascaline, 2014. 'Projected labour market imbalances in Europe: Policy challenges in meeting the Europe 2020 employment targets', in OECD/European Union, Matching Economic Migration with Labour Market Needs, OECD Publishing (<http://dx.doi.org/10.1787/9789264216501-12-en>).

²⁶ COM(2015) 240 final, p. 14

²⁷ The legal migration according to the EU law, *see*, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/legal-migration/index_en.htm

labour market is no more only exclusive market for European citizens, but for third country nationals legally established within EU too. Attracting international labour over the medium to long-term is a crucial strategic issue for the EU. Demographic challenges, enhanced European global competitiveness, sustained European growth and the survival of welfare systems over the next decades, all depend on it²⁸. This category of persons is very specific one, and there is a need to fit legal migration channels to the need of the European labour markets²⁹. However, many of the future third country nationals demand have also their relatives. Under the current EU regulation, the legal migration approach specifies the persons who comply with the market needs, and are active economically. For instance, there are other groups as students and family members who are not economically active, but still, they must be considered as legal immigrants. Foreign students graduating in EU education institutions should have some opportunity to access EU labour markets, enhancing thus the attractiveness of the EU destination with the required skills³⁰, to mirror the success of Europe in establishing a single market underpinned by labour mobility³¹. Furthermore, that mobility must be granted to all third country nationals legally established within EU. In particular, the Commission will look at the possibility of developing, with the Member States, an «expression of interest system». This would use verifiable criteria to automatically make an initial selection of potential migrants, with employers invited to identify priority applicants from the pool of candidates, and migration taking place after the migrant is offered a job. This would allow for the creation of an «EU-wide pool» of qualified migrants, accessible to both employers and Member States' authorities³². For this reason, and maybe not by accident, there is other expression for migrants who are seeking for better life conditions called «selective or targeted immigration»³³. Besides that the pillar of the European Agenda on Migration refers to legal migration, all the ongoing legal initiatives are based on labour migration and on how fulfill the future European market needs.

²⁸ Martín Iván, Anna Di Bartolomeo, Philippe de Bruycker, Géraldine Renaudiere, Justyna Salamosnka, Alessandra Venturini, 2015. 'Exploring new avenues for legislation for labour migration to the European Union', Study for the LIBE Committee, Directorate-General for Internal Policies, Policy Department C, Citizens' rights and constitutional affairs, European Parliament, European Union, Brussels, p.14

²⁹ *Ibidem*, p.12

³⁰ *Ibidem*, p.13

³¹ COM(2015) 240 final, p. 16

³² COM(2015) 240 final, p. 18

³³ The selective immigration is a form of immigration in which the host country unilaterally selects the foreigners to be allowed to enter on the basis of certain criteria (e.g. a shortage of skilled labour in certain areas). *See, supra* note 3

III. THE RIGHTS OF LEGAL IMMIGRANTS IN ACCORDANCE WITH EU LAW TO ENTER AND RESIDE IN THE EU

The legal entry and stay of third country nationals in EU depend on many factors, conditions and requirements. The greater scope of rights and conditions for third country nationals to entry and reside in the EU, and, the extent of the rights to these nationals who are established legally in the EU territory, should represent the key role in guarantying the integration of third country nationals in European territory³⁴. Once the third country nationals decide to enter into EU territory legally, they must comply with the general EU regulation and the legal provisions of each Member State in particular.

The first observation to point out is the admission criteria. The decisions on the volume of admissions of third country nationals coming to seek work in European single market will remain the exclusive competence of Member States³⁵. It is possible to develop a new European legal migration policy if the Member States have the competence to decide how many third country nationals are allowed to entry into their territory? The national selection and admission procedure put into evidence the myth of the common future European legal migration policy. However, the EU needs to look at how to marry this limitation with the collective needs of the EU economy.

