

## ARTICLE

# Regulation of EU Labour Migration: At a Crossroads after the New Pact on Migration and Asylum?

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The 2020 New Pact on Migration and Asylum could have been the perfect opportunity for the Commission to address and overcome the crisis in the field of a common EU labour migration policy by getting it back on track. But nothing was further from the truth. The attention which the Commission devotes to the subject of EU labour migration in the New Pact is disappointing. It even seems as though the Commission is abdicating its responsibility and leaving it up to the Member States to make national policy in this area. EU labour migration policy has always been a battle ground between the EU and the Member States. It has led to a highly fragmented EU policy that is proving to be ineffective and is generating resistance rather than contributing to a common policy. This article describes and analyses the EU labour migration policy as it has been shaped since 2000, framing it in a post-crisis dilemma. After the failure of an ambitious proposal for a common comprehensive approach to the admission and residence conditions of third country national workers in general, the Commission opted for a sectoral approach, which so far has led to the establishment of four labour migration Directives, namely for highly skilled workers, seasonal workers, intra-corporate transferees and a single permit for residence and work procedure. Due to the 2015 refugee crisis, the Commission has mainly focused on asylum-related issues during the last few years. With regard to EU labour migration regulation, barely any new initiative has been taken. The only EU institutional player which seriously challenges the addressing of the post-crisis situation in this area is the European Parliament. Are we at a crossroads regarding the regulation of EU labour migration?

**Keywords:** labour migration; EU regulation; New Pact on Migration; competences; common EU policy

## 1. Introduction

It has now been more than 20 years since the European Union received far-reaching legislative powers in the field of immigration and asylum, by the entering into force of the Treaty of Amsterdam. In October 1999 the European Council adopted in Tampere a common immigration and asylum policy to meet the targets set out in the Amsterdam Treaty.<sup>1</sup> Over the last twenty years, a great deal of regulation has been initiated by the EU regarding a common policy on asylum and on the joint control of the EU's external borders. The restrictive elements of a common migration policy seem to have been the easiest on which to reach agreement. The result of the legislative activity of the past years is that there are now comprehensive EU law rules for all major forms of migration: family members, asylum seekers, refugees, students, long-term residents and researchers. However, regarding the management of labour migration, the Member States have been less able throughout these years to agree upon a common policy. Labour migration is one of the areas where the fear of losing national sovereignty is most pronounced. Many governments still regard the decision on who should be allowed to enter and reside in their country as a labour migrant to be a core aspect of this national sovereignty. This article will analyse the political impasse concerning shaping and reforming the European governance of labour migration which has resulted in perpetuating a situation of crisis in the field of a common EU labour migration policy. The 2015 refugee crisis seems to have affected the focus of the European Commission, leading to an inert attitude concerning the announcing of any relevant initiatives.

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<sup>1</sup> European Parliament, 'Tampere European Council 15 and 16 October 1999 Presidency Conclusions' <[https://www.europarl.europa.eu/summits/tam\\_en.htm#>](https://www.europarl.europa.eu/summits/tam_en.htm#>) accessed 20 June 2021.

The long awaited 2020 New Pact on Asylum and Migration, which is meant to reform EU migration, was not used as an opportunity to address and overcome this crisis.

Based on policy documents and scholarly comments, the current fragmented legislative instruments are analysed and the main developments in the labour migration crisis, with its inter-institutional challenges, are discussed.

## 2. The Failure of a Common Strategy

In 2001, the Commission published a general proposal setting out admission and residence conditions for third country national (TCN) workers and self-employed persons.<sup>2</sup> A residence permit for the purpose of paid employment and self-employed activities would be issued prior to the entry of the applicant to the EU territory. The personal scope of this proposal was very broad. Only posted workers, refugees, TCN family members of EU citizens and those covered by the then pending proposal for a Directive on family reunification were excluded from the proposal. The issuing of the permit was conditional on a labour market test for workers and a beneficial effects test for the self-employed. The labour market needs would remain crucial for admission in this regard.<sup>3</sup>

The differences between national systems, the history and traditions regarding relationships with specific third countries or regions, and different economic situations as well as the fear of being deprived of the sovereign right to decide who is entitled to enter and reside were, among others, the main factors which have made and still make a significant move towards EU action difficult.<sup>4</sup>

As Groenendijk convincingly demonstrated, there was strong resistance among some Member States (especially Germany) against any interference by the EU in setting up any form of common policy regarding labour migration.<sup>5</sup> It should be noted that, in the meantime, the Commission succeeded in reaching agreement on a Family Reunification Directive, a Long-Term Residence Directive, a Students Directive and a Researchers Directive, but none of these Directives regulate the core labour migration areas of the EU.<sup>6</sup>

In September 2005 the original 2001 proposal was withdrawn and the Commission decided to follow a selective and sectoral approach.<sup>7</sup> Contrary to the horizontal proposal of 2001, the Commission decided to target some workers defined by categories. Four categories were identified (highly skilled workers, seasonal workers, intra-corporate transferees (ICTs) and remunerated trainees) which led in due course to the adoption of three Directives, the last category having been dropped, to be incorporated later in the recast Students and Researchers Directive 2016/801.<sup>8</sup> The European Council backed the new approach in December 2006 and invited “the Commission to present these proposals as part of the comprehensive EU Migration Policy”.<sup>9</sup>

## 3. Fragmented labour migration Directives as a solution

In the following years this led to the introduction of a patchwork of several Directives, focusing on a specific segment of EU labour migration (Blue Card Directive, Single Permit Directive, Seasonal Workers Directive, Intra-Corporate Transferee Directive, and a recast of the Students and Researchers Directive). However, even

<sup>2</sup> For an overview see Helen Oosterom-Staples, ‘Regulating Labour Migration: The EU Saga on Third Country Nationals Seeking Access to the European Labour Market’ in Anita Böcker and Others (eds), *Migration law and sociology of law; Collective essays in honour of Kees Groenendijk* (Wolf Legal Publishers Nijmegen, 2008) 121–130.

<sup>3</sup> European Commission, ‘Proposal for a Council Directive on the conditions of entry and residence for the purpose of paid employment and self-employment activities’, COM(2001) 386 final 11 July 2001.

<sup>4</sup> Yves Pascouau, ‘Intra-EU Mobility: The “Second Building Block” of EU Labour Migration Policy’, (2013) EPC Issue Paper No. 74.

<sup>5</sup> Kees Groenendijk, ‘Which Way Forward with Migration and Employment in the EU’ in Sergio Carrera, Elspeth Guild and Katharina Eisele, *Rethinking the Attractiveness of EU Labour Immigration Policies; Comparative Perspectives on the EU, the US, Canada and Beyond* (CEPS 2014) 91–100.

<sup>6</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, [2004] OJ L 16/44; 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, [2004] OJ L 375/12; and 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 289/15. The first three Directives do not deal directly with access of third country nationals to the labour market of the Member States. The Researchers Directive focuses on very specific types of workers.

<sup>7</sup> European Commission, ‘Communication from the Commission “Policy Plan on Legal Migration”, COM(2005) 669 final, 21 December 2005.

<sup>8</sup> European Parliament and Council, Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ L132/21, 21.05.2016.

