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EU Migration Law: The Opportunities and Challenges Ahead

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I. INTRODUCTION

FOR MORE THAN four decades labour migration policy in Western Europe has gone without forward planning, coherence, or fairness. Being a by-product of top down decision-making, it has often been attuned to political expedience, shifting discourses about the usefulness or undesirability of migration and to fluctuating domestic economic needs.[1] Because governments tend to be more interested in their own 'office journeys' than in responding to increasing human mobility, migrant labour has been used to fill gaps in labour markets without attention to long-term horizons and the welfare of human beings.[2] Accordingly, there has been little interest in smart policy interventions and the fair regulation of migration since governments often assume that the future will resemble the present[3] and that what really matters are questions of 'who should enter' their territory and how popular anxieties about either growing numbers of migrants or the increasing diversity of the population or both could be appeased, rather than 'how' and 'what aspects' of human mobility should be regulated. In this respect, Western European labour migration policies have been situated in

[1] See generally: R Brubaker (ed), *Immigration and the Politics of Citizenship in Europe and North America* (Lanham, MD, University Press of America, 1989); S Castles and M Miller (eds), *The Age of Migration* (London, Macmillan, 1998); G Freeman, 'Modes of Immigration Politics in Liberal States' (1995) 29 *International Migration Review* 881; A Geddes, *The Politics of Migration and Immigration in Europe* (London, Sage, 2003).

[2] S Castles, 'How Nation-States Respond to Immigration and Ethnic Diversity' (1995) 21 *New Community* 293; D Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester, Manchester University Press, 2001); CU Schierup et al, *Migration Citizenship and the European Welfare State: A European Dilemma* (Oxford, Oxford University Press, 2006); C Dauvergne, *Making People Illegal: What Globalisation Means for Migration and Law* (Cambridge, Cambridge University Press, 2008).

[3] Interestingly, Dauvergne has observed that 'migration laws of prosperous Western states functioned primarily as sieves through which the shifting whims of national policy could be poured and made law in short order'. *Making People Illegal* (n 2) 9.

the borderlands of law, politics and ideology and one finds shifting paradigms, fluctuating policies and a great deal of unfairness.[4]

The gradual assumption by the EU of competence over migration policy had added several layers of complexity to this picture. This is not merely due to the unavoidable antagonism between competence centralism and 'home rule', but also due to the experimental nature of European integration and the willingness of the Member States to take risks. In this respect, the institutional journey from extra-communitarian agreements (Schengen) to the intergovernmental pillar of justice and home affairs in the context of the Union (the Treaty on European Union) and Title IV on the area of freedom, security and justice (AFSJ)[5] to the full communitarisation of AFSJ by the Lisbon Treaty[6] has shown that no system of temporary sensitive balances can conceal processes of continuous feedback loops of learning and trust-building as well as the desire for better and more efficient regulatory choices.

Accordingly, the Lisbon Treaty set the scene for a more open and accountable EU by infusing the AFSJ with effective parliamentary supervision and judicial scrutiny. Qualified majority voting in the Council and the ordinary legislative procedure have become the norm, thereby upgrading the Parliament to a co-legislative body in this domain. The Commission's exclusive right of initiative over labour migration policy is complemented by the involvement of the national parliaments in the evaluation of the implementation of EU policies in this area[7] and, most importantly, the increasing powers of the Court of Justice of the European Union (ECJ) to review and interpret EU migration law.[8] The ECJ has already delivered its first three rulings on the Long-term Residence Directive, which add to three other rulings on the Family Reunification Directive, in which it has clearly restricted Member State's discretion in light of the purpose of the directive and the principles of effectiveness and proportionality.[9] Finally, the fully binding EU Charter of Fundamental Rights will make migration policy more responsive to human rights protection across the EU. Indeed, the Court has used the Charter in its recent rulings on the Long-term Residence and Family Reunification Directives.[10]

[4] True, Western Europe is not unique in this respect; no national labour migration policy could be considered to be well-integrated and 'stainless'. For instance, in 1964 President Kennedy stated in connection with his proposed reform of US migration policy that 'immigration policy should be generous; it should be fair; it should be flexible. With such a policy we can turn to the world, and to our past, with clean hands and a clear conscience. Such a policy would be but a reaffirmation of old principles'. F Susan Martin, *A Nation of Immigrants* (New York, Cambridge University Press, 2010) 186.

[5] Amsterdam Treaty, in force 1999.

[6] In force 1 December 2009

[7] Art 70 TFEU.

[8] D Acosta and A Geddes, 'The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy' (2013) 51 *Journal of Common Market Studies* 179.

[9] Case C-508/10 *Commission v Netherlands*, 26 April 2012 nyr; Case C-571/10 *Kamberaj*, 24 April 2012 nyr; Case C-502/10 *Singh*, 18 October 2012 nyr. See on these cases S Peers, 'The Court of Justice Lays the Foundations for the Long-Term Residents Directive: Kamberaj, Commission v Netherlands, Mangat Singh' (2013) 50 *CML Rev* 529.

[10] Case C-571/10 *Kamberaj*; Cases C-356/11 and 357/11 *O, S, L*, 6 December 2012 nyr.

