"WE ASKED FOR WORKERS . . ." LEGAL RULES ON TEMPORARY LABOR MIGRATION IN THE EUROPEAN UNION AND IN GERMANY

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I. INTRODUCTION

In the Lisbon Strategy, the European Union (EU) had expressed its ambition to become the "most competitive and dynamic knowledge-based economy in the world" by 2010.[1] Shortly thereafter, it became evident that intra-EU mobility of workers was not sufficient to fill labor and skill shortages in the Member States' labor markets. Although not acknowledged as a long-term strategy, fostering immigration was identified as "one of the available tools within a broader policy mix" to raise the number of qualified workers, when the European Commission launched its Policy Program on Legal Migration in 2005.[2] The aim was to attract workers from outside the EU to fill employment gaps resulting from demographic change, mismatch in the labor market due to lack of qualified workers and low intra-EU mobility, and at the same time covering gaps in the social security systems.[3] This resulted in the enacting of several directives on labor migration: the Single Permit Directive, the Blue Card Directive, the Seasonal Workers Directive and the Intra-Corporate Transfer Directive. Due to a lack of support by the Member States, the EU legislator followed a rather segmented approach when determining rules for the access of third country nationals (TCN). Hence, the need to develop a comprehensive strategy for labor

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1. Presidency Conclusions, Lisbon European Council, Mar. 23-24, 2000, *available at* http://www.europarl.europa.eu/summits/lis1_en.htm.

2. *Commission Communication Policy Plan on Legal Migration*, COM (2005) 669 final (Dec. 31, 2005).

3. Martin Kahanec, *Labour Market Needs and Migration Policy Options: Towards More Dynamic Labour Markets*, *in* RETHINKING THE ATTRACTIVENESS OF EU LABOUR IMMIGRATION POLICIES. COMPARATIVE PERSPECTIVES ON THE EU, THE US, CANADA AND BEYOND 48 (Sergio Carrera, Elspeth Guild & Katharina Eisele eds., 2014); Peo Hansen, *The European Union's External Labour Migration Policy; Rationale, Objectives, Approaches and Results, 1999-2014* (OECD Soc., Emp. & Migration, Working Paper No. 185, 2016).

migration had been put on the political agenda again with the EU2020 strategy,[4] however without elaborating any concrete proposals.

This changed with the "refugee crisis" 2015, when the number of asylum seekers and refugees had dramatically risen with hundreds, if not thousands drowning in the Mediterranean Sea when trying to reach Europe. The European Commission proposed a European Agenda on Migration,[5] urging for rules on the distribution of persons in need of international protection among the Member States according to a quota model. Besides, it called for the opening of regular migration routes in order to prevent illegal immigration, migrant smuggling, and the congestion of the asylum system. The Commission made clear that migration policy needs to be coherent with not only development cooperation, trade, foreign, and home affairs, but with employment policies. Hence, a revision of the existing legal framework is envisaged.

This article will discuss the rules on temporary labor migration of TCN in the EU and relate them to the free movement of EU citizens. I will then refer to the case of Germany, considering recent developments triggered by the high influx of refugees in 2015. These developments imply a shift from the needs-based "guest worker programs" established in the 1950s and 1960s and the traditional German legislation toward a (slightly) more skills-based approach. The notion of "temporary labor migrants" refers to persons who need a visa or other type of residence permit in order to take up employment, but who are not allowed to settle permanently in this country.[6] I will focus on temporary workers from third countries,[7] even though EU citizens may fulfill these attributes when working in other Member States, too, e.g., in the context of posting.[8]

II. EUROPEAN LEGAL FRAMEWORK

Within the Single Market, the freedom of establishment as well as the free movement of labor, goods, services, and capital are integral

4. Communication from the Commission, Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth, COM (2010) 2020 final (Mar. 3, 2010).

5. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Agenda on Migration, COM (2015) 240 final (May 13, 2015).

6. Michael Samers, *New Guest Worker Regimes?*, *in* AN ANTHOLOGY OF MIGRATION AND SOCIAL TRANSFORMATION. EUROPEAN PERSPECTIVES 121, 122 (Anna Amelina, Kenneth Horvath & Bruno Meeus eds., 2016).

7. Rules stemming from agreements between the European Union and third countries, such as the Association Agreement with Turkey, the European Economic Area (EEA, consisting of Iceland, Liechtenstein and Norway) and the EU-Swiss Agreement on Free Movement are not dealt with in this article.

8. Zinovijus Ciupijus, *Ethical Pitfalls of Temporary Labour Migration: A Critical Review of Issues*, 97 J. BUS/ETHICS 9, 12 (2010).

preconditions for the EU being a territory without internal borders, fostering competition and trade among the Member States.

A. Primary Law Provisions

1. Free Movement of Workers

The free movement of workers, Article 45 TFEU,[9] is the core element of labor migration in the EU.[10] This fundamental freedom grants access to the territory and the labor market of other Member States in order to accept job offers, to engage in gainful employment and to remain there after the termination of the employment relationship. Moreover, the Treaty awards the right to equal treatment regarding remuneration and other working conditions. According to the jurisdiction of the European Court of Justice (ECJ), Member States may not establish any obstacles to free movement in their national law, comprising language requirements, labor market tests or the proof of certain qualifications. However, recent ECJ rulings reveal a tendency to restrict free movement to those who are already engaged in employment. In contrast, job seekers without sufficient financial means may be excluded from social assistance benefits in the country of residence, thus being indirectly obliged to return to their country of origin.