<sup>9</sup> European Commission, ‘Simplified Admission Procedures and Common Set of Rights for Third-country Workers’, (Press Release 23 October 2007) Memo 07/422.

with this sectoral approach in the field of labour migration, it proved to be difficult to reach agreement between the Member States. It took 10 years to adopt the first two Directives (the Blue Card Directive and the Single Permit Directive) in that field after the declaration of the Tampere Conclusions. The Seasonal Workers Directive and the Intra Corporate Transferee Directive were adopted in 2014. A short overview of the scope of these Directives will be provided in the sections 3.1–3.4. During this period of time European decisions in the area of legal migration remained subject to unanimity in the Council with simple consultation with the European Parliament until the entry into force of the Lisbon Treaty in 2009. Then, under the new regime of co-decision and qualified majority voting, a new Article 79 of the Treaty of the Functioning of the EU (TFEU) was redacted. However, an express limitation on the exercise by the EU of its shared legal competence affecting labour migration was laid down in Article 79(5) TFEU:

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

This provision excludes the possibility of adopting quotas of migrant workers at EU level and was especially added at the request of Germany which only accepted the institutional change of the Lisbon Treaty by an explicit limitation of EU powers on this point. This provision does not cover all migrants, but only workers, and is limited to those coming from third countries, meaning that it does not include the movement of third country workers inside the Member States.<sup>10</sup>

### **3.1. The Blue Card Directive**

In 2009 the EU adopted the first measure designed to admit third country national workers to the EU. This Directive, known as the EU Blue Card Directive, was intended to be a skill-attracting instrument alongside the national highly skilled immigration schemes and aimed to offer a fast-track entry procedure for third country national workers with high qualifications, who had already secured a job in the EU. It regulates the conditions for entry and residence of highly qualified third country national workers and establishes an EU-wide permit for them. However, the objective of a common labour market for highly qualified migrants was not really achieved because a second Member State was still entitled to re-examine whether the conditions of high qualification and work were fulfilled.<sup>11</sup> The Directive's narrow focus on a small group of highly qualified migrants and the (perhaps too) flexible approach of the Commission regarding the heterogeneous interests of the Member States ensured that a final version of this Directive was established fairly easily. In the end it took the Council one year, from 2007 to 2008, to complete negotiations on the Blue Card Directive.<sup>12</sup>

### **3.2. The Single Permit Directive**

The realization of the second Directive faced more difficulties. It took four years of negotiations before the Single Permit Directive was published in December 2011. This Directive lays down a single application procedure for third country nationals to reside in a Member State of the EU for the purpose of work. This single application procedure is meant to simplify existing procedures and to facilitate the inspection and control of the working migrants' status. The criteria for entry and admission are still determined by the individual Member States. Both migrants admitted for reasons of work, and working although admitted for other reasons (such as family reunification or asylum), fall within the scope of this Directive. Nevertheless, a number of categories are excluded from the scope of this Directive, among them third country family members of EU citizens, posted workers, seasonal workers and intra-corporate transferees (both discussed below), au pairs, long-term residents under Directive 2003/109 and self-employed workers. These exclusions exemplify the fragmented approach of the EU to a common labour migration policy.<sup>13</sup> Within the boundaries

<sup>10</sup> See Sergio Carrera and others (eds), *Pathways Towards Legal Migration into the EU: Reappraising Concepts, Trajectories and Policies* (CEPS 2017) 190.

<sup>11</sup> 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 17. See Carolus Grütters and Tineke Strik, *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers Oisterwijk 2013).

<sup>12</sup> Christof Roos, *The EU and Immigration Policies: Cracks in the Walls of Fortress Europe?* (Palgrave Macmillan Basingstoke 2013).

<sup>13</sup> 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 [2011] OJ L 343/1; Herwig Verschueren, 'Employment and Social Security Rights of Third Country Nationals Under the EU Labour Migration Directives' (2018) 20(2) *European Journal of Social Security* 100–115.

of this personal scope, the Directive provides for the right to equal treatment (although with limitations) for all third country nationals legally working in a Member State, irrespective of the purposes for which they were initially admitted.<sup>14</sup> An analysis of the negotiations showed that attempts by some Member States to block the Directive or to reduce its scope were inhibited first by the Commission in 2009 and in the latter stages of negotiations by the European Parliament.<sup>15</sup> It took from 2007 to 2011 to reach agreement on the Commission's proposal for this Directive.<sup>16</sup> During this time, negotiations were at one time frozen, resumed under new decision-making rules after the entry into force of the Lisbon Treaty, and then stalled once again after the European Parliament voted not to adopt the Council's version of the Directive.

The negotiations on the other two labour migration Directives (Seasonal Workers Directive and Intra Corporate Transferee Directive) adopted in 2014 also took a long time. They lasted more than three and a half years. This was partly because, as a result of the entering into force of the Lisbon Treaty, these legal acts had to be negotiated and adopted both by the European Parliament and the Council now as co-legislators. Furthermore, both Directives had challenging issues that had to be resolved during the negotiations in order to adopt provisions that could easily be interpreted and therefore effectively implemented.<sup>17</sup>

### 3.3. The Seasonal Workers Directive

The Seasonal Workers Directive determines the conditions of entry, stay and access to the labour market for a limited period of time for (unskilled or low-skilled) third country national workers in the EU Member States and defines their rights to ensure decent working conditions. A seasonal worker is defined as

A third country national who retains their principal place of residence in a third country and stays legally and temporarily in the territory of an EU Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that EU Member State.<sup>18</sup>

Member States have to define what the relevant sectors are. The preamble of the Directive refers to tourism, agriculture and horticulture as areas where seasonal work is usually needed.<sup>19</sup> The Directive is designed to promote circular migration of these workers, to avoid them becoming permanent residents in the EU, but at the same time allowing them to come back for several years in a row to perform seasonal work.<sup>20</sup> There is a maximum limit of between five and nine months per calendar year of residence for a seasonal worker, after which they must then return to their third country. The proposal was the subject of long and difficult negotiations in the Council of Ministers and the European Parliament, as its discussion took place during a period of economic crisis in some of the Member States, and an increased scepticism about migration in almost all areas.<sup>21</sup> Since the level of rights granted to workers under this Directive is lower than the rights under the Single Permit Directive 2011/98, there could be a temptation for employers (and for Member State authorities) to give an expansive interpretation of what is defined as seasonal work. The Directive also bears the risk of providing an endless temporary employment of "seasonal" workers. The third country worker is employed for nine months at the most, has to return for three months to his country of origin and returns the next year to work for the same employer for nine months again. The Directive leaves Member States free to provide the third-country worker with a more stable residence permit or not, but seasonal

<sup>14</sup> See Paul Minderhoud and Tineke Strik (eds), *The Single Permit Directive: Central Themes and Problem Issues* (Wolf Legal Publishers Oosterwijk 2015).

<sup>15</sup> Christof Roos, 'EU Politics on Labour Migration: Inclusion Versus Admission' (2015) 28(4) *Cambridge Review of International Affairs* 536.

<sup>16</sup> European Commission, 'Proposal for a Council Directive on a Single Application Procedure for a Single Permit for TCN 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' COM(2007)638 final 23 October 2007; 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 [2011] OJ L 343/1.

