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Abstract:

This article offers an assessment of EU directives in the field of legal immigration in the light of the Union's own claims of economic rationale behind its immigration policy. While stopping short of economic analysis of law, the work pinpoints the areas of EU immigration law of relevance to economists in future immigration research in the European context, and to policy makers when enacting immigration laws. It is argued that, contrary to the political discourse, EU immigration law is inconsistent with the objectives of EU immigration policy and fails to take into account economic rationales for migration.

ESSAY

REGULATION THAT DEFIES GRAVITY: POLICY, ECONOMICS AND LAW OF LEGAL IMMIGRATION IN EUROPE

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1. Introduction

EU policy-makers and European governments increasingly favor immigration policy linked to the demand for labor. The proponents of this approach argue that Europe should welcome immigrants who bring with them skills required in our economies, while their opponents claim that this approach dehumanizes migrants ignoring their non-economic needs. This article analyzes the legal substance behind these claims and discusses whether the two seemingly opposing camps can at all be disconnected the way they are portrayed in European politics. To do this, the official objectives of common immigration policy (CIP) of the EU will be matched against the actual effect of the legislation adopted to achieve them, while introducing some basic notions from the economics of migration as benchmark for the policy-law comparison. This will take out the politics from immigration policy and offer a systematic look at how the law is used to achieve CIP goals. Does the substance of law correspond to its declared objectives?

Five caveats apply. First, the analysis is limited common immigration policy as opposed to immigration rooted in international human rights law (refugees and asylum seekers): the rationales and objectives valid for one group of immigrants are not easily transferable to the other, while the body of law applicable to the two types of migrants significantly differs. Second, the analysis is limited to EU Directives on legal as opposed to illegal migration: this is for the sake of space and because legal migration is the most controversial branch of immigration law politically, making the distinction between politics and policy not readily apparent; the match between the policy objectives and the law is less obvious in the Directives on legal immigration, many provisions of which remain optional and open-worded. Third, the analysis is limited to the EU law and policy as opposed to the national (implementing) measures. Fourth, while immigration policy is an inherently interdisciplinary field, the analysis presented here omits other factors that may influence immigration flows, such as the general economic situation, the presence of immigrant networks, cultural and historic ties, etc. In the discussion of the economics of migration, for each of the selected factors, the analysis will assume that the other factors remain equal. Fifth, EU policy objectives are taken at their face value, presuming their legitimacy and appropriateness, while questioning instead the feasibility of their accomplishment through the enacted laws. The terms “immigrant”, “migrant”, and “third-country national” are used interchangeably throughout to refer to persons not in the possession of nationality of any EU or EFTA state, who come to the EU as a primary migrant, as opposed to the second and third generations of third-country nationals and family members of the primary migrant or “sponsor”.

The paper proceeds in two parts. *Part I* unpacks the objectives of common immigration policy contained in EU policy documents and legal texts, and discusses how these objectives may be attained. *Part II* analyzes EU immigration law in light of EU policy objectives, using economics of immigration as a tool to evaluate the match between the policy and the law. Results are then summarized and discussed.

2. Objectives of Common Immigration Policy

2.1 Sources of Objectives and Their Relevance

The Amsterdam Treaty reform of 1999 introduced a power for the EU – then the European Community – to regulate immigration. This new power, however, was not accompanied by any objectives in the text of the Treaty itself, prompting commentators to describe the area of freedom, security and justice (AFSJ), which incorporates the CIP, as “singularly less specific”¹ than other Community policies. The only thing one could infer from the text of the Treaty itself was that EU immigration policy was somehow tied to the establishment of the internal market and the Schengen space.² Objectives of the CIP were *de facto* – and, with the Lisbon Treaty, are *de jure*³ – formulated by the European Council and are found, first, in the Council Conclusions, second, in the policy documents of the Commission, and, third, in the explanatory memoranda to legislative proposals and preambles to the Directives on legal immigration. This fluid system of objective-setting adds flexibility to EU immigration policy while simultaneously rendering it more vulnerable to momentary political concerns of national governments. It has been noted that without concrete objectives listed alongside the competence provisions in the Treaty, the prominence of objectives is diluted, encouraging pragmatic over visionary approach to EU immigration law;⁴ proposals on immigration law easily turn into a battle over national sovereignty where each

¹ E. Guild and H. Staples, ‘Labor Migration in the European Union’ in P. DeBruycker (ed) *The Emergence of a European Immigration Policy* (Bruylant 2003) 214.

² The name itself of the original Title IV EC supports this conclusion: “Visas, Asylum, Immigration and other Policies Related to Free Movement of Persons”. The new Title V TFEU, successor to Title IV EC, is called “Area of Freedom, Security and Justice”. Its first article, Article 67 TFEU, proclaims that the Union as a whole – as opposed to only the Schengen area in the previous Treaty version – shall constitute AFSJ; however, the second point of this article links EU immigration policy to the absence of internal border controls – and thus back to the Schengen space.

³ Art. 68 TFEU.

⁴ G. Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (2006) 197-262.

Member State seeks to export its model to the EU.⁵ EU and national immigration policies should take into account other Union policies in order not to jeopardize the latter.⁶ Consistency, however, is a small consolation for anyone looking for the purpose of Union's immigration law.

With the re-shuffling of the Union's purposes in the Lisbon Treaty and the increasing prominence of the AFSJ, the broad objectives of the CIP are now stated in Article 79 TFEU. This Treaty article restates the three main policy strands formulated over the preceding decade by the European Council. The Union's immigration policy should thus ensure "efficient management of migration flows", "fair treatment" of legally resident third-country nationals, and the prevention of illegal immigration.

2.2 Objective 1: State Management of Immigration

Two questions call for answer before proceeding to the substance of EU's "managed immigration policy".

The first is whether and to what extent a state can manage its immigration flow. Management of immigration flow by the state implies two basic functions: (1) capacity of the state to de-select immigrants from entry and residence in its territory and (2) capacity of the state to attract and retain immigrants. The capacity of Member States to restrict immigration is inherently incomplete, not least due to the existing legal framework in international law.⁷ On the other hand, the EU has enacted directives on illegal immigration and return,⁸ necessary for implementing

⁵ S. Boelaert-Suominen, 'Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals Who Are Long-Term Residents: Five Paces Forward and Possibly Three Paces Back' [2005] C.M.L.Rev. 42; Peers, 'Implementing Equality? The Directive on long-term resident third-country nationals' [2004] EL Rev. 29; Louise Halleskov, 'The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?' [2005] EJML 7.

⁶ Joined Cases 281, 283, 284, 285 and 287/85 *Germany and others v. Commission* [1987] ECR 03203. This principle has been adopted in the Lisbon Treaty: for instance, new Article 21(3) TEU on the external action states that "The Union shall ensure consistency between the different areas of its external action and between these and its other policies".

⁷ Most notably, Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, Rome (4.11.1950) as amended; European Convention on the Legal Status of Migrant Workers (1977); Geneva Convention relating to the status of refugees (1951); ILO C143 Migrant Workers (Supplementary Provisions) Convention (1975); C97 Migration for Employment Convention (Revised) (1949); Cases *Gaygusuz v Austria* (ECHR, 16 September 1996) and *Jabari v Turkey* (ECHR, 11 July 2000).

⁸ Regulation 562/2006 Schengen Borders Code, Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, Directive

the Schengen space and abolition of internal borders.⁹ The competence to restrict is therefore not only regulated but presents fewer open questions as regards the content of policy: foreign nationals may not enter the territory of the state unless specifically authorized either by the state itself, by international or Union law. And here comes in the policy component. If the policy is, as it is in Europe, to encourage immigration by some foreign nationals only, then we need to examine closely the capacity of Member States to attract these people. This capacity is much less restricted by supranational law and is determined instead by a number of factors, including but not limited to the admission policy, legal protection of the rights of migrants, and (economic) situation in the host state. The rest of this article will analyze how EU immigration law affects the capacity of Member States to attract and retain “wanted” immigrants.

The second question of “managed immigration policy” concerns the instruments that a state can use to manage immigration efficiently. Labor immigration quotas have been criticized for inability of the public administrator to identify the fluctuating needs of the business community¹⁰ and for the rigid nature of the system that cannot timely react to changes in the demand for workers.¹¹ While state-managed schemes will likely deplete the resources of any public administration, by changing its legislation a state can influence individual decisions of migrants and thus affect the volume and composition of immigration flow.¹² The skills of immigrants, in particular, “can be directly influenced by immigration policy”.¹³ Governments may provide “incentives for foreign skills to flow in or remain in the country, for instance by easing immigration and work permits restrictions, providing tax incentives, and promoting the country as an attractive working and living environment.”¹⁴ Points systems increase the share of

2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

⁹ In particular, abolition of internal borders does not present any problem of legal immigration because all third-country nationals are required to report their presence on arrival to another Member State, failing which they become illegal, Articles 11 and 21 Schengen Borders Code.

¹⁰ A. Constant and K.F. Zimmermann, ‘Immigrant Performance and Selective Immigration Policy: a European Perspective’ [2005] 195 *National Institute Economic Review* 105.

¹¹ G. Orcalli, ‘Constitutional choice and European immigration policy’ [2007] 18 *Constit Polit Econ* 9.

¹² M. Ruhs and P. Martin, ‘Numbers vs. Rights: Trade-Offs and Guest Worker Programs’ [2008] 42 *1 IMR* 253.

¹³ M. Ruhs, ‘Economic Research and Labour Immigration Policy’ [2008] 24 *3 Oxford Review of Economic Policy* 406.

¹⁴ S. Mahroum, ‘Europe and the Immigration of Highly Skilled Labour’ [2001] 39 *5 International Migration* 29.

skilled immigrants in the overall immigration flow;¹⁵ however, their success depends on the favorable disposition of other factors, such as employment opportunities in the destination country and the wage differential with the country of origin. The weakness of the points systems has been their inability to guarantee jobs, leading to significant brain waste. This has been the case in Canada¹⁶, the UK¹⁷, and New Zealand¹⁸, suggesting that employers should be closely involved in the admission of economic migrants.¹⁹ Yet, uncontrolled employer-driven systems may “discourage employers from raising wages and/or adopting alternative production technologies, thus exacerbating shortages and entrenching certain low-cost production systems in the long run.”²⁰ Thus, no single stakeholder, not even the state, is placed in the position to manage immigration in isolation from others. State management of immigration requires a system that is flexible enough to timely react to the changing circumstances and to accommodate participation by non-state actors.