The Treaty of Lisbon has also introduced a new provision that deals expressly with labour migration policy[11] and refers to the

> development of a common immigration policy aimed at ensuring at all stages, the efficient management of migration flows, fair treatment of third country nationals (TCNs) residing legally in the Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.[12]

It also contains explicit legal bases for EU action against unauthorised residence, in addition to irregular migration, including the removal and repatriation of persons residing without authorisation[13] and for EU supporting action in the field of integration of long-term resident TCNs.[14] Finally, the Member States' competence to 'determine volumes of admission of TCNs coming from third countries to their territory in order to seek work, whether employed or self-employed' has been explicitly affirmed.[15] This new institutional structure provides for avenues to have a more coherent EU migration law with a more liberal outcome and a stronger focus on the rights of the individual.[16]

The purpose of this chapter is to shed light onto the institutional openings that have appeared in post-Lisbon Europe and the new policy directions that are emerging. These move away from the logic of preventing, restricting and reducing extra-EU migration thereby opening the way for a different frame of labour migration which seeks to maximise migrants' contributions to economies and societies and to manage complex processes of change. Although it is difficult to predict what the future might hold, it is nevertheless the case that the Stockholm Programme and the strengthening of fundamental rights in the EU point towards the possibility of a labour migration policy that replaces national executives' monologues with conversations among multiple participants. The proposal, as yet unfulfilled to adopt an EU Immigration Code[17] could signal the creation of an EU labour migration policy[18] in ways that require refinement of our ethics and political morality while questioning vested interests and established ideology.

The subsequent discussion proceeds as follows. In section II, we examine the Stockholm and post-Stockholm dynamics and reflect on the institutional and analytical roadmap to the EU migration code. Sections III to VI critiques the EU's fragmented approach to labour migration and reflects on the three new directives on TCNs, two of which are under negotiation (the Seasonal Workers and Intra-corporate Transferees Directives). We argue that by seeking to add three new directives to the five existing migration directives, the EU has already laid the path

[11] Art 79 TFEU.
[12] Art 79(1) TFEU.
[13] Art 79(2) TFEU.
[14] Art 79(4) TFEU.
[15] Art 79(5) TFEU.
[16] See Peers, ch 2 in this book.
[17] S Peers, 'An EU Immigration Code: Towards a Common Immigration Policy' (2012) 14 *European Journal of Migration and Law* 33.
[18] C Bason, *Leading Public Sector Innovation: Co-creating for a Better Society* (Bristol, Policy Press, 2010).

for a comprehensive migration code. But more creative thinking, a human dignity-based approach, and a reappraisal of some of the underlying assumptions that underpin policy selection are also needed. The role of the ECJ and the legally binding Charter will also be essential in this regard. The concluding section comments on the changing dynamic and the challenges ahead.

II. IN ANTICIPATION OF THE EU MIGRATION CODE

The Stockholm Programme reflected the innovative processes established by the Lisbon Treaty and brought forward a more citizen-oriented perspective.[19] This appeared to balance the heavy emphasis on security displayed by its predecessor, the Hague Programme,[20] and, although the AFSJ's securitisation past was not disowned, more pragmatism, the 'reweighing' of freedom, human rights and citizens' rights featured quite prominently in it. The subtitle itself of the Stockholm Programme reflected this: 'An open and secure Europe serving and protecting the citizen'. Additionally, an explicit priority was 'the interests and needs of citizens'. Thus, 'the challenge will be to ensure respect for fundamental freedoms and integrity while guaranteeing security in Europe'.[21] The Commission had already laid the path for a more citizen-friendly institutional surrounding by outlining four key policy priorities for 'building a citizen's Europe' in its Communication on 'an area of freedom, security and justice serving the citizen' which was issued in June 2009.[22] Among these, the promotion of a 'Europe of rights' and 'promoting a more integrated society: a Europe that displays responsibility and solidarity in immigration and asylum matters' deserve special mention. This is because the Commission's perspective on the future common migration policy blended a global approach to migration with partnership with third countries and respect for fundamental rights and human dignity. Accordingly, the Communication contained explicit references to the need to promote a dynamic and fair immigration policy based on a comprehensive, innovative and coherent framework that takes into account increased mobility and the needs of national labour markets.[23] A key aspect of this institutional design was the articulation of an Immigration Code that would provide a uniform level of rights comparable to that pertaining to EU citizens thereby ending the present fragmented approach of adopting sectoral directives.[24] TCNs are of course beneficiaries of most rights in the Charter but

[19] C Kaunert and S Leonard, 'Internal Security Policies in the European Union – after the Stockholm Programme' special issue (2010) 19 *European Security*.

[20] A Baldaccini et al (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Policy* (Oxford, Hart Publishing, 2007).

[21] Council, The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens, Brussels, 2 December 2009, 17024/09.

[22] D Kostakopoulou, 'An Open and Secure Europe? Fixity and Fissures in the Area of Freedom, Security and Justice after Lisbon and Stockholm' (2010) 19 *European Security* 151.

[23] Commission, 'An area of freedom, security and justice serving the citizen: wider freedom in a safer environment' Brussels, COM(2009) 262/4, 10 June 2009, 23–24.