<sup>17</sup> Agnes Tottos, 'The ICT Directive: Negotiations in the Council' in Paul Minderhoud and Tesseltje de Lange (eds), *The Intra Corporate Transferee Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (Wolf Legal Publishers Oosterwijk 2018) 5–18.

<sup>18</sup> See Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94/375, Article 3(b).

<sup>19</sup> *Ibid.*, Preamble, Recital 13.

<sup>20</sup> Herwig Verschueren, 'Employment and Social Security Rights of Third Country Nationals under the EU Labour Migration Directives' (2018) 20(2) *European Journal of Social Security* 100.

<sup>21</sup> Margarite Zoetewij, 'The EU Seasonal Workers Directive; Another Vicious Circle?' in Tesseltje de Lange and Conny Rijken (eds), *Towards a Decent Labour Market for Low Waged Migrant Workers* (Amsterdam University Press 2018) 129–149.

workers are excluded from the personal scope of the Long Term Residence Directive and cannot build up a history for permanent residence.<sup>22</sup> Zoetewij therefore expressed her doubt that the adoption of this Directive has contributed to a substantive improvement of the position of the TCN seasonal workers in the EU Member States.<sup>23</sup>

### 3.4. The Intra- Corporate Transferee Directive

This Directive makes it easier for businesses and multinational corporations to temporarily relocate their managers, specialists and trainee employees to their branches or subsidiaries located in the European Union. The Intra Corporate Transferee Directive regulates the temporary secondment of managers, specialists or trainee employees who are transferred from a company outside the EU to an entity of the same undertaking or group of undertakings inside the EU, while staying on their home country employment contract. They have to be residing outside the EU at the time of application. Three crucial issues determined the negotiations. First, this group had to be identified in relation to other groups, such as highly skilled migrants and posted workers. Secondly, social security issues were extensively debated with a special focus on family benefits and the application of social security agreements. Thirdly, Member States were very reluctant regarding the introduction of a new autonomous regime of intra-EU mobility, which was one of the most important added values of this Directive.<sup>24</sup> This Directive was in part justified because it implemented bilateral and multilateral trade agreements to which the EU and the Member States were already bound, in particular the General Agreement on Trade in Services.<sup>25</sup> Such agreements usually contain immigration-related provisions which aim to facilitate the mobility of service providers.<sup>26</sup> The Intra-Corporate Transferee Directive includes special provisions for EU Member States to ensure or enforce the ‘temporariness’ of these workers, so that they cannot stay on at the end of the assignment. These workers are also not granted the possibility of crossing the bridge towards a long-term residence status in the receiving Member State.<sup>27</sup>

## 4. A New Attempt: the Idea of an EU Immigration Code

Although the Commission had committed itself to a sectoral approach, the Commission's agenda remained ambitious. It announced in 2010 the plan to publish in 2013 a proposal for an EU immigration code, i.e. the consolidation of legislation in the area of legal immigration, taking into account the evaluation of existing legislation, the need for simplification and, where necessary, the extension of existing provisions to categories of workers currently not covered by EU legislation.<sup>28</sup> In its 2014 Communication, ‘An Open and Secure Europe: Making it Happen’, the Commission outlined its vision on the future priorities to guide the next phase of EU immigration policy and stated that further steps could be taken to codify and streamline the substantive conditions for admission, as well as the rights of third-country nationals. This would be a step towards a ‘single area of migration’, with the aim of facilitating intra-EU mobility of third-country nationals, including through mutual recognition of national permits.<sup>29</sup> So far it has been mainly scholars who have taken this proposal seriously. According to Peers,<sup>30</sup> such a code should ‘establish a more ambitious level of harmonization than the status quo’, first by raising existing EU standards, and second by introducing a simplified and more consistent set of common regulations. This higher level of ambition could have three different aspects: extension of EU law to cover more categories of persons; a greater

<sup>22</sup> Kees Groenendijk, ‘Which Way Forward with Migration and Employment in the EU?’ in Sergio Carrera, Elspeth Guild and Katharina Eisele, *Rethinking the Attractiveness of EU Labour Immigration Policies; Comparative Perspectives on the EU, the US, Canada and Beyond* (CEPS 2014) 91–100.

<sup>23</sup> Margarite Zoetewij (n 21) 129–149.

<sup>24</sup> Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] *OJ L 157/1*; Tottos (n 17) 5–18.

<sup>25</sup> *ibid* recital 13; See Jean Baptiste Farcy, ‘Labour Immigration Policy in the European Union: How to Overcome the Tension between Further Europeanisation and the Protection of National Interests?’ (2020) 22(2) *European Journal of Migration and Law* 198.

<sup>26</sup> Sandra Lavenex and Flavia Jurje, ‘The Migration-Trade Nexus: Migration Provisions in Trade Agreements’ in Leila Simona Talani and Simon McMahon (eds.), *Handbook of the International Political Economy of Migration* (Edward Elgar Cheltenham 2015) 259–281.

<sup>27</sup> Sergio Carrera and others (eds), *Pathways towards Legal Migration into the EU: Reappraising Concepts, Trajectories and Policies* (CEPS 2017) 193.

<sup>28</sup> European Commission, ‘Communication on Delivering an Area of Freedom, Security and Justice for Europe's Citizens: Action Plan Implementing the Stockholm Programme’, COM(2010) 171 20 April 2010. See Pascouau (n 4).

<sup>29</sup> European Commission, ‘Communication on an open and secure Europe: Making it happen’ COM(2014) 154 11 March 2014.

<sup>30</sup> Steve Peers, ‘An EU Immigration Code: Towards a Common Immigration Policy’ in Sergio Carrera, Elspeth Guild and Katharina Eisele (eds), *Rethinking the Attractiveness of EU Labour Immigration Policies; Comparative Perspectives on the EU, the US, Canada and Beyond* (CEPS 2014) 100–111.

intensity of harmonisation; and higher standards for the persons concerned. It follows that a fuller degree of harmonisation in this field could only be justified if standards were raised significantly. He even drafted a complete text for such a code.<sup>31</sup> Since 2014 the Commission has not come back to this idea again. It is only recently that the Civil Liberties Committee of the European Parliament has taken up the notion of establishing an immigration code again (see section 8).

## 5. Shifting the Focus Towards Asylum In Stead of Regular Migration

The emergence in 2015 of what became known as the 'European Refugee Humanitarian Crisis' shifted the main EU political focus and debate towards the areas of asylum, borders and irregular immigration, and away from the extent to which the forms of EU policy on economic immigration are 'fit for purpose' and the facilitation of labour mobility.<sup>32</sup> The proposal for a European Agenda on Migration, presented by the European Commission on 13 May 2015, contained a chapter on 'A new policy on legal migration' but it did not refer to anything strikingly new in relation to the existing EU labour immigration regime.<sup>33</sup> There was no clear vision on a future EU labour migration policy and its integration with national labour market and employment policy. It did not build a comprehensive and coherent policy set and it did not make up for the shortcomings of current EU labour migration policies.<sup>34</sup> The only legislative initiative announced was the recast of the Blue Card Directive because this Directive had failed to live up to its expectations. Surprisingly, Germany was the only Member State that exclusively used the Blue Card scheme to admit highly skilled non-EU citizens for employment purposes, which could partly be explained by the fact that it lacked a highly skilled immigration policy at the time of implementation and decided to tailor the implementing national law according to its national preferences. Bury showed that many of the early Blue Cards permits issued in Germany had been provided to third country nationals workers who were already present in Germany with other kinds of residence statuses. According to her this meant that the Blue Card was used as a means to acquire a homogenous, EU-based set of rights for third country nationals already present in a Member State – indicating that it was acting as a form of retention tool to keep talented people rather than to attract them in the first place. She therefore observed that if the Blue Card did not seem to work very well for the purposes of attraction, it might be wise to enhance its value as a retention tool.<sup>35</sup>