The second observation to highlight is the visa requirement. The efforts to develop new legal migration policy mirror the modernisation of EU visa policy³⁶. There is still need to apply for visa for many third country nationals who want to establish any Member State as their work and/or labour destination. For this purpose, we must differ between third country nationals who decide to enter into Schengen Area³⁷ or not. Under

³⁴ Elisa Pérez Vera, Elisa, 1996. 'Citoyenneté de l'Union Européenne, nationalité et condition des étrangers', *R. des C.* No 261, 397

³⁵ Article 79 (5) of TFEU

³⁶ The common visa policy mainly provided for in the Visa Code (Regulation 810/2009) sets out the rules for the issuing of short stay visas to third country nationals travelling for the purpose of e.g. tourism, business, private visits family/friends, cultural and sport events. In 2014, the Schengen States issued approximately 15.8 million visa which represents an increase of approximately 60% compared to 2009. A recast proposal of the Visa Code is currently under discussion in the Parliament and the Council (COM (2014) 164.

³⁷ Some third country nationals may enjoy the visa-free travel status entry into Schengen Area. See more about Schengen Area <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm>

Schengen Borders Code³⁸, for stays not exceeding three months per six month period, the entry conditions for third country nationals shall be the following; possession of a valid travel document or documents authorising them to cross the border, justification of the purpose and conditions of the intended stay, and sufficient means of subsistence, among others³⁹. These stays are called as «*travel stays*». Bearing in mind that only short-term visas have been integrated at the EU level and only to the Member States that joined the Schengen Area. The Commission tabled a revision of the Visa Code and proposed the establishment of a new type of visa; the Touring Visa⁴⁰. But, still the legal entry into the territory of the Schengen Area at EU level is guaranteed only for the «*travellers*» and not for workers, neither students. Are the third country nationals as future actors to fulfill the European economic needs interested only in travelling? Most of the third country nationals, legal immigrants do not associate the EU with short holidays but mainly the EU is seen as their work destination. The different visa requirements for every category of third country nationals in every Member State are still considered as legal barriers.

Nowadays, the «hot issue» to be solved by EU legislation in the field of legal migration is not dealing only with the entry to the EU territory but mainly is dealing with the legal stay of third country nationals in the EU. As we mentioned above, the third country nationals have the right to reside legally in the EU for more than three months. These legal stays depend on plenty of conditions and limitations. There are only some of the «*privileged categories of persons*» invited to stay legally for more than three months in EU territory. This stay is not even more the EU policy competence but it depends on every Member State legal provisions. So, the EU only establish «limited» framework to deal with the legal stay in EU. For this purpose, every third country national has to respond the following question; *Who you are?*, or *Which is your legal status?* If you are worker, then due to plenty of Directives, we have to ask you; *Which kind of worker are you?* The categories for the third country nationals' workers to entry and reside legally in the EU are the following. «EU Blue Card» holders or *Highly*

³⁸ European Parliament and the Council Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105

³⁹ Article 5 (1) of the European Parliament and the Council Regulation (EC) 562/2006. The adoption of these proposals will provide the EU with more flexible visa policy tools, aiming to maximise the positive economic impact of attracting more tourists, and visitors on personal or professional grounds while minimising the risks of irregular migration and security.

⁴⁰ It is a new type of visa both for visa-exempt and visa requiring third-country nationals with a legitimate interest in travelling around the Schengen area for more than 90 days in any 180-day period, COM(2014)163.

qualified workers⁴¹, seasonal workers⁴², intra-corporate transferees (ICTs) of as managers, specialists or trainee employees⁴³. There is other legal status for non-UE workers, the single permit for *non-EU workers* legally residing in an EU Member State⁴⁴, which offer the possibility for third-country national to apply to reside in a Member State for the purpose of work⁴⁵. The second category of the privileged third country nationals represents the *Students, pupil exchange, unremunerated training or voluntary service*⁴⁶, and *Researchers*⁴⁷. Turning back to the categories of third country nationals allowed to reside in the EU territory for more than three months, we must mention the *long-term residents*⁴⁸. The long-term residents obtain the residence permit issued by the Member State upon the acquisition of long-term resident status⁴⁹. The last category of third country nationals who can reside in the EU legally are the *family members*. For this purpose, we must distinguish between rights to family reunification members of non-EU nationals who reunite with non-EU national family members, on one hand. On the other hand, there is a right to family reunification of EU citizens with non-EU family members⁵⁰.