[24] This is discussed in s III below.

an Immigration Code could provide more coherence with regard to the way they are treated in EU law under different migration directives. Unfortunately, irregular migration was omitted from the substantive framework of the code. This confirmed the maintenance of the present law enforcement and preventive approach to the regulation of undocumented migration.[25]

The key priorities of the Commission's Communication found expression in the Stockholm Programme: promoting citizenship and fundamental rights, on the one hand, and dealing with migration and asylum, on the other, were important policy priorities. However, it is noteworthy that national executives sought to close the conversation about the Immigration Code that the Commission had promoted. Thus, the notion of 'well-managed' migration replaced the Commission's reference to a 'fair immigration policy'. The Stockholm Programme also noted the need for a flexible labour migration policy that takes into account labour market requirements and the closer alignment of migration and development.[26] The Commission's Action Plan highlighted the importance of migration to the Europe 2020 strategy 'by providing an additional source of dynamic growth'[27] and resurrected the mandate of compiling an Immigration Code, which national executives had left out of the Stockholm Programme. The latter would provide a 'uniform level of rights and obligations for legal immigrants' and further contribute to the aim of designing a common migration and asylum policy 'within a long-term vision of respect for fundamental rights and human dignity'.[28] Accordingly, it comes as no surprise that a couple of months later the Council reacted by noting that 'some of the actions proposed by the Commission are not in line with the Stockholm Programme' and urged the Commission to 'take only those initiatives that are in full conformity with the Stockholm Programme'.[29]

Yet the design of a common legal framework would furnish a set of uniform conditions for the admission of the TCNs and a common set of rights and obligations – thereby offsetting a number of externalities in this area, including unfair competition. In the labour migration field, both TCNs and employers should benefit from the new common and more transparent consolidated European immigration framework. As highlighted in the Europe 2020 Strategy, and explicitly stated in the Commission's 2011 Communication on migration, the Member States should recognise that rational migration policies can bring economic dynamism, new ideas, and new jobs into the existing labour market. 'Migrant workers can fill gaps in the labour market, which the EU workers cannot, or do not wish to

[25] Kostakopoulou, 'An Open and Secure Europe?' (2010); E Guild and S Carrera, 'Towards the Next Phase of the EU's Area of Freedom, Security and Justice: The European Commission's Proposals for the Stockholm Programme' (2009) *CEPS Policy Brief*, No 196/20.

[26] Council of the EU 2009, 59.

[27] Commission, 'Delivering an area of freedom, security and justice for Europe's citizens – Action Plan implementing the Stockholm Programme' COM(2010) 171 final, 7.

[28] ibid, 7.

[29] Council, 'Council Conclusions on the Commission Communication "Delivering an area of freedom, security and justice for Europe's citizens – Action Plan implementing the Stockholm Programme"' COM(2010) 171 final, Luxembourg, 3 June 2010, 2.

fill'.[30] Moreover, labour migration can contribute to addressing the demographic challenge facing the EU in the future where it is estimated that the EU would need significant net migration in order to keep the ratio of working-age population to the total population of the 2008 level.[31] A more flexible and coherent labour migration policy would lead to increased competitiveness and economic vitality, and make the Member States more prepared for the future demand for labour.[32] Appreciating the positive impact of migration, however, would require the transcendence of existing policy orientations towards migration restriction and control in favour of an open, pluralistic and dynamic approach which puts more emphasis on human beings' actual contributions and cooperative practices than their state of origin.[33] As such, it would reflect Dewey's belief that:

> [D]emocracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience. The extension in space of the number of individuals who participate is an interest so that each has to refer his own action to that of others and to consider the action of others to give point and direction to his own, is equivalent to the breaking down of those barriers of class, race and national territory which kept men from perceiving the full import of their activity.[34]

True, threatening to remove the nationalist frame upon which contemporary political communities rest would give rise to social protectionist discourses about the strain that migration places upon social services such as education, health care, housing, job training and policing. Yet the argument that migration correlates negatively with both generous and high quality welfare services assumes incorrectly that migrants are just poor and recipients of welfare and that too many people would demand services at the same time. Both assumptions are simplifications and are contradicted by empirical data. Indeed, if one examines the economic contributions that migrant employees, self-employed persons, consumers and investors make and their impact on the economy's long-term or 'trend' rate of growth, any short-term difficulties are generally outweighed by overall welfare gains and long-term perspectives.[35] For this reason, changing perspectives must be linked with other processes including laws and changes in policy agendas. The drafting of an EU Immigration Code could reinforce changing perspectives on migration.

[30] Commission, 'Migration' (Communication) COM(2011) 248 final, 12.

[31] ibid.

[32] Compare Council of European Union, Note from the Presidency to the Council of Employment, Social Policy, Health and Consumer Affairs. Legal Immigration (Labour Immigration), Brussels, 1 December 2010, 16929/10. SOC 796, MIGR 132, 2.

[33] W Connolly, *The Ethos of Pluralisation* (Minneapolis, University of Minnesota Press, 1995); R Rubio-Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge, Cambridge University Press, 2000); D Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe' (1996) 4 *Journal of Political Philosophy* 337.

[34] J Dewey, *Democracy and Education* (New York, Macmillan, [1916] 1964).

[35] J Simon, *The Economic Consequences of Immigration* (Oxford, Blackwell, 1989); K Butcher and D Card, 'Immigration and Wages: Evidence from the 1980s' (1991) 81 *American Economic Review* 292. Compare also Commission, 'Immigration, integration and employment' (Communication) COM(2003) 336 final.

