

Labour Migration in the ‘New Pact’: Modesty or Unease in the Berlaymont?

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Creating legal avenues to the European Union (EU) is undoubtedly a central component of a comprehensive and balanced immigration policy. Although asylum attracts most of the media coverage and the political attention, the vast majority of third-country nationals entering the EU are coming for other purposes than international protection. This could suggest that the EU legal migration system is working well. To be sure, immigration for family and educational purposes are addressed almost comprehensively by secondary EU legislation. While Directives 2003/86/EC¹ and 2004/38/EC² set out the conditions of family reunification, the admission of students and researchers is now spelt out in the recast Directive (EU) 2016/801³.

However, when it comes to labour migration, the EU policy is relatively underdeveloped. Harmonisation in this field is limited both in scope and intensity: EU directives regulate the admission and stay of a few categories of workers only and the flexibility provided by the existing EU legislation protects rather than challenges the autonomy of national authorities.⁴ The EU acquis is also fragmented and EU instruments lack effectiveness. As

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1 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L251/12.

2 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L158/77.

3 Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ L132/21.

4 Jean-Baptiste Farcy, *L'Union européenne et l'immigration économique: les défis d'une gouvernance multi-niveaux* (Anthemis 2021).

argued convincingly, fragmentation is both the cause and the consequence of a minimum harmonization loop where low harmonization at the EU level appears as a self-reinforcing mechanism leading to low usage of EU tools and more fragmentation.⁵ As a result, it should not come as a surprise that the recent “fitness check” of the EU acquis on legal migration concluded that “the current legal migration framework had a limited impact vis-à-vis the overall migration challenges that Europe is facing”.⁶

Given the limited added value of EU directives on labour migration, it was not unreasonable to expect a new look, or even a “fresh start”, on this issue. For sure, more could be done at the EU level to manage effectively immigration by designing legal avenues for all workers irrespective of their skills, and through balanced cooperation with third countries. The rights of labour immigrants could also be enhanced to avoid exploitative situations and ensure fair treatment in line with the Treaties. The European Commission could also trigger a new narrative on immigration where labour immigrants are not only a subsidiary labour force fixing gaps and needs.

The “New Pact” however fails to convince. Unfortunately, labour immigration continues to be treated as a secondary matter (1). No legislative proposal is actually put forward and a number of core dilemmas remain unresolved (2). Written in evasive terms, the Communication on a New Pact on Migration and Asylum raises more questions than it provides answers to.

1. New Instruments or More of the Same?

As the European Commission acknowledges, the development of legal pathways to Europe for work purposes not only helps alleviate the pressure on irregular routes, but it is also in line with the EU’s interests. Invariably, the Commission considers that the admission of labour immigrants is justified by demographic considerations (an ageing and shrinking population in many Member States) and labour market needs. As the Covid-19 pandemic highlighted, third-country workers are overrepresented in a number of key sectors (agriculture, health care, domestic workers ...). More impor-

5 See European Parliament, ‘The Cost of Non-Europe in the Area of Legal Migration’ (PE 631.736, March 2019), xiii.

6 European Commission Staff Working Document, ‘Fitness Check on EU Legislation on Legal Migration’ SWD (2019) 1055 final of 29 March 2019, 105.

tantly, the Commission is concerned that the EU is currently losing the “global race for talent”. Thus, the argument is that efforts should aim at attracting and retaining larger numbers of (highly) skilled professionals.

The Commission hopes to do so in two different ways: (i) by way of cooperation with third countries and (ii) by way of internal legislation. In order “to match people, skills and labour market needs”, the Commission is to launch “Talent Partnerships” which will provide a comprehensive EU policy framework as well as funding support. Knowing that legal pathways are a key factor for partner countries, the Commission hopes to convince them to cooperate on broader migration-related issues. Although the Communication remains silent on the content and the scope of these partnerships, it is likely that they will be a scaled-up version of current pilot projects on labour migration. This means that “Talent Partnerships” would be bilateral in nature, tailored to the interests of the participating Member State and the partner third-country, and involving the private sector as far as possible. In any case, opening up legal pathways for (talented) labour migrants through bilateral agreements is hardly a novelty. Legal migration is indeed one of the four strategic objectives of the Global Approach to Migration and Mobility. However, since 2005 achievements have been limited which undermines the reputation and the credibility of the EU on the international stage.⁷