2.3 Objective 2: Competing for the Highly-Skilled

Over the past half-a-century, Western Europe witnessed remarkable turnarounds in its immigration policies. Low-skilled labor immigration in the 1960s was followed by a closure to economic immigrants after the oil crisis of 1973, this principle reiterated by the Council as recently as 1994.²¹ However, only a few years

¹⁵ R. Iredale, ‘The Internationalization of Professionals and the Assessment of Skills: Australia, Canada, and the US’ [2002] 16 Georgetown Immigration L.J. 797; J. Walsh, ‘Navigating Globalization; Highly-Skilled Labor Migration and State Management: The Cases of Canada and Australia’ [2006] Paper presented at the annual meeting of the American Sociological Association, www.allacademic.com (25.02.2010); A. Shachar, ‘The Race for Talent: Highly-Skilled Migrants and Competitive Immigration Regimes’ 151-152 citing OECD, ‘International Mobility of the Highly Skilled’ 88 [2001] 29.

¹⁶ R. Iredale, ‘The Need to Import Skilled Personnel: Factors Favouring and Hindering its International Mobility’ [1999] 37 1 International Migration 98.

¹⁷ C. Dustmann, ‘Immigrants and the Labour Market’ [2008] 16 4 European Review 508.

¹⁸ M. Benson-Rea and S. Rawlinson, ‘Highly Skilled and Business Migrants: Information Processes and Settlement Outcomes’ [2003] 41 2 International Migration.

¹⁹ J. Doomernik, R. Koslowski, J. Laurence, R. Maxwell, I. Michalowski, D. Thränhardt, ‘No Shortcuts: Selective Migration and Integration’ [2009] Transatlantic Academy Report, www.transatlanticacademy.org.

²⁰ M. Ruhs, ‘Economic Research and Labour Immigration Policy’ [2008] 24 3 Oxford Review of Economic Policy 421.

²¹ Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment and Council Resolution of 30 November 1994 relating to the limitations on the admission of third-country nationals to the territory of the

later, the Lisbon Strategy goals necessitated the admission of economic migrants in order to secure the international competitiveness of Europe.²² The Hague European Council Conclusions explicitly mentioned establishment of admission procedures capable of responding promptly to the fluctuating demand for migrant workers. The objective of a more “selective” and better “managed” immigration policy is reiterated in the European Pact on Immigration and Asylum²³ and found support of many governments at the national level.²⁴ The Stockholm Program calls for a flexible admission system that is responsive to the priorities, needs, numbers and volumes determined by each Member State and that enables migrants to take full advantage of their skills and competence. Such immigration policy should benefit “all stakeholders”.²⁵

It would, however, be erroneous to assume that Europe re-opened its doors to economic immigrants. Proposal of the Commission on the admission of third-country nationals for employment met little enthusiasm in the Council and was subsequently withdrawn.²⁶ Member States found it difficult to agree on a common admission policy, as the demand for workers and skills vary from one Member State to the other²⁷ while “economic impact of immigration critically depends on the skills of residents and the characteristics of the host economy”.²⁸ Instead, the Union should “assist Member States in meeting the existing and future labour needs” by establishing EU “admission procedures capable of responding promptly to fluctuating demands for migrant labor in the labor market”²⁹ which would

Member States for the purpose of pursuing activities as self-employed persons, OJ C 27 [1996] 0003 0009.

²² The Hague Programme (13.12.2004) Council 16054 [2004] 10.

²³ European Pact on Immigration and Asylum (24.12.2008) Council 13189 [2008].

²⁴ For instance, for Finland see ‘Regeringens invandrapolitiska program’ (19.10.2006) Statsrådets principbeslut.

²⁵ Draft Council Conclusions on ‘Labour Migration and its Development Potential in the Age of Mobility’ 19 November 2009, Council document 15823 [2009] 2.

²⁶ Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities COM(2001) 386 final, withdrawn COM(2005) 462 final OJ C 64. For a discussion of Member State objections to the 2001 Proposal see B. Ryan, ‘The EU and Labor Migration: Regulating Admission or Treatment?’ in A. Baldaccini, E. Guild and H. Toner, *Whose Freedom, Security and Justice?* (Hart Publishing 2007) 500.

²⁷ European Pact on Immigration and Asylum (24.12.2008) Council 13189 [2008] 4-5.

²⁸ M. Ruhs, ‘Economic Research and Labour Immigration Policy’ [2008] 24 3 Oxford Review of Economic Policy 407.

²⁹ Hague Programme (13.12.2004) Council 16054 [2004] 10.

“improve labour market efficiency” and “prevent skill shortages”.³⁰ EU law, being a rather slow instrument that requires time to pass and amend, should therefore leave certain provisions open-ended in order to secure rapid adjustments on national level.

Recognition of diverging labor needs found expression in the “division of labor” between the national and European levels, whereby the admission of economic immigrants, at least on the face of it, remains within the powers of each Member State,³¹ while the admission of other immigrants and the rights of migrants once admitted are regulated increasingly in EU law. There seems to be a presumption that selection of third-country workers is separate and dissimilar from the regulation of their rights once admitted. This distinction between admission and rights has been criticized as misguided: “legal rules cannot be classified as concerning either selection or regulation because every rule concerns both.”³² Thus, although Member States preserve their powers not to admit economic migrants, their capacity to attract third-country workers is inevitably tied to the European level.

While Member States emphasize the divergence of their labor market needs, studies suggest that the OECD countries increasingly compete to attract international migrant workers with the same set of skills.³³ Convergence in the demand for skills triggers what has been termed a “global race for talent”³⁴ competition between destination countries to attract international migrants with high human capital attributes. While there is no common accord as to what amounts to “high” professional skills³⁵, it is more accurate to call these migrants

³⁰ Blue Card Directive; Council Conclusions (14.12.2007) Council 16616/1 [2007] 5.

³¹ Article 79(5) TEU – under this article, however, Member States are only guaranteed power to regulate admission of work seekers from outside the Union; secondary EU immigration law, e.g. Recital 8 Blue Card Directive and Article 14(3) LONG-TERM RESIDENCE Directive, recognizes national powers to restrict admission of all economic migrants. Stockholm Programme (02.12.2009) Council 17024 [2009] 63; European Pact on Immigration and Asylum (24.12.2008) Council 13189 [2008] 5.

³² A.C. Cox, ‘Immigration Law’s Organizing Principles’ [2008] 157 2 Univ. of Pennsylvania L. Rev.

³³ D. Guellec and M. Cervantes, ‘International Mobility of Highly Skilled Workers: From Statistical Analysis to Policy Formulation, in International Mobility of the Highly Skilled’ [2001] OECD; A. Wyckoff and M. Schaaper, ‘The Changing Dynamics of the Global Market for the Highly-Skilled’ [2005] OECD www.si.umich.edu/AdvancingKnowledge/drafts/Wyckoff-Version%20Feb%2028%20-%20Global_HRST_7-Jan_Draft.doc (25.02.2010).

³⁴ A. Shachar, ‘The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimens’ [2006] [2006] 18 NY Univ. L. Rev.

³⁵ The issue has been disputed both in Council and European Parliament during the adoption of Blue Card Directive, see Working Party on Migration and Expulsion (4.4.2008) 8249 [2008] 13;

“wanted” in order to reflect the mismatch between their supply and demand. The scarcity in the supply of “wanted” immigrants relative to the overall immigration flow³⁶ coupled with the shortage of workers in high-skill occupations in the OECD countries³⁷ create an excess demand, which builds up competitive pressure on the destination countries and changes the rationale behind immigration law.³⁸ It is not about restricting immigration of the highly-skilled, but about attracting this type of migrant.

Global competition for the highly skilled is vividly reflected in EU immigration policy. The Lisbon Strategy set a “new strategic goal” for the EU: “to become the most competitive and dynamic knowledge-based economy in the world”.³⁹ This marked an official entry of the EU into the competition for the best and the brightest. The Hague Program recognized the importance of legal immigration “in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy”.⁴⁰ The *European Pact on Immigration and Asylum* fine tuned this objective: it is necessary to “increase the attractiveness of the European Union for highly qualified workers”.⁴¹ The EU acknowledged that it must take into account “the fact that the main world regions are already competing to attract migrants to meet the needs of their economies.”⁴² Member States thus aspire to compete with the traditional immigration countries for migrant workers with high human capital attributes.⁴³ Competition with the United States as regards both attraction and retention of skilled workers⁴⁴ plays a prominent role in the formation of EU

summary of the meeting of the LIBE Committee of the European Parliament (5.5.2008) 9259 [2008] 4.

³⁶ T. Liebig, ‘Migration Theory from a Supply-Side Perspective’ [2003] 92 Discussion Paper, Research Institute for Labour Economics and Labour Law, www.faa.unisg.ch/publikationen/diskussionspapiere/dp92.PDF (25.02.2010)

³⁷ M. Doudeijns and J.-C. Dumont, ‘Immigration and Labor Shortages: Evaluation of Needs and Limits of the Selection Policies in the Recruitment of Foreign Labor’ [2003] OECD.

³⁸ M. Ruhs and P. Martin, ‘Numbers vs. Rights: Trade-Offs and Guest Worker Programs’ [2008] 42 1 IMR; A. Shachar, ‘The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimens’ [2006] [2006] 18 NY Univ. L. Rev.

³⁹ Presidency Conclusions of the Lisbon European Council, 23-24 March 2000.

⁴⁰ The Hague Programme (13.12.2004) Council 16054 [2004] 10.

⁴¹ European Pact on Immigration and Asylum (24.12.2008) Council 13189 [2008] 5.

⁴² Green Paper on an EU Approach to Managing Economic Migration [2005] COM(2004) 811 final 4.

⁴³ Policy Plan on Legal Migration [2005] COM(2005) 669 final.