According to the 2010 Roadmap, the Immigration Code would not only codify the existing framework, but it would also make it more open, fair, flexible and coherent.[36] In its 2011 Communication,[37] the Commission notes that simplifying administrative procedures and reviewing the mobility restrictions for TCNs within the EU, and between the EU and third-counties, without the migrant workers losing their rights of residence and employment would help labour markets function better. The Communication was issued in response to the arrival of North African migrants and asylum seekers during the Arab Spring uprisings and to French and Italian calls for either a reconsideration or implementation of the Schengen Agreement. Nevertheless, it also included explicit references to the need for a coherent EU approach in this field that adopts a long-term perspective and a global approach. An important aspect of the latter constitute mobility partnerships between the EU and Southern Mediterranean countries (Morocco, Tunisia and Egypt) along the lines of those concluded between the EU and Moldova, Cape Verde and Georgia.[38] Such bilateral agreements are intended to facilitate the mobility of TCNs to the EU and the portability of social security rights in exchange for the state of origin's determination to ensure the effective management of border crossings and the prevention of irregular migration. This, in turn, is to foster Euro–Mediterranean cooperation 'in the framework of the renewed European Neighbourhood Policy'.[39] What is quite significant here is that despite the restrictive agendas pursued by the Member States towards migration in a recession-ridden Europe, the Commission 'has been continuously defending mobility as an important aspect of the cooperation with its neighbours'.[40] Having said this, it remains the case that mobility is embraced instrumentally as a means of filling European labour market shortages and eventually encouraging the return of migrant workers without a sustained attention to the rights of migrants, including their right to family reunification, as well as the broader EU strategy of securitising the southern Mediterranean border. Similarly, the securitisation paradigm that characterised the earlier phases of cooperation in migration matters has not disappeared. The Commission's Communication refers to ensuring 'a well managed mobility in a secure environment. Preventing irregular migration and maintaining public security is compatible with the objective of increased mobility'.[41]

Hopefully, the process of the articulation of the Immigration Code will bring more coherence in the propositions and policy orientations underpinning EU migration law as well as a reappraisal and possibly restructuring of the EU's policy

[36] See especially: Peers, 'An EU Immigration Code' (2012).

[37] Commission, 'Migration' (Communication) (2011) 12.

[38] On this, see Commission, 'Circular migration and mobility partnerships between the European Union and third countries' (Communication) COM(2007) 248 final; R Kunz, S Lavenex and M Panizzon (eds), Multilayered Migration Governance. The Promise of Partnership (Oxon, Routledge, 2011).

[39] Commission, 'Migration' (Communication) (2011) 13.

[40] M Martin, 'A Radically Changing Political Landscape in the Southern Mediterranean? The Dialogue for Migration, Mobility and Security with the Southern Mediterranean Counties' (2011) Statewatch Analysis, accessed at: www.statewatch.org/analyses/no-136-southern-med.pdf.

[41] ibid, 11.

towards irregular migration and the measures adopted in this domain thus far. After all, policies never remain still, environments are characterised by complexity and unpredictability and markets are in states of transition. In the next section we examine how the Immigration Code may tackle the current fragmentation in the existing (legal) migration regime. By adding three new directives, that is, the Single Permit, Seasonal Workers and the Intra-corporate Transferees Directives, to the five existing migration directives, the EU has already laid the path for a comprehensive Immigration Code which includes regulation of entry and residence into the EU, a set of uniform rights across the EU for TCNs, long-term residence status in the host Member States and mobility to a second Member State, the mobility of researchers and students, highly-skilled as well as low-skilled migrants, and the mobility of managerial and technical employees of branches and subsidiaries of multinational corporations. In the future a reappraisal of some of the underlying assumptions and value choices that underpin policy selection in the migration field may be required.[42]

III. THREE NEW DIRECTIVES ON THIRD-COUNTRY NATIONALS

It is anticipated that the Immigration Code would furnish a coherent and consolidated legal framework for the regulation of migration by building on, and further supplementing, the five existing directives in the fields of legal immigration; namely, Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (Blue Card); Directive 2005/71/EC on specific procedures for admitting third-country nationals for the purposes of scientific research; Directive 2004/114/EC on the admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents and Directive 2003/86/EC on the right to family reunification. However, this process also presupposes the addition of new categories of workers,[43] given the fact that European labour markets face different types of labour skills shortages and the structural need for low-skilled and low-qualified workers is likely to intensify in the future.[44]

EU labour migration regulation has thus far been fragmented and incoherent. When the EU finally obtained a clear competence to deal with migration issues with the entry into force of the Treaty of Amsterdam in 1999, the Tampere Council Conclusions heralded a period in which the EU would adopt several provisions in the area. It was soon seen how dealing with economic migration was

[42] More than a decade ago, AGIT (Academic Group on Immigration – Tampere) sought to introduce such an interpretative turn by proposing a positive, humane and comprehensive approach to migration: 'Efficient, Effective and Encompassing Approaches to a European Immigration and Asylum Policy'. Final Draft, 9 June 1999. These proposals continue to be relevant.

[43] Roadmap, 'EU Immigration Code' No 2 10/2010, 1.

[44] Compare European Parliament, Procedure File. COD/2010/0210, 'Seasonal Employment: Conditions of Entry and Residence of Third-country Nationals' Summaries 13 July 2010, 2.

subject to controversy and disagreement between Member States. Indeed, the Commission proposed a directive in 2001 on the entry and residence of TCNs for the purpose of paid employment and self-employed economic activities that, despite being positively welcomed by the other institutions, was rejected by the Council.[45] This made the Commission change its strategy by re-launching the debate, following the Hague Programme, with a Green Paper issued in January 2005[46] and the subsequent adoption of a Policy Plan on legal migration in December of that year.[47] In this document, the Commission announced its intention to present several proposals consisting of a general framework directive and of four specific directives, thereby addressing the conditions of entry and residence of different categories of TCNs (highly skilled, seasonal workers, intra-corporate transferees and remunerated trainees). Accordingly, the by-product of the aborted attempt to adopt a horizontal directive designed to regulate the entry and residence conditions for all TCNs exercising paid and self-employed activities has been the adoption of a category by category worker regulative framework which accords different rights, standards and conditions of residence to different categories of third-country workers, as stated above. The Immigration Code would reverse the prevailing sectoral approach and establish a uniform set of rights for all TCNs legally residing in a Member State.