Notwithstanding its open wording, the personal scope of Article 45 TFEU is limited to the citizens of EU Member States. This reveals a community preference, giving EU citizens favorable access to the Member States' labor market vis-à-vis TCN.[11] Hence, for EU citizens, Europe consists of just one single labor market, whereas TCN still face a patchwork of national laws.[12] For them, entry, stay, and labor depends on an authorization by a Member State, while EU citizens can move, reside and work freely within the whole territory of the EU. Yet, the EU has the competence to adopt rules on the conditions of employment for third-country nationals legally residing in Union territory, Article 153 (1) lit. g) TFEU.

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9. Treaty on the Functioning of the European Union, Oct. 26, 2012, 2007 O.J. (C 326/47).

10. *Cf.* Kees Groenendijk, *Recent Developments in EU Law on Migration: The Legislative Patchwork and the Court's Approach*, 16 EUR. J. MIGRATION & L. 313, 316 (2014) (for an overview on the historical development of free movement of workers).

11. Martin Ruhs, *Immigration and Labour Market Protectionism. Protecting Local Workers' Preferential Access to the National Labour Market*, *in* MIGRANTS AT WORK. IMMIGRATION AND VULNERABILITY IN LABOUR LAW 60, 62 (Cathryn Costello & Mark Freedland eds., 2014); Daniel Thym, *Legal Framework for EU Immigration Policy*, *in* KAI HAILBRONNER & DANIEL THYM, EU IMMIGRATION AND ASYLUM LAW. A COMMENTARY (2d ed. 2016).

12. Elspeth Guild, *The EU's Internal Market and the Fragmentary Nature of EU Labour Migration*, *in* MIGRANTS AT WORK. IMMIGRATION AND VULNERABILITY IN LABOUR LAW 98–118 (Cathryn Costello & Mark Freedland eds., 2014).

2. EU Migration Policy

Under the Treaty of Maastricht, immigration policy has been part of the cooperation in justice and home affairs. However, no substantial rules were established under that regime.[13]

It was not until the adoption of the Amsterdam Treaty in 1997 that migration policy became a task of the EU. Article 78 TFEU determines the competence to develop a common asylum system. Several legal acts—the so-called "Dublin regulation," the Qualification directive, the Reception Conditions Directive, and the Asylum Procedures directive—determine the administrative procedures for granting a uniform asylum or subsidiary protection status. However, they cover solely humanitarian aspects.

For any other form of migration, including labor migration or family reunification, the Union shall establish a common immigration policy as laid down in Article 79 TFEU. It aims at the efficient management of migration flows, fair treatment of third country nationals legally residing in the EU and the combat against illegal immigration and human trafficking. The article contains a mere competence rule, setting no material standards.[14] In particular, the notion of "fair treatment" refers to a normative status of social justice only, which has to be understood in an abstract manner and does not award any individual rights related to the access to the labor market or certain living and working conditions.[15] Consequently, the EU legal framework does not affect the Member States' competence to determine volumes of admission in order to seek work, whether employed or self-employed. Such restrictions of access to the labor market do not necessarily have to be based on immigration quotas, but also on labor market tests or other measures.[16]

B. Secondary Law Provisions

The general rules in EU primary law have been specified in several directives. The directive is an instrument that has to be transposed into national law by the Member States.[17] It is binding by the result to be achieved, but leaves it up to the discretion of the Member States to choose the forms and methods, Article 288 TFEU.

In 2011, the EU adopted the Single Permit Directive 2011/98/EU. Member States are required to establish a single application procedure for

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13. Judy Fudge & Petra Herzfeld Olsson, *The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights*, 16 EUR. J. MIGRATION & L. 439–66 (2014).

14. Groenendijk, *supra* note 10.

15. Daniel Thym, *EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook*, 50 COMMON MARKET L. REV. 709, 723 (2013); Thym, *supra* note 12, at 276.

16. Thym, *supra* note 11, at 284.

17. Denmark, Ireland, and the United Kingdom do not participate in the common immigration policy.

labor immigrants and to issue a common work and residence permit for third country nationals. Besides, equal treatment in respect of working conditions and social security has to be guaranteed, though the Member States may determine the conditions for access to their labor market. This directive contains the regulatory framework for all workers that are not covered by other specific directives,[18] out of which the Blue Card Directive, the Seasonal Workers Directive, and the Intra-Corporate Transfer Directive are the most prominent.

1. Blue Card Directive

The Blue Card Directive 2009/50/EC regulates the conditions of entry and residence of highly skilled professionals and their family members. It establishes common rules for accelerating administrative procedures and facilitating intra-EU migration of Blue Card holders. They shall enjoy a broad range of rights, in particular equal treatment regarding working conditions, education, and training; access to goods and services; as well as social security benefits.[19] The directive is driven by the labor demands of the Member States, aiming at an efficient allocation of highly skilled persons by allowing job change and regional mobility.[20]

The notion of "highly qualified employment" refers to paid occupational activities of employees with higher professional qualifications who work in the field of their specific competence. "Higher professional qualifications" can be attested for persons with (post-secondary) higher education or at least five years of professional experience at a level comparable to higher education qualifications, under the condition that this qualification is relevant for the desired job in the EU. The Blue Card, basically a special type of residence permit valid for one to four years, is issued by the Member State in which the person is going to work. Admission requires a valid employment contract or job offer—thus it is the employer who "choses" the migrant. Furthermore valid travel documents, e.g., a visa and the proof of sickness insurance need to be presented.