Internally, the Commission intended to give yet another push to the reform of the Blue Card Directive.⁸ The goal of the reform proposal is to attract and retain larger number of highly-skilled workers across the EU. The impact assessment of the 2009 Directive noted that, in comparison with other countries including the USA, Canada and Australia, the EU “appears less effective in retaining talents and in converting its attractiveness into increased actual numbers of highly-skilled workers coming to work into the EU”.⁹ Indeed, despite the adoption of a directive setting common

7 Elspeth Guild, ‘Negotiating with Third Countries under the New Pact: Carrots and Sticks?’ (*EU Migration Law Blog*, 27 November 2020) <<https://eumigrationlawblog.eu/negotiating-with-third-countries-under-the-new-pact-carrots-and-sticks/>> accessed 18 November 2021.

8 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L155/17.

9 European Commission Staff Working Document, Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing Directive 2009/50/EC, 9 June 2016, ADD1 10012/16, 4.

standards, the EU remains a fragmented territory for third-country workers and secondary legislation has done little to improve their mobility across the EU.¹⁰

Since 2016, negotiations over the reform proposal made by the Juncker's administration have stalled, mostly due to the unwillingness of Member States to give up their own national schemes. From the outset, the Council made clear that EU Member States would reject such a proposal.¹¹ As argued by Lucie Cerna, "Member States are not necessarily interested in a level-playing field since they compete with each other and prefer rather to rely on their own high-skilled immigration policies".¹² In the future, the Blue Card will thus continue to coexist with national instruments. While competition between national and EU schemes is in contradiction with the development of a *common* immigration policy, the existence of parallel national schemes is not a problem *per se* for suppressing those schemes would not help to attract more highly skilled workers to Europe. Quite the contrary in fact. As argued by Jo Antoons and Andreia Ghimis, both practitioners,

"National schemes are often more flexible than the EU Blue Card and more foreigners tend to qualify under national admission criteria (if these are not adapted for the Blue Card). Furthermore, labour market realities change very rapidly and EU instruments take very long to negotiate. EU and national authorities' ability to respond to these changes in due time would thus be affected dramatically".¹³

Although the Commission would prefer to have a single European scheme with no concurring national programs, it did acknowledge eventually that national schemes tailored to domestic needs offer greater flexibility.¹⁴

After five years of negotiations, the European Parliament (EP) and the Council have finally come to an agreement over the reform of the Blue Card Directive. The plenary of the EP approved the text in September 2021

10 Elspeth Guild, 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration' in Mark Freedland and Cathryn Costello (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014) 98-118.

11 Presidency of the Council of the European Union, 'Legal Migration – what can we do better?', 18 September 2019, LIMITE 12269/19.

12 Lucie Cerna, 'The EU Blue Card: preferences, policies and negotiations between member states', (2014) 2 *Migration Studies* 73, 80.

13 Jo Antoons and Andreia Ghimis, 'What it takes to have a successful new Blue Card scheme: The practitioner's viewpoint' (2021) 26 *ELJ* 264, 272.

14 European Commission, 'Communication on a New Pact on Migration and Asylum' COM(2020) 609 final of 23 September 2020, 25.

and the Council followed suit in October.¹⁵ This agreement puts an end to a five-year drought in the field of legal migration for no legal text has been adopted since the 2016 Directive on students, researchers and trainees.

For highly skilled workers to prefer the blue card rather than parallel national schemes, conditions of admission and stay should be more attractive. To that end, the EP and the Council came to a consensus and agreed that in many respects (such as procedural rights, application fees, equal treatment and family reunion) more favorable rules relating to national schemes must apply to Blue Card holders.¹⁶

In order to further increase the attractiveness of the Blue Card, the EU legislature agreed to lower the salary threshold (to be set between the average salary and 1.6 times the average salary), in particular for young graduates (the salary threshold *may* be cut by 20%) and occupations with a 'particular need of third-country national workers'.¹⁷ Access to the labour market is also extended but the agreed text fails to set common standards: within the first year of employment, change in occupation *may* be subject to a labour market test and an official approval.¹⁸ After that, Blue Card holders *may* only be required to inform Member States about a change of job. Family reunification is also upheld and facilitated. The maximum processing time is 90 days and family members can take up any employment or self-employment in the Member State concerned.