At this time the Member States showed little enthusiasm for new EU labour migration initiatives. As a result of the economic crisis in some Member States, the unemployment rates in the decade starting in 2010 reached 20 or even 30 per cent, and up to 50 per cent among young people, which was coupled with a sharp drop in economic growth. Also at a time when the DG Home Affairs legislative task was heavily focused on asylum and border management, the idea of engaging in new negotiations and transposition of what was still fairly new EU legislation was unlikely to be welcomed by the Member States.<sup>36</sup>

In 2016 the Commission started a 'Fitness Check' of the Directives adopted in the area of legal migration.<sup>37</sup> Nine directives were covered, although only those that had been in force for several years were assessed in terms of effectiveness and efficiency: family reunification (2003); long-term residents (2003); students and researchers (2004, 2005; recast in 2016); EU Blue Card (2009) and Single Permit (2011).<sup>38</sup> A fitness check is a comprehensive evaluation which includes a compliance assessment of the Directives on legal migration regarding transposition and implementation by the Member States. The results of the fitness check have been used in the 2020 New Pact on Migration and Asylum for announcing

<sup>31</sup> Steve Peers, 'Statewatch Analysis: A Proposal for an EU Immigration Code' (Statewatch, date of publication to be added) <<https://www.statewatch.org/media/documents/analyses/no-167-immigration-code-steve-peers.pdf>> accessed 20 June 2021.

<sup>32</sup> Katrien Luyten and Selene González Díaz, 'Legal Migration to the EU' (European Parliament's Study, March 2019) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635559/EPRS\\_BRI\(2019\)635559\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635559/EPRS_BRI(2019)635559_EN.pdf)> accessed 20 June 2021.

<sup>33</sup> European Commission, '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' COM (2015) 240 final 13 May 2015.

<sup>34</sup> Ivan Martin and others, 'Exploring New Avenues for Legislation for Labour Migration to the European Union' (European Parliament's Study, September 2015) <[https://www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2015\)536452](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2015)536452)> accessed 23 December 2021.

<sup>35</sup> Paulina Bury, *Cooperation and Competition in Highly Skilled Migration Policy in the European Union: Analysing the Policy Cycle of the Blue Card Directive* (Maastricht University 2018).

<sup>36</sup> Ibid.

<sup>37</sup> European Commission, 'Legal Migration Fitness Check' (2019) <[https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/fitness-check\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/fitness-check_en)> accessed 20 June 2021.

<sup>38</sup> European Commission, 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe' COM(2016) 197 final 18.

some initiatives revising the Long-Term Residence Directive and reviewing the Single Permit Directive (see section 7).<sup>39</sup>

## 6. Towards a More Coherent Post-crisis EU Labour Migration Policy

During the past 10 years there have been several arguments in favour of a more coherent EU labour migration policy. Creating legal channels for labour migrants is an indispensable part of the EU's comprehensive approach to migration and goes hand in hand with the fight against irregular flows of people. The proper management of labour migration not only helps to reduce the incentives to use irregular routes, it also enables the EU to attract the right sets of talent and skills and enables admissions to be tailored to labour market needs, hence contributing to the overall economic growth of the EU.<sup>40</sup>

Research supports the finding that free movement of workers should also be extended to a far greater degree to third country nationals, based on the following arguments:

- in times of labour shortages and economic crises, migrants could play an important role to satisfy the needs of enterprises under the condition that their mobility is not restricted legally and practically;
- restricted mobility rights for third country nationals can seriously impinge on the economic growth of the EU by obliging third country nationals to “stay put” instead of looking for more suitable jobs elsewhere, and eventually tend to favour their long-term dependency on that Member State's social welfare system; and
- the greater number and variety of opportunities that third-country nationals could then take up in other EU countries would also make the EU and its Member States a more attractive destination for skilled migrants from outside the EU.

It has to be borne in mind that coordination bringing rights at the European level – especially rights related to EU mobility – makes each country more attractive for third-country nationals than similar national schemes would.<sup>41</sup>

It is stressed that differential treatment of third-country nationals undermines the EU's ability to attract workers, to tackle EU labour market shortages in specific sectors or occupations, to address demographic changes (an ageing population), and to boost innovation and growth. Migration is therefore a challenge that should also be seen as an opportunity, in particular at a time when Europe is witnessing the rapid ageing of its population. In the coming years, the working-age population in the EU (people aged between 15 and 64) will decrease significantly.<sup>42</sup> The smaller workforce may cause problems in the medium and longer term, for instance regarding the financing of Member States' pension systems. To minimise the negative impacts of an ageing population and to help key sectors of the EU's economy that are already facing skills shortages, the EU has to work towards improving the legal pathways to enter Europe.

With the adoption of the four Directives on the Blue Card, the single permit, the seasonal workers and intra-corporate transferees in, respectively, 2009, 2011 and the last two in 2014, it took more than eight years to finalise the policy plan on legal migration. This is a long period on the political agenda, clearly showing that labour migration remains a difficult issue to deal with at EU level.<sup>43</sup>

## 7. The New Pact on Migration and Asylum: a Solution for the EU Labour Migration Crisis?

In September 2020 the Commission released the long awaited New Pact on Asylum and Migration which is meant to reform EU migration and asylum law and practice.<sup>44</sup> It has had a mixed reception with little outright praise, quite a lot of scepticism and some quite strong criticism. The Pact reflects a regulatory framework that does not fix the existing divergences between the Member States, while at the enforcement

<sup>39</sup> European Commission, 'Commission Staff Working Document Fitness Check on EU Legislation on legal migration' SWD(2019) 1055.

<sup>40</sup> Luyten (n 32).

<sup>41</sup> *ibid.*

<sup>42</sup> European Commission, '2018 Ageing Report: Policy Challenges for Ageing Societies' (25 May 2018) <[https://ec.europa.eu/info/news/economy-finance/policy-implications-ageing-examined-new-report-2018-may-25\\_en](https://ec.europa.eu/info/news/economy-finance/policy-implications-ageing-examined-new-report-2018-may-25_en)> accessed 20 June 2021.

<sup>43</sup> Philippe De Bruycker, 'The EU Policy on Labour Migration: How Common It Is and Should It Be?' in Constança Urbano de Sousa (eds), *The Relevance of Migration for the 2030 Agenda for Sustainable Development* (Universidade Autonoma de Lisboa Lisbon 2019) 170.