One important aspect is that the salary of the Blue Card holder shall not be lower than one-and-one-half times the average gross annual salary in the

18. Refugees or persons with subsidiary protection status, researchers, long-term residents, seasonal workers and posted workers do not fall within the scope of the directive notwithstanding their qualification. Hansen, *supra* note 3, at 20.

19. The term "social security benefits" refers to Regulation (EEC) 883/2004 and comprises benefits paid in case of sickness and maternity, unemployment, incapacity for work, old age, survivorship, work accidents and occupational diseases and family benefits. Benefits securing the minimum of subsistence (social assistance) are exempt from the equal treatment principle. Regulation (EC) No. 883/2004 of the European Parliament and of the Council Apr. 30, 2004, 2004 O.J. (L 166/1).

20. It has been critizised harshly under the aspect of "brain drain," *cf.* Yasin Kerem Gümüs, *EU Blue Card Scheme: The Right Step in the Right Direction?*, 12 EUR. J. MIGRATION & L. 435, 436 (2010).

Member State concerned. This threshold shall secure that EU citizens are not deterred from applying for the vacancy.[21] Finally, the applicant must not represent a "threat to public policy, public security and public health." In respect of this condition, Member States' discretion is rather broad, because third country nationals—in contrast to EU citizens—do not enjoy the right to free movement within the EU.[22]

In order to protect their national labor markets, Member States have the right to restrict the issuing of the Blue Card to certain economic sectors or professions or to set up a maximum volume of third country nationals to whom the permit can be granted. Besides, the Member States may apply a labor market needs test, determining whether there are any local workers available for the vacancy.

After two years of employment, Member States may grant equal access to the whole national labor market for Blue Card holders. After this period, they can change their employer without prior authorization and their salary can be lower than the income threshold established for the first access. In any case, they still have to perform highly qualified work. In case of temporary unemployment for less than three consecutive months, the Blue Card shall not be withdrawn, so that that the holder can remain in the Member State and look for another job in a highly skilled profession. If unemployment occurs more than once, the residence permit can be withdrawn.

The directive shall encourage geographic mobility within the EU. Therefore, after eighteen months[23] the Blue Card holder and his family members are entitled to move to another Member State for the purpose of highly qualified employment. However, the second Member State will have to issue another Blue Card, which is valid for its own territory. When doing so, it will check whether all conditions for issuing the residence permit are (still) met and it may apply its own rules regarding quota or labor market tests.[24]

After five years of legal residence in one or more Member States, the Blue Card holder can achieve the status of a long-term resident enjoying free movement in the whole EU territory. Thus, the long-term residence permit has a transnational effect. The granting of the long-term residence status

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21. Kai Hailbronner & Julia Herzog-Schmidt, *Blue Card Directive 2009/50/EC, in:* KAI HAILBRONNER & DANIEL THYM, EU IMMIGRATION AND ASYLUM LAW. A COMMENTARY 764, 785 (2d ed. 2016).

22. *Id.* at 788; Hansen, *supra* note 3, at 19.

23. "In order to be mobile within the EU, the Blue Card Holder needs to be immobile for quite a while." Tesseltje de Lange, *The EU Blue Card Directive: A Low Level of Trust in EU Labour Migration Regulation, in* CAROLUS GRÜTTERS & TINEKE STRIK, THE BLUE CARD DIRECTIVE: CENTRAL THEMES, PROBLEM ISSUES, AND IMPLEMENTATION IN SELECTED MEMBER STATES 17, 22 (2013).

24. *Id.* at 23.

requires "stable and regular income," making the holder independent from public benefits, and coverage by health insurance.[25]

In June 2016, the European Commission presented a proposal for a revised Blue Card directive.[26] In the future, immigration of highly qualified workers shall be regulated exclusively by the Blue Card, thus any parallel instruments in national law or national guest worker programs shall be abolished.[27] However, a change from the needs-based to a potential-based approach of highly skilled labor immigration is not intended. However, labor market needs tests shall be less strict and apply only when a Member State's labor market undergoes "serious disturbances." Member states shall have to report to the Commission whether they face such disturbances when applying the test. Intra-EU mobility shall be possible after twelve months. The long-term resident status shall be awarded after three years. Besides, the income threshold shall be lowered. Family members shall have access to the labor market and the personal scope of Blue Card shall be opened to refugees or persons with subsidiary protection status as well as to persons with non-academic degrees (now called "higher professional qualifications"), which can be verified by higher education or at least three years of professional experience. This option shall become mandatory for all Member States. With the revised directive, the Commission strives for a higher attractiveness of the Blue Card for both immigrants and the Member States that have—so far—applied this instrument only reluctantly.

2. Seasonal Workers Directive

Directive 2014/36/EU provides a common legal framework for access, employment, and rights of seasonal workers. The term "seasonal work" refers to employment in jobs depending on the passing of the season, which means that the activity must be linked to certain events in the course of a year that go along with a significantly higher demand of labor. This is the case, for example, in agriculture, horticulture, or tourism. Consequently, seasonal work is always based on a fixed-term work contract. However, the directive does not determine sectors that have to be considered as seasonal but leaves that in the discretion of the Member State. The personal scope includes only

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25. However, long-term residents do not enjoy a status equal to those of EU citizens, since the Long-Term Residence directive contains several provisions allowing Member States to restrict the influx of TCN residing in other Member States. Hansen, *supra* note 3, at 16.

26. Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM (2016) 378 final.

27. Christine Langenfeld & Holger Kolb, *Der Kommissionsvorschlag einer neuen EU-Hochqualifiziertenrichtlinie*, 2016 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW) 527, 528 (2016).

workers who are residing outside the EU and who keep their principal place of residence in a third country during their seasonal work.

The aim of the directive is to contribute to "the effective management of migration flows," thus avoiding illegal immigration or employment and, at the same time, minimizing negative incentives for exploiting the seasonal worker through the granting of a decent standard of living and working conditions.[28] The rules for admission differ, depending on the intended length of the stay. For stays not exceeding ninety days, applicants for a seasonal work permit need to present a valid employment contract that complies with the national labor law standards, sickness insurance, and evidence on adequate accommodation during their stay. Access to the social assistance systems is denied, so that seasonal workers who receive a salary below the minimum of subsistence cannot apply for any benefits. If the stay exceeds ninety days, the same conditions apply. Beyond that, applicants have to prove sufficient means of subsistence, so that they will not be dependent on social assistance benefits, and they must not be considered as a threat to public policy, public security, and public health. In any case, Member States may impose a labor market needs test.

Besides, the directive provides a maximum duration of stay of nine months in any twelve-months-period. After this maximum period, the seasonal worker is required to leave the country. An extended stay in that Member State is possible only for purposes other than seasonal work. Member states have the right to establish a maximum duration for the hiring of seasonal workers, thus hindering the abuse of seasonal work when there is actually permanent labor demand. To safeguard this interest, Member States may reserve the placement of seasonal workers to public employment services.

In contrast to the Blue Card directive, the seasonal workers directive aims at low-skilled workers, for which likewise a notable demand exists throughout all Member States.[29] It lies in the Member States' discretion to determine employment sectors to which the directive shall apply, and a maximum volume of seasonal workers. The directive therefore offers a rather flexible framework.

Once the work permit is awarded, seasonal workers have the right to enter and stay in the territory of the respective Member State and to exercise their professional activity. However, they do not enjoy the right to free

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28. Till Sachadae, *Saisonarbeiterrichtlinie 2014/36/EU*, *in* WINFRIED BOECKEN ET AL., GESAMTES ARBEITSRECHT 1355, 1356 (2016); Anja Wiesbrock, Tobias Jöst & Alan Desmond, *Seasonal Workers Directive 2014/36/EU*, *in* KAI HAILBRONNER & DANIEL THYM, EU IMMIGRATION AND ASYLUM LAW. A COMMENTARY 928, 936 (2d ed. 2016).

29. For EU citizens, seasonal work usually is not attractive since it does not offer a sustainable route out of unemployment.

movement within the EU, nor do they have the right to family reunification. Yet equal treatment regarding working conditions, labor rights[30] and social security benefits,[31] access to goods and services available to the public (except housing), education and training linked to the seasonal work as well as tax benefits is granted.

3. Intra-Corporate Transfer (ICT) Directive

Directive 2014/66/EU sets out a legal framework for the entry and stay of TCN in intra-corporate transfers. ICT is common and widespread among globally operating enterprises; they usually face obstacles resulting from differing national law provisions. Some degree of harmonization should facilitate the transfer of highly qualified personnel within a group of companies, hence allowing for an optimum allocation of human resources so that Member States can benefit from the knowledge and competences of the transferees.[32]

The personal scope of the directive is rather narrow. It comprises employment of managers, specialists, and trainees usually residing in third countries, who work temporarily in an EU-subsidiary of their multinational employer.[33] The directive does not cover stays for less than ninety days. Hence, Member States may regulate short-period ICT at their own discretion.

Intra-corporate transfer requires a valid employment contract between the applicant and an internationally-operating undertaking seated in a third country, in the context of which he is delegated—for occupational or training purposes—temporarily to an undertaking established in the EU, that belongs to the same entity as his employer. This model differs from posting inasmuch as the latter refers to situations where the worker temporarily works for a client of his employer in a State other than the one in which he usually works.[34] In contrast, ICT refers to settings in which the authority to give instructions to the employee is not kept with the sending employer, but transferred to the receiving company.[35] Transferees have to possess higher

30. Making the entitlement to certain employee rights dependent on special conditions, e.g., waiting periods, that might hinder the acquisition if such entitlements due to the short period of residence of the seasonal worker, does not constitute a violation of the equal treatment principle if these rules are equally applied to all employees. Sachadae, *supra* note 28, at 1360.

31. Access to family benefits and unemployment benefits may be restricted.

32. Sebastian Klaus, *Die ICT-Richtlinie—Ende einer europäischen Odyssee*, ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK (ZAR) 1, 3 (2015); Hansen, *supra* note 3, at 22; Hendrik Lörges, *Intra-Corporate Transfer Directive 2014/66/EU*, *in* KAI HAILBRONNER & DANIEL THYM, EU IMMIGRATION AND ASYLUM LAW. A COMMENTARY 974, 982 (2d ed. 2016).

33. Researchers, posted workers, self-employed, students or persons assigned by employment agencies or temporary work agencies are not covered by the directive.

34. Lörges, *supra* note 32, at 987.

35. Klaus, *supra* note 32, at 3.

qualification, also if they are delegated for the purpose of training. However, Member States have the right to establish rules for ICT of unskilled workers.