As of 1 June 2013, two of these directives had been adopted,[48] whereas two had already been proposed[49] and one was yet to be proposed.[50] Out of the two adopted directives, the EU Blue Card Directive facilitates the admission of highly-skilled migrants to the EU by establishing a common fast-track and flexible procedure for their admission with a view to advancing the EU's knowledge-based economy.[51] In December 2011 the EU finally adopted the Single Permit Directive.

Negotiations related to the Intra-corporate Transfer and Seasonal Workers Directives are still under way. The reports on these directives were approved by the Parliament in January 2012 and April 2012 respectively, by the Committee on Civil

[45] B Ryan, 'The European Union and Labour Migration: Regulating Admission or Treatment?' in A Baldaccini et al (eds), *Whose Freedom, Security and Justice?* (Oxford, Hart Publishing, 2007).

[46] Commission, 'An EU approach to managing economic migration' (Green Paper) COM(2004) 811 final.

[47] Commission, 'Policy Plan on Legal Migration' COM(2005) 669 final.

[48] 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 2009 L155/17; 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 2011 L343/1.

[49] Commission, 'Proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer' COM(2010) 378 final, Brussels, 13 July 2010; '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) 379 final, Brussels, 13 July 2010.

[50] The Commission has yet to propose a directive on remunerated trainees.

[51] See, for a comprehensive analysis and critique of the Directive, S Peers, 'Legislative Update: EC Immigration and Asylum Law. Attracting and Deterring Labour Migration: The Blue Card and the Employer Sanctions Directive' (2009) 11 *European Journal of Migration and Law* 387.

Liberties, Justice and Home Affairs, which added amendments to the original proposals by the Commission. In turn, the Council reached a general agreement on inter-corporate transfers in June 2012[52] and on seasonal workers in December 2012.[53] As Peers has highlighted, it is noteworthy that the two EU presidencies (Denmark and Cyprus) in 2012 failed to reach agreements in this area.[54]

IV. THE SINGLE PERMIT DIRECTIVE

When the Commission proposed a directive on a single permit in 2007, it had in mind an instrument that would secure the legal status of third-country workers while at the same time providing for a simplified common procedure for the applicants. The main rationale behind the directive was that there existed a 'rights gap' between national workers, on the one hand, and third-country workers, on the other, and that addressing that gap would reduce the possibility of facing unfair competition for EU citizens, as well as the risk of exploitation for TCNs. It would also create a 'level playing field within the EU' for all those TCNs regularly working in the different Member States.[55] Whereas the establishment of a simplified common procedure did not prove that contentious during the negotiations, as shown by the fact that the final text is fairly similar to the proposal, the same cannot be said about the scope of the directive and the protection to be granted to third-country workers.[56] In fact, four years were necessary to reach agreement on a directive which from the very beginning had left issues aside which could have been much more controversial such as admission conditions or the grounds for the non-renewal of permits.[57] The Council was only able to reach an agreement after the shift with the Lisbon Treaty to qualified majority voting. In turn, the Parliament rejected the proposal when it first voted on it in December 2010.[58] There were two main bones of contention. First, some MEPs felt that the scope of the Directive was too limited since it did not include seasonal or posted workers

[52] Council of the European Union Permanent Representatives Committee, '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' (2012) Council doc 10618/12 available at: www.statewatch.org/news/2012/jul/eu-council-ict-10618-12.pdf.

[53] The Council of the European Union Permanent Representatives Committee, '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' (2012) Council doc 17100/12 available at: www.statewatch.org/news/2013/jan/eu-council-seasonal-workers-mandate-17100-12.pdf.

[54] S Peers, 'Analysis EU Immigration and Asylum Law in 2012: The Year of Living Ineffectually' (2012) available at: www.statewatch.org/analyses/no-210-immigration-asylum-12.pdf.

[55] Proposal Single Permit Directive, 2–3.

[56] See on the negotiations: G Brinkmann, 'Opinion of Germany on the Single Permit Proposal' (2012) 14 *European Journal of Migration and Law* 351.

[57] S Peers, 'Single Permits and Workers' Rights' in S Peers, E Guild, D Acosta Arcarazo, K Groenendijk and V Moreno-Lax (eds), *EU Immigration Law: Text and Commentary*, 2nd edn (Leiden, Martinus Nijhoff, 2012); Y Pascouau and S McLoughlin, 'EU Single Permit Directive: A Small Step Forward in EU Migration Policy' (2012) *European Policy Centre*, Policy Brief, 24 January 2012.

[58] Pascouau and McLoughlin (2012).

among others. Second, there were also some doubts regarding the many possible limitations on the right to equal treatment, especially with regards to the portability of pensions when a single permit holder decided to move to a third-country. Accordingly, the Civil Liberties, Justice and Home Affairs Committee and the Employment and Social Affairs Committee adopted opposing positions. It was only in March 2011 that the Parliament decided its position so that it could negotiate an agreement with the Council.[59] The exclusion from the scope of the directive of certain categories of third-country workers remained in the final text but the Parliament managed to secure the portability of pensions.

