

Labour Immigration Policy in the European Union: How to Overcome the Tension between Further Europeanisation and the Protection of National Interests?

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Abstract

This article critically assesses EU harmonisation in the field of labour immigration. It argues that EU directives are limited both in scope and intensity which explains their relatively low effectiveness and added value. Given the current political and institutional context, the article claims that a truly common labour immigration policy is unrealistic. Labour immigration remains a predominantly national prerogative and EU rules have done little to overcome normative competition between EU Member States. Looking forward, the EU should adopt complementary measures to Member States' policies. The role of the EU in this sensitive policy area should be better defined and justified, in particular in relation to the principle of subsidiarity.

Keywords

labour immigration – harmonisation – subsidiarity – European politics – normative competition

1 Introduction

As the European Commission repeatedly emphasised over the last few years, creating legal avenues to Europe is an indispensable part of a balanced and

comprehensive migration policy.¹ More should be done for those in need of international protection, through resettlement opportunities, as well as for labour immigrants taking up work in Europe.² According to the European executive, a well-managed labour immigration policy would not only help reducing incentives to use irregular routes, but also enable the European Union (EU) to attract talents and skills contributing to the economic prosperity of the Union.³ However, the development of an EU labour immigration policy has been slow and difficult since the entry into force of the Treaty of Amsterdam which conferred a competence to the EU in the field of immigration.

The aim of this article is to critically assess the EU policy on labour immigration and provide explanations as to why it remains underdeveloped and poorly effective.⁴ In the first part of the article, the four EU directives related directly to labour immigration are discussed. Looking at the substance of these instruments, I argue that their added value is currently limited. EU directives only achieve a minimal level of harmonisation, thus leaving a significant amount of discretion to Member States. As a result, the European policy is hardly common and the national paradigm of immigration remains mostly unchallenged.

The second part of the article examines the challenges EU institutions are facing in designing new avenues for labour immigration. As will be discussed, structural obstacles undermine the emergence of a truly European labour

- 1 European Commission (2018). *Enhancing legal pathways to Europe: an indispensable part of a balanced and comprehensive migration policy*, COM(2018) 635 final, 12 September 2018, p. 1; European Commission (2016). *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM(2016) 197 final, 6 April 2016, p. 14; European Commission (2015). *A European Agenda on Migration*, COM(2015) 240 final, 13 May 2015, p. 14.
- 2 Gatta, F.L. (2018). Legal avenues to access international protection in the European Union: past actions and future perspectives. *European Journal of Human Rights* (3), pp. 163–201; Savino, M. (2019). Refashioning Resettlement: from Border Externalization to Legal Pathways for Asylum, in: S. Carrera, L. den Hertog, M. Panizzon and D. Kostakopoulou (Eds.), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*. Leiden: Brill, pp. 81–104.
- 3 COM(2018) 635 final, *op. cit.*, p. 2. On the issue whether legal avenues reduce irregular migration, see: Barslund, M., Di Salvo, M. and Ludolph, L. (2019). *Can regular replace irregular migration across the Mediterranean?*, Brussels: Centre for European Policy Studies, accessible online.
- 4 This statement can be substantiated by statistical data on the issuance of residence permits based on EU directives. For instance, according to Eurostat data, 32,678 blue cards for highly skilled workers were delivered across the EU in 2018. Yet, one Member State alone (Germany) delivered more than 80% of them (26,995). Overall, the figures are relatively low and disaggregated figures show that the directive is not popular in the majority of European countries. See also, Chaloff, J. (2016). *The Impact of EU Directives on the labour migration framework in EU countries*. OECD Social, Employment and Migration Working Papers, No. 180, Paris: OECD Publishing.

immigration policy. Since the admission of labour migrants is mostly contingent on labour market needs, Member States' interests remain prevalent and they have been reluctant to forgo part of their prerogatives. Moreover, the absence of a shared vision on immigration has led to interinstitutional disagreements over the nature and the objectives of the European labour immigration policy. As shown by the attempted reform of the blue card directive, EU institutions have conflicting views and policy preferences over the matter. Although highly skilled workers do not constitute a contentious group of labour immigrants, inter-institutional negotiations are currently stalled.

Therefore, if at all, change is taking place at national level. Most significantly, Germany, a country that has traditionally been reluctant to harmonisation efforts, has recently adopted a new approach towards labour immigration.⁵ In the past few years, a number of Member States have also set up admission schemes for start-up founders and employees, without any harmonisation proposal yet.⁶ In addition to inter-institutional disagreements at EU level, the stand-alone behaviour from the Member States further undermines integration efforts.

Given the current political context which is not conducive to a truly common labour immigration policy, this article argues that the EU should not, and need not, seek to substitute national labour immigration policies with EU policies. Rather, the latter should be complementary to the former and any EU intervention should be carefully justified in relation to the principle of subsidiarity.

2 The EU *Acquis* on Labour Immigration: the National Paradigm of Labour Immigration Unchallenged?

The EU became competent over immigration and asylum with the entry into force of the Treaty of Amsterdam in May 1999. However, it was not before 2009 that the first directive in the field of labour immigration was adopted, namely

5 Thym, D. (2019). The German Migration Package: A New Deal on Labour Migration?. *EU Migration Law Blog*.

6 De Lange, T. (2018). Welcoming talent? A comparative study of immigrant entrepreneurs' entry policies in France, Germany and the Netherlands. *Comparative Migration Studies* 6, p. 27. See also: European Migration Network (2018). *Attracting and retaining foreign startup founders*. EMN Study 2019, Brussels: EMN. Accessible at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/inform_startups_2018_final_revised.pdf.

the blue card directive.⁷ Previously, the European Commission has failed to convince the Member States to adopt a single and comprehensive text on labour immigration.⁸ As a consequence, the matter is now fragmented into different instruments, allowing for greater flexibility and selectivity. The blue card directive of 2009, targeting highly qualified workers, was followed by two directives on seasonal workers and intra-corporate transferees in 2014.⁹ In the meantime, the single permit directive was adopted in 2011.¹⁰ Contrary to other directives, it does not regulate the conditions of admission of labour immigrants, rather it focuses on procedural aspects and the establishment of a common set of rights.

In fact, the fragmentation of the EU labour immigration policy into different categories of workers, based on their occupation and their skills, follows to a large extent national legislation (section 2.1). Moreover, the vertical approach followed means that EU law only regulates the admission of a few categories of labour immigrants who are deemed to be in need across the EU. Yet, even for those categories, EU rules leave a wide margin of discretion to Member States. Given the high number of facultative provisions, or 'may' clauses, legal harmonisation is minimal and it does not overcome national disparities (section 2.2). As a consequence, despite the adoption of EU rules, the State-centred paradigm of immigration remains: the admission of labour immigrants is limited to the *national* territory and to the *national* labour market. Due to inherent weaknesses of internal rules, it should not come as a surprise

7 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* L155/17, 18 June 2009. The Researchers directive of 2005 is not included here since it is not considered in policy documents as labour immigration. Therefore, this article will not address that instrument.