Member states shall issue an Intra-Corporate Transferee Permit if the transferee has been employed for at least three to twelve (respectively three to six for trainees) uninterrupted months in the sending undertaking before the transfer. They have to prove their qualification, valid travel documents, sickness insurance and sufficient resources so that they will not be depending on the social assistance system of the receiving state. Member states have to ensure that the working conditions are equivalent to those of posted workers; regarding the salary, equal treatment with nationals has to be ensured.[36]

ICTs have the right to enter and stay and to exercise their occupational activity—maximum three years, respectively one year for trainees—on the territory of the Member State that has issued the permit. They enjoy the right to family reunification, which shows the similarity with the Blue Card directive. Member states must not establish obstacles like language requirements for spouses or children. Besides, family members enjoy immediate access to the labor market in the receiving country. Both the transferee and his family members have the right to equal treatment regarding employment conditions, freedom of association, recognition of diplomas, social security benefits,[37] and access to goods and services.

Similar to the Blue Card, the ICT permission establishes the right to intra-EU mobility. Short-term stays of maximum ninety days within a 180-day period can be made dependent on a notification by the first to the second state. In case of longer stays, the second state may (or may not) establish some kind of admission procedure that—among others—may include a labor market test.

C. Outlines of the European Temporary Labor Migration Policies

The EU secondary legislation aims to attract the best-qualified labor, thus making Europe's economy competitive and promoting economic growth compared to the US, Canada or Australia.[38] Instead of a "puzzle" of twenty-eight different national schemes with different personal scopes and different administrative procedures, a single framework could make migration more attractive. However, EU law provides for a merely gradual harmonization of national immigration laws and follows a sectoral approach, regulating only certain specific types of migration.[39] The European Commission had opted

36. Insofar, the level of protection of ICT goes beyond that of posted workers, for who only statutory wage provisions are applicable and not those stemming from collective agreements.

37. Access to family benefits can be limited to ICTs who are permitted to stay in the country for more than nine months.

38. Gümüs, *supra* note 20, at 435.

39. Thym, *supra* note 15, at 272.

for a horizontal approach with similar rules for all kinds of labor immigration, but could not implement this goal due to the opposition of several Member States.[40] Hence, the national rules on immigration are not replaced by common EU rules; they are just aligned to common objectives and minimum standards. However, regarding highly skilled migrants, the proposal for a revised Blue Card directive strives for an "overall harmonization" since all parallel residence permits will have to be abolished.[41] However, the right to control immigration lies within the sovereignty of each national state: It allows to consider public interests like economic, social, cultural, security, or human rights aspects—all arguments of the polity.[42] Therefore, all directives allow for flexibility regarding the Member States' rules on admission of foreigners, e.g., salary thresholds.[43]

Whereas Blue Card and ICT refer to highly skilled professionals, seasonal work is often conducted by unskilled or low skilled workers. Hence, for seasonal workers, the directive explicitly aims at improving their socio-economic status, preventing the widespread abuse and exploitation of low skilled workers. This is a qualitative specific of the seasonal workers directive compared to any other temporary labor immigration rules.

ICT and seasonal work constitute specific forms of circular migration, which means that the groups covered by these directives shall be prevented from becoming permanent residents.[44] They are expected to return to their country of origin. Yet, one can clearly observe the differences regarding intra-EU mobility, which is offered to the highly skilled transferees and blocked for the low skilled seasonal workers. However, one might argue that intra-EU mobility is not necessary for seasonal workers: They carry out work that is by its nature limited to certain periods of the year. Thus there is no continuous demand for their skills, which explains the expectation for them to return to their country of origin. Anyway, circular migration is possible for this group of workers, too. They do have the right to re-enter the EU for the next season (although there is no "multi season permit"). Though they do not necessarily return to the same EU Member State (although re-entry is possible for former seasonal workers under more favorable conditions), but can rather make a new choice every year depending on labor demand.[45]

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40. Sergio Carrera et al., Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020, CEPS Policy brief No. 240, Apr. 5, 2011, 3, www.ceps.eu; Hansen, *supra* note 3, at 24.

41. Lagenfeld & Kolb, *supra* note 27, at 532.

42. Thym, *supra* note 15, at 730.

43. One reason might be the lack of binding international rules on access rights for labor migrants, *cf.* Christof Roos & Natascha Zaun, *Norms Matter! The role of international norms in EU policies on asylum and immigration*, 16 EUR. J. MIGRATION & L. 61 (2014).

44. Fudge & Herzfeld Olsson, *supra* note 13, at 440.

45. *Id.* at 450.

Evidently, Blue Card holders may engage in circular migration, too: Periods of absence from EU territory do not hinder the gaining of a long-term resident status. Member states may determine certain reasons for "harmless" absence periods, such as work or studies. However, for them, circular migration is rather an individual decision than a legally binding expectation, since they always have an option for long-term residence.[46]

One last observance relates to intra-EU mobility. Neither Blue Card holders nor ICT enjoy preferential treatment in the second Member State. Instead, they must undergo the whole administrative procedure again to obtain the right to enter that state. Thus, the aim to facilitate mobility of highly skilled TCN is missed.[47]

III. THE CASE OF GERMANY

In the following section, I shall take a closer look at the German labor immigration policies. Germany provides an interesting example, since it developed the prototype of "Gastarbeiter" immigration, had been reluctant toward accepting it status as immigration country in a long time, but finally has discovered the advantages of a comprehensive immigration policy, however without finding a common understanding about its indispensable basic principles.