The Directive[60] aims at simplifying and harmonising procedural rules to obtain a single permit 'to reside for the purpose of work', so as to make the process easier for third-country workers as well as their employers. In line with the Tampere goal of ensuring fair treatment of TCNs, as re-stated in the Stockholm Programme, it also provides 'a common set of rights' for workers regularly residing in the EU, 'irrespective of the purposes for which they were initially admitted'.[61] Hence, the Directive is divided into Chapters II and III. Chapter II deals with the single application procedure and permit. The final version, although amended, does not largely depart from the spirit of the Commission's proposal. It establishes the procedure, rules related to the authority in charge of dealing with the procedure, remedies, access to information and fees. Chapter III enumerates a series of rights that third-country workers shall enjoy under equal conditions with nationals of the Member State where they reside. These include working conditions, freedom of association, education and vocational training, access to social security, tax benefits and access to goods and services including counselling services offered by national employment offices. Member States are, however, allowed to limit these equal treatment provisions in various ways.[62] This means that the level of protection enjoyed by long-term residents is much higher than that of third-country workers who would hold a single permit. In fact, the Commission's intention to address the 'rights gap' has not been successful in two crucial areas: access to labour markets and social assistance.[63] There are, however, other areas where the gap has been reduced such as unemployment and family benefits, portability of pensions and access to public services. This has left commentators with a 'sweet and sour' taste when discussing the Directive. Indeed, despite making a contribution towards ensuring equal treatment, the situation of single permit holders will remain somewhat precarious[64] even if certain provisions will improve their integration into the job market.[65] A complete evaluation is certainly difficult due to

[59] European Parliament. Procedure files: 2007/0229(COD). Text adopted: P7-TA(2011)0115. Single Application Procedure for Residence and Work, Brussels, 24 March 2011, 2.

[60] The UK, Ireland and Denmark are not bound by the Directive.

[61] Art 1.

[62] Art 12.

[63] Peers, 'Single Permits' (2012) 228.

[64] ibid; Pascouau and McLoughlin (2012).

[65] T Huddleston, 'EU Single Permit makes workplace "slightly favourable" for integration' (2011) MIPEX Blog.

the various 'may' provisions that will require an analysis of the transposition of the Directive in the different Member States. Importantly, the reference in the Preamble to the Tampere Conclusions, as well as the principle of effectiveness, will no doubt mean that the ECJ will have to consider its case law on EU citizens when interpreting this Directive. As argued earlier, the ECJ has drastically reduced Member State's margin of discretion when interpreting the provisions of the Long-term Residence Directive, even those with a reference to national law, so as not to deprive it of its effectiveness. These rulings will have an important effect on the way in which Member States implement this Directive as well. For example, Article 10 of the Directive provides that Member States may request applicants to pay fees which 'shall be proportionate and *may* be based on the services actually provided for the processing of the applications' (our emphasis). However, following *Commission v Netherlands*,[66] it is clear that this 'may' clause will need to be interpreted as a 'shall' one so as not to endanger the effectiveness of the Directive.[67] The Directive does not apply to several categories of third-country workers including those who have applied for admission or been admitted as seasonal workers or those who have applied for admission or been admitted as intra-corporate transferees, which are discussed below.

V. THE SEASONAL WORKERS DIRECTIVE

The Seasonal Workers Directive was proposed by the Commission in 2010[68] and its main rationale is to regulate the status of seasonal workers who are becoming less and less available from within the EU itself, but are needed for sectors such as agriculture, construction and tourism. Many third-country seasonal workers face exploitation and those economic sectors requiring seasonal workers are prone to employ migrants in an irregular situation. Hence, the Directive seeks to secure a legal status for seasonal workers and to furnish a fast-track procedure for the provision of a temporary permit while, at the same time, protecting EU citizens from unfair competition. Since the negotiations between the Council and the Parliament are still ongoing and there is not yet an agreed text, our discussion focuses on the most important provisions in the proposal which are proving contentious and on which the institutions' views diverge.[69]

[66] Case C-508/2010 *Commission v Netherlands*, 26 April 2012 nyr.

[67] Peers, 'An EU Immigration Code' (2012) 47.

[68] Commission, 'Proposal for a directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment' COM(2010) 379.

[69] We will refer to the Council position by looking at the text that received the support of the majority of delegations at the meeting of the Permanent Representatives Committee on 5 December and that will thus serve as a mandate for the presidency to start discussions with the European Parliament: Council doc 17100/12. For the Parliament's stance we will use the LIBE Rapporteur's draft legislative resolution available at: www.europarl.europa.eu/document/activities/cont/201205/20120504ATT44532/20120504ATT44532EN.pdf. On 25 April 2012, the European Parliament's LIBE Committee held its orientation vote on the proposal. The result of the vote also incorporates the opinion of the EMPL Committee and serves as a mandate for the European Parliament for negotiations with the Council.

First, the proposal provides that the Directive would only apply to those TCNs residing outside the territory of the Member States and would not apply to those who arrive with the intention of staying for less than three months.[70] This provision is supported by the Council, but has been criticised by different NGOs that point to the presence of a large number of TCNs already residing and working in seasonal jobs with an irregular status.[71] Sharing these concerns, the European Parliament suggests that the Directive should apply to migrants in an irregular situation but only for a transitional period after the transposition of the Directive. This is, in our view, a fair acknowledgement of a reality on the ground with many irregular migrants working on seasonal employment.[72]

The meaning of seasonal work is another point of contention. According to the Commission,[73] it would refer to those sectors where there is a higher workforce requirement by virtue of an event or pattern including holiday periods in tourism or harvesting periods in agriculture. Again, NGOs have contested the vagueness of this provision as inadequate and the European Parliament would like to see this provision better defined and limited only to tourism, agriculture and the horticulture sector while at the same time allowing the Member States the option to extend it further provided that social partners agree to such an extension. By contrast, the Council would prefer to leave this definition fairly open.