Provisions on intra-EU mobility remain however largely disappointing (see chapter V of the new directive). Despite the adoption of common standards on entry, Member States wished to retain their control over the admission of third-country highly-skilled workers, including those who already reside in another EU Member State. The right to work in another EU Member State on the basis of the Blue Card delivered by the first Member State is limited to 90 days in any 180-day. For longer periods, a new application for another Blue Card is still required. Therefore the Blue Card is yet to be truly "blue".

15 Directive 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC, OJ L382/1.

16 See Articles 11(6), 13(5), 16(7) and 17(10).

17 Article 3(3-5).

18 Article 15.

Other measures put forward in the “New Pact” include a revision of the Long-Term Residents Directive 2003/109/EC¹⁹ - currently under-used compared to national schemes²⁰ - and a review (thus not a revision) of the Single Permit Directive 2011/98/EU²¹. The Commission stated that such a review would explore ways to clarify the scope of the Directive, including admission for low and medium skilled workers. Here, the “New Pact” creates unnecessary confusion since the “single permit” directive does not regulate conditions of entry and stay, but aims to simplify procedures and to create a common set of rights for all migrant workers irrespective of their skills or reason of entry.²² A separate text on the admission and stay of medium-skilled workers and professionals would thus be preferable.²³ Yet for now, the admission of medium and low-skilled workers (with the exception of seasonal workers) remains regulated at national level only.

In the longer run, the Commission also aims to set out options to develop an EU Talent Pool based on the “expression of interest” system in place in Canada and New Zealand.²⁴ In these countries, the central objective is to deal with the backlog of highly-skilled workers awaiting admission

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- 19 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L16/44.
 - 20 European Commission, ‘Report to the European Parliament and the Council on the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents’, COM(2019) 161 final of 29 March 2019.
 - 21 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L343/1.
 - 22 As recently recalled by the Court of Justice, Article 12 of the Single Permit Directive “is not limited to ensuring equal treatment for holders of a single work permit but also applies to holders of a residence permit for purposes other than to work, who have been given access to the labour market in the host Member State” (CJEU, *O.D.*, C-350/20 [GC], 2 September 2021, ECLI:EU:C:2021:659, para 49). Given the wide personal scope of that provision, it is a useful tool to ensure equality between nationals and third-country nationals but also among third-country nationals themselves. For a critical assessment see: Ana Beduschi, ‘An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive’ (2015) 17 EJML 210.
 - 23 Tesseltje de Lange and Kees Groenendijk, ‘The EU’s legal migration *acquis*: Patching up the patchwork’ (*European Policy Centre*, 16 March 2021) <www.epc.eu/content/PDF/2021/Immigration_Issue_Paper.pdf> accessed 18 November 2021.
 - 24 OECD, *Building an EU Talent Pool: A New Approach to Migration Management for Europe* (March 2019); Maria Vincenza Desiderio and Kate Hooper, ‘The Canadian

through a dynamic ranking system. In the EU, the relevance of a Talent Pool is somewhat different. The core idea would be to set up an online platform where skilled third-country nationals can express their interest in migrating to the EU, thus allowing local employers to recruit among a pool of pre-screened candidates. Unlike admission to Canada or New Zealand, labour immigrants cannot enter European countries without a job offer. By matching employers with a pre-selected pool of third-country workers, the EU Talent Pool would facilitate the recruitment process.

For our purposes, it is also relevant to point out what is NOT included in the Communication. For instance, the idea of an immigration code, advocated for by the European Commission and academics alike a few years ago, has disappeared. The "New Pact" is also vague on the admission of non-seasonal low and medium skilled workers, although this is arguably an important gap in the European legislation as the European Parliament has acknowledged.²⁵ No measure is proposed with regards to the admission of self-employed or entrepreneur migrants either.²⁶ While a growing number of Member States are setting up start-up visas and schemes to attract entrepreneurs and investors, the EU is yet to offer an EU-wide scheme that would allow them to reap the full benefits of the single market.²⁷ Clearly the ambition is not to extent the personal scope of the EU labour migration policy – irrespective of actual needs – but to focus on the attraction and retention of larger numbers of skilled and talented workers.