A. From Recruitment to Rejection

In order to fill the labor gaps in the period of reconstruction after World War II, Germany recruited an enormous number of guest workers from Italy, Spain, Greece, Turkey, Morocco, Portugal, Tunisia, and former Yugoslavia in the 1950s and 1960s. Employers would have to apply with the Federal Employment Agency (FEA), which acted as a kind of recruitment agency. The system included both unskilled and skilled workers. Usually their contacts with the German population were rare: There was special housing for the workers (comparable to dormitories), no language courses or other measures to make them become part of the society or to familiarize with German culture. Besides, family reunification had been suspended. According to the rotation principle, all guest workers should have been replaced after two years (or a certain period as agreed upon in a contract).[48] In practice, the rotation principle has not worked due to the ongoing demand for workers and the lack of willingness to return to the home countries.

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46. Hansen, *supra* note 3, at 18.
47. Guild, *supra* note 12, at 108.
48. James F. Hollifield, *The Emerging Migration State*, 38 INT'L MIGRATION REV. 885, 894 (2004); Samers, *supra* note 76, at 123.

Hence, in contrast to the expectation of the German government, guest worker mobility was not temporary but continued on a permanent basis. It was only with the oil crisis and economic recession and the raising number of unemployed persons in the early 1970s, that the German government decided to suspend the guest-worker program ("Anwerbestopp") in 1973.

Ever since then, no substantial rules on labor immigration had been developed. Until the 1990s, governments denied that Germany was an immigration country. It took a change of government in 1998 until first attempts to modernize migration law and citizenship law were made. The idea of a points based system of labor immigration did not find support, thus the regulatory framework remained rather restrictive. This is well illustrated by the government's attitude towards the citizens of the new EU Member States, especially after the enlargement by the Middle- and East-European countries in 2004. Germany was one of the few Member States that restricted the free movement of workers for citizens of the new Member States (except Malta and Cyprus) for a period of seven years, claiming that otherwise its labor market would face serious threats. Regarding the last enlargement in 2013, when Croatia became a member of the European Union, Germany decided to stop the ban after two years. These restrictions had been driven by the fear of an "immigration into the social security systems,"[49] an assumed influx of cheap workers and of raising unemployment rates.

B. Legal Framework for the Immigration of Workers

Regarding access to the labor market, the German Residence Act (*Aufenthaltsgesetz*) differs between residence permits for other purposes that allow the holder to pursue an economic activity—such as family reunification or persons entitled for international protection—and the residence permit for the purpose of exercising an economic activity. For the latter, a combined residence and work permit is issued. It requires a job offer and sufficient means to cover subsistence. The FEA has the main role in regulating and controlling labor immigration:[50] It will generally assess whether the employment of the TCN has any negative impact on both the labor market and employment opportunities of persons already residing in Germany. In a second step, it will apply a labor market needs test by checking the availability of local workers for the vacancy. The employer may reject the proposal of the FEA if he considers a local worker as not being suitable for

49. This insinuates that migrants would choose Germany as their destination country only in order to claim social assistance benefits. This welfare magnet thesis has so far not been proved.

50. The involvement of the FEA is a mere internal administrative procedure. The applicant has to refer to the Aliens Authority only (so called "one stop government"). Harald Dörig, *Fachkräftegewinnung mit Blue Card oder Punktesystem*, 2016 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1033, 1034 (2016).

the job. However, he will have to justify his requirements for the vacancy,[51] allowing the FEA to evaluate whether these are essential for the job, which poses a relatively high administrative burden on the procedure.[52] Alternatively, the FEA can determine occupational groups or sectors for which there is high demand, making it "justifiable in terms of labor market policy and integration aspects" to fill vacancies with immigrants. This is the case in the care sector, information technologies, or logistics. Hence, access to employment in shortage occupations is privileged. Thereby these become "global jobs" without any preference for local workers.[53]

In any case, working conditions of a TCN must be equal to those of local workers. The FEA may limit its approval to a specific employer or to a specific sector. Thus, job mobility is individually awarded.

In 2013, the rules on the requirement of an FEA approval underwent a fundamental change. Before the reform, there were different sets of rules for foreigners already living in Germany and incoming TCN. Now there is one single regulation for any type of labor migrants, which shall contribute to transparency and advocate applicability. The regulation (*Beschäftigungsverordnung*) differentiates between certain groups of labor and contains detailed provisions on the duration and the conditions for these types of work. There are cases, in which employment of TCN is possible without any approval by the FEA. This is the case for highly skilled labor, holders of a domestic academic degree, or scientists, but also for volunteers, posted journalists or employees of charitable organizations. In other cases, the FEA has to approve but does not apply a labor market needs test, for example for senior executive staff, ICTs, native-speaking teachers in language courses, Au Pairs, or domestic workers employed by expatriates. A labor market test applies for seasonal workers, travelling funfair employees and housekeepers. Some sectors are entirely exempt from approval, i.e., science, sports, tourist guides, or models. Due to the detailed character of the rules and the rather un-systematic approach, the aim of simplification has not entirely been achieved.

Therefore the discussion on a fundamental reform of German immigration policy continues. The region of Baden-Württemberg started a pilot project on a labor immigration model for skilled labor based on the Canadian points-based system in 2016.[54] This shall form a blueprint for a

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51. In 2012, Germany adopted rules on the recognition of degrees that have been acquired in third countries, giving an individual right to taking part in a recognition procedure even before entering Germany. This includes both regulated and unregulated professions (which is interesting because work experience is taken into account). The administrative procedure has to be accelerated, therefore deadlines are set.