⁴⁴ W. Geis, S. Uebelmesser, M. Werding, ‘Why go to France or Germany, if you could as well go to the UK or the US? Selective Features of Immigration to four major OECD Countries’ [2008] 2427

immigration policy.⁴⁵ The necessity to attract skilled third-country workers has been reflected in the proposals for EU immigration directives⁴⁶ and in the text of the directives themselves.⁴⁷

More subtle objectives, however, can be more revealing about the nature of the EU's stance in competition for the highly-skilled. One such objective is "to establish a level playing field within the EU".⁴⁸ Beyond elimination of competition between Union citizens and third-country workers resulting from unequal rights, the "level playing field" concerns *elimination of competition between Member States*⁴⁹, which might result from national immigration schemes favoring "wanted" workers.⁵⁰ An example of this reasoning is found in the Commission's proposal for the Blue Card Directive, which states that in a situation where each Member State has different national entry and residence conditions for highly-qualified workers, national systems are bound to be in competition, which weakens the attractiveness of the EU as a whole and distorts third-country workers' migration choices; this, according to the Commission, triggers the need for a common EU admission

CESIFO Working Paper. Skilled immigrants from third countries coming to the United States for work often transit through another European country, see A. Takenaka, 'Secondary Migration: Who Re-Migrates and Why These Migrants Matter, Migration Policy Institute' 26.04.2007, www.migrationinformation.org/Feature/print.cfm?ID=597. See also D. J. DeVoretz and J. Ma, 'Triangular Human Capital Flows between Sending, Entrepot and the Rest of the World Regions' [2002] www.iza.org (20.10.2008). IT specialists who entered Germany under its "green card" scheme stayed only long enough to cultivate a job offer in the United States, see D. G. Papademetriou and K. O'Neil, 'Efficient Practices for the Selection of Economic Migrants' [2004] Migration Research Group for the European Commission. Third-country students studying in the EU tend to stay more on a temporary basis than those studying in the United States, see 'International Mobility of the Highly Skilled' OECD Policy Brief, July 2002 <http://www.oecd.org/dataoecd/9/20/1950028.pdf> (20.10.2008).

⁴⁵ In connection with the Blue Card Proposal, Commissioner Frattini alleged that while the US attracts 55% of all skilled migrants worldwide, the EU attracts only one eleventh that number, see European Commission SPEECH/07/526, Lisbon, 13.09.2007.

⁴⁶ E.g. Explanatory Memorandum to the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, 23 October 2007, COM(2007) 637 final 2.

⁴⁷ Recital 6 Student Directive, Recital 17 Research Directive, Recital 7 BC Directive.

⁴⁸ Proposal for a Council Directive 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, COM(2007) 638 final.

⁴⁹ Commission *Communication on immigration, integration and employment*, COM (2003) 336 final 16.

⁵⁰ E.g. the UK points system, German green card, preferential treatment accorded to highly skilled immigrants in Sweden and the Netherlands. A. Shachar, 'The Race for Talent: Highly-Skilled Migrants and Competitive Immigration Regimes' 187; R. Cholewinski, 'The Legal Status of Migrations Admitted for Employment' [2004] 44; S. Mahroum, 'Europe and the Immigration of Highly Skilled Labour' [2001] 39 *5 International Migration*.

system.⁵¹ The UK House of Commons pointed out a tension between this objective, the objective of matching immigration flow to the labor market needs of individual Member States, and the objective of protecting rights of third-country nationals.⁵² While enhanced incentives by one destination may “undermine the effectiveness of the managed-migration policies” of another destination,⁵³ competing destinations are forced to match each other’s immigration rules, leading to convergence of their immigration policies in the long run,⁵⁴ making EU regulation unnecessary. When competition between Member States is artificially reduced, the total competitive pressure on individual Member States falls, leading to a longer period of adjustment of national immigration policy to global competitive realities.⁵⁵ The situation would be different only if elimination of competition between Member States would be accompanied by unification of Europe into a single destination for “wanted” international migrants.

2.4 Objective 3: Temporary Labor Immigration

Another subtle objective of EU immigration policy is its temporary nature. Temporary labor immigration is a pragmatic approach, which should increase the responsiveness of skill composition of immigration flow to ever shorter cycles of the demand for skills,⁵⁶ offer an alternative to illegal immigration,⁵⁷ reduce the

⁵¹ Proposal for Blue Card Directive, COM(2007) 637 final 7. The objective of elimination of competition between Member States is contrary, in its conception, to the logic of the internal market and could be challenged on economics grounds. As global race for talent leads to “non-cooperative action taken by fiercely competitive jurisdictions”, the countries seek to emulate and exceed their rivals’ immigration offer, leading to “a significant policy convergence among rival economies”. Thus, competition will actually result in convergence rather than differentiation, which would annihilate the need for EU-level regulation. See A. Shachar, ‘The Race for Talent: Highly-Skilled Migrants and Competitive Immigration Regimes’ [2006] 18 NY Univ. L. Rev. 156-157.

⁵² UK House of Commons, European Scrutiny Committee hearing 13.10.2010, record available at www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-iii/428iii12.htm (last accessed 07.09.2011).

⁵³ A. Shachar, ‘The Race for Talent: Highly-Skilled Migrants and Competitive Immigration Regimes’ [2006] 18 NY Univ. L. Rev. 166.

⁵⁴ N. T. Duncan, ‘International Labor Competition: Explaining the Timing of Immigration Policy Convergence’ Paper presented at the MPSA Annual National Conference (Apr 03, 2008) www.allacademic.com/meta/p268242_index.html (23.02.2010).

⁵⁵ This has been argued even in international setting, see C. Dauvergne, *Sovereignty*, ‘Migration and the Rule of Law in Global Times’ [2004] 67 4 Modern L.Rev. 603 604.

⁵⁶ C. Dustmann, ‘Immigrants and the Labour Market’ [2008] 16 4 European Review 505.

⁵⁷ Article 79 TFEU; on the link between temporary legal immigration and the fight against illegal immigration see e.g. Council Conclusions (21/22.06.2007) Council 11177/1 [2007] 4 17; ‘A Common Immigration Policy for Europe: Principles, actions and tools’ COM(2008) 359 final 7.

integration and other costs resulting from settlement migrants. The link is based on two premises. First, it is submitted that giving illegal immigrants an option to come and work in the EU legally, albeit on a temporary basis, would remove the necessity of illegal migration. Second, the possibility of multiple entries to the EU and of return home without losing the rights acquired from work and residence in Europe would reduce the incentives for staying in the EU, both legally and illegally. These two components are expressed in two corresponding instruments: (1) mobility partnerships between the interested Member States and third countries and (2) circular migration approach to EU immigration law.

Mobility partnership is an instrument of external policy, whereby interested Member States offer concessions to one or more third countries for short-term admission of third-country workers flanked by an agreement on readmission and a monitoring mechanism to ensure the temporary character of migration.⁵⁸ Return to the country of origin is the default, while the duration of residence at destination is typically less than a year. Competence of the EU in mobility partnerships is limited to coordination and facilitation, with no legislative powers. Due to the lack of EU regulatory powers in this field, mobility partnerships will not be discussed here further.

Circular migration can be characterized as an approach to EU immigration law, which avoids penalizing third-country nationals for absences due to return to their countries of origin in order to study and work there. Specific clauses to this effect are inserted into LTR and Blue Card Directives.⁵⁹ These clauses are often said to promote development of the countries of origin, which is a rather feeble claim considering that “countries of origin” include such developed nations as the USA and Japan. On the other hand, no provision is made to facilitate absences due to employment in developing countries other than the country of origin of the migrant. A more accurate vision appears to be that of the Commission, which sees circular migration as a legislative framework that aims to promote temporary immigration over permanent settlement.⁶⁰ It is thus an approach valid for all types of legal immigration.

⁵⁸ Mobility partnerships have been concluded with Moldova and Cap Verde. For an overview see R. Parkes, ‘EU Mobility Partnerships: A Model of Policy Coordination?’ [2009] 11 E. J. of Migration and L. 327-345.

⁵⁹ LONG-TERM RESIDENCE Directive contains an optional derogation for absence rules, to be implemented at the discretion of Member States; this derogation was conceived to accommodate mobility between the EU and country of origin, see Proposal for Long-Term Residence Directive COM(2001) 127 final 17. Article 16(5) Blue Card Directive specifically provides for such derogation.

⁶⁰ M. Cremona, ‘Circular Migration: a legal perspective’ 30 CARIM Analytic and Synthetic Notes (2008) 1, citing the Commission’s ‘Communication on circular migration and mobility partnerships’ COM(2007) 248 final.

2.5 Objective 4: Fair Treatment

Initially, the fair treatment objective was conceived from the benefit-conferring and individual-empowering angle to secure non-discrimination in economic, social and cultural life, access to employment and, as a collateral policy, measures against racism and xenophobia.⁶¹ While temporary character of immigration aims to avoid the costs associated with settlement, fair treatment of immigrants inevitably implies incurring these costs. This conflict finds expression in the integration – fair treatment nexus,⁶² whereby granting non-discrimination rights is implicitly tied to the “reasonable prospects of permanent residence”⁶³ and the condition of having integrated into the host state.⁶⁴ The nexus between integration and fair treatment leaves a logical gap for third-country workers, who *ab initio* are perceived as temporary migrants. Unwillingness to secure rights even for “wanted” immigrant workers is traceable in the adoption of Blue Card Directive.⁶⁵

The idea that economic migrants are somehow less in need of being integrated in the host Member State because they will one day leave is not new. This has been the case in Germany and other European countries in the second half of the past century and lead to disastrous consequences that spread across generations. The current situation in the EU is different: it is no longer the low-skilled who are supposed to circulate between Europe and third-countries, but highly-skilled workers who can, it is submitted, choose where to migrate. In the context of this selective policy goal, openness of the receiving labor market and fight against discrimination are the determining factors for success of selective immigration policy.⁶⁶ Xenophobia and discrimination create a “disadvantaged reception context” that dissuades potential migrants⁶⁷ and acts as a push factor forcing

⁶¹ Tampere European Council Presidency Conclusions (15 - 16.10.1999) SN 200/99.

⁶² European Pact on Immigration and Asylum, Recital 12 LONG-TERM RESIDENCE Directive.

⁶³ Wording borrowed from FR Directive but the idea is linked to the substance of LONG-TERM RESIDENCE Directive: see the section on substance of non-discrimination rights.

⁶⁴ Articles 5(2) and 15(3) Long-Term Residence Directive, Articles 4(1) last indent and 7(2) Family Reunification Directive.

⁶⁵ S. Peers, ‘Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directives’ [2009] 11 E. J. of Migration and L. 387-426.

⁶⁶ J. Doomernik, R. Koslowski, J. Laurence, R. Maxwell, I. Michalowski, D. Thränhardt, ‘No Shortcuts: Selective Migration and Integration’ [2009] Transatlantic Academy Report 14-15, www.transatlanticacademy.org.