<sup>44</sup> European Commission, 'Communication on a New Pact on Migration and Asylum', COM(2020)609 final.

level the approach is still precarious, both as to the role of EU agencies and as a strategy to ensure Member States' compliance. Although the Commission points out that "the EU is currently losing the global race for talent", the largest part of the section addressing the issue of labour migration is on reviewing, revising or intensifying already existing instruments: the EU Blue Card Directive, the Long Term Residence Directive and the Single Permit Directive. According to the Pact, the European Parliament and the Council should conclude their negotiations on the recast of the EU Blue Card Directive which is designed to attract highly skilled talent from outside the EU. As previously mentioned, in 2016 the Commission had already published a proposal to recast the 2009 Blue Card Directive recommending, among other things, a lower salary threshold and better intra-EU mobility possibilities. So far the negotiations on this recast have been unsuccessful because a substantial number of the Member States (among others the Netherlands) were against one of the most important proposed changes. Member States have to relinquish the possibility of their own national schemes for the admission of highly qualified workers in parallel to the Blue Card scheme. Statistics show that the Blue Card scheme has not been a successful labour market instrument, partly due to this wish of several Member States to give preference to national schemes for highly skilled workers. The total number of EU Blue Cards issued in 2018 was only 32,678, of which 82.6% were issued in Germany.<sup>45</sup>

The Pact wants to revise the Directive on long-term residents because it is currently under-used, as most Member States have not actively promoted the issuance of EU long-term residence permits, and continue to issue, almost exclusively, national long-term residence permits. In 2019, in the 25 Member States bound by the Directive there were around 3 million third-country nationals holding an EU long-term residence permit, compared with around 7 million holding a national long-term residence permit. The second main problem which has been identified concerns the barriers which holders of EU long-term residence permits face in exercising the right to move and reside in other Member States for work, study, or other reasons, which is subject to a number of conditions in the current Directive. For example, when a long-term resident has an offer of a job in a second Member State, that country may apply a labour market test before accepting the application, to check if that job could be filled first by EU nationals. Furthermore, it is not possible to start working or studying in the second Member State while the application is being assessed, and delays in the assessment can jeopardise the work or study possibilities. Therefore, the current Directive does not provide an effective right to intra-EU mobility. The objective would be to create a true EU long-term residence status, in particular by strengthening the right of long-term residents to move and work in other Member States.<sup>46</sup>

The Pact also promises a review (not a revision) of the Single Permit Directive, because it has not fully achieved its objective of simplifying the admission procedures for all third-country national workers. The personal scope of the Directive is very fragmented, with numerous exceptions that are difficult to implement. As a rule, the Directive covers all third-country workers, but with many exceptions. It is also inconsistent with other Directives covering other categories of third-country nationals. This review would look at ways to simplify and clarify the scope of the legislation and explore the possibility of introducing admission conditions that would apply to all low- and medium-skilled third-country workers, and of measures to prevent and fight labour exploitation of third-country workers.

At the moment the Single Permit is the only 'labour migration' permit which is issued extensively in the EU. The latest Eurostat figures show that, in 2019, in the (now) 27 Member States almost 3 million permits were issued.<sup>47</sup> The Single Permit is especially popular in France (892,385), Italy (526,194) and Germany (401,861). Together with Spain and Poland these Member States issued 75% of the single permits recorded in 2019.<sup>48</sup> It should be remembered, however, that the criteria for entry and admission under this Directive are still completely determined by the individual Member States. It should also be stressed that not all of these permits are directly related to labour migration, because the registered data on single permits cover not only permits issued for work under national and European law, but also permits issued for other reasons

<sup>45</sup> Germany was followed by Poland (1,576; 4.8 %) and France (1,523; 4.7 %). In all the other Member States the number of Blue Card permits issued is negligible. The Netherlands issued, in 2018, 119 Blue Card Permits. Only 27% of the highly skilled TCN workers admitted in the Member States received a Blue Card.

<sup>46</sup> European Commission, 'Inception impact assessment: Rights of third-country nationals who are long-term residents in the EU', Ref. Ares(2020)7238524.

<sup>47</sup> Eurostat, 'Single Permits Issued by Type of Decision, Length of Validity' (Eurostat) <[https://ec.europa.eu/eurostat/web/products-datasets/-/migr\\_ressing](https://ec.europa.eu/eurostat/web/products-datasets/-/migr_ressing)> accessed 20 June 2021.

<sup>48</sup> Eurostat, 'Residence Permits – Statistics on Authorisations to Reside and Work' (Eurostat) <<https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=539496>> accessed 20 June 2021.



where the holder has the right to work. The Eurostat statistics show that, in 2019, only 1.2 million first residence permits in the EU-27 were in fact issued for employment-related reasons.<sup>49</sup> This amounts to 40.5 % of all first permits issued. The other first permits were issued for family-related reasons (810,000; 27.4 %), other reasons (546,000; 18.5 %) and education-related reasons (400,000; 13.5 %).<sup>50</sup>

The 2019 Eurostat figures on both the intra-corporate transferee permits<sup>51</sup> and the seasonal workers permits are fragmented.<sup>52</sup> In relation to both permits Eurostat does not provide a figure covering all 27 Member States together. Based on the available figures an estimation of 8,287 granted intra-corporate transferee permits can be made, half of which were issued in the Netherlands.<sup>53</sup> The total number of seasonal workers permits issued in 2019 can be estimated to be 109,803. Poland is the undisputed leader here with 46,630 permits, but a large percentage of these permits is not really provided under the Seasonal Workers Directive scheme but under a bilateral agreement between Poland and Ukraine.<sup>54</sup> The schemes in some other Member States are based on national rules, bilateral agreements or on other EU legislation such as the Single Permit Directive, which makes it difficult to outline a reliable picture.

Furthermore, the Pact introduces a relatively new labour migration instrument, namely the 'EU Talent Pool', but does not go into any detail on this. This EU Talent Pool is a pool for third country national skilled workers which could operate as an EU-wide platform for international recruitment through which skilled third country nationals could express their interest in migrating to the EU and could be identified by EU migration authorities. It will work through an Expression of Interest (EoI) model, supporting the selection of migrants under specific programmes. Three countries have implemented an EoI system so far: New Zealand, Australia and Canada.<sup>55</sup> Whether this will be a real solution for the EU is questionable. A 2019 publication from the OECD shows that the international job-matching features in the existing EoI systems have so far been under-utilised.<sup>56</sup> Besides, in the EU, migration and employment management systems are run in very different ways across EU countries. Issuance of residence permits is within the competence of Member States, which also have the prerogative to define the number of labour migrants to admit to their respective labour markets. The EoI models in New Zealand, Australia and Canada lead to immediate permanent residence, which is unknown in EU Member State legislation and not contemplated in the EU legal migration framework. Even the most basic adaptation of this EoI model would require a complex and costly infrastructure.

As far as legal migration is concerned, the Commission has also announced the launch of what it calls 'Talent Partnerships' in the form of an enhanced commitment to support legal migration and mobility with key partners. Without providing any details, these partnerships will provide a comprehensive EU policy framework as well as funding support for cooperation with third countries, to better match labour and skills needs in the EU, as well as being part of the EU's toolbox for strategically engaging partner countries on migration. Strong engagement of Member States will be essential, as will involvement of the private sector and the social partners, and ownership from partner countries. According to Sarolea and Farcy, these Talent Partnerships would be bilateral in nature, tailored to the interests of the participating Member State and the partner third country, involving the private sector as far as possible.<sup>57</sup> This means that the key actors will be the individual Member States and not the Commission itself.<sup>58</sup> The experiences of the existing

<sup>49</sup> The majority of single permits issued in 2018 represent extensions of residence permits corresponding either to renewal or change of status of already existing residence permits. First single permits accounted for 41.3% of all single permits issued in the EU in 2018.