8 European Commission (2001). Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, *OJ* C332E/248, 27 November 2001.

9 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* L94/375, 28 March 2014; Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, *OJ* L157/1, 27 May 2014.

10 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* L343/1, 23 December 2011.

that the external dimension of the EU labour immigration policy is particularly weak (section 2.3).

2.1 *EU Directives on Labour Immigration: a Reproduction of National Policies*

Following the entry into force of the Treaty of Amsterdam and the conclusions of the European Council of Tampere which detailed the objectives of the newly established EU competence in the field of immigration, the European Commission published two proposals related to labour immigration. The first one was a legislative proposal for a directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employment.¹¹ The second aimed to extend the open method of coordination, previously applied in the context of the European employment strategy, to the related area of labour immigration.¹² The particularity of the first proposal was to follow a horizontal approach which covered in a single text the admission of all economic migrants, irrespective of their skills. The rationale behind the admission of labour migrants was to meet identified labour market needs and the proposal did not encroach on the competence of Member States to set quotas.¹³ Objective and transparent criteria were also established in order to reduce the margin of discretion of national administration. At the time, the proposal was ambitious considering that Member States had only recently, if at all, created new legal pathways for labour immigrants in their domestic legislation.

Indeed, in parallel to EU's legislative efforts, most Member States were adopting new legislation on labour immigration, thus recognising that the 'zero' immigration policy of the last two decades was no longer appropriate. Domestic policies remained restrictive but facilitated access was usually given to specific categories of labour immigrants, such as highly skilled workers. This is the case most notably in Belgium as of 1999, a green card for information technology professionals was launched in Germany in the year 2000, the United Kingdom introduced a programme dedicated to highly skilled migrants in 2002, followed two years later by the Netherlands.¹⁴ As these schemes reveal,

11 European Commission (2001). Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, *OJ C332E/248*, 27 November 2001.

12 European Commission (2001). *Communication on an open method of coordination for the community immigration policy*, COM(2001) 387 final, 11 July 2001.

13 Article 26 of the proposal. A similar provision is now found at Article 79, §5 of the Treaty on the Functioning of the European Union (TFEU).

14 Apap, J. (2002). *Shaping Europe's Migration Policy New Regimes for the Employment of Third Country Nationals: A Comparison of Strategies in Germany, Sweden, the Netherlands*

national policy preference was to differentiate among migrant workers based on their skills. As a consequence, the Commission's proposal of 2001 which followed a different structure was not likely to be adopted and the majority of Member States was not ready to agree on a comprehensive European labour immigration policy. In fact, the proposal was not even discussed in the Council and it was eventually withdrawn in 2005.

The 2001 proposal was also premature for the European Commission did not justify its action properly, in particular in relation to the principle of subsidiarity. The Commission used the divergence of national policies as an argument for legal harmonisation which 'can only be achieved at Community level'.¹⁵ This argument is tautological and it does not explain what role the EU should play in this sensitive policy field. In January 2005, after a few years of inaction, the Commission published a green paper entitled 'an EU approach to managing economic migration' and launched a wide-scale public consultation.¹⁶ The objective was to answer 'some basic questions', including the degree and the scope of harmonisation to aim at.¹⁷ This implicitly indicates that those questions had not been asked previously and no prior assessment was actually conducted before the publication of the 2001 proposal. In the early 2000s, reflection on the rationale, objectives and scope of a European labour immigration policy was accordingly insufficient.¹⁸

Given the reluctance of most Member States to adopt a horizontal approach, the European Commission had no choice but to propose a partitioned policy program which targets defined categories of workers for which there is a perceived need across the Union: highly skilled workers, seasonal workers,

and the UK. *European Journal of Migration and Law* 4(3), pp. 309–328; European Parliament (2008). *Comparative Study of the Laws in the 27 EU Member States for Legal Immigration including an Assessment of the Conditions and formalities imposed by each Member State for Newcomers*, Brussels: European Parliament, available online.

15 COM(2001) 386 final, *op. cit.*, p. 5.

16 European Commission (2005). *Green Paper on an EU approach to managing economic migration*, COM(2004) 811 final, 11 January 2005. For more details on the reasons behind the initial policy failure and the relaunch of labour immigration in 2005, see: Menz, G. (2015). Framing the matter differently: the political dynamics of European Union labour migration policymaking. *Cambridge Review of International Affairs* 28(4), pp. 554–570; Roos, Ch. (2013). How to Overcome Deadlock in EU Immigration Politics. *International Migration* 51(6), pp. 67–79.

17 European Commission (2004). *Study on the links between legal and illegal migration*, COM(2004) 412 final, p. 16.

18 One could ask, not without reason, whether the admission of economic migrants should actually be regulated at EU level at all. See, Ryan, B. (2007). The European Union and Labour Migration: Regulating Admission or Treatment?, in: A. Baldaccini, E. Guild and H. Toner (Eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*. Oxford: Hart, pp. 489–515.

intra-corporate transferees (ICTs) and remunerated trainees.¹⁹ Actually, the intention was to strike a balance between the interests of all Member States: while some are more inclined to attract highly skilled workers, others need lower-skilled migrants, in particular seasonal workers.²⁰ As explained above, a significant number of Member States have concurrently adopted facilitated admission criteria in order to attract highly skilled workers. Seasonal workers were also needed to fill labour market shortages and do the jobs that domestic workers would not do. In order to regulate the admission and stay of seasonal workers, most Member States relied on domestic programs as well as on bilateral agreements, for instance between Spain and Morocco or Poland and Ukraine. Regarding ICTs, a directive was in part justified to implement bilateral and multilateral trade agreements to which the EU and the Member States are bound, in particular the General Agreement on Trade in Services.²¹ Such agreements usually contain immigration-related provisions which aim to facilitate the mobility of service providers.²²

The resulting labour immigration policy is not only fragmented but also selective since different conditions of admission and stay apply to each category of workers. As Guild argued, the principle pursued seems to be that economically strong workers should be privileged compared to other labour immigrants who are not less needed but economically weaker.²³ One of the objectives of the single permit directive was to create a common set of rights for all migrant workers. However, due to the number of migrant workers excluded from its personal scope, including seasonal workers and intra-corporate transferees, the directive fails to challenge the fragmented approach to labour immigration.²⁴

19 The latter category has been dropped but is now part of Directive 2016/801 of the European Parliament and of the Council of 11 May 2016 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* L32/21, 21 May 2016.

20 European Commission (2005). *Policy Plan on Legal Migration*, COM(2005) 669 final, p. 6.

21 Directive 2014/66/UE, recital 13.

22 Lavenex, S. and Jurje, F. (2015). The Migration-Trade Nexus: Migration Provisions in Trade Agreements, in: L.S. Talani and S. McMahon (Eds.), *Handbook of the International Political Economy of Migration*. Cheltenham: Edward Elgar, pp. 259–281.

23 Guild, E. (2010). Equivocal claims? Ambivalent controls? Labour migration regimes in the European Union, in: E. Guild and S. Mantu (Eds.), *Constructing and Imagining Labour Migration: Perspectives of Control from Five Continents*. Farnham: Ashgate, p. 216.