⁶⁷ R. Iredale, ‘The Migration of Professionals: Theories and Typologies’ [2001] 39 5 International Migration 19.

immigrants to leave Europe.⁶⁸ Importance of the level of rights of migrants increases together with their skill:⁶⁹ discrimination, both in employment and other spheres, is progressively a larger deterrent for highly-skilled than for low-skilled workers.⁷⁰ As person's income rises above the minimum level, her relative status becomes more important, as the determinant of human happiness, than even the absolute value of income.⁷¹ This suggests that the degree of deterrence remains unaltered with the change in the value of the loss caused by discrimination; rather, the occurrence of discrimination as such plays a key role. Where rights of immigrants are restricted, an economic case can be made for selectivity in the restriction of rights, with lower restriction levels associated with "wanted" immigrants.⁷²

3. Substance of EU Immigration Law

The previous section has outlined the policy choice of EU immigration law: legal immigration should match the demand for workers in national labor markets with preference to the highly-skilled who should come to Europe temporarily and be guaranteed rights on a level that is considered "fair" both to them and to EU-national workers. This section focuses on how EU immigration law achieves these policy objectives. Four directives will be examined: Directive 2005/72/EC on the admission of researchers (Research Directive), Directive 2009/50/EC on the admission of highly qualified workers (Blue Card Directive), Directive 2003/86/EC on family reunification of third-country nationals (Family Reunification Directive) and Directive 2003/109/EC on the status of long-term residents (Long-Term Residence Directive). These directives regulate immigration to the EU for work, tackle specifically highly-skilled immigrants and produce cumulative effects that are bound to influence the attainment of the CIP objectives.

⁶⁸ MIREM data on return of Maghrebi immigrants from the EU and J.-P. Cassarino (ed.) 'Return Migrants to the Maghreb: Reintegration and Development Challenges' [2008] RSCAS/EUI <http://www.mirem.eu/>.

⁶⁹ J. Doomernik, R. Koslowski, J. Laurence, R. Maxwell, I. Michalowski, D. Thränhardt, 'No Shortcuts: Selective Migration and Integration' [2009] Transatlantic Academy Report, www.transatlanticacademy.org.

⁷⁰ T. Liebig, 'Migration Theory from a Supply-Side Perspective' [2003] 92 Discussion Paper Research Institute for Labour Economics and Labour Law, <http://www.faa.unisg.ch/publikationen/diskussionspapiere/dp92.PDF> (20.10.2008).

⁷¹ Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) 49.

⁷² M. Ruhs, 'Economic Research and Labour Immigration Policy' [2008] 24 3 Oxford Review of Economic 414.

3.1 State Management of Migration

Economic models of immigration are based on the assumption that people migrate in order to maximize the utility and return on their human capital.⁷³ According to the *human capital theory*, immigration is a form of investment whereby workers seek to maximize their lifetime earnings.⁷⁴ For immigration to take place, the value of the opportunity available abroad must exceed the value of the opportunity available at home plus the costs of moving.⁷⁵ The costs of immigration include, but are not limited to, the foregone earnings, the direct costs of migration, the burden of bureaucratic procedures, as well as the non-monetary costs of adjustment to a new environment. Immigration law can raise or lower these costs by regulating the conditions for lawful residence and admission. The value of the opportunity depends on the wage level and employment options in the destination country, the length of stay, and the predictability of the outcomes of migration. Immigration law can affect these factors by regulating access to work, security of residence, the duration of stay, and the legal protection of the rights of migrants. An increase in immigration costs or decrease in the expected earnings at the destination reduce the overall volume of immigration without altering the skill composition of immigration flow.⁷⁶ However, when immigration costs or immigration earnings vary across workers who differ in their skills, the composition of immigration flow might change.⁷⁷ Increased immigration costs or lower rate of returns for one group of workers may lead to their negative self-selection and a drop of the share of these immigrants relative to the other immigrant groups. The opposite would occur

⁷³ Not necessarily only in monetary terms but also in terms of the overall satisfaction, happiness and standard of living: people optimize for the “best life” they can get, where the “best” is defined by the individual in comparative terms, depending on her group of reference; what is “best” will vary throughout the individual’s lifetime but the optimizing behavior is presumed to persist. In addition to pull factors in the destination country, it is important to acknowledge the role of the push factors in the countries of origin e.g. the desire to diversify risks resulting from instability in the country of origin, when the family sends some of its members to work abroad.

⁷⁴ G. J. Borjas, *Labor Economics* (McGraw-Hill 2005) 314 - 351.

⁷⁵ This theory has been developed by Sjaastad. For an overview see Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) Ch. 2.

⁷⁶ G. J. Borjas, *Labor Economics* (2005) 338; D. Chiquiar and G. H. Hanson, ‘International Migration, Self-Selection, and the Distribution of Wages: Evidence from Mexico and the United States’ [2002] 59 Working Paper The Center for Comparative Immigration Studies, University of California, San Diego www.ccis-ucsd.org/publications/wrkg59.pdf.

⁷⁷ D. Chiquiar and G. H. Hanson, ‘International Migration, Self-Selection, and the Distribution of Wages: Evidence from Mexico and the United States’ [2002] 59 Working Paper The Center for Comparative Immigration Studies, UC San Diego www.ccis-ucsd.org/publications/wrkg59.pdf ; J. Grogger and G. H. Hanson, ‘Income Maximization and the Sorting of Emigrants across Destinations’ (2007) www.princeton.edu/~ies/Spring07/HansonPaper.pdf 2.

should a particular group of workers receive a preferential treatment that lowers their costs or increases earnings. The pattern of destination choices made by individual immigrants based on the cost-benefit analysis is called the *self-selection* of immigrants.

Because the costs and benefits of immigration include but are not limited to the factors controlled by immigration law,⁷⁸ immigrant self-selection happens even in the absence of pro-active immigration policy. The closure of Europe to economic immigrants between the oil crisis and the Amsterdam Treaty, characterized by restrictions on economic immigration, resulted not in the absence of immigrant selectivity but in the reinforcement of self-selection patterns that favored first of all low-skilled settlers.⁷⁹ Restrictive immigration policy adds to the overall costs of immigration, reducing the rates of return on immigration and thus reducing attractiveness of the destination country.⁸⁰ Non-economic immigration channels coupled with the limited employment opportunities in Europe led to a strong path dependency⁸¹ and de-selection of economic migrants in favor of humanitarian and

⁷⁸ For instance, networks reduce immigration costs through active assistance to the newly arrived, provision of information, and facilitating adjustment; network effects become stronger over time and may be self-enforcing, see W. Geis, S. Uebelmesser and M. Werding, 'Why Go to France or Germany, if You Could Go As Well to the UK or the US? Selective Features of Immigration in Four Major OECD Countries' [2008] 2427 CESIFO Working Paper www.cesifo-group.org/wp.

⁷⁹ I. Kogan, *Working through Barriers. Host Country Institutions and Immigrant Labor Market Performance in Europe* (Springer 2007). Ireland and the UK are an exception to this trend, see A. Turmann, 'A New European Agenda for Labor Mobility' [2004] CEPS, Brussels. Non-economic migrants have been accused of being "less active in the labour market and exhibit lower earnings" than immigrants admitted for work, see A. Constant and K.F. Zimmermann, 'Immigrant Performance and Selective Immigration Policy: a European Perspective' [2005] 195 *National Institute Economic Review* 94-96; B. R. Chiswick, 'Are Immigrants Favorably Self-Selected?' Available at www.rau.ro/intranet/Aer/1999/8902/89020181.pdf 181. Studies based on US data suggest that family-based immigration may weaken the selective immigration policies aimed at achieving a bias towards the highly-skilled, see W. Geis, S. Uebelmesser and M. Werding, 'Why Go to France or Germany, if You Could Go As Well to the UK or the US? Selective Features of Immigration in Four Major OECD Countries' [2008] 2427 CESIFO Working Paper www.cesifo-group.org/wp; B. R. Chiswick, 'Are Immigrants Favorably Self-Selected?' Available at www.rau.ro/intranet/Aer/1999/8902/89020181.pdf 183; A.C. Cox, 'Immigration Law's Organizing Principles' [2008] 157 *2 University of Pennsylvania Law Review* 383. Other studies suggest that self-selectivity of family migrants depends also on factors beyond immigration rules, see J. Doornik, R. Koslowski, J. Laurence, R. Maxwell, I. Michalowski, D. Thränhardt, 'No Shortcuts: Selective Migration and Integration' [2009] www.transatlanticacademy.org (01.02.2010).

⁸⁰ The so-called Clark, Hatton and Williamson model, see Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) 48.

⁸¹ One of the factors contributing to path dependency is the availability of immigrant networks, which tend to reinforce existing skill composition of immigration flow, see R. Iredale, 'The Need to Import Skilled Personnel: Factors Favouring and Hindering its International Mobility' [1999] 37 *1*

family reunification channels.⁸² The challenge of the European immigration policy today is to turn the tide by opening the channels, lowering the costs and increasing the benefits for “wanted” third-country workers.

3.2 Selection, Differentiation or Discrimination?

EU law prohibits discrimination on the grounds of nationality as regards nationals of the Member States.⁸³ This, however, is not the case for third-country nationals. First, third-country nationals may be treated differently as between themselves depending on their nationality. A number of external agreements of the EU with third countries secure for nationals of these countries equal treatment rights in various areas, e.g. conditions of employment including remuneration and dismissal,⁸⁴ social security,⁸⁵ and the right to continue employment and residence in the host Member State.⁸⁶ Second, there is no general prohibition of discrimination of third-country nationals vis-à-vis nationals of Member States. General non-discrimination law adopted by the EU is applicable to third-country nationals but discrimination on the grounds of nationality remains excluded from its scope.⁸⁷ Quite on the contrary, equal treatment with nationals of the host Member State is granted to third-country nationals in deviation from the general unequal treatment presumption. Differential treatment of foreign nationals serves

International Migration 94. Other authors mention regional disparities in prosperity among the drivers of migration: K. F Zimmermann, ‘European Labor Mobility: Challenges and Potentials’ [2005] 4 *De Economist* 153.

⁸² G. Orcalli, ‘Constitutional choice and European immigration policy’ [2007] 18 *Constit Polit Econ* 15. Those who could enter under the no-immigrant-worker policies were humanitarian immigrants and family members of the low-skilled workers already settled in Europe.

⁸³ Article 18 TFEU.

⁸⁴ Partnership and Cooperation Agreements : 1999 Armenia Article 20; 1999 Azerbaijan Article 20; 1999 Georgia Article 20; 1999 Kazakhstan Article 19; 1999 Kyrgyz Republic Article 19; 1998 Moldova Article 23; 1996 Russia Article 23(1); 1998 Ukraine Article 24; 1999 Uzbekistan Article 19; 2005 Stabilization and Association Agreement with Croatia Article 45; 2004 Agreement with Yugoslav Republic of Macedonia Article 44.