52. Ruhs, *supra* note 11, at 75.

53. *Id.* at 63.

54. PUMA, "Punktebasiertes Modell für ausländische Fachkräfte."

revised Immigration Act, although it is still questionable whether a political consensus can be reached.

C. *The Blue Card—A Tool to Attract Highly Skilled Workers?*

However, Germany's experience with the Blue Card could trigger a broader debate about labor immigration reform. The national rules related to the Blue Card have been adopted in 2012 after a vivid discussion on labor gaps in highly skilled jobs, especially in the German IT and engineering sector. In some aspects, the German rules even go beyond the minimum standards prescribed by the EU directive.

Whereas the personal scope of the Blue Card directive is limited to academics, the Federal Ministry of Labor has the authority to broaden the national rules to persons without university degree, who acquired five years of working experience that has led to qualifications comparable to an academic degree. However it has not made use of its competence yet.

The income threshold has been defined as to two-third of the earnings ceiling in the pension insurance.[55] For employees in a shortage occupation a lower threshold applies. If this income level is met, the FEA does not have to approve the issuing of a Blue Card. An above-average wage suggests that there is high labor demand, so the agency will not have to investigate further.[56]

The Blue Card is issued for four years. Within the first two years, a change of the employer is possible only after the approval by FEA. After thirty-three months, a long-term residence permit can be issued, provided the Blue Card holder has paid sufficient contributions to the pension insurance system and the employment contract is still in force. If he proves good language skills, the long-term residence status can be awarded after twenty-one months already. Compared to other immigration routes, the road to long-term residence is remarkably shorter. This is, however, not entirely positive, since the acquisition of the long-term residence status leads to a loss of the right to intra-EU mobility because this title is purely national-law based. To gain intra-EU mobility again, the Blue Card holder needs to fulfill the five-year waiting period in order to receive the EU long-term residence permit.[57]

Family unification with a Blue Card holder is possible, the residence permit will be fixed-term in line with the validity of the Blue Card and they have immediate access to the labor market. TCN with higher education

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55. This earnings ceiling refers to the income up until which contributions to the pension system are levied, currently 77,200 Euro in West Germany, 68,400 Euro in East Germany per year.

56. de Lange, *supra* note 23, at 21.

57. Martin Strunden & Michaela Schubert, *Deutschland gibt sich Blue Card "Plus" – EU-Richtlinie genutzt für Meilenstein der Arbeitsmigration*, 2021 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK 270, 274 (2012).

qualification enjoy the right to stay in the country if unemployed. This is unusual even in the context of the German Residence Act, which usually does not award residence permits for the purpose of seeking employment. The permit is issued, however, under strict conditions: The TCN's qualification has to be recognized or otherwise comparable to a German higher education, he must be able to secure his subsistence and job-seeking is possible for a maximum period of six months.[58]

Compared to other EU Member States, where the Blue Card is considered to have failed,[59] it turned out to be an attractive instrument for Germany's recruitment of highly skilled workers: About 90% of all Blue Cards have been issued in Germany.[60] It is therefore regarded as a German, rather than a European instrument of labor immigration.[61] Even with the proposal for a revised Blue Card directive, Germany does not face a huge burden when implementing it into national law, since it had always gone beyond the directive's standards.[62]

D. Lessons Drawn From the "Refugee Crisis"

The insight into filling labor gaps with migrants did, traditionally, not apply to persons seeking international protection. In contrast to labor immigration, which is based on an individual, voluntary decision of the migrant, refugees, and asylum seekers represent types of forced migration. According to the provision of the Geneva Convention, they are allowed to participate in the labor market as soon as the international protection status is awarded. This is, however, regarded rather as a right of the refugee than as option for the receiving State profiting from the refugee's qualification.

1. Labor-Market Integration of Persons Seeking International Protection

According to the Asylum Act (*Asylgesetz*), persons seeking international protection have the right to reside in Germany while the asylum procedure is pending. They are not provided with a residence permit, but with a special document (*Aufenthaltsgestattung*). After a three months waiting period they are allowed to work. However, foreigners shall not be allowed to take up employment as long as they are required to stay in a reception center, which is the case for six weeks upon arrival, though not more than six

58. *Id.* at 272.
59. Proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM[2016]378 final:2.
60. Dörig, *supra* note 50, at 1038.
61. Lagenfeld & Kolb, *supra* note 27, at 528.
62. *Id.* at 530.

months. Hence in some cases, the three-month waiting period is exceeded. The FEA has to approve the employment after assessing whether local employees are available for the vacancy and a test of the equality of working conditions.

In 2015, when nearly 500,000 persons applied for international protection in Germany, the authorities in charge faced congestion, which lead to an enormous prolongation of the asylum procedures. Consequently, the legislature passed several acts that aimed at limiting the number of asylum seekers, to accelerate the procedures and to foster asylum seekers' overall participation. The latter aspect is discussed in Germany under the notion of "integration." The exact meaning of the expression is not entirely clear.[63] However, in legislation, integration is equated with good language skills, knowledge about the legal system, culture, and history of Germany as well as labor market participation. In the past, the need for integration was acknowledged only for persons with a perspective of becoming a long-term resident, which excluded persons in pending asylum procedures from any measures related to integration, i.e., integration and language courses or employment promotion.