<sup>50</sup> Eurostat, 'Residence Permits – Statistics on First Permits Issued During the Year' (Eurostat 2021) <[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Residence\\_permits\\_-\\_statistics\\_on\\_first\\_permits\\_issued\\_during\\_the\\_year&oldid=507019#First\\_residence\\_permits\\_.E2.80.94\\_an\\_overview](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Residence_permits_-_statistics_on_first_permits_issued_during_the_year&oldid=507019#First_residence_permits_.E2.80.94_an_overview)> accessed 20 June 2021.

<sup>51</sup> Eurostat, 'Intra-corporate Transferee Permits Issued, Tenewed and Withdrawn by Type of Permit, Length of Validity and Citizenship' (Eurostat) <[https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_resict1\\_1&lang=en](https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_resict1_1&lang=en)> accessed 20 June 2021.

<sup>52</sup> *ibid.*

<sup>53</sup> In 2019 the intra corporate transferee permit was mostly issued in the Netherlands (4,375), followed by France (2,260), Spain (982) and Hungary (778).

<sup>54</sup> Other countries with high numbers are Finland (17,068), Spain (12,015), Bulgaria (10,924), Estonia (4,762), and Italy (4,205).

<sup>55</sup> OECD, 'The Expression of Interest Model: What Lessons for Migration Management in the EU and elsewhere?' (2019) 18 Migration Policy Debates 1.

<sup>56</sup> OECD, *A New Approach to Migration Management for Europe* (OECD Publishing 2019).

<sup>57</sup> Sylvie Sarolea and Jean Baptiste Farcy, 'Legal Migration in the "New Pact": Modesty or Unease in the Berlaymont?' (EU migrationlaw blog, 11 February 2021) <<http://eumigrationlawblog.eu/legal-migration-in-the-new-pact-modesty-or-unease-in-the-berlaymont/>> accessed 20 June 2021.

<sup>58</sup> The devil is in the detail here because these partnerships would combine direct support for mobility schemes for work or training with capacity building in areas such as labour market or skills intelligence, vocational education and training *with the integration of returning migrants* (emphasis of the author). So it looks like a quid pro quo system. See Salvatore Nicolosi and Paul Minderhoud,

mobility partnerships so far are, according to Guild, unlikely to convince any third states that these Talent Partnerships will result in enhanced opportunities for their citizens.<sup>59</sup> These Talent Partnerships do not offer anything close to a legal pathway, yet.<sup>60</sup>

As far as the approach of labour migration in this New Pact is concerned, there is a remarkable resemblance with the first 2008 Pact which was a Council Document established under the French Presidency.<sup>61</sup> That 'French Pact', as it was known, downplayed the need to harmonise immigration policies. The Council stimulated Member States to 'organise' legal immigration themselves rather than construct common policies: 'it recalls that it is for each Member State to decide on the conditions of admission of legal migrants to its territory, and where necessary, to set their number'. This clearly reflected the reluctance of the Member States to relinquish their competence. Carrera and Guild observe that this 2008 Pact was very much oriented towards the Member States and driven by a predominantly intergovernmental logic. In their view it would boost the ongoing tension between the establishment of a European immigration and asylum policy and the perpetuation of Member States' competences and power of discretion over these fields.<sup>62</sup>

## 8. The European Parliament Takes the Initiative

In sharp contrast to the Commission, the European Parliament is eager to initiate a new common EU labour policy.<sup>63</sup> Before the publication of the new Pact, the Civil Liberties Committee of the Parliament had sent a letter in 2020 to the responsible EU Commissioner Johansson complaining that, despite legal migration being one of the priorities of the European Agenda for Migration announced in 2015, the only legislative proposal in this field in the last legislature was a revision of the Blue Card Directive, a proposal that has been blocked by the Council since the end of 2017.<sup>64</sup> The EU Parliament announced that the Committee itself was working on an own-initiative report on New Avenues for Legal Labour Migration and expressed the hope that the European Commission would be equally ambitious.<sup>65</sup> Among the options on the table, the Committee points to developing sectoral labour migration, as well as long-term residence, intra-EU mobility and family reunification rights. The Committee is convinced that all Member States could profit from a more harmonised approach to labour migration at European level. In its view, the European Union could contribute to improving third-country nationals' access to the European labour market, addressing skills demands, making Member States more attractive to third-country workers, and improving working conditions and integration of third-country nationals. The Committee stresses that the hosting communities would benefit from this on several levels.<sup>66</sup>

Two weeks after the release of the New Pact on Migration and Asylum, the Civil Liberties Committee of the European Parliament published a draft report on new avenues for legal labour migration in which it pointed out that the current legal framework and the divergent implementation of the existing Directives

<sup>59</sup> 'The New Pact on Migration and Asylum: a Paradigm Shift in Regulation and Enforcement?', (Renforce blog, 18 January 2021) <<http://blog.renforce.eu/index.php/nl/2021/01/18/the-new-pact-on-migration-and-asylum-a-paradigm-shift-in-regulation-and-enforcement-2/>> accessed 20 June 2021.

<sup>59</sup> Elspeth Guild, 'Negotiating with Third Countries under the New Pact: Carrots and Sticks?' (EU migrationlaw blog, 27 November 2020) <<http://eumigrationlawblog.eu/negotiating-with-third-countries-under-the-new-pact-carrots-and-sticks/#more-3368>> accessed 20 June 2021.

<sup>60</sup> Tesselte de Lange and Kees Groenendijk, 'The EU's Legal Migration Acquis. Patching up the Patchwork.' (European Policy Centre, 16 March 2021) <<https://epc.eu/en/Publications/The-EUs-legal-migration-acquis-Patching-up-the-patchwork~3cad34>>.

<sup>61</sup> Council of the European Union, 'European Pact on Immigration and Asylum' of 24 September 2008, Council Document no.13440/08.

<sup>62</sup> Sergio Carrera and Elspeth Guild, 'The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights?' (CEPS, 11 September 2008) CEPS Policy Brief No. 170 <<https://www.ceps.eu/ceps-publications/french-presidencys-european-pact-immigration-and-asylum-intergovernmentalism-vs/>>.

<sup>63</sup> The European Commission has a near monopoly on legislative initiative in the EU, with special initiative rights for other institutions applying only in certain specific cases. However, the European Parliament and the Council may invite the Commission to submit legislative proposals. Whilst this 'indirect' initiative right does not create an obligation on the Commission to propose the legislation requested, the Treaty of Lisbon codified the Commission's obligation to provide reasons for any refusal to follow a parliamentary initiative. See Silvia Kotanidis, 'Parliament's Right of Legislative Initiative' (European Parliament's Briefing, 12 February 2020) <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2020\)646174](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)646174)> accessed 20 June 2021.

<sup>64</sup> European Parliament, 'Asylum and Migration Pact: MEPs Push for Legal and Safe Avenues' (PubAffairs Bruxelles, 1 May 2020) <<https://www.pubaffairesbruxelles.eu/asylum-and-migration-pact-meps-push-for-legal-and-safe-avenues-eu-parliament-press/>> accessed 20 June 2021.

<sup>65</sup> European Parliament, 'Draft Report on New Avenues for Legal Labour Migration' (2020/2010(INI)).