24 Directive 2011/98/UE, art. 3, §2; Beduschi, A. (2015). An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive. *European Journal of Migration and Law* 17(2–3), p. 217.

As a result of the vertical approach followed, the personal scope of the EU labour immigration policy is limited. EU directives only regulate the entry and stay of a few categories of labour immigrants and Member States retain their discretion for others. More importantly, the categories of labour immigrants covered by EU law actually reproduce national categories. Obviously, legal harmonisation does not operate in a vacuum. Yet, to a large extent, EU rules are a reiteration of policy choices made earlier at national level. The consequences are twofold.

Firstly, the scope of the European policy reflects rather than challenge Member States' priorities and preferences.²⁵ In other words, under the vertical approach to labour immigration, national standards are 'locked-in' at EU level.²⁶ Since the core of the EU labour immigration policy is settled, policy change is now more difficult, even after the evolution of the institutional framework following the entry into force of the Lisbon treaty.²⁷

Secondly, rather than being complementary to national policies, the EU policy targets similar workers. This is particularly problematic for highly skilled workers who represent, both quantitatively and qualitatively, the main category of workers the EU wants to attract and retain. Since Member States are allowed to keep parallel national schemes—despite the principle of pre-emption—the risk is to have a competition between the European blue card and national schemes.²⁸ During the negotiations over the reform of the blue card directive, the proposal to abandon concurrent national schemes was unsurprisingly met with opposition from the vast majority of Member States which are reluctant to lose their comparative advantage by giving up their own national schemes in favour of an EU-wide scheme.²⁹ The resulting inter-institutional dispute

25 Geddes, A. (2015). Differential institutionalisation and its effects, in: F. Trauner and A. Ripoll Servent (Eds.), *Policy Change in the Area of Freedom, Security and Justice: How EU Institutions Matter*. Abingdon: Routledge, p. 78.

26 Roos 2013, *op. cit.*, p. 75. EU decision-making rules made sure Member States' preferences were respected for, up until the Lisbon Treaty, they decided alone and under the unanimity rule.

27 Trauner, F. and Ripoll Servent, A. (2016). The *Communitarization* of the Area of Freedom, Security and Justice: Why Institutional Change does not Translate into Policy Change. *Journal of Common Market Studies*, p. 4.

28 Under the Treaty of Amsterdam, Member States were allowed to maintain or introduce national provisions despite the adoption of EU measures related to labour immigration. However, according to article 2, §2, TFUE, Member States are allowed to exercise their competence *only to the extent that the Union has not exercised its own competence*.

29 Council of the European Union (2017). *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*, 18 January 2017, 5336/17, p. 30; Cerna, L. (2014). The EU Blue Card: preferences, policies and negotiations between member states. *Migration*

is the expression of both a vertical competition for normative action and limited trust in the European Commission. Although both sides have valid arguments, the Commission arguably misses the point. For highly skilled workers to prefer the blue card, conditions of admission and stay should be more attractive. As such, suppressing national schemes will not help to attract more highly skilled workers to Europe.

Normative competition is not only vertical but also horizontal (among Member States) for EU directives only provide for minimal harmonisation.³⁰ Due to the flexible content of EU directives, national divergences remain.

2.2 *A Limited Degree of Harmonisation: Flexible EU Norms*

Despite the adoption of a vertical approach, the level of harmonisation remains low. Although one could have expected a higher degree of harmonisation following reduction to the personal scope of EU directives, text of proposals made by the European Commission have undergone changes, at times significant, during inter-institutional negotiations which lasted up to almost four years for the seasonal workers and the ICTs directives. The result is secondary legislation with often long and technical provisions that leave a large margin of manoeuvre to the Member States. Due to references to national law and optional provisions, principles and objectives stated in EU directives are subjugated to national transposition measures. As a result, the autonomy of EU law, meaning its ability to command solutions to all Member States bound by the directives, is relative since it is subject to national policy choices. Quite obviously, the more EU directives leave room to Member States, the less common solutions are. A short analysis of some important provisions in each directive will illustrate this point.

As previously noted, the blue card directive aims to attract and retain a higher number of highly skilled workers in Europe. Although Member States largely agree on the need to better compete with other destination countries such

Studies 2(1), p. 80. Member States with an open and successful scheme for attracting highly skilled workers were actually opposed to the Blue Card proposal for they did not see the added value of a common policy.

30 Although the term 'regulatory competition' was primarily coined in reference to economic integration, competition among legal norms also explains EU Member States' reluctance to cooperate in immigration matters. Esty, D. and Damien, G. (2001). *Regulatory Competition and Economic Integration: Comparative Perspectives*. Oxford: Oxford University Press; Barbou des Places, S. (2002). *Evolution of Asylum Legislation in the EU: Insights from Regulatory Competition Theory*. European University Institute Working Paper RSC n°2002/66, Firenze: EUI.

as Canada or Australia, the very definition of the term ‘highly skilled worker’, thus delimiting the personal scope of the directive, was not easily agreed on. A comparative analysis shows that three main criteria are used by destination countries worldwide: tertiary education, professional experience or salary.³¹ Interestingly, as each of these criteria were used by at least one Member State, it was agreed to combine them all in the blue card directive in a somewhat surprising fashion.³² Article 2(g) of the directive which defines the notion of ‘higher professional qualifications’ refers to higher educational qualifications of at least three years and, ‘by way of derogation when provided for by national law’, professional experience of at least five years. The higher education criterion is thus compulsory while professional experience is optional. As for the salary criteria, it is partly optional. According to Article 5, §3, the salary threshold must be of at least 1.5 times the gross annual salary in the Member State concerned. The directive only sets a minimum threshold, leaving Member States free to set a higher requirement which can hamper the effectiveness of the directive. As Steve Peers rightly noted, a maximum salary threshold should have been preferred.³³ Moreover, Member States are *allowed to* impose a labour market test at the initial admission phase, but also in case of renewal and intra-EU mobility.³⁴ After two years as a blue card holder, third country nationals *may* be granted equal access to the labour market along with nationals, yet only for highly qualified employment.³⁵ Professional as well as geographical mobility are thus dependent on the Member States’ transposition measures since EU law does not oblige them, but only allows them, to act in a given manner. Knowing that blue card holders need to apply for another blue card in case of intra-EU mobility, and thus meet initial admission criteria, the blue card is not as blue as it seems.³⁶

31 Boucher, A. (2019). How ‘skill’ definition affects the diversity of skilled immigration policies. *Journal of Ethnic and Migration Studies*, pp. 1–18.

32 Cholewinski, R. (2013). International Perspective on Highly Skilled Migration in Light of the Blue Card Directive and its Transposition in EU Member States, in: C. Grütters and T. Strik (Eds.), *Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*. Oisterwijk: Wolf Legal Publishers, p. 31.

33 Peers, S. (2009). Legislative Update: EC Immigration and Asylum Law: Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directives. *European Journal of Migration and Law* 11(4), p. 407.