⁸⁵ Euro-Mediterranean Agreements: 2005 Algeria Article 67; 2000 Morocco Article 64; 1998 Tunisia Article 64.

⁸⁶ EEC-Turkey Association Agreement (1963) Additional Protocol Article 37, Decisions 1/80 and 3/80 of EEC-Turkey Association Council.

⁸⁷ E.g. Article 3(2) Race Directive 2004/43/EC and Article 3(2) Framework Directive 2000/78/EC. For further analysis see A. Wiesbrock, *Legal Migration to the European Union. Ten Years after Tampere* (Wolf Publishers 2009).

as a tool in external relations of the Union and its Member States by allowing them to offer privileged treatment in exchange for other concessions.⁸⁸

In the CIP, differential treatment of migrants is the key to influencing the skill composition of immigration flow. At the first glance, the structure of EU immigration law is coherent with the overall policy objective of attracting skilled migrants in that there are two types of directives: vertical directives on admission, which differentiate between the different professional groups of migrants (Students, Research and Blue Card Directives, 2004/114/EC, 2005/72/EC and 2009/50/EC accordingly), and horizontal directives on the rights of migrants, applicable across the different groups (Family Reunification and Long-Term Residence Directives, 2003/86/EC and 2003/109/EC accordingly).⁸⁹ Both types of instrument regulate the rights of third-country workers and thus produce cumulative effects that vary from one group to another.

The problem, however, arises with the definition of these migrant groups. In other words, do the groups that form the basis for differentiation reflect the professional skills of migrants? The answer to this question is “not necessarily”. This is so because rights in EU immigration law attach to immigration status (the label on the residence permit, e.g. “Blue Card holder” or “researcher”), which is the function of the motives for first admission into the Union (in order to study, join family members, undertake research, seasonal or highly-qualified employment, etc), while subsequent switching between the statuses is not always possible.⁹⁰ Differentiation in the admission directives is not linked to the skills of workers *per se*: a highly-skilled third-country national who is a family member of Union citizen, for example, will likely opt for admission as a family member rather than the complex

⁸⁸ For example, offering visa facilitations in return for readmission obligations for third states, e.g. Council Decision 2007/340/EC of 19 April 2007 on the conclusion of the Agreement between the European Community and the Russian Federation on the facilitation of issuance of short-stay visas and Council Decision 2007/341/EC of 19 April 2007 on the conclusion of the Agreement between the European Community and the Russian Federation on readmission, both agreements concluded together and entering into force simultaneously.

⁸⁹ Students Directive 2004/114/EC is left out from the analysis as it is not directly concerned with economic migration and does not give a right to remain and work upon the completion of studies. Proposal on a single work and residence permit (COM(2007) 638 final) is currently pending Council negotiations.

⁹⁰ A requirement to apply for status prior to admission and from outside the territory of the Member State is contained in Article 3(1) of Research Directive, Blue Card Directive and Students Directives. However, Member States may allow applications for EU Blue Card once already in the country, Article 10 Blue Card Directive.

admission and certification procedure under the Blue Card Directive.⁹¹ If not all highly-skilled immigrants are admitted under the Blue Card Directive,⁹² not all the highly-skilled will benefit from the facilitations contained therein. This is in sharp contrast with the approach adopted in EU free movement law, where the rights of “wanted” migrants (in this case EU national workers) arise as a direct consequence of their economic activity and independently of the initial reason for their migration.⁹³ Impossibility of switching based on actual employment and impossibility to accumulate rights under the different immigration statuses for which the same individual could be eligible, add rigidity to the system and nullify facilitations aimed at the highly-skilled. In order to promote skilled migration and discourage brain waste, switching and upgrading of status should be allowed for lawfully resident third-country workers who engage in skilled work independently of their initial motives for entry into the Union. Tying the rights of migrant workers to their *actual* employment (rather than to their immigration status in law) would give a clear incentive to engage in skilled work.

The rights directives, on the other hand, apply across the different migrant groups, allowing third-country workers to upgrade their rights subsequently to the first entry into the Union, tying this upgrade directly to the stability of residence in the host Member State. To understand the influence of these directives on the composition of immigration flow, we need to answer whether the “wanted” groups of third-country nationals benefit from these directives more (or at least no less) than third-country nationals generally. This question is addressed below.

3.3 Decreasing Costs: Admission Procedures

EU immigration policy links admission of third-country workers to the availability of open vacancies in specified employment sectors,⁹⁴ with a protective preference secured for EU labor force.⁹⁵ Research and Blue Card Directives are coherent with

⁹¹ No accumulation of rights under the different immigration status to which the same individual may be entitled is possible under EU immigration law, see for instance Article 3(2)(e) Blue Card Directive. A family member of Union citizen will thus have to choose whether to benefit from EU free movement law but remain dependent on his/her spouse as the source of rights or undergo much more cumbersome admission procedures in order to gain independent rights.

⁹² Blue Card Directive also allows parallel national schemes, Article 3(4).

⁹³ E.g. Cases C-415/93 *Bosman* [1995] ECR I-04921, C-292/89 *Antonissen* [1991] ECR I-00745, 53/81 *Levin* [1982] ECR 01035, 48/75 *Royer* [1976] ECR 497; 157/79 *Pieck* ECR [1980] 02171; 118/75 *Watson and Belmam* [1976] ECR 118; C-363/89 *Roux* [1991] ECR I-273; C-459/99 *MRAX* [2002] ECR I-6591.

⁹⁴ Policy Plan on Legal Migration COM(2005) 669.

⁹⁵ Articles 11(3)(a) and 14(3) Long-Term Residence Directive, 8(2) BC Directive.

this approach: both include a mechanism of employer authorizations and quotas that allows each Member State to refuse admission of economic immigrants; this is a *de facto* opt-out available to the Member States from application of the Directives.⁹⁶ Those Member States that set their admission quotas and employer authorizations above zero, may subject admission of third-country workers into their territories and labor markets to the so-called “labor market test”,⁹⁷ which for the holders of EU Blue Card may be made anew on each renewal.⁹⁸ To allow adjustments to the divergent and constantly changing needs of the national labor markets, many provisions relating to the acquisition and retention of residence rights remain undefined on Union level, causing variations from one Member State to the other, in particular financial requirements and salary thresholds,⁹⁹ conditions for the loss of status,¹⁰⁰ and access to the labor market.¹⁰¹ EU and national residence permits may lead parallel co-existence and Member States may issue either to economic migrants.¹⁰² While the intention is clearly to ensure a match between immigrant workers and the local demand for labor, avoiding rigidity that could result from fixing the rules at the Union level, for highly-skilled third-country workers such variations between Member States create uncertainty, making immigration to the EU less attractive.

According to the human capital theory, the choice of whether and where to move depends on the ability of the migrant to predict the value of immigration option, in

⁹⁶ A direct opt-out from EU immigration law is exercised by the UK, Ireland and Denmark.

⁹⁷ Article 8(2) Blue Card Directive, Article 14(2) Family Reunification Directive, Article 14(3) Long-Term Residence Directive as regards admission of long-term residents for employment from one Member State to another; Research Directive does not regulate access to the labor market outside the pre-approved research project with pre-approved employer.

⁹⁸ Articles 8(2) and 12(2) BC Directive.

⁹⁹ Articles 4(2)a and 7(3-6) Blue Card Directive, Article 6(2)b Research Directive, Articles 5(1)a, 7(1) and 15(2)a Long-Term Residence Directive, Article 7(1)c Family Reunification Directive.

¹⁰⁰ Due, inter alia, to non-compliance with the financial and other variable conditions on the renewal of permit. In some cases, divergences arise also due to variations in national implementation: for instance, although Article 9 Long-Term Residence Directive contains mandatory conditions for the loss of status, Finnish law implementing of this directive allows for longer periods of absence without the loss of status, §58 Utlänningslag 30.4.2004/301.

¹⁰¹ Research Directive does not specify whether researchers may engage in economic activities other than research and teaching, while its Article 4(2) allows Member States adopt more favorable provisions, presumable including on access to work. Article 12 Blue Card Directive on access to economic activities leaves scope for significant variations between Member States. According to Article 14 Family Reunification Directive, access to employment for family members follows the national deviations for the main migrant and allows additional national variations under Article 14(2).

¹⁰² Article 13 Long-Term Residence Directive.

other words the total earnings from immigration, which is a function of the duration of stay, the rights of migrants, and the wage differential compared to the alternative destinations (including staying at home). Scarcity of any of these factors, e.g. wage differential that in Europe is lower than in the US,¹⁰³ can be compensated by the other factors, such as the duration of stay, stronger protection of the rights of migrants, and overall clarity of immigration rules. Inability to forecast future earnings at destination creates a potential cost for migrants and could act as a deterrent, lowering the total volume of immigration, postponing migration¹⁰⁴, or causing re-migration.¹⁰⁵ High degree of uncertainty over immigration rules (admission, residence length, rights and treatment) in the host state increases migration costs and renders the destination less attractive. In order to enhance selectivity, clarity and predictability of immigration rules should be progressively increased and harmonized for immigrants with the desired skills. A European policy to attract highly-skilled workers requires more boldness if it is to affect the actual composition of immigration flow to any perceptible degree.

3.4 Increasing Benefits: Length of Stay and Security of Residence

If immigration is an investment into the individual's future, the value of immigration option is directly proportional to the length of residence at the destination, i.e. the period during which the return on investment is reaped. Recent experiences in Europe show that temporary migration schemes are not sufficiently attractive for highly-skilled immigrants.¹⁰⁶ The pay-off period on immigration is reduced for temporary migrants, while home-specific human capital

¹⁰³ One of the non-immigration-law factors that contribute to the self-selection of immigrants with lower human capital in Europe than e.g. in the United States is lower income dispersion and more progressive social policies in the EU. J. Grogger and G. H. Hanson, 'Income Maximization and the Sorting of Emigrants Across Destinations' [2007] www.princeton.edu/~ies/Spring07/HansonPaper.pdf; G. J. Borjas, 'The Economics of Immigration' [1994] XXXII Journal of Economic Literature ; Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009).

¹⁰⁴ Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) 50.