Chapter II deals with the conditions of admission, grounds for refusal, withdrawal and non-renewal of the permit. While there are differences in the position of the three institutions, we prefer to focus on certain issues surrounding the procedure and the rights granted to seasonal workers that are, in our view, more important. With regard to the procedure, the possible length of the residence permit is a key element. The proposal provides for a maximum period of six months in any calendar year without any possibility to renew it beyond that period.[74] This is consistent with the idea provided in Recital 6 that there is the need to prevent any temporary stay from becoming permanent. The Council advocates for a period of between five to nine months whereas the Parliament, while agreeing with the Commission as regards the six-months limit, would like to introduce a new provision by which seasonal workers who may be entitled to stay in the Member State under a different permit or visa would not be required to return to their country of origin. Under any of the three possible scenarios seasonal workers would not be able to start counting their residence period towards the acquisition of a long-term residence status. This heightens the importance of clearly defining the jobs for which seasonal workers may be employed as opposed to those sectors where

[70] Art 2.

[71] Joint NGO Statement, 'EU Seasonal Migrant Workers' Directive: full respect of equal treatment necessary' 20 April 2011, available at: www.cire.be/ressources/EU-Seasonal-Migrant-Workers-Joint-NGO-Statement-20110420.pdf.

[72] T Maroukis et al, 'Irregular Migration and Informal Economy in Southern and Central-Eastern Europe: Breaking the Vicious Cycle?' (2011) 49 *International Migration* 129.

[73] Art 3.

[74] Art 11.

Member States would need to offer the TCN concerned a renewable temporary residence permit, which could eventually lead to obtaining long-term residence.

Another central issue concerns the rights of seasonal workers, addressed in Chapter IV, which tend to be more limited than those entailed by the Single Permit Directive. These include the right to enter and stay in the territory exercising the employment activity for which the permit has been granted, working conditions applicable to seasonal workers as established by the legislation or applicable collective agreements in the Member State concerned and equal treatment with nationals with regards to freedom of association, the branches of social security coming under Article 3 of Council Regulation 883/2004, payment of statutory pensions when they move to a third country and access to certain goods, with the exception of public housing and counselling services. Member States would also need to make sure that there is a mechanism to facilitate complaints and that the employers provide seasonal workers with adequate accommodation.

As expected, positions diverge on these issues with the European Parliament showing more concern for workers' rights and the Council aligning itself with the Commission or moving towards a more restrictive position. Yet this central element requires resolution particularly since avoiding the exploitation of migrants is a goal pursued by this legislation. Indeed, Peers argues that the proposal breaches Article 15(3) of the Charter of Fundamental Rights, which states that TCNs authorised to work in a Member State should enjoy working conditions equal to those pertaining to EU citizens.[75] These concerns seem to have been taken on board by the Council since its position provides for equal treatment with nationals with regard to 'working conditions including pay and dismissal as well as health and safety requirements at the workplace'.[76]

Finally, family reunification does not feature in the draft directive. So whereas the intra-corporate transferees' proposal, examined below, seeks to facilitate the admission of family members even when the sponsor TCN will reside for a short period of time, seasonal workers receive less protection. This gives rise to concerns that the EU privileges the economically stronger migrants while depriving of rights 'the equally needed but economically weaker' seasonal workers.

VI. THE INTRA-CORPORATE TRANSFEREES DIRECTIVE

The proposed Directive on Intra-corporate Transferees deals with the mobility of managerial and qualified employees belonging to the same undertaking or the same group of undertakings. The European Commission proposed this directive in July 2010[77] with a view to facilitating the movement of managers, specialist and graduate trainees in order to meet the needs of branches and subsidiaries of multinational corporations. In what follows we will refer to the proposal. The directive

[75] Peers, 'Single Permits' (2012) 181.
[76] Art 16 of the Council's Position, Council doc 17100/12.
[77] COM(2010) 378 final, Brussels, 13 July 2010.

provides for a transparent and simplified procedure for an intra-corporate transfer of key personnel thereby advancing the knowledge-based economy in Europe and promoting investment flows. Article 3(b) defines an intra-corporate transfer as

> the temporary secondment of a TCN from an undertaking established outside the territory of a Member State and to which the TCN is bound by a work contract, to an entity belonging to the undertaking or to the same group of undertakings which is established inside this territory.

In order to take advantage of this possibility, transferees must be managers, specialists and graduate trainees with a higher education qualification and must have been employed within the same group of undertakings for at least 12 months prior to the transfer. Member States have an obligation to provide all the necessary information on entry, residence and rights as well as the evidence that needs to accompany an application for an intra-corporate transfer. They are free to determine whether the application has to be made by the TCN or by the host entity,[78] but it can only be considered and examined if the transferee is outside the territory of the Member State to which admission is sought.[79] Member States have an obligation to grant successful applicants every facility to obtain the necessary visa, while there also exist provisions for simplified procedures for recognised groups of undertakings, including a fast-track admission procedure.[80]