Besides the personal scope and regulation provided in the Directives mentioned above, we must take into account that the Member States are the responsible to concrete

⁴¹ 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 [2009] OJ L 155. The Blue Card Directive provides a scheme for attracting highly qualified third country nationals (brains), but it is underused in order to improve the EU's skilled labour migration policies. See, COM(2015) 240 final, p.15. The Blue Card Directive already provides such a scheme, but in its first two years, only 16,000 Blue Cards were issued and 13,000 were issued by a single Member State. The Commission launched a public consultation on future of the Blue Card Directive. A review of the Directive will look at how to make it more effective in attracting talent to Europe. The review will include looking at issues of scope such as covering entrepreneurs who are willing to invest in Europe, or improving the possibilities for intra EU mobility for Blue Card holders

⁴² Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94

⁴³ Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intracorporate transfer [2014] OJ L 157. Regarding article 3(c) *intra-corporate transferee* means any third-country national who resides outside the territory of the Member States at the time of application for an intra-corporate transferee permit and who is subject to an intra-corporate transfer

⁴⁴ Directive 2011/98/EU 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 [2011] OJ L 343

⁴⁵ Article 1 (1)(a) of Directive 2011/98/EU

⁴⁶ 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. Currently this Directive is under revision[2004] OJ L 375

⁴⁷ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289

⁴⁸ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents [2004] OJ L 16

⁴⁹ Article 2 (g) of the Directive 2003/109/EC

⁵⁰ Directive 2004/38/EC 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 [2004] OJ L 158

the legal status of the third country nationals residing legally in the EU due to the lack of EU common legislation. As we can observe, this EU policy represents *very «selective group of interest»* policy which invites the Member States to clarify and make final decision of this *«selection of persons»*. In practice, the third country nationals must tackle with different conditions and limitations in every Member State they wish to live and/or work, due to the lack of common EU regulation. The Directives mentioned above refer to one particular category of third country nationals. But, is there any legal provision which regulates the possible changes in migratory legal status? Mostly, the possible change from non-economic migrants to economically active must be supported, by getting a better knowledge of their skills and facilitating changes in migratory status.

IV. (NON) EXISTENT INTRA-EU MOBILITY RIGHTS LEGAL IMMIGRANTS

Intra-EU mobility, the possibility for one person to move from one Member State to another Member State, represents only one right covered by freedom of movement. Does the EU guarantee to third country nationals' the intra-EU mobility rights once they are legally established in EU? The best answer for the previous question is, it depends. However, given the reality of increased human mobility, further efforts are required to be ensured. The mobility of third country nationals, within the EU borders is of strategic importance⁵¹. It is well acknowledged that, highly mobile economic migrants typically improve the allocation of production factors, most notably human capital. The mobile migrants often act as agents of knowledge transfer, international trade, and pools of skilled immigrants may attract high-tech investments⁵². The current EU market is a market without internal frontiers where the companies demand the mobility between their employees. The third country nationals benefit from free intra-EU mobility only in *«theory»*. Only few EU law provisions regulate the intra-EU mobility of third country nationals.

The EU «Blue card» holders enjoy the possibility to move to a Member State other than the first Member State for the purpose of highly qualified employment after legal

⁵¹ The mobility means a much broader concept than migration. Mobility and visa policy are interlinked and around 11 million visas were granted by the Member States issuing Schengen visas in 2009. *See more, 'The Global Approach to Migration and Mobility', European Commission COM (2011) 743 final, Brussels, 18 November 2011, 3*

⁵²Martin Kahanec, Anzelika Zaiceva, Klaus Zimmermann, 'Lessons from Migration after EU Enlargement Free University of Berlin' (2009) Discussion Paper No. 4230 <<http://ftp.iza.org/dp4230.pdf>> accessed 18 May 2015