¹⁰⁵ MIREM data on return of Maghrebi immigrants from the EU and J.-P. Cassarino (ed) 'Return Migrants to the Maghreb: Reintegration and Development Challenges' [2008] RSCAS/EUI <http://www.mirem.eu/>.

¹⁰⁶ This was the conclusion of numerous commentators of the original German "green card" scheme for IT immigrants. See for instance M. Doudeijns and J.-C. Dumont, 'Immigration and Labor Shortages: Evaluation of Needs and Limits of the Selection Policies in the Recruitment of Foreign Labor' [2003] OECD.

valuable in the case of return is depreciated during the stay abroad.¹⁰⁷ Temporary character of migration may even lead to a negative self-selection and a drop in the level of skills because temporary immigrants have fewer incentives to invest in the destination-specific human capital.¹⁰⁸

Research and Blue Card Directives offer only temporary stay; there is no underlying presumption or expectation that the workers will settle, nor is there a right to permanent settlement from the day of entry or anytime soon after. In order to secure residence and employment rights, third-country nationals must apply for the long-term residence permit after having resided continuously in the EU for at least five years.¹⁰⁹ The likelihood of being able to apply for this permit depends on whether the immigrant succeeds in preserving continuous legal residence over a five-year period. The combination of restrictions on employment and geographic mobility with tying residence rights to constant availability of employment make it more difficult for Blue Card holders and researchers to fulfill the residence requirement as compared to other third-country nationals.¹¹⁰ This makes those who come to the EU for skilled employment comparatively worse off than other migrants, because the general rule of the Long-Term Residence Directive only requires employment at the time of the application for status and not throughout the five preceding years.¹¹¹ Researchers are in an even worse situation because they (1) cannot accumulate periods of residence in different Member States and (2)

¹⁰⁷ T. Liebig, 'Migration Theory from a Supply-Side Perspective' [2003] 92 Discussion Paper Research Institute for Labour Economics and Labour Law

www.faa.unisg.ch/publikationen/diskussionspapiere/dp92.PDF.

¹⁰⁸ B. R. Chiswick, 'Are Immigrants Favorably Selected? An Economic Analysis' in C. D. Brettell and J. F. Hollifield (eds) *Migration Theory: Talking Across the Disciplines* (Routledge 2000) 60-61.

¹⁰⁹ The general rule is five years of residence in the same Member State. Blue Card holders may accumulate residence periods in different Member States but must reside continuously in the same Member State for at least two years immediately prior to the application for the long-term resident status (Article 16 Blue Card Directive). Family members of Blue Card holders may still be required to accumulate five years of residence within only one Member State (Article 15(7) Blue Card Directive).

¹¹⁰ Articles 7(2), 13(1) and 16 Blue Card Directive and Article 4(1) Long-Term Residence Directive; Article 8 Research Directive specifies that residence permits should be valid for at least one year, but typically both research and Blue Card permits are valid for less than five years, and should thus be renewed at least once before the worker qualifies for acquisition of long-term residence permit; the conditions for admission should be fulfilled on each renewal of permit, Article 9(1)b Blue Card Directive and Article 8 Research Directive.

¹¹¹ Article 5(1)a Long-Term Residence Directive refers to "stable and regular resources" at the time of application for the permit: thus both at the time of application and prior to that the resources may come from sources other than work, decoupling legality and continuity of residence from the situation in the employment market. This, however, is not so for researchers and Blue Card holders, whose permits are linked directly to their employment.

could fall outside the scope of the Long-Term Residence Directive altogether pursuant to Article 3(2)e.¹¹²

EU long-term residence rules may be counterproductive for achieving EU policy goals. On the one hand, their very existence undermines the temporary character of labor immigration, one of the objectives of EU immigration policy; on the other hand, long-term residence rules fail to lower the costs of migration by securing a longer period of returns on migration for “wanted” migrants. Despite the weak attempts to facilitate acquisition of the long-term resident status for Blue Card holders, the combination of various rules clearly favors non-economic migrants. While highly-skilled workers are more internationally mobile than their low-skilled counterparts,¹¹³ for many highly-skilled immigrants, especially those from poorer and less stable countries, stability and participation in the host society may be an additional non-monetary benefit of migration, which is already offered by the traditional destination countries. Europe may lose attractiveness if it fails to match the “talent for citizenship exchange” offered elsewhere.¹¹⁴ Treating “wanted” migrants as “visitors” makes them “less likely to come in the first place”.¹¹⁵

3.5 Increasing Benefits: Labor Market Size

Other things being equal, more populous destination countries are more attractive for migrants, especially the highly-skilled, because they maximize career choices¹¹⁶

¹¹² Member States diverge on this point, see Report from the European Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (28.9.2011) COM(2011) 585 final.

¹¹³ A. Takenaka, ‘Secondary Migration: Who Re-Migrates and Why These Migrants Matter’ [2007] Migration Policy Institute www.migrationinformation.org/Feature/print.cfm?ID=597; G. J. Borjas, ‘Labor Economics’ [2005] 317-319; A. Solimano, ‘The International Mobility of Talent and its Impact on Global Development’ 08 UN University Discussion Paper [2006]. Positive correlation between education and mobility was also noted in the European context, see A. Turmann, ‘A New European Agenda for Labor Mobility’ [2004] CEPS Brussels.

¹¹⁴ M. Ruhs and P. Martin, ‘Numbers vs. Rights: Trade-Offs and Guest Worker Programs’ [2008] 42 1 IMR; A. Shachar, ‘The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimens’ [2006] [2006] 18 NY Univ. L. Rev.

¹¹⁵ J. Wickham, ‘A Skilled Migration Policy for Europe? in European Governance of Migration’ [2008] www.migration-boell.de (18.01.2010).

¹¹⁶ A. Shachar, ‘The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimens’ [2006] 18 NY Univ. L. Rev. This is consistent with the gravity model of immigration developed by Zipf (1946), see Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) 30. See also R. Iredale, ‘The Need to Import Skilled Personnel: Factors Favouring and Hindering its International Mobility’ [1999] 37 1 International Migration 90.

and offer wider consumption options.¹¹⁷ The size of potential labor market matters more for the highly-skilled:¹¹⁸ as workers become more specialized, a limited local labor market is less likely to offer sufficient breadth for lifetime career development.¹¹⁹ For the highly-skilled, “countries with very specific skills requirements are less attractive than those with a more ample demand for skills, as future employment perspectives will be more limited in the former.”¹²⁰

EU law limits employment opportunities of migrants both geographically and by type of economic activity. Only long-term residents (independently of their profession) have a general right to work in the host Member State. Access to the labor market for Blue Card holders and researchers is limited to a specific job with a specific employer; switching jobs *must* be authorized each time, while switching to a branch that does not meet the criteria established in the Directives will lead to a loss of residence permit.¹²¹ The right to change jobs for Blue Card holders is circumvented further by tying their residence rights to the continuity of employment.¹²² This reduces attractiveness of the EU as a destination for the “wanted” immigrants because workers with high professional qualifications are more likely to change jobs and occupations.¹²³ Difficulty in switching between various economic activities was one of the reasons for failure of the German “green

¹¹⁷ Migration is responsive to availability of amenities and overall quality of life, see Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) 34-36.

¹¹⁸ T. Bauer and A. Kunze, ‘The Demand for High-Skilled Workers and Immigration Policy’ (Feb. 2004) 4274 Centre for Economic Policy Research Discussion Paper.

¹¹⁹ G. J. Borjas, *Labor Economics* (McGraw-Hill 2005) 318. In some highly-skilled careers, there is even an expectation of geographic mobility without which career progression is stalled, see S. Morano-Foadi, ‘Scientific Mobility, Career Progression, and Excellence in the European Research Area’ [2005] 43 *5 International Migration* 144.

¹²⁰ T. Liebig, ‘Migration Theory from a Supply-Side Perspective’ [2003] 92 Discussion Paper Research Institute for Labour Economics and Labour Law

www.faa.unisg.ch/publikationen/diskussionspapiere/dp92.PDF.

¹²¹ Residence of researchers is tied to a hosting agreement with a particular employer for a particular project, Articles 7(1)(b) and 10(1) Research Directive; Articles 9(1) and 12(2) Blue Card Directive.

¹²² Blue Card permit may be withdrawn if unemployment lasts longer than three consecutive months or if it occurs more than once during the validity of Blue Card, see Article 13 Blue Card Directive. The European Convention on the Legal Status of Migrant Workers obliges France, Italy, Portugal, Spain, Sweden and the Netherlands to allow at least five months’ unemployment prior to withdrawal of residence permit.

¹²³ D.G. Papademetriou and K. O’Neil, ‘Selecting Economic Migrants’ in D.G. Papademetriou, ‘Europe and Its Immigrants in the 21st Century’ [2006] *Migration Policy Institute* 236.

card” scheme.¹²⁴ “Restricting migrants’ employment to specific employers [...] is likely to have adverse consequences for the employment prospects of resident workers and for the efficiency of the labour market[; i]t can encourage employers to prefer migrants over resident workers who have free choice of employment”,¹²⁵ creating social dumping and undermining the 2020 Strategy goals.¹²⁶

Geographically, residence and employment permits established in EU law and marked “EU” permits are limited to the issuing Member State and do not grant a right to work and reside outside its borders.¹²⁷ Residence and economic activities in another Member State must be authorized anew on each relocation. Although the Directives contain provisions regulating mobility between Member States, the effect of these provisions on mobility is restrictive.¹²⁸ Even long-term resident status, which is supposed to secure residence rights and facilitate mobility, is easily lost as a direct consequence of mobility both within the EU and between the EU and non-EU countries.¹²⁹ Blue Card Directive explicitly prohibits mobility in the EU during the first 18 months of residence in *each* Member State; thereafter conditions for admission to another Member State equal the conditions for first admission into the Union.¹³⁰ If anything, these provisions increase certainty: there

¹²⁴ H. Werner, ‘The Current “Green Card” Initiative for Foreign IT Specialists in Germany, in International mobility of the Highly Skilled’ [2001] OECD.

¹²⁵ M. Ruhs, ‘Economic Research and Labour Immigration Policy’ [2008] 24 3 Oxford Review of Economic Policy 413.

¹²⁶ One of them being employment: Communication from the Commission, *Europe 2020 A strategy for smart, sustainable and inclusive growth* (3.3.2010) COM(2010) 2020, p. 8.

¹²⁷ For all groups of migrants, the second Member State must grant a permit to reside in order to move within the Union: Article 19 Long-Term Residence Directive, Article 18 Blue Card Directive, Article 13 Research Directive.