Last but not least, the facilitation of intra-EU mobility is not touched upon either, with the (very modest) exception of highly skilled workers

Expression of Interest System: A Model to Manage Skilled Migration to the European Union' (Migration Policy Institute, March 2016).

- 25 European Parliament, Draft Report on new avenues for legal labour migration, Committee on Civil Liberties, Justice and Home Affairs, 9 October 2020, 2020/2010(INI). Restrictions on the mobility of medium or low-skilled workers is a social and political construct that is not however empirically grounded. See Régine Paul, 'How 'Low-Skilled' Migrant Workers Are Made: Border-Drawing in Migration Policy' in Conny Rijken and Tesselte de Lange (eds), *Towards a Decent Labour Market for Low-Waged Migrant Workers* (Amsterdam University Press 2018), 57 – 78.
- 26 Tesselte de Lange, 'Welcoming talent? A comparative study of immigrant entrepreneurs' entry policies in France, Germany and the Netherlands' (2018) 6 *Comparative Migration Studies* 27.
- 27 European Commission, 'Migratory Pathways for Start-Ups and Innovative Entrepreneurs in the European Union' (EMN Synthesis Report for the EMN Study 2019, December 2019).

under the new Blue card scheme. Although the promotion of intra-EU mobility should be a key component of the EU's legal migration policy, as it provides clear added value that cannot be achieved at national level only, the mobility of third-country nationals remains subject to strict conditions, thus reinforcing the significance of national borders.

In fine, the overall impression is that the Commission has decided not to decide. Using vague terms and referring to consensual objectives such as attracting more highly-skilled workers to Europe, the Commission avoids making concrete pledges. If anything, new clothes are being put on past initiatives. Although no new legislative proposal is put forward, the Commission will continue to support (mostly financially) and coordinate national pilot projects that aim to manage labour migration. For the rest, there is no convincing reasons to believe that the current administration will succeed where others have failed in the past as a number of contradictions remain unresolved.

2. *Unresolved Contradictions and Dilemmas behind the EU Labour Migration Policy*

The EU's capacity to bring about a new direction to the current labour immigration policy is impaired by both legal and political obstacles.²⁸ Although Article 79 TFEU calls for a "common immigration policy", Member States retain the right to determine volumes of admission for people coming from third countries to seek employment (§ 5 of that provision). As a consequence, Member States can limit the application of secondary EU legislation by setting a cap to the number of labour immigrants they admit on their territory. Another consequence of that provision is that the EU's external action is dependent on Member States' willingness to act.²⁹ Irrespective of the level of harmonisation achieved internally, the EU should refrain from making offers to its partners without the participation of its Member States, or at least some of them. Therefore, the development of "Talent Partnerships" may be blocked by the unwillingness of Member States to participate. Indeed, since 2015 and the adoption of the European Agenda on Migration, only a handful of Member States have set up pilot

28 Jean-Baptiste Farcy, 'Labour Immigration Policy in the European Union: How to Overcome the Tension between Further Europeanisation and the Protection of National Interests?' (2020) 22 EJML 198.

29 Paula García Andrade, 'EU external competences in the field of migration: How to act externally when thinking internally' (2018) 55 CML Rev. 157.

projects on labour migration. Nevertheless, the Commission stated that "the EU has a strong track record in labour mobility schemes".³⁰

The exclusive competence of Member States to set volumes of admission for labour immigrants can be seen as a consequence of their political reluctance to act in common in the field of labour migration. For decades, and at least since the 1987 case *Germany et al. v. Commission*,³¹ Member States have tried to limit the reach of the EU's intervention in this politically sensitive field. Although the Commission considers that the EU immigration policy needs to reflect the integration of the EU economy and the interdependence of national labour markets, Member States are hardly convinced of the need to forgo their own legislation in favour of harmonised EU rules. As the long-awaited reform of the Blue Card Directive showed, their reluctance is persistent even for highly-skilled workers - arguably the least contentious group of labour migrants. Despite the alleged interdependence of Member States' economies and labour markets, needs are actually different from one country to another and labour policies are mostly national. For instance, while Estonia wishes to attract investors and start-ups in line with its digital economy policy, Germany experiences labour shortages in highly-skilled occupations, and Spain traditionally needs workers in the tourism and agriculture sectors. In that sense, the call for a common labour immigration policy is in contradiction with the diversity of labour market situations and employment policies across the EU.