residence in a first Member State for a minimum period of 18 months before moving to a second Member State. In order to do so, they must apply for another EU Blue Card. Fitting legal migration channels to the needs of the European labour markets, as the ongoing reform of the EU Blue Card should impose fewer costs on migrants and employers and grant more rights, in particular the intra-EU mobility to Blue Card holders⁵³. In this framework, Member States enjoy comfortable 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 series of reasons based on salary requirements mismatch, a labour market test, ethical recruitment or because the employer has 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 large discretionary powers which may be used to limit intra-EU mobility for highly skilled workers. The current proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment⁵⁴, establishes in Chapter V «Mobility between Member States», completely new Article 19, called «Business activity in a second Member State». This new article allows Blue Card holders to enter and stay in other Member States for the purpose of carrying out a business activity. Second Member States are not allowed to require a work permit or any other authorisation than the EU Blue Card issued by the first Member State for carrying out such activity. Where the EU Blue Card is issued by a Member State applying the Schengen acquis in full, the EU Blue Card holder can move within the Schengen area and carry out a business activity for 90 days within a 180-day period. He or she can carry out a business activity for the same duration when moving to Member States participating in the EU Blue Card but not fully applying the Schengen acquis. Where the EU Blue Card is issued by a Member State not applying the Schengen acquis in full, second Member States must allow entry and stay on the basis of the EU Blue Card for the purpose of business activity, without requiring a separate visa or any other authorisation, also for a duration of 90 days within a 180-day period. The main purpose of this Article is to guarantee that intra-EU business activities, which may belong to the habitual tasks of highly skilled workers, can be carried out without legal uncertainty or excessive administrative burden. On the other hand, and compared to Directive 2009/50/EC, mobility between Member States is further facilitated in order to make the EU Blue Card a truly EU-wide scheme better equipped

⁵³ Supra note 28, at 12

⁵⁴ Strasbourg, 7.6.2016 COM(2016) 378 final 2016/0176 (COD)

to attract the necessary skills to Europe. The residence period required in the first Member State is shortened from 18 to 12 months. Notably, no labour market test is allowed for mobile EU Blue Card holders if it is not also introduced for first entry applications, no quotas are allowed and the second Member State cannot re-verify the qualifications for unregulated professions. The relevant procedure is simplified and speeded up, and work can begin immediately after the application for an EU Blue Card has been submitted. Family members can join the EU Blue Card holder without any delay and some conditions are waived for their residence in the second Member State.

For the seasonal workers there are no provisions on intra-EU mobility. The first Directive which clearly establishes the Chapter called Intra-EU mobility is the Intra-corporate transferees (ICTs) Directive⁵⁵. The researchers from third countries benefit from facilitated entry and stay in a second Member State if the period of mobility does not exceed three months. If yes, they may comply with a lot of specific conditions limited to a specific research post⁵⁶. Due to students, the conditions for student mobility are subject to strict limitations⁵⁷. However, the possibility to move to another Member State is strictly framed by the Directives which may limit its effect in practice. In a proposal published in March 2013 addressing several types of third country nationals, the Commission proposed to facilitate and simplify intra-EU mobility for students and researchers⁵⁸. For now, the Council and the European Parliament presented positive

⁵⁵ Third-country nationals who hold a valid intra-corporate transferee permit issued by the first Member State may, on the basis of that permit and a valid travel document and under the conditions laid down in Directive, enter, stay and work in one or several second Member States. Article 20 and following of the Directive 2014/66/EU

⁵⁶ According to Article 13 of the Directive 2005/71/EC. 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 the stay planned in the second member state. For a short stay, i.e. up to 3 months, a researcher is able to move on the basis of the hosting agreement concluded in the first member state. He/she has also to prove he/she has sufficient resources and hold 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 3 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 and/or general conditions for admission (article 7) as they are applicable in the first state. There are no mobility provisions for the family members of researchers

⁵⁷ According to Article 8 of the Directive 2004/114/EC, 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 exercise of this right is subject to conditions. The general and specific conditions requested to 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 have participated in an exchange programme, unless the study period abroad is a mandatory part of the chosen study programme.

⁵⁸ 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,

report for this proposal. The long-term residents may reside in a second Member State (exceeding more than three months) only if they comply with requirements established in Directive and in every Member State national regulation⁵⁹. In practice, the Directive has not reached the goal to constitute a major factor of mobility, notably on the Union's employment market and the transposition of rules related to intra-EU mobility has fallen short of meeting the objectives⁶⁰.