¹²⁸ A. Kocharov, ‘What Intra-Community Mobility for Third-Country Workers?’ [2008] 6 E.L.Rev. 913–926, S. Iglesias Sanches, ‘Free Movement of Third-Country Nationals in the European Union?’ [2009] 15 6 E.L.J. 791–805.

¹²⁹ Twelve months of absence from the territory of the Community or six years of absence from the issuing Member State trigger a loss of status. Longer absences are permitted for Blue Card holders; however, Member States may limit this extension to cases where the absence is due to the exercise of economic activities or study in the country of origin (Article 16(4) and (5) Blue Card Directive). The status is confined to the issuing Member State and its acquisition *ex novo* in other Member States is subject to the same conditions as in the first Member State. A loss of long-term resident status in one Member State may lead to withdrawal of or refusal to renew a residence permit in another Member State (to which the person has relocated pursuant to Chapter III Long-Term Residence Directive) and initiation of removal procedures to a non-EU country even where other conditions for residence continue to be met (Article 22(1)b Long-Term Residence Directive). Member States, however, must allow facilitated re-acquisition of status to compensate for this drawback, though not necessarily re-admit.

¹³⁰ Article 18 Blue Card Directive.

is no EU-wide labor market.¹³¹ Surprisingly, the workers who are supposedly the most “wanted” and whose availability should reduce skill shortages in the EU, are being penalized by an outright ban on their geographic mobility. This is in line with the concealed goal of reducing competition for highly-skilled immigrants between Member States. Having established a “level playing field” between themselves, Member States remain disadvantaged in the international arena: a highly-skilled third-country worker might have only one plausible employer in the host Member State due to the structure of its labor market; in a situation where a change of employer takes place, either because of a career move or because the job is no longer available, a rule facilitating admission and preserving residence status in another Member State could induce the migrant to stay in the EU. Without such rule, onward migration from the EU becomes more likely. This is especially so for Blue Card holders, who might see their residence right withdrawn after three months of unemployment in their Member State of residence.¹³²

The mismatch between the connotation of permits as “EU” permits and their substance, limited to the issuing Member State, creates a deceptive impression of the EU as a single immigrant destination, especially as regards the “Blue Card” permit, which was explicitly designed to send a “clear signal” that “highly skilled people from all over the world are welcome in the European Union”.¹³³ Obviously, creating an “EU” permit with a name reminiscent of the US Green Card is likely to “have an effect on the expectations that migrants have regarding their life” in Europe,¹³⁴ in particular as regards both stability and geographical breadth of residence and employment rights. This disinformation may lead to suboptimal immigration choices resulting from the underestimation of costs and risks, and the overestimation of benefits of the “destination Europe”. Having realized their mistake, migrants will be more likely to re-migrate to destinations outside Europe.¹³⁵ Immigrants will waste their time and resources, the benefit of having attracted them will be short-lived, while the reputation of Europe as destination will be undermined. The Blue Card deception could also run counter to Article 3

¹³¹ A. Skordas, ‘Immigration and the Market: the Long-Term Residence Directive’ [2006] 13 Columbia J. of E.L. 201.

¹³² Article 13 Blue Card Directive.

¹³³ J. M. Barroso, SPEECH/07/650, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/650> (18.01.2010).

¹³⁴ W. Geis, S. Uebelmesser and M. Werding, ‘Why Go to France or Germany, if You Could Go As Well to the UK or the US? Selective Features of Immigration in Four Major OECD Countries’ [2008] 2427 CESIFO Working Paper 9 www.cesifo-group.org/wp; S. Peers, ‘Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directives’ [2009] 11 E.J. of Migration and L. 410.

¹³⁵ Ö.B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) 264

of the ILO Convention 97 on Migration for Employment, which obliges its signatories – inter alia Belgium, France, Germany, Italy, Netherlands, Portugal, Slovenia, Spain, UK – to “take all appropriate steps against misleading propaganda” relating to immigration.

It is regrettable that the Union fails to cash in on one of its greatest potentials. An EU-wide labor market is one of the main benefits that EU law could offer to its prospective immigrants.¹³⁶ Occupational and geographic mobility of resident third-country workers could be a “primary mechanism” for improving labor market efficiency¹³⁷ and enhance the “effective attainment of an internal market”.¹³⁸ When it comes to the exercise of economic activities, the EU seems incapable to translate its own policy goals into a binding law that would achieve them.

3.6 Decreasing Costs: Family Reunification

Inability to live with one’s own family is one of the most immediate non-monetary costs of migration. Following the differentiation principle, EU immigration law facilitates family reunion for “wanted” third-country nationals. Blue Card holders enjoy exemptions from some of the onerous conditions of the Family Reunification Directive: the requirements of the “reasonable prospects” of permanent residence, the minimal residence period, facilitation of integration requirements where they are applied, halved period for evaluation of applications, and immediate access to the labor market for family members.¹³⁹ Family unity of researchers should be “facilitated and supported”¹⁴⁰ though each Member State “decides to grant a residence permit to the family members of a researcher”¹⁴¹ without a binding EU standard.¹⁴²

¹³⁶ Y. Schibel, ‘Mobility Rights in Europe’ in R. del Caz, M. Rodríguez and M. Saravia (eds) ‘Report of Valladolid. The Right to Mobility’ [2005] www.migpolgroup.com/documents/3183.html; S. Mahroum, ‘Europe and the Immigration of Highly Skilled Labour’ [2001] 39 5 International Migration.

¹³⁷ Recital 15 Blue Card Directive.

¹³⁸ Recital 18 Long-Term Residence Directive.

¹³⁹ Article 15 Blue Card Directive.

¹⁴⁰ Recital 18 Family Reunification Directive.

¹⁴¹ Article 9(1) Research Directive. Family reunification of researchers upon their mobility between Member States is governed by national law, see Recital 19 Family Reunification Directive.

¹⁴² It is recommended that Member States offer “favorable and attractive conditions and procedures” for family reunification of researchers. Point 3 Council Recommendation 2005/762/EC.

Exercise of mobility between Member States is much more problematic for family unity of third-country workers. Although the Blue Card Directive offers Blue Card holders a possibility to accumulate periods of residence in different Member States for the purposes of acquisition of long-term residence permit (five years of continuous residence), there is no provision for a similar facilitation for their accompanying family members. Intra-EU mobility for family members of researchers is even more problematic because the Research Directive leaves the admission of family members to the discretion of Member States; thus, family members may face with different rules on their admission each time their researcher spouse moves between Member States. Not only does this create uncertainty about migration outcomes, but it may discourage the primary migrant from effectuating the move altogether. As an increasing number of spouses are themselves career professionals and participate in immigration choices, their position becomes equally important to that of the principle migrant.¹⁴³

3.7 Increasing Benefits: Labor Market Access for Family Members

Despite facilitated rules for family reunification outlined above, family members of researchers and Blue Card holders may find it more difficult, as compared to other immigrants, to access the labor market. This is so because Member States may restrict access to economic activities for family members of any immigrant group “in the same way as the sponsor”.¹⁴⁴ Where the sponsor’s work permit is limited to one employer or branch, or sets an overall cap on the number of hours she may work, this may apply equally to all her family members. Not all family members of the highly-skilled migrants will necessarily qualify for employment under the Blue Card scheme or under the Research Directive; even those who do possess the necessary qualifications may be unable to find employment in the same branch due to the labor market structure of the host Member State. Children of Blue Card holders may be excluded from the labor market altogether for lack of requisite qualifications. Yet, the degree to which family members can compensate for the opportunity costs incurred by quitting a job at an alternative destination in order to follow the principle migrant has a major impact on destination choice.¹⁴⁵ This is why countries competing for the “wanted” immigrants increasingly allow spouses of the highly-skilled immediate access to their labor market.¹⁴⁶ In EU free

¹⁴³ D. Guellec and M. Cervantes, ‘International Mobility of Highly Skilled Workers: From Statistical Analysis to Policy Formulation, in *International Mobility of the Highly Skilled*’ [2001] OECD.

¹⁴⁴ Article 14(1)b Family Reunification Directive.

¹⁴⁵ G. J. Borjas, *Labor Economics* (McGraw-Hill 2005) 321-327.

¹⁴⁶ This has been the case, for instance, in Australia and Germany, see A. Shachar, ‘The Race for Talent: Highly-Skilled Migrants and Competitive Immigration Regimes’ 185, 190.

movement of workers, liberal family reunification rules are a condition *sine qua non* for ensuring mobility of EU nationals.¹⁴⁷ Fortunately, the rules on access to work for family members of third-country workers are only minimum standards, not followed by all Member States.¹⁴⁸ It is nevertheless surprising that EU immigration law sets such low a standard that the objectives of EU immigration policy come in peril and must be rescued by non-application of what EU law allows.

3.8 Decreasing Costs: Rights Protection

It has long been recognized in EU free movement law that the protection of the rights of migrant workers plays a key role in their ability and willingness to migrate. The ECJ has developed the doctrines of direct effect, *effet utile*, and state responsibility in order to ensure the protection of the individual's rights in EU law.¹⁴⁹ Third-country nationals benefit from these principles when they derive rights from Union-citizen family members¹⁵⁰ or EU service providers.¹⁵¹ These doctrines have equally been extended to the provisions of mixed external agreements with third-countries where these provisions regulate the rights of migrant workers.¹⁵² While a detailed discussion of all these instruments would go beyond the scope of this work,¹⁵³ it is important to note here that third-country

¹⁴⁷ E.g. cases C-370/90 *Singh* (1992) ECR I-04265, C-60/00 *Carpenter* (2002) ECR I-06279, C-127/08 *Metock* (2008) ECR I-06241.

¹⁴⁸ K. Groenendijk, R. Fernhout, D. van Dam, R. van Oers, T. Strik, 'The Family Reunification Directive in EU Member States the First Year of Implementation' [2007] Centre for Migration Law Nijmegen.

¹⁴⁹ Case 6/64 *Costa v ENEL*, Case 26/62 *Van Gend en Loos*, Case C-6&9/90 *Frankovich*.

¹⁵⁰ Case C-127/08 *Metock* (2008) ECR I-06241; Case C-34/09 *Zambrano*; Article 24(1) Directive 2004/38/EC.

¹⁵¹ Case C-43/93 *Van der Elst* (1994) ECR I-03803.

¹⁵² Cases 12/86 *Demirel* (1987) ECR 03719, C-18/90 *Kziber* (1991) ECR I-00199, C-235/99 *Kondova* (2001) ECR I-06427, C-265/03 *Simutenkov* (2005) ECR I-02579.