34 Art. 8, §2, and 18, §4, a).

35 Art. 12, §1.

36 Art. 18, §2. The only facilitation *allowed* is to lower the salary threshold in case of intra-EU mobility (art. 4, §2, a)).

The single permit directive has two main goals: to establish a single application procedure for issuing a single permit combining the residence and the work permit in a single administrative act, and to lay down a common set of rights for all migrant workers, irrespective of their entry channel. Concerning the single application procedure, the directive does not prevent Member States from running two parallel examination procedures, one for work-related and another for residence-related issues, as long as there is a 'one-stop-shop' for applicants.³⁷ As a result, the procedure need not be a single one and the single permit procedure may actually be more burdensome for national administrations causing delays for employers and workers alike.³⁸ As for the common set of rights, it is not common to all migrant workers. On the one hand, more than 10 categories of workers are excluded from the personal scope of the directive, most notably seasonal workers and intra-corporate transferees. On the other hand, paragraph 2 of Article 12 on the right to equal treatment allows for restrictions to no less than half the substantive rights laid out in the first paragraph. As a result of prolonged negotiations, the scope of the right to equal treatment has been significantly reduced.³⁹ Once again, given the extent of Member States' margin of manoeuvre, European policy objectives are hampered by national transposition measures.

Similar examples can be found under the seasonal workers directive. Regarding the personal scope of the directive, a seasonal worker is defined as someone carrying out 'an activity dependent on the passing of the seasons'.⁴⁰ However, it is up to Member States to determine the sectors of activity which are within the scope of this definition. The directive simply mentions agriculture, horticulture and tourism as examples, yet in the preamble which is non-binding. Therefore, the personal scope of the directive varies from one Member State to another, according to the relative importance of a given sector of activity for the *national* economy or labour shortages on the *national* labour market. Another example is Article 16 on facilitation for re-entry, also known as 'circular migration' which the European Commission sought to promote. Paragraph 1 states that Member States are under the obligation to facilitate re-entry of seasonal workers who have previously been

37 Preamble, recital 12.

38 De Lange, T. (2015). The Single Permit Directive: a limited scope, a simple procedure and limited good administration requirements, in: P. Minderhoud and T. Strik (Eds.), *The Single Permit Directive: Central Themes and Problem Issues*. Oisterwijk: Wolf Legal Publishers, p. 9.

39 Beduschi 2015, *op. cit.*, p. 220; Groenendijk, K. (2015). Equal treatment of workers from third countries: the added value of the Single Permit Directive. *ERA Forum* 16, p. 555.

40 Art. 3, a).

admitted in the past five years and who then complied with all requirements. Paragraph 2 lists four measures that can achieve that aim. The final text of that provision is however entirely optional for Member States may adopt another measure that is purely domestic. One should also note that the circular mechanism foreseen only applies in relation to the Member State where the seasonal worker had previously been admitted to, and not to all the Member States bound by the directive.

Although the ICT directive is related to international trade commitments which guided EU legal harmonisation, it also contains a number of flexible provisions. The most illustrative are Articles 21 and 22 on intra-EU mobility which include no less than 9 and 7 paragraphs, respectively. Those articles make a distinction between short and long-term mobility, that is whether stay is over 90 days in any 180-day period per Member State. Short-term mobility may be allowed on the basis of the permit granted by the first Member State or, alternatively, the second Member State may impose a notification procedure. Under that procedure, a number of documents may be required and the second Member State may object to the mobility within 20 days on one of the grounds enumerated under article 21, §6. Regarding long-term mobility, Member States have a third choice. In that case, an application must be introduced in the second Member State. The documents to be provided for can vary from one Member State to another and the possibility to work before a decision has been taken is conditional.⁴¹ Although the ICT directive introduces the principle of mutual recognition of residence permits for the purpose of intra-EU mobility, it remains optional and few Member States have actually taken that path.⁴²

Given the high number of optional provisions in EU directives on labour immigration, the level of harmonisation achieved is low. The margin of manoeuvre of Member States is protected by EU rules whose flexibility allows for a differentiated application. Through optional clauses, Member States' requests have been incorporated into the directives and, instead of overcoming national disparities, EU rules arguably add up national preferences into a single text. Ultimately, the extent of legal harmonisation is dependent on national transposition measures and whether Member States use optional provisions to derogate from common principles and rules. Although the inclusion

41 Directive 2014/66/EU, Art. 22, §2, d).

42 Lutz, F. (2018). Transposition of the ICT Directive 2014/66/UE: Perspective of the Commission, in: P. Minderhoud and T. de Lange (Eds.), *The Intra Corporate Transferee Directive: Central Themes, Problem Issues and Implementation in Selected Member States*. Oisterwijk: Wolf Legal Publishers, p. 27.

of optional clauses arguably eased political negotiations, their frequency is striking, even in EU directives adopted under the codecision procedure. Therefore, the unanimity rule in the Council—which remained applicable to labour immigration until the entry into force of the Lisbon Treaty—does not in and of itself explain the low level of harmonisation, which is most evident when one looks at the external dimension of EU policy on labour immigration.

2.3 *The External Dimension of EU Policy on Labour Immigration: a Reflection of the Internal Dimension's Limitations*

On various occasions, EU institutions have called for a holistic approach to immigration, stressing the need to reinforce cooperation with countries of origin and transit.⁴³ For immigration to be managed effectively and properly, internal policies should be complemented with external actions and cooperation with third countries. Acting jointly, Member States increase their bargaining power and create economies of scale. Although legal migration, including for work purposes, is one of the four strategic objectives of the Global Approach to Migration and Mobility (GAMM),⁴⁴ it has been subordinated to other policy objectives which are of higher political priority, especially the fight against irregular immigration.

Under the framework of the GAMM, an array of instruments, bilateral and regional, have been developed.⁴⁵ The intention here is not to examine these cooperation frameworks in detail, which is beyond the scope of this article. Rather, the purpose is to stress that international cooperation on immigration is marked by a high level of informality as well as flexibility. The main instrument designed to improve opportunities for legal migration, including economic migration, are Mobility Partnerships which are conceived

43 European Commission (2011). *The Global Approach to Migration and Mobility*, COM(2011) 743, 18 November 2011; Council Conclusions on the Global Approach to Migration and Mobility, 3 May 2012, doc. n° 9417/12; European Parliament (2014) *Resolution of 17 December 2014 on the situation in the Mediterranean and the need for a holistic EU approach to migration*, P8_TA(2014)0105. The idea is not new. The Tampere conclusions of 1999 already called for partnerships with countries of origin and a greater coherence of internal and external policies of the Union.

44 The other pillars focus on the reduction and the prevention of irregular migration, the promotion of international protection (including through the external dimension of asylum policy), and the maximisation of the development impact of migration.