Moreover, while the Commission is trying to build a system that "manages and normalises migration for the long term",³² the paradigm of the EU labour immigration policy remains unchanged. The admission of migrant workers continues to be dependent on short-term economic needs and the demand of local employers. In order to "normalise" migration, we should no longer see labour immigration purely as a solution to current socio-economic problems in destination countries. In the future, the EU should offer a new narrative on labour immigration and move towards a more hybrid system, according to which labour migrants are for instance selected in light of different criteria (language, age, past experiences in the

30 European Commission, 'Communication on a New Pact on Migration and Asylum' (n 14), 23.

31 CJEU, *Federal Republic of Germany et al. v Commission of the European Communities*, Joined cases C-281, 283, 284, 285 and 287/85, 9 July 1987, ECLI:EU:C:1987:351.

32 European Commission, 'Communication on a New Pact on Migration and Asylum' (n 14), 1.

destination country, professional experience,...) and not only on the basis of immediate economic needs.

Overall, the question of the added value of the EU labour immigration policy must be asked. Although the EU has achieved partial harmonisation in respect of some categories of labour immigrants, the EU *acquis* lacks effectiveness (take for instance the low number of Blue cards issued in most Member States). In my view, the reason is to be found in the limited added value of EU rules.³³ Why would employers and workers alike choose to fill an application for an EU Blue Card if that permit does not offer much more than its national counterpart?³⁴ In fact, EU schemes mostly replicate national programmes and EU directives contain a relative high number of flexible provisions ('may clauses') that safeguard national discretion.³⁵ The absence of truly operative intra-EU mobility provisions in EU labour immigration directives is the most blatant example.³⁶ Such a weakness in the EU *acquis* is arguably the consequence of a low level of trust and national resistance in a sensitive political field.³⁷

To conclude, in the field of legal migration, and labour immigration in particular, not much is to be expected in the months (and years?) to come since the European Commission – aware of its limited powers – refrains from making new pledges. Although a new narrative and new policy instruments could strengthen the EU *acquis* on labour immigration, the "New Pact" does not include any specific proposals on the matter which continues to be treated as a secondary and long-term issue. First and fore-

33 For more see Farcy, *L'Union européenne et l'immigration économique: les défis d'une gouvernance multi-niveaux* (n 4). See also: European Parliament, 'Legal Migration Policy and Law, European Added Value Assessment' (September 2021); European Commission Staff Working Document, 'Fitness Check on EU Legislation on Legal Migration' (n 6), 93-100.

34 Antoons and Ghimis (n 13), 269.

35 Christooft Roos, 'How to Overcome Deadlock in EU Immigration Politics' (2013) 51 *International Migration* 67, 75; Anaïs Faure Atger, 'Competing Interests in the Europeanization of Labour Migration Rules' in Elspeth Guild and Sandra Mantu (eds), *Constructing and Imagining Labour Migration* (Ashgate 2010), 170.

36 Sara Iglesias Sanchez, 'Free movement of third country national in the European Union? Main features, deficiencies and challenges of the new mobility rights in the Area of Freedom, Security and Justice' (2009) 15 *ELJ* 791. See also: Ségolène Barbou des Places, 'L'empreinte des nationalismes sur le droit de l'immigration de l'Union européenne' (2018) *Revue trimestrielle du droit européen* 725.

37 Tesseltje de Lange, 'The EU Blue Card Directive: A Low Level of Trust in EU Labour Migration Regulation' in Carolus Grütters and Tineke Strik (eds), *Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers 2013), 17-25.

most, in order to design new legal pathways, the Commission will need to work closely with the Member States whose disagreements and reluctance to act in common will be the most significant obstacle to overcome.