<sup>66</sup> *ibid.*

by the Member States have resulted in many inconsistencies for third-country nationals as regards equal treatment, entry and re-entry conditions, work authorisation, residence status, intra-EU mobility, social security coordination, recognition of qualifications and family reunification.<sup>67</sup> It emphasises the added value of having an EU framework for legal migration as part of a holistic approach to migration, as such a framework would provide opportunities through legal pathways for those seeking work, encourage more orderly migration, attract workers that the EU labour markets need, and ensure that TCN workers are treated in accordance with fundamental rights in the EU (point 8).<sup>68</sup> According to the European Parliament there is a reality in the EU that has not been properly addressed: an ageing population, the exploitation of foreign workers, the reality of migration, and the global race for talent.

Among other things the report recommends that, as a first step, rights to intra-EU mobility should be enhanced across all the existing legal migration directives and it reiterates that the Commission should propose appropriate legislative action in this direction.<sup>69</sup> Interestingly, it explicitly proposes that, in the medium term, the EU must move away from the current sectoral approach and adopt an immigration code setting out broad rules governing entry and residence for all TCNs seeking employment in the EU.<sup>70</sup> Such an overarching legislative instrument would remove the different requirements laid down across the Member States and would provide the needed simplification and harmonisation of rules without discriminating against any sector of employment or type of employee.<sup>71</sup>

## 9. Rise of Intergovernmentalism: Member States Refuse to Cooperate

This ambition of the European Parliament is in sharp contrast with the current position of the Member States, as reflected in a discussion paper of 28 October 2020 from the then German Presidency on a new way forward on European migration and asylum policy. It reads under point 20:

Legal migration is an integral part of a well-balanced, managed and orderly migration strategy. The European Union must do better in the international competition for highly qualified third-country nationals. To achieve this, a more attractive Blue Card is needed, designed with the flexibility necessary for national labour markets. The Council will also join in the discussion on developing legal migration into the EU. The Council supports better implementation and stronger coherence within the existing legal framework, but only a few Member States see a need for new areas of EU legislation on legal migration. It could still be conceivable to discuss jointly agreed provisions in EU law for certain other categories of third-country nationals, such as mobile workers or service providers; the vast majority of Member States however is not in favour of an expansion of the acquis to include low- and medium-skilled third-country nationals.<sup>72</sup>

The position of most Member States was also well expressed by the recent Dutch response to an EU public consultation on the future of EU legal migration:

Legal migration is a shared competence between the European Union and its Member States. There are major differences between the Member States with respect to their economic performances, their labour markets and their demographic situations. For this reason, the Netherlands believes that EU legislation needs to allow Member States to maintain and develop a legal migration policy that is tailor-made for the national labour market needs. This is a key principle for the Netherlands. Therefore, the current division of competences between the EU and its Member States should

<sup>67</sup> European Parliament (n 65) para 7.

<sup>68</sup> European Parliament (n 65) para. 8.

<sup>69</sup> The report notes that more recently adopted Directives on students and researchers and ICTs grant more far-reaching mobility rights to third country nationals than labour migration Directives adopted earlier, such as the original Blue Card Directive. See European Parliament (n 65) para 14.

<sup>70</sup> European Parliament (n 65) para 25.

<sup>71</sup> European Parliament (n 65) para 26. In addition, the opinion of the Committee on Employment and Social Affairs of 15 January 2021 on this report emphasises, in point 13, the need to create a more favourable environment for the integration and protection of migrant workers' rights, irrespective of their skills or wage level, immigration status or nationality, ultimately leading to a European Migration Code; See European Parliament, 'Opinion of the Committee on Employment and Social Affairs for the Committee on Civil Liberties, Justice and Home Affairs on new avenues for legal labour migration' (2020/2010(INI)).

<sup>72</sup> Council of the European Union, 'A New Way Forward on European Migration and Asylum Policy – Presidency Discussion Paper' ST 12272 2020 INIT – NOTE para 20. <[www.statewatch.org/media/1449/eu-council-presidency-paper-way-forward-asylum-migration-12272-20.pdf](http://www.statewatch.org/media/1449/eu-council-presidency-paper-way-forward-asylum-migration-12272-20.pdf)> accessed 20 June 2021.

remain unchanged. At the same time, legal migration policies in one Member State can have consequences for other Member States. For this reason, the Netherlands believes that *coordination* between Member States should be further improved and would welcome EU initiatives in this regard. However, any new EU initiatives in the field of legal migration should be without prejudice to national laws relating to the entry, residence and access to employment of third-country workers.<sup>73</sup>

In a statement of 10 December 2020 it was rather unexpectedly announced that the German Council Presidency, the European Parliament and the Commission had made progress towards a political agreement on the key elements of the reform of the EU Blue Card, and were confident it could be reached in the coming months. This was the result of some secretly held trilogues.<sup>74</sup> The three institutions consider the reform of the EU Blue Card to be a key element to relaunch the EU legal migration policy, which is essential to the comprehensive EU approach on migration. The aim is to better attract highly qualified and skilled third-country workers needed by the EU economy through a revised EU-wide instrument. In September 2021 the European Parliament plenary approved the revised law.<sup>75</sup> The formal adoption of the final text by the Council has taken place in October 2021.<sup>76</sup> One of the key elements of this new proposed reform is that the Member States will, after all, be allowed to maintain their parallel national schemes.<sup>77</sup> It can be questioned though whether this will sufficiently improve the attractiveness of the Blue Card, given the past experience.

## 10. Has the EU Come at a Crossroads Regarding the Regulation of Labour Migration?

With the publication of the New Pact and the initiative of the European Parliament, it looks as though the European Union has come to a crossroads regarding which direction should be taken by the regulation of EU labour migration. The EU has to decide whether it will withdraw from its involvement in this policy area and leave it up to the Member States or whether it will, after all, try to build some sort of common policy. On the 20th anniversary of the Tampere Conclusions in 2019, Groenendijk reflected that

“Considering the large differences in labour market needs and Member States’ opposition to the 2016 proposal for a new Blue Card directive, a common policy on admission of highly skilled workers or on the temporary admission of workers without high skills appears to be unrealistic. As long as employers, workers and national authorities prefer the flexibility of the national admission schemes and consider the EU directives in this field as too complex, Member States will prefer to issue residence permits under their national schemes.”<sup>78</sup>

However, he leaves the door ajar and notes that the Commission’s Fitness Check on EU legislation on legal migration observed that the current Directives do not cover two main categories: (a) admission for temporary migration (more than the maximum nine months per year covered by the Seasonal Workers Directive), and (b) admission of third country national entrepreneurs for establishment, self-employment

<sup>73</sup> Response from the Netherlands regarding the public consultation on the future of EU legal migration, Appendix to TK 22112, no 3003, Tweede Kamer der Staten-Generaal (Dutch Senate), 17 December 2020, <<https://zoek.officielebekendmakingen.nl/kst-22112-3003>> accessed 20 June 2021.

<sup>74</sup> Monika Mühlböck and Berthold Rittberger, ‘The Council, the European Parliament, and the Paradox of Inter-institutional Cooperation’ (2015) 19(1) European Integration Online Papers 1.