45 Garcia Andrade, P., Martin, I. and Mananashvili, S. (2015). *EU Cooperation with Third Countries in the Field of Migration*. Study for the LIBE Committee, Brussels: European Parliament.

as comprehensive and long-term bilateral frameworks.⁴⁶ In exchange for third countries' commitment to cooperate on preventing irregular immigration, the EU and its Member States make pledges on legal migration. Mobility partnerships usually include a commitment to open negotiations on visa facilitation and liberalisation, which could boost mobility and create opportunities for labour immigrants. However, in practice, they have not led to significant pathways for migrant workers. Mobility partnerships are largely unequal and labour immigration opportunities are conceived as bargaining chips in negotiations with third countries.⁴⁷ Similarly, in the new Partnership Framework under the European Agenda on Migration, legal pathways are designed as leverage tools.⁴⁸ The European Commission does not explain how it intends to facilitate legal migration and the only reference is to the everlasting reform of the blue card directive targeting highly skilled workers. With regards to visa facilitation, the EU remains cautious and the recent reform of the Visa Code actually introduces a mechanism of negative conditionality. Henceforth, visa restrictions may be imposed on nationals of third countries who do not cooperate with the EU on border control and the readmission of irregular migrants.⁴⁹ So far, legal pathways for labour immigrants appear to be mainly an afterthought of third countries cooperation on border control and irregular migration.

The near absence of effective avenues for labour immigration in the EU's external policy can be tied to two main reasons. The first one is the *lack of political willingness*. Mobility partnerships as most other forms of cooperation

46 European Commission (2007). *On circular migration and mobility partnerships between the European Union and third countries*, COM(2007) 248 final, 16 May 2007.

47 Weinar, A. (2017). Legal migration in the EU's external policy: An objective or a bargaining chip?, in: S. Carrera et al. (Eds.), *Pathways towards Legal Migration into the EU: Reappraising Concepts, Trajectories and Policies*. Brussels: Centre for European Policy Studies, p. 87.

48 European Commission (2016). *Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration*, COM(2016) 385 final, 7 June 2016, p. 8. See, Reslow, N. (2019). Transformation or Continuity? EU External Migration Policy in the Aftermath of the Migration Crisis, in: S. Carrera, J. Santos Vara and T. Strik (Eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*. Cheltenham: Edgar Elgar, p. 106.

49 Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), OJ L188/25, 12 July 2019. This development is part of a shift from a 'more for more' towards a 'less for less' approach to cooperation with third countries. Strik, T. (2017). The Global Approach to Migration and Mobility, *Groningen Journal of International Law* 5(2), p. 323.

structures are of political nature and as such they do not create legally-binding commitments on the part of the EU and its Member States. Their priorities remain centred around border controls and the fight against irregular migration, mainly through operational cooperation.⁵⁰ More importantly, the second reason relates to the *(in)ability of the EU to act* externally and to make commitments in relation to labour immigration. Unlike visa or border policy, the EU does not enjoy an exclusive competence in the field of labour immigration but shares its competence with its Member States.⁵¹ Yet, given the low level of harmonisation of internal rules on labour immigration, including various optional provisions as explained above, the EU does not have much to offer to its partners. As Paula Garcia Andrade argued, 'it does not seem coherent to conclude agreement with third countries at EU level which are aimed at facilitating the legal admission of their nationals in the absence of truly common rules of admission'.⁵² Moreover, Member States enjoy an exclusive competence to set volumes of admission of third-country nationals into their labour markets.⁵³ This restriction is important for it limits the EU's capacity to act as a self-standing actor. The intricate distribution of EU external competences thus explains why the participation of both the Union and willing Member States are needed.

Despite the rhetoric of EU institutions and their desire to expand their sphere of influence, the EU cannot make pledges without the support of its Member States, knowing that they could ultimately refuse to admit labour immigrants. Although the European Commission can use funding opportunities as an incentive for Member States' involvement, their participation

50 Den Hertog, L. (2016). Funding the EU-Morocco 'Mobility Partnership': Implementation and Competences. *European Journal of Migration and Law* 18(3), p. 289. Looking at where the money goes to, the author shows that the priority is indeed on irregular immigration as well as protection and integration in Morocco. See also, Reslow, N. (2019). Making and Implementing Multi-Actor EU External Migration Policy: the Mobility Partnerships, in: S. Carrera, L. den Hertog, M. Panizzon and D. Kostakopoulou (Eds.), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*. Leiden: Brill, p. 287.

51 Garcia Andrade, P. (2018). EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally. *Common Market Law Review* 55, p. 172; Martenczuk, M. (2014). Migration Policy and EU External Relations, in: L. Azoulai and K. de Vries (Eds.), *EU Migration Law: Legal Complexities and Political Rationales*. Oxford: Oxford University Press, p. 84.

52 Garcia Andrade, P. (2013). The Legal Feasibility of the EU's External Action on Legal Migration: The Internal and the External Intertwined, *European Journal of Migration and Law* 15(3), p. 273.

53 Treaty on the Functioning of the European Union, art. 79, §5.

remains voluntary.⁵⁴ The risk is then that cooperation frameworks serve the national interests of willing Member States and that labour immigration pledges are distinct from one Member State to another, leading to policy differentiation.⁵⁵

3 What Can the EU Do? Obstacles Undermining the Emergence of a Common Labour Immigration Policy

In the first part of this article, it was argued that the level of legal harmonisation in the field of labour immigration is limited both in scope and intensity. As a result, it should not come as a surprise that EU directives lack effectiveness and a clear added value. For instance, although the blue card directive was meant to be the flagship of the EU policy on labour immigration, it has been described by the Commission as providing little coherence and harmonisation, thus failing to create a single EU-wide scheme.⁵⁶

In the second part of the article, the aim is to question whether, in the current institutional and political context, the EU could do more towards a truly common labour immigration policy. For different reasons discussed below, the answer is most likely negative. For a common policy to be adopted, common objectives need to be agreed on. However, when it comes to labour immigration, policy documents do not substantially explain what those objectives are. This has led to inter-institutional disputes over agenda-setting and political leadership. Moreover, the evolution of the institutional framework following the entry into force of the Lisbon Treaty has not brought significant changes in terms of policy output. Today, most policy developments are stalled and, if at all, change occurs at national level.

⁵⁴ Den Hertog 2016, *op. cit.*, p. 297.

⁵⁵ Reslow, N. (2012). Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships. *European Integration* 34(3), pp. 223–239. The author shows that Member States decide to participate in mobility partnerships when they enhance their national policies. Mobility partnerships also function as an ‘umbrella’ for individual projects which are mostly bilateral (between a third country and a Member State). To some extent, policy differentiation is a normal and inevitable feature of EU migration governance. See, Den Hertog, L. (2019). In Defence of Policy Incoherence—Illustrations from the EU External Migration Policy, in: S. Carrera, L. den Hertog, M. Panizzon and D. Kostakopoulou (Eds.), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*. Leiden: Brill, pp. 364–382.

⁵⁶ COM(2018) 635 final, *op. cit.*, p. 5. See also: Cerna, L. (2013). Understanding the diversity of EU migration policy in practice: the implementation of the Blue Card initiative. *Policy Studies* 34(2), pp. 180–200.