Improving intra-EU mobility would contribute to making the EU more attractive for migrant workers. This is crucial in the short and the long-term with forthcoming labour demand in consideration⁶¹. Different conditions regarding prior residence to establish the future intra-EU mobility rights. The vast majority of third country nationals will have to wait for a longer period of time, i.e. 5 years, provided they meet the requested conditions. Since shortages are experienced mainly in medium skilled jobs, the absence of any right to move before 5 years does not help address the effects of the crisis through making the allocation of workforce in another member state easier. Without question, a single economic market works best when its workers and citizens are mobile. For this reason, the EU must count with wider concept of mobility. Furthermore, the free mobility can be expected to raise potential growth in the EU as a whole⁶². Member states' discretionary powers The Directives' provisions enable member states to keep strong control over the right to move. First, member states may destroy any perspective to exercise the right to move through preventing third country nationals to acquire the appropriate status.

25.03.2013. For researchers, the period of 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 3 to 6 months. For students and remunerated trainees, new provisions 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. The condition for having been admitted as a student in the first member state for no less than two years has disappeared from the Commission's proposal. In addition to this, researchers' family members can move between member states together with the researcher.

⁵⁹ Article 14 of the Directive 2003/109/EC. The provision adds that such possibility is open for the performance of an economic activity in an employed or self-employed capacity; pursuit of studies or vocational training or any other purposes. 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.. Mobile third country national long-term residents must apply for a residence permit to reside in a second Member State, whereas EU citizens need only to register their right to stay for more than three months

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 Yves Pascouau, 2013. 'Intra-EU mobility of third-country nationals State of play and prospects', European Policy Centre, April, 2

⁶² See, among others, Saara Koikkalainen, 'Free Movement in Europe: Past and Present', (*Migration Policy Institute Europe*, April 2011) <<http://www.migrationpolicy.org/article/free-movement-europe-past-and-present>> accessed 18 May 2015

CONCLUDING REMARKS

This article presents an overview of the current EU legislation dealing with the entry, legal stay and intra-EU mobility rights of the third country nationals legally established within EU territory. As we mentioned above, not all the third country nationals are allowed to be legal immigrants according to EU law. Legal migration is one of the pillars of the current European Agenda on Migration. Globalisation, demographic change and societal transformation are affecting the EU, its Member States and countries around the world. Without any doubt, the legal migration from third countries into EU represents one of the main policies which must be taken into account at European level. The implications of this reality, together with the contemporary challenges facing Europe's external borders, have placed significant stress on free movement within EU territory. The free movement of persons to and within the EU is directly related to the creation of new European framework on legal and labour migration. Due to the lack of a common, comprehensive mobility policy in EU, the third country nationals must fight with many challenges to comply with all conditions and requirements set up in each Member State. Migration and mobility is about freedom. It is about giving each and every individual the opportunity and the ability to influence his or her life situation, economically and socially.

As we observe in this article, the EU has only very limited competence in the field of legal migration pointing out, that this policy field depends on each Member State interests and benefits. This situation may lead to conflicting area to achieve the goals of European internal single market without any borders. Jean Monnet said, «*Nous ne coalisons pas des États, nous unissons des hommes*»⁶³. In this study we can see the opposite of the former citation, as the European legislator still differentiate between who are «Europeans» and who not. As we observe in the present article, only very few selective groups of third country nationals, mainly if they are «attractive and interesting for EU» may count with the opportunity to establish their work and/or life destination within EU legally. The current opportunities brought by migration and by mobility leave significant areas of discretions to regional, national and local levels of Member States. It is best known that mobility rights have economic and social benefits for the individuals and for the Member States, addressing unemployment and supporting growth at EU level. The EU must count with more competences to establish harmonize

⁶³ Jean Monnet Discours, Washington 30 april1952

legal body to solve the dilemma which was neatly summarized by Swiss author Max Frisch: «*We asked for workers, but human beings came*». To manage mobility in a secure environment, the EU needs to continue with dialogue and cooperation with third countries through (non)existent, unique, comprehensive and common EU migration policy offer. Intra-EU mobility may constitute a step to complete the single European labour market. Deepening the single European labour market calls for giving greater freedom of movement to legally residing migrants.

The future framework should be simplified, clearly distinguishing EU and third countries objectives beside any potential hypotheses. The legal migration policy should be developed within a coherent EU framework, taking into account the legal, political, economic, social and cultural diversity of Member States.