<sup>75</sup> European Parliament, ‘European Parliament Legislative Resolution of 15 September 2021 on the 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 Highly Skilled Employment (COM(2016)0378 – C8-0213/2016 – 2016/0176(COD)).

<sup>76</sup> Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L 382/1.

<sup>77</sup> Note from the Presidency, 26 November 2020, 13407/20 (Interinstitutional File) 2016/0176 (COD). Other key topics for the new negotiation rounds include: facilitated switching to the Blue Card for migrants with a national permit; limited but mandatory extension of the scope to highly skilled (instead of highly qualified) professionals in information and communication technology; departing from raising the maximum period of temporary unemployment to six months, but bringing it back to three consecutive months in the first two years of residence as a blue card holder; **conditional labour market tests only** in case of ‘disturbances’; introducing **a notification procedure for long-term mobility** and simplification of procedures in the case of intra-EU mobility, including ‘trusting’ the first Member State’s diploma recognition. See Tesseltje de Lange, ‘A New Narrative for EU Migration Policy: Sustainability and the Blue Card Recast’ (2021) 26(3-4) European Law Journal 274.

<sup>78</sup> Kees Groenendijk, ‘Legal Migration’ as cited in Philippe De Bruycker and others (eds.) *From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration* (EPC 2019) 69.

or investment (who are currently excluded from the Single Permit Directive). According to Groenendijk, the increased flexibility in the labour market (e.g., as jobs previously performed by employees are increasingly performed by real or quasi-self-employed persons) could be a reason to consider the latter issue. Farcy also questions a more common EU labour migration policy.<sup>79</sup> He argues that, taking the principle of subsidiarity seriously, the need for the intervention of the European Union rather than national governments, or even sub-national authorities, is not self-evident.<sup>80</sup> Since the primary rationale for a labour immigration policy is to serve labour market needs, Member States are arguably better placed to design admission systems that are responsive to such needs. Labour market needs are indeed primarily country specific. He gives the example that Estonia is willing to attract investors in line with its digital economy policy, while Spain primarily needs workers in the tourism and agriculture sectors. The added value of common criteria on admission is unclear, except for highly skilled migrants due to the global competition to attract those workers.<sup>81</sup> Having common standards for the admission of highly skilled workers and facilitated intra-EU mobility could help increase the attractiveness of the EU as a whole. For other categories of workers however, arguments in favour of common standards on admission are less convincing, at least as long as there is no single European labour market for third country nationals.<sup>82</sup> According to De Bruycker, a rational analysis, taking into consideration the principle of subsidiarity, would lead to the conclusion that labour migration would have to remain *mainly* a competence of Member States.<sup>83</sup>

Other scholars emphasize, by contrast however, the necessity of the introduction of a binding European immigration code streamlining and harmonising the substantive conditions for admission<sup>84</sup> This binding immigration code would increase EU 'attractiveness', as the EU would treat migrant workers with human dignity, in line with international human rights and labour standards, and not only on the basis of economic arguments and outputs. A binding immigration code is also likely to increase intra-EU mobility among all categories of workers, who are willing to adapt to labour market situations.<sup>85</sup> From this perspective the current differential treatment of third-country nationals undermines the EU's ability to attract workers, to tackle EU labour market shortages in specific sectors or occupations, to address demographic changes (an ageing population), and to boost innovation and growth.<sup>86</sup> Research shows that there are still a number of gaps and barriers in the EU immigration policy, notably concerning the lack of incorporation and implementation of international and EU human rights and labour standards. Research thus suggests that the EU should become a more active promoter of international and regional standards on labour and fundamental human rights, through developing concerted partnerships with regional and international actors – particularly the International Labour Office (ILO) – so as to encourage Member State ratifications, and the joining of forces in ensuring effective compliance with their commonly shared standards.<sup>87</sup>

## 11. Conclusion

It is now more than 20 years since the formulated ambitions of the Tampere conclusions to develop a common migration policy, but in the area of labour migration there is still a lot of work to be done. The legislative instruments established so far only regulate in a fragmented way the admission and stay of a selected category of third country national workers in the EU. The Member States have been very reluctant

<sup>79</sup> Jean Baptiste Farcy, 'Labour Immigration Policy in the European Union: How to Overcome the Tension between Further Europeanisation and the Protection of National Interests?' (2020) 20(2) *European Journal of Migration and Law* 198.

<sup>80</sup> Before the adoption of the Seasonal Workers Directive, national parliaments from Austria, the Czech Republic, Denmark, France, the Netherlands, Poland and the UK expressed concerns about the violation of the principle of subsidiarity, mainly on grounds of interference with different national labour market needs and policies. Jörg Monar, 'Justice and Home Affairs' (2011) 50(2) *Journal of Common Market Studies* 152.

<sup>81</sup> Mikkel Barslund and Matthias Busse, 'Labour Migration to Europe: What Role for EU Regulation?' in Sergio Carrera and others (eds.), *Pathways towards Legal Migration into the EU: Reappraising Concepts, Trajectories and Policies* (CEPS 2017) 75.

<sup>82</sup> Elspeth Guild, 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration' in Mark Freedland and Cathryn Costello (eds.), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014) 98–118.

<sup>83</sup> Philippe De Bruycker, 'The New Pact on Migration and Asylum: What it is not and what it could have been', (EU migrationlaw blog, 15 December 2020) <<https://eumigrationlawblog.eu/the-new-pact-on-migration-and-asylum-what-it-is-not-and-what-it-could-have-been/>> accessed 20 June 2021.

<sup>84</sup> Marion Schmidt-Drüner, 'New avenues for legal labour migration; Selected and commented bibliography of research since 2015' (Policy Department for Citizens' Rights and Constitutional Affairs European Parliament. March 2020) <[https://www.europarl.europa.eu/thinktank/en/document/IPOL\\_IDA\(2020\)649576](https://www.europarl.europa.eu/thinktank/en/document/IPOL_IDA(2020)649576)> accessed 23 December 2021.

<sup>85</sup> Wouter van Ballegooij and E Thirion, 'The Cost of Non-Europe in the Area of Legal Migration, European Parliament's Study, 13 May 2019.

<sup>86</sup> Schmidt-Drüner (n84).

<sup>87</sup> *ibid.*

all these years to open up their labour markets to third country nationals under common EU schemes. The Commission has tried for years to promote a more common policy but seems to be settling for a minimal approach at the moment, not creating new initiatives. The only EU institutional player which really wants to enhance the involvement of the EU at this moment in this area is the European Parliament. Given the demographic trends and the foreseeable shortages in the national labour markets, a common European policy seems to be inevitable. Better enforcement and implementation of the existing instruments that constitute the EU legal framework, complemented by addressing proper working conditions for migrants and protecting third country workers in the EU labour market, would be a first step. More harmonised rules facilitating intra-EU mobility for third country nationals would act as an incentive for employers, and could help Member States to fill gaps in their labour markets. Creating new legal pathways to enter the EU as labour migrants could be a next step. Increasing the number of legal migration channels could help to reduce irregular migration. The need to create a more favourable environment for the integration and protection of migrant workers' rights, irrespective of their skills or wage level, immigration status or nationality, could ultimately lead to a European Migration Code. Do we need a future crisis containing severe labour shortages to convince the Member States to more common cooperation?

### Competing Interests

The author has no competing interests to declare.

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