3.1 *The Absence of Common Objectives*

The competence of European institutions in the field of immigration, including for the purpose of work, was set out for the first time in the Treaty of Amsterdam. The overarching goal was to establish an area of freedom, security and justice which, as argued, does not form a coherent and clearly defined political project.⁵⁷ For the rest, treaty provisions did not spell out specific objectives and it was decided to convene a meeting of the European Council in Tampere in 1999 to add meat to the bones of the newly acquired competence in the field of home affairs. However, the conclusions remained vague in relation to labour immigration: the European Council acknowledged the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union and taking into account the reception capacity of each Member State as well as their historical and cultural links with countries of origin. Here, the conclusions did not call for a truly common policy, but only for the approximation of domestic laws which should respect national interests and bilateral relations with third countries. Although not explicitly mentioned, there was an underlying understanding that labour migration is desirable to respond to *national* labour market shortages.

In The Hague, five years after Tampere, the conclusions of the European Council did not provide more guidance. It was only stated that legal migration will play an important role in enhancing the knowledge-based economy in Europe. However, this statement explains neither what a European policy on labour immigration should look like, nor what its objectives are. The European Council also emphasized that the determination of volumes of admission of labour immigrants is an exclusive competence of the Member States, which later found its way into primary law under Article 79(5) of the TFEU. Subsequently, the European Commission acknowledged in its 'Policy Plan on Legal Migration' that sufficient flexibility should be provided for in order to meet the different needs of national labour markets. In a similar vein, the Stockholm programme of 2009 stated that the 'Union should encourage the creation of flexible admission systems that are responsive to the priorities, needs, numbers and volumes determined by each Member State'.⁵⁸ Interestingly, the conclusions

57 Walker, N. (2004). In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey, in: N. Walker (Ed.), *Europe's Area of Freedom, Security, and Justice*. Oxford: Oxford University Press, p. 5.

58 European Council (2010). The Stockholm Programme—An Open and Secure Europe Serving and Protecting Citizens, *OJ C115/1*, 4 May 2010, pt. 6.1.3.

mention a 'concerted' rather than a 'common' policy in line with *national* labour market needs.

Taking the principle of subsidiarity seriously, the intervention of the European Union rather than national governments, or sub-national authorities even, is not self-evident.⁵⁹ 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. For instance, while Estonia is willing to attract investors in line with its digital economy policy, Spain primarily needs workers in the tourism and agriculture sectors. Therefore, such is the argument, the added value of common criteria on admission is unclear, except for highly skilled migrants due to the global competition to attract those workers.⁶⁰ 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 though, 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.⁶¹

Since 1999, the tension between the Europeanisation of labour immigration policy and the preservation of national interests is recurrent and until this day it has been a major policy dynamic underlying the development of a European labour immigration policy.⁶² Despite the Commission's rhetoric and endorsement of labour immigration, for Member States the admission of migrant workers remains an issue to be decided at national level. Divergent views between the majority of the Member States and the European Commission increase

59 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. Monar, J. (2011). Justice and Home Affairs. *Journal of Common Market Studies* 49, p. 152.

60 Barslund, M. and Busse, M. (2017). Labour Migration to Europe: What Role for EU Regulation?, in: S. Carrera et al. (Eds.), *Pathways towards Legal Migration into the EU: Reappraising Concepts, Trajectories and Policies*. Brussels: Centre for European Policy Studies, p. 75.

61 Guild, E. (2014). The EU's Internal Market and the Fragmentary Nature of EU Labour Migration, in: M. Freedland and C. Costello (Eds.), *Migrants at Work: Immigration and Vulnerability in Labour Law*. Oxford: Oxford University Press, pp. 98–118; See also, Ryan 2007, *op. cit.*, pp. 489–515.

62 Toner, H. (2014). The Lisbon Treaty and the Future of European Immigration and Asylum Law, in: L. Azoulai and K. de Vries (Eds.), *EU Migration Law: Legal Complexities and Political Rationales*. Oxford: Oxford University Press, p. 28.

the risk of inter-institutional conflicts and competition for political leadership over agenda-setting.⁶³ In fact, despite institutional changes brought about by the Treaty of Lisbon, the politics of immigration at EU level remains entangled between national interests and efforts towards greater supranationalisation.

3.2 *Institutional Imbalance and Relative Supranationalisation*

While Member States have for the most part refused to integrate their labour immigration system, it was not unreasonable to hope for further integration efforts after the entry into force of the Lisbon Treaty. Henceforth the European Parliament is on par with the Council where qualified majority voting has replaced unanimity. Moreover, the Court of Justice of the European Union is now competent over labour migration as well. Accordingly, the relative power of Member States collectively, but also individually, is decreased in favour of truly supranational institutions. Change to the institutional framework arguably facilitated the adoption of the single permit directive as well as the seasonal workers and ICT directives, although it did not prevent long negotiations. Nonetheless, the argument in this section is that beyond the wording of the Treaties, inter-institutional and decision-making dynamics continue to favour Member States to the detriment of a truly supranational approach to labour immigration.⁶⁴ The political crisis that followed the ‘reception crisis’ of 2015–2016 further supports the argument.⁶⁵

Despite the desire of Jean-Claude Juncker to have a political Commission, political decisions are primarily taken at the level of Member States. While the European Council defines general political directions and priorities, the right of initiative belongs exclusively to the European Commission.⁶⁶ Proposals from the Commission are meant to overcome national interests in favour of

63 Such a conflict occurred following the publication by the European Commission of the action plan implementing the Stockholm programme. For more details: Carrera, S. (2012). *The Impact of the Treaty of Lisbon over EU Policies on Migration, Asylum and Borders: The Struggles over the Ownership of the Stockholm Programme*, in: E. Guild and P. Minderhoud (Eds.), *The First Decade of EU Migration and Asylum Law*. Leiden: Martinus Nijhoff, pp. 229–254.

64 In political science, some authors have labelled the current institutional dynamics ‘the new intergovernmentalism’ which provides some useful insights for our discussion. See, Wolff, S. (2015). *Integrating in Justice and Home Affairs: A Case of New Intergovernmentalism Par Excellence?*, in: Ch. Bickerton, D. Hodson and U. Puetter (Eds.), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*. Oxford: Oxford University Press, pp. 129–145.

65 Guiraudon, V. (2018). The 2015 refugee crisis was not a turning point: explaining policy inertia in EU border control. *European Political Science* 17(1), pp. 151–160.