¹⁵³ See *ex multis*, A. Evans, 'Third-Country Nationals and the Treaty on European Union' [1994] EJIL 5; K. Hailbronner, 'European Immigration and Asylum Law under the Amsterdam Treaty' [1998] CMLR 35; J. Niessen, 'Overlapping Interests and Conflicting Agendas: The Knocking into Shape of EU Immigration Policies' [2001] EJML 3; J. Apap, 'Shaping Europe's Migration Policy New Regimes for the Employment of Third Country Nationals: a Comparison of Strategies in Germany, Sweden, the Netherlands and the UK' [2002] EJML 4; A. Baldaccini and H. Toner, 'From Amsterdam and Tampere to the Hague: An Overview of Five Years of EC Immigration and Asylum Law' in A. Baldaccini, E. Guild, H. Toner (eds) *Whose Freedom, Security and Justice?* (Hart Publishing 2007); E. Ozlem Atikcan, 'Citizenship or Denizenship: The Treatment of Third Country Nationals in the European Union' [2006] Sussex European Institute working paper, www.sei.ac.uk (05.02.2010)

nationals do benefit from rights that are directly applicable and enforceable both against their host Member State and against employers.

EU immigration law is different. First, the rights of third-country nationals are not set in the Treaty text itself but in the secondary legislation, which takes form of directives. This strips the rights from horizontal direct effect, making them directly enforceable in national courts only against the state but not against private parties (most importantly, not against employers).¹⁵⁴ Many provisions of EU directives on legal migration are difficult to enforce even against the state because their objectives are far from clear, their provisions are often optional and open-ended, leaving only *effet utile* as a last resort.

Second, equality with host state nationals is an exception in EU immigration law, and is often limited to narrow fields. Presumption of inequality is particularly strong as regards access to economic activities (secured on quasi-equal footing with nationals only for long-term residents) and rights related to services financed from the public coffer. The latter include access to education, housing, and tax benefits, which are protected at a minimum-standard level.¹⁵⁵ Equal treatment is more widespread as regards employment-related rights, such as working conditions, recognition of professional qualifications and freedom of association, where equality without reservations is secured in the Charter of Fundamental Rights¹⁵⁶ and reiterated in all immigration Directives as well as in some external agreements of the EU.¹⁵⁷ Possibly, having the same rights secured in immigration directives and in the Charter also give these rights a direct horizontal effect, making them enforceable against employers without the need for national implementing measures.

EU law differentiates the rights accorded to different immigrant groups, but the criterion employed for raising the level of rights is not the skill or economic activity of migrants. Priority instead is placed on securing rights for those already settled, while rights of newcomers persistently remain sidelined. This is in line

¹⁵⁴ For more on (the absence of) horizontal direct effect of directives see, T. Tridimas, ‘Horizontal Direct Effect of Directives: a Missed Opportunity?’ [1994] 19(6) ELRev 621-636, P. Crig, ‘Directives: Direct Effect, Indirect Effect, and the Construction of National Legislation’ [1997] 22 6 ELRev 519-538, M. Lenz, ‘Horizontal What? Back to Basics’ [2000] 25 5 ELRev 509-522.

¹⁵⁵ Articles 12(c) Research Directive, 14 Blue Card Directive, 11 Long-Term Residence Directive.

¹⁵⁶ Articles 27-31 EU Fundamental Rights Charter.

¹⁵⁷ Articles 12 Research Directive, 14 Blue Card Directive, and 11 Long-Term Residence Directive. Equal treatment with host Member State nationals as regards working conditions is also granted in the external agreements of the EU – op.cit 84-86.

with the CIP objective of “fair” treatment,¹⁵⁸ while at the same times undermining the objective of managing the composition of immigration flows. Equal treatment rights are widest for long-term residents, enhanced for Blue Card holders, and significantly reduced for researchers. The final policy choice is relegated to the national level, as each Member State may enhance differentiation by raising the level of rights for any immigrant group and facilitating naturalization (and thus the access to full rights of Union citizenship). Considering the low minimal level of rights ensured in EU law, the contribution of EU immigration law to positive self-selection of migrants is negligible.

4. Summary and Discussion

The table below summarizes the results of the combined effect of the four Directives in terms of the costs and benefits imposed on researchers and Blue Card holders. For each of the areas regulated by EU immigration law, the middle column reflects the cost or benefit effect that should result to the highly-skilled in order to enhance their self-selection, as suggested by economics of migration; the last column reflects the corresponding situation under EU immigration law. Each factor is taken in isolation, other factors deemed equal. The inconsistencies between what is required to achieve the objectives of the CIP and the actual effects of EU Directives are highlighted in **Bold**.

	Economics of migration	EU immigration law
<i>Admission criteria</i>	COST Admission linked to employment	COST Admission linked to employment
Admission procedure	BENEFIT Migration costs due to bureaucracy are high for all migrants but low for “wanted” migrants	COST Migration costs due to bureaucracy and complexity are uniformly high for all migrants

¹⁵⁸ Policy Plan on Legal Migration (2005) COM 669 final; S. Castles, ‘Back to the Future? Can Europe Meet its Labor Needs through Temporary Migration?’ [2006] 1 Int. Migration Institute Working Paper 27. Single Permit Proposal, currently negotiated in the Council, has been qualitatively transformed from a horizontal instrument that protects rights of all third-country nationals who are allowed to work in the EU, into yet another vertical directive that regulates rights only of those who are admitted under a certain type of residence permit: compare the scope of the original proposal COM (2007) 638 final, Articles 2(b) and 3(1)b, to the amended version, interinstitutional file 2007/0229 (CNS) (30.06.2009), Articles 2 and 3.

Labor market size	BENEFIT Enhanced geographic mobility for employment	COST Restricted geographic mobility for employment
Employment mobility	BENEFIT Right to change jobs / branch / employers	COST Right to change jobs / branch / employer restricted
<i>Family reunification</i>	BENEFIT Facilitation of family reunification rules	BENEFIT Facilitation of family reunification rules
Rights of family members	BENEFIT Broad and immediate employment rights for admitted family members	COST Access to employment for family members may be significantly limited
<i>Length of stay</i>	COST Temporary stay linked to employment	COST Temporary stay linked to employment
Security of residence rights	BENEFIT Clear possibility of permanent stay for “wanted” migrants	COST More difficult to attain permanent stay for “wanted” migrants
Non-discrimination	BENEFIT Strong non-discrimination, equal treatment and anti-racism policy	COST Equal treatment with nationals is only secured in selected fields as a derogation from the unequal treatment standard

The table is revealing. In six cases out of nine, EU immigration law establishes rules contrary to the objectives of EU immigration policy, imposing a cost on migrants instead of conferring benefits. While economics of immigration suggest that only two of the nine factors should be restrictive in order to implement selective immigration policy biased towards the highly-skilled, the only liberalization granted to “wanted” immigrants in EU law is facilitation of family reunification for Blue Card holders. The other eight factors – and for researchers all nine – amount to an overall restriction, which will reduce the net benefits of migrating to the EU. This is a surprising result if we believe in the scarcity of “wanted” workers both in the EU and globally. Under a shortage of highly-skilled workers, provisions of immigration law that decrease net benefits to this group of migrants can be expected to cause a fall in their overall number and a loss for the destination economy and its business. Economic considerations and interests of national economies are what Member State governments and EU institutions argue

to justify the adoption of EU immigration law. Yet, the substance of the adopted law jeopardizes the achievement of these goals.

Evaluation of EU law on legal economic immigration depends largely on our benchmark. The Directives enhance legal venues for economic migration in comparison to the previous European rules. Western Europe evolved from a low-skilled labor immigration policy in the 1960s to a zero labor immigration policy in the 1990s, and a temporary admission policy for the highly-skilled workers presently. These are radical changes over a very short time span. Both the magnitude of change and the brief period available for its implementation present a considerable challenge that might be insurmountable simply because of the natural length of human life cycle. Measuring the directives by reference to the rights of nationals of the Member States also presents a coherent picture, considering the restrictions on free movement of workers from new Member States and the fact that naturalization policies remain within the sole competence of each European nation. Yet, these comparisons do not reflect the reality that in competing for the “wanted” immigrants, the EU and its constituent countries do not challenge themselves or their own citizens but the traditional countries of immigration.

The goals of EU policy on legal immigration reveal a thoroughly confused vision of European policy-maker. Presuming that the objectives as set are legitimate and desirable, they are incoherent between themselves. Thus, the objective of eliminating competition between Member States for highly-skilled third-country workers, in situation where no unified EU immigration space is created, is counterproductive to the objective of attracting these workers to Europe; the objective of temporary labor immigration runs counter to the objective of “fair treatment” of third-country nationals, when one of the criteria set for such treatment is availability of stable residence rights; EU development objectives might also come in conflict with the objective of attracting the highly-skilled, which may contribute to brain drain in the countries of origin despite the framework of circular migration. Such examples abound. Inconsistencies in the conception of EU policy on legal economic immigration certainly are unhelpful at the implementation stage. Claims of the Council and the Commission that Europe as a whole needs third-country workers with high professional skills are difficult to reconcile with the other claims of these same actors to the effect that labor needs vary across Member States. Controversial political nature of immigration complicates the adoption of EU immigration law, resulting in multiple optional clauses, which *de facto* delegate the finality of the CIP to national level. The underlying assumption seems to be that immigrant admission and selection rules are somehow different from the rules regulating the rights of immigrants once admitted. Yet, economics of immigration predict that both immigrant-selection

and rights-regulating provisions affect the volume and the composition of immigration flow. The artificial division of labor between the Union and national levels splits the capacity to select, complicating the achievement of EU policy goals more.

The picture is equally contradictory in substance of the adopted rules. The overall approach of EU immigration law follows economics of immigration: the law differentiates between the different groups of immigrants by varying both the admission criteria and the rights once admitted. However, these groups are not defined by their professional skills. This mismatch between the objectives of EU immigration policy and the structure of law undermine the attainment of EU policy goals. When it comes to the substantive rights accorded to “wanted” third-country workers, EU law imposes an overall cost on these migrants, rendering immigrating to Europe less attractive for them than for third-country nationals generally. It is not possible to attract the people without giving them benefits; offering benefits without discriminating between people by skill will not increase the share of the skills we desire. If economic considerations are the force of gravity that pull together policy and the law, then EU immigration law is drifting in outer space.