If the conditions set out in the directive have been met, inter-corporate transferees will be issued with a specific residence permit, which would allow them to carry out their assignment in different units belonging to the same transnational corporation, including in entities located in another Member State. The permit shall have a minimum validity of one year, or of a shorter period if the duration of the transfer is shorter, and 'may be extended to a maximum of three years for managers and specialists and one year for graduate trainees'.[81] During its period of validity, transferees will have the rights to enter and stay, free access to the entire territory of the Member State issuing the permit, the right to carry out the economic activities they have been authorised to take up and to carry out their assignments at clients' sites.[82]

The permit would also give inter-corporate transferees favourable conditions for family reunification, including the absence of the obligation to comply with integration measures for family members and a brief waiting period of two months for obtaining residence permits for family members and equal treatment with nationals of the host Member State with respect to freedom of association and trade union membership, recognition of diplomas, certificates and other professional qualifications, provisions in national law regarding the branches of social security, the payment of statutory pensions and access to

[78] Art 10(1).
[79] Art 10(3).
[80] Arts 7 and 8.
[81] Art 11(2).
[82] Art 13.

goods and services except public housing and counselling services afforded by employment services.[83]

The Member States can always reject an application for an intra-corporate transfer if the conditions for admission are not met, the documents presented have been fraudulently acquired, falsified or tampered with, if the employer has been sanctioned for undeclared work and/or illegal employment, if they have concerns about the volumes of admission of TCNs and in case of several locations in several Member States, they can limit the geographical scope of the validity of the residence permit to the Member States where the conditions for intra-corporate transfer are met.[84] The specified grounds for the withdrawal or refusal to renew the intra-corporate transfer are fraud, residence for purposes other than those for which he/she was authorised to reside, if the conditions for the intra-corporate transfer are not met and reasons of public policy, public security or public health are.[85] The first two grounds bring about a mandatory withdrawal while the latter two fall within the discretion of the Member State concerned.

The amendments in the Civil Liberties Committee Report accommodate some of the issues discussed above. The key changes to the proposal improve the conditions of transferred workers between the EU Member States, and give their relatives the right to work in the host country. The amendments to the directive also provide for better definitions on host entity and the categories of workers covered by the directives and reduce the prior employment conditions.[86] As stated earlier, the Council achieved a Common Position in June 2012 when Member States finally reached a general agreement to begin negotiations with the Parliament.[87] One of the main disagreements between both institutions relates to the fact that the Council would like to give intra-corporate transferees similar rights to those enjoyed by posted workers whereas the Parliament would prefer to grant them rights equal to those enjoyed by EU citizens.

VII. THE CHANGING DYNAMIC AND THE CHALLENGES AHEAD

Notwithstanding the evolving legal framework in the field of legal migration, which was almost unthinkable 15 years ago, it nevertheless, remains the case that

[83] Art 14(2).

[84] Art 6.

[85] Art 7.

[86] On 14 February 2012, the European Parliament's LIBE Committee held its orientation vote on the proposal. The result of the vote also incorporates the opinion of the EMPL Committee and serves as a mandate for the European Parliament for negotiations with the Council. It is available at:www.europarl.europa.eu/document/activities/cont/201202/20120215ATT38244/20120215ATT38244EN.pdf. Rapporteur: Salvatore Iacolino. Twenty-five amendments are made to the original proposal. The Committee approved the report in 42 votes in favour, 5 against and 3 abstentions.

[87] The Council Position derives from the text which received the support of the majority of delegations at the meeting of the Permanent Representatives Committee on 30 May 2012 and which serves as a mandate for the presidency to pursue discussions with the Parliament. This is available at:www.statewatch.org/news/2012/jul/eu-council-ict-10618-12.pdf.

the drafting of an Immigration Code will lead the EU to navigate relatively uncharted waters. Minimalist and maximalist positions will undoubtedly collide and new dilemmas may arise. Yet, a Code would provide the opportunity to raise standards as well as giving more visibility to migrant rights and facilitating the cohesiveness and clarity of EU migration law.[88] Also, by bringing together rights in a single document a consolidation effect may take place since 'rights engender rights'.[89]At the same time concrete improvements have already taken place and the directives examined thus far show that there exists a changing dynamic and understanding of what is perceived to be a problem with TCNs mobility. Although the ongoing interplay between closing and opening dynamics is bound to continue, the legally binding Charter and the renewed role of the ECJ will prove essential in enhancing the rights of TCNs as is clear from its rulings on the Long-term Residence Directive and Family Reunification Directive in 2012.

True, like its preceding variegated institutional frameworks, this process will involve a leap of faith. Yet, it is also bound to give rise to new patterns of regulation of migration, display a great deal of emphasis on rights as well as respect for the fundamental rights of TCNs and the wearing out of the securitisation paradigm of migration owing to adjacent readings with the Citizenship Directive (2004/38) and the need to eliminate incoherence and unjustified distinctions among categories of migrants. As such, notwithstanding existing constraints in design and outcomes, it will capture the trend towards developing a long-term, integrated and simplified model of labour migration that is strong in mobility, genuine partnerships as well as rights protection. This will view migrants not just as vendors of labour power, but as participants in, and expected full contributors to, practices of socio-economic cooperation. The success of this approach will depend as much on the willingness of national executives to dispense with ideological narratives about migration restriction as on leadership and forward thinking.

[88] Peers, 'An EU Immigration Code' (2012) 61.

[89] E Guild, 'The Evolution of the Concept of Union Citizenship after the Lisbon Treaty' in S Morano-Foadi and M Malena (eds), *Integration for Third-Country Nationals in the European Union* (Cheltenham, Edward Elgar, 2012) 3–15, 5.