66 Treaty on the European Union, art. 15(1) and 17(1).

the general interest of the Union, and to promote cooperation rather than competition between Member States. In practice, however, the European Council does not hesitate to give instructions to the European Commission, thus circumventing its right of initiative, and the role of the Commission has become more technocratic.⁶⁷ Strangely enough, Article 68 of the TFEU reaffirms that the European Council defines the strategic guidelines for legislative and operational planning in relation to the area of freedom security and justice. Such a provision, which is found in relation to no other substantive area of EU law, stresses the primacy of the Member States over agenda-setting.⁶⁸ Yet, labour immigration does not rank amongst the political priorities of most Member States. Accordingly, the most dynamic areas of immigration policy remain security and control-oriented rather than those enabling immigration to Europe.⁶⁹ Faced with a legitimacy crisis, the European Commission is struggling to overcome national disparities and to convince enough Member States of the added value of a common labour immigration policy.⁷⁰

Within the Council, qualified majority voting has replaced unanimity. Actual vote does not however take place automatically as deliberation practices, a legacy from inter-governmental decision-making, have increasingly become an end in themselves. To be sure, negotiations are easier than before since each Member State has lost its veto power, yet Member States' representatives continue to search for a consensus and negotiations take place in the shadow of a vote.

Deliberation also guides inter-institutional discussions. Deviating from the formal ordinary legislative procedure, the Council and the European Parliament, in particular the LIBE committee, are eager to use the practice of early agreements, known as 'trilogues'. A compromise is usually negotiated informally between a limited number of representatives from the European

67 Wolff 2015, *op. cit.*, p. 131; Bocquillon, P. and Dobbels, M. (2014). An elephant on the 13th floor of the Berlaymont? European Council and Commission relations in legislative agenda setting. *Journal of European Public Policy* 21(1), pp. 20–38; Maricut, A. (2016). With and without supranationalisation: the post-Lisbon rules of the European Council and the Council in justice and home affairs governance. *Journal of European Integration*, Vol. 38(5), pp. 541–555.

68 Labayle, M. (2013). The New Commission's Role in Freedom, Security and Justice in the Post-Lisbon Context: New Era or Missed Opportunity?, in: M. Chang and J. Monar (Eds.), *The European Commission in the Post-Lisbon Era of Crises: Between Political Leadership and Policy Management*. Brussels: Peter Lang, p. 231.

69 Hampshire, J. (2016). European migration governance since the Lisbon treaty: introduction to the special issue. *Journal of Ethnic and Migration Studies* 42(4), p. 549.

70 Carrera, S. (2018). *An Appraisal of the Commission of Crisis: Has the Juncker Commission Delivered a New Start for JHA Policies?*. Brussels: Centre for European Policy Studies, p. 74.

Parliament, the Council and the European Commission. What matters here is that according to some scholars the Council's influence is greater through early agreements.⁷¹ Representatives from the EP are aware that in case of second reading, the majority of members (not only of voters) of the hemicycle is required. This procedural rule creates an incentive for them to accept the amendments of the Council.⁷² Under co-decision, the equality between both institutions is thus relative. It is even more so since the Council enjoys a first-mover advantage.⁷³ Prior to the application of the co-decision procedure, the Council had settled the 'policy core' of the labour immigration policy, based on a category-by-category approach which led to the fragmentation of the legal framework, and it is now difficult for the EP to push for a policy overhaul. Member States in the European Council and the Council remain in the driver's seat which explains policy continuity despite institutional change.

The failed attempt to reform the blue card directive shows that the switch from the intergovernmental to the supranational method has not led to a significant policy change.⁷⁴ A more effective blue card was amongst the priorities of the Juncker Commission and highly skilled workers is the least sensitive category of labour migrants. Yet, the co-legislators could not find a common ground and negotiations are now stalled. Member States are not ready to forgo their national schemes in favour of a European scheme that would offset their competitive advantage.⁷⁵ For most Member States, there is no pressing need to have a truly common policy on highly skilled migrants and their position is closer to the *status quo*. As a consequence, the relative power of the Council is higher than that of the EP and the European Commission.

As a last note on EU institutions, the role of the Court of Justice of the European Union (CJEU) against this background should be assessed. So far, the number of rulings on labour migration is very low, especially in comparison to family reunification and the long-term residence status.⁷⁶ The limited effectiveness of EU directives on labour immigration partly explains this difference.

71 Costa, O., Dehousse, R. and Trakalova, A. (2011). *Codecision and 'Early Agreements': An Improvement or a Subversion of the Legislative Procedure?*. Paris: Notre Europe, pp. 28–29.

72 Treaty on the Functioning of the European Union, art. 294, §7; Hagemann, S. and Hoyland, B. (2010). Bicameral Politics in the European Union. *Journal of Common Market Studies* 48(4), p. 815.

73 Trauner and Ripoll Servent 2016, *op. cit.*, p. 7. See also: Geddes 2015, *op. cit.*, pp. 73–90.

74 De Bruycker, Ph. (2019). The EU Policy on Labour Migration: How Common It Is and Should It Be?, in: C. Urbano de Sousa (Ed.), *The Relevance of Migration for the 2030 Agenda for Sustainable Development*. Lisbon: Universidade Autónoma de Lisboa, p. 170.

75 Roos 2013, *op. cit.*, p. 74.

76 Thym, D. (2019). A Bird's Eye View on ECJ Judgments on Immigration, Asylum and Border Control Cases. *European Journal of Migration and Law* 21(2), p. 172.

Yet before domestic courts, labour immigration is also less contentious since the admission of migrant workers is more a matter of administrative discretion, for instance when a labour market test is imposed, than individual rights. Accordingly, the CJEU is less likely to play a major role in relation to labour immigration than it does for asylum or family reunification, except for cases related to the rights of labour migrants already residing in a Member State.⁷⁷

To sum up, significant policy change is not to be expected and the development of a truly European labour immigration policy is currently unrealistic. Then, the question is what *should* the EU do.

4 What Should the EU Do? Alternatives and Options for the Future

The central dilemma of a European labour immigration policy is that the interests and priorities of Member States vary considerably due to differences in their economic and demographic situation, their geographical location, language, (colonial) history and past immigration trends. The rhetoric of the European Commission, calling for a new policy on legal migration in the 2015 Agenda on Migration, does not overcome the heterogeneity of interests. So long as labour immigration is primarily meant to meet labour market and demographic needs, the development of a European policy will fail due to the absence of common objectives. As argued in this article, the rationale and scope of the EU labour immigration policy appear redundant and accordingly it lacks added value compared to national policies. Taking the principle of subsidiarity seriously, it is difficult to demonstrate that Member States are unable to meet the stated objectives of filling labour market needs.

Although Member States may be reluctant to adopt a common labour immigration policy or may be unconvinced of the need to do so, they do not ignore the relevance of labour immigration. However, policy change is not confined to supranational harmonisation and Member States may prefer to act on their own rather than cooperate at the European level for a variety of reasons. For instance, Germany who traditionally opposed integration efforts in relation to labour immigration adopted a new Skilled Worker Immigration Act in 2019 which brings about significant changes to the German labour immigration policy.⁷⁸ A few months later, the French government announced its intention to reform its labour immigration policy using quotas for defined sectors

77 Case C-449/16 *Martinez Silva*, 21 June 2017, ECLI:EU:C:2017:485.

78 Thym, D. (2019). The German Migration Package: A New Deal on Labour Migration?. *EU Migration Law Blog*.

of activities. A number of Member States have also adopted legislation on entrepreneurs from third countries in order to attract start-ups.⁷⁹ Beyond the political desire to keep control over admission criteria for sovereignty reasons, domestic legislation is more flexible than EU law, and thus more responsive to perceived needs on the labour market. Efficiency thus supports the preference for domestic policy change, especially when executive discretion allows for swift decisions. Given the EU legislative apparatus and the usual period of transposition of EU directives, a trial and error process is not possible at the European level. To the contrary, as the German case illustrates, Member States are in a position to easily design and test new pathways for labour immigration. In the future, national policy reforms may possibly stir international debates about labour immigration through platforms of dialogue and mutual learning, and the need for EU harmonisation may be felt once domestic policy reforms have been evaluated.

In the meantime, the development of a common European labour immigration policy should not be seen as a necessity nor as an end in itself.⁸⁰ The EU need not seek to substitute national policy choices with EU policies. Instead, a new approach based on complementary objectives should be adopted. Alongside policy developments at national level focusing on the volumes and the profile of labour immigrants, complementary measures could include enhanced rights for labour migrants, such as labour standards but also greater professional and geographic mobility across the Union.⁸¹ Although the adoption of common criteria on admission should facilitate the cross-border mobility of labour immigrants, the absence of a genuine right to intra-EU mobility for labour immigrants is a significant weakness of EU harmonisation. Transitions between one immigration status to another, as found in Article 25 of Directive 2016/801 on students and researchers who may have up to nine months to look for a job after the completion of their studies or research, should also be facilitated. In line with that provision, a job seeker visa scheme could be set up to help third country nationals, possibly from partnering countries, find a job which remains a necessary condition to be admitted as a labour migrant under any EU directive. Criteria on labour market tests could also be

79 European Migration Network (2019). *Migratory pathways for start-ups and innovative entrepreneurs in the EU and Norway*. Brussels: EMN. Accessible online.

80 Contrary to a widespread belief, the single market does not require common a labour immigration policy. As long as internal free movement rights are only for EU citizens, there is no EU labour market for third country nationals and there is no logical requirement for common admission criteria for labour migrants.

81 Ryan 2007, *op. cit.*, spec. pp. 503–514.

adopted to reduce the discretion of national administration. Interestingly, in the 2001 proposal on labour immigration, the labour market test was deemed to be fulfilled if a job vacancy has been made public via the employment services of several Member States for a period of at least four weeks.⁸² Better use of the EURES portal as well as exchange of information between Member States should also be enhanced, possibly by the newly established European Labour Authority.⁸³ As those measures illustrate, there is room for EU actions outside the regulation of admission criteria.

In the 2015 Agenda on Migration, the European Commission stated that it will look into the possibility of developing an ‘expression of interest system’, which is already in use by destination countries like Canada and New Zealand.⁸⁴ Those countries, unlike European States, receive important number of applications, creating long waiting periods and administrative backlogs which ultimately hamper the attractiveness of their admission system. Through the creation of a job bank where local employers can meet potential labour immigrants, the expression of interest system is meant to attract those with a job offer in priority. In Europe, the intention is less to better manage labour immigration than to bolster recruitment.⁸⁵ As things currently stand, employers at searching for specific profiles of workers have to identify suitable candidates on their own which may turn out to be a lengthy and costly process, in particular for small and medium size enterprises. A matching system could thus be beneficial for prospective labour migrants and employers alike. Additionally, an expression of interest system could be used to depart from purely demand-driven admission systems currently in place in most European countries towards hybrid admission mechanisms that combine supply and demand-based criteria. In Europe, the paradigm underlying labour immigration policies is demand-driven and accordingly the admission of labour migrants is closely related to the socio-economic situation of each Member State. A more hybrid system would arguably help overcome overall migration

82 European Commission (2001). Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, *OJ C332E/248*, 27 November 2001, art. 6, §2.

83 Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, *OJ L186/21*, 11 July 2019.

84 COM(2015) 240 final, *op. cit.*, p. 18.

85 Desiderio, M. and Hooper, K. (2016). *The Canadian Expression of Interest System: A Model to Manage Skilled Migration to the European Union?*. Brussels: Migration Policy Institute Europe, p. 17.

challenges that the EU is facing and in relation to which the *acquis* is of limited relevance.⁸⁶

5 Conclusion

Assessing the added value of the EU *acquis* on legal migration, the ‘fitness check’ launched by the European Commission in 2016 acknowledged that harmonisation has been limited.⁸⁷ EU directives are limited both in scope and intensity: they regulate the admission and stay of a few categories of workers only and the flexibility of EU provisions protects rather than challenges the autonomy of national authorities. Although EU institutions have adopted rules on access to the labour market of Member States by third countries nationals, those rules lack a truly common and autonomous existence. Moreover, due to the limited degree of harmonisation achieved and resulting divergences in national transposition measures, EU directives on labour immigration have not prevented horizontal normative competition: Member States want to attract labour immigrants to their own labour market and intra-EU mobility is not facilitated. As a consequence, the national character of admission remains firmly grounded: labour immigrants are admitted on the *national* territory and to the *national* labour market.⁸⁸ In other words, the admission of labour immigrants is still conceived as a national prerogative and any federal move in this field appears hesitant and uncertain.⁸⁹

Despite institutional changes following the entry into force of the Lisbon Treaty, any progress towards a common labour immigration policy is conditioned to consensus amongst a majority of Member States. Although a fair share of Member States does not question the necessity of a labour immigration policy, they are not ready to act in common. National interests continue to be prevalent and a positive vision of immigration which includes labour immigration is yet to emerge at the European level in the current post-crisis

86 European Commission (2009). *Fitness Check on EU Legislation on Legal Migration*, SWD(2019) 1055 final, Part 1/2, 29 March 2019, p. 105.

87 *Ibid.*, p. 95.

88 Barbou des Places, S. (2018). L’empreinte des nationalismes sur le droit de l’immigration de l’Union européenne. *Revue trimestrielle de droit européen*, pp. 725–741. As argued by the author, EU legislation does not overcome the methodological nationalism of immigration law and policy.

89 Guild, E. (2014). Immigration Regulation as a Battleground: The European Union’s Anxiety over Federalism, in: S. Baglay and D. Nakache (Eds.), *Immigration Regulation in Federal States*. Dordrecht: Springer, pp. 223–244.

context.⁹⁰ Variations in domestic preferences for the direction of an EU immigration policy have increased over the last few years and the search for common objectives in relation to labour immigration remains unresolved. The formalistic, and at times dogmatic, desire of the European Commission to expand its scope of action, combined with Euroscepticism particularly in the field of immigration, prevents any rational assessment of policy objectives. In a context of increased politicisation of immigration, the added value of any EU policy put forward must be duly demonstrated and the reasons why the objectives to be achieved require common actions ought to be exposed. As argued in this article, there is room for the EU to design added-value actions, yet these should be complementary rather than a substitute to national policies.

90 In her Agenda for Europe, Ursula von der Leyen made only one quick reference to labour immigration which is invariably meant 'to bring in the people with the skills and talent we need'.