During the so-called "refugee crisis" it became evident that the duration of the procedures would hinder integration of persons whose claim for protection was likely to be accepted, e.g. for persons from Syria or Eritrea. Besides, employers demanded to increase labor market participation of the refugees in order to meet the continuously high labor demand in care and other sectors. Therefore, the government decided to prepone integration measures for all persons who "are expected to be permitted to remain lawfully and permanently"[64] in Germany. They are entitled to participate in integration and language courses. Besides, access to employment has generally been facilitated. Asylum seekers with a university degree who are going to work in a job with high labor demand (as recognized in the shortage occupation list by the FEA) and who meet the income threshold valid for Blue Cards, may engage in employment without approval of the FEA. For any other professions, no labor market test applies if the asylum seeker has been residing in Germany for more than fifteen months or if he wants to engage in temporary agency work. For a transitional period, in regions with low unemployment rates the labor market test is suspended. Only equal working conditions have to be proved, but no longer the availability of local workers. This might also have an effect on the regional distribution, inasmuch as asylum seekers are invited to settle in regions with low

63. *Cf.* JOHANNES EICHENHOFER, BEGRIFF UND KONZEPT DER INTEGRATION IM AUFENTHALTSGESETZ (2013).

64. Cf. Art. 44 IV AufenthG (*Residence Act*).

unemployment.[65] After four years, the approval of the Federal Employment Agency is generally dispensable.

Summing up, the legislature acknowledges that employment of asylum seekers and refugees does not automatically impose a threat on the national labor market but is rather welcome to meet the needs of employers.

2. Special Rules for Asylum-Seekers from "Safe Countries of Origin"

However, this assumption does not apply for all persons seeking international protection. The public debate centered on the question whether the reception conditions for asylum seekers could attract persons who are not in need of protection but rather immigrate for economic reasons, i.e., escaping poverty and finding access to the labor market. The legislature decided to exclude persons from certain countries of origin from the regular reception conditions. In order to achieve this aim, the Western Balkan states Albania, Macedonia, Bosnia and Herzegovina, Serbia, Montenegro, and Kosovo have been classified as "safe countries of origin." Applications for protections from citizens of these states had remarkably risen in 2015 and only a negligible part of the claims—less than 0.5%—have been successful. Consequently, they were considered as "welfare tourists" who seek to abuse the asylum system in order to be entitled to social welfare benefits. Even though the welfare magnet thesis has never been proven, the assumed negative incentives resulting from the reception conditions shall be abolished. Asylum seekers from "safe countries of origin" are now obliged to live in a reception center for the whole duration of their asylum procedure.[66] They do not receive cash benefits but benefits in kind only, and are entirely excluded from the labor market and any measures aiming at integration—even if their deportation is suspended for humanitarian reasons.

On the other hand, for persons from the Balkan states a route to regular labor migration has been opened: The FEA will approve any type of employment, given that they were residing outside Germany and have not filed an asylum application within the last twenty-four months. The issuing of a residence permit additionally requires the ability to secure one's subsistence without public means, so this route is still blocked for persons fleeing from poverty.

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65. Correspondingly, the government has established a residence requirement for refugees for reasons of public interest. They can thus be forced to move to a certain region in Germany and do not enjoy free choice of their domicile.

66. A reception center is a form of collective accommodation for asylum seekers, that is not necessarily comparable with normal housing. Rather huge numbers of persons share rooms.

IV. CONCLUSIONS

The current situation in Germany is far from being comparable to that of the *Gastarbeiter* in the 1950s and later. The regulatory framework has markedly opened allowing for the immigration of highly skilled workers, guaranteeing equal working conditions and access to social security benefits as well as an option for long-term settlement, the latter being limited to highly skilled workers. With the recent developments in the "refugee crisis" it became obvious that it is impossible to entirely control the influx of migrants. However, transparent rules and clear administrative procedures can enable these persons to participate in the workforce, thus reducing their dependency on welfare benefits, promoting their integration with society and profiting from their knowledge and capabilities.

There are two ways to organize labor migration: according to potential of the immigrant or according to need of the receiving state. Whereas the first system strives for the "best and the brightest," the latter makes immigration dependent on concrete job offers.[67] Germany did not generally turn away from the needs-based approach, but one can observe a first and slight tendency toward appreciating the occupational potential of immigrants.

Yet, there are still considerable differences between EU citizens and TCN. They stem from the supranational character of the EU itself aiming at European integration,[68] which gives way for generous rules that have been consented by all Member States. In regard to third countries, however, the discretion of the legislator is much broader, especially since no specific migration regime—ranging from open borders to closed borders—has been defined on an inter- or supranational basis.

Unless they are highly skilled, guest workers from third countries are expected to behave like commodities—coming when we call them, leaving when we tell them.[69] This idea is even immanent in the wording, e.g., the recitals of the ICT directive explicitly refer to the aim to make "optimum use of human resources" and the whole regulatory framework is driven by employers' preferences. Temporariness is deemed necessary in order to find tailor-made solutions for covering labor market gaps. Thus employers have an influence on the design of immigration rules, offering them the possibility to recruit personnel according to their needs.[70] Concerning seasonal work, this seems logical due to the temporariness of the work they perform. Whereas workers' rights regarding social security, access to goods, and

67. Ruhs, *supra* note 11, at 63; Döring, *supra* note 51, at 1034.
68. Thym, *supra* note 15, at 723.
69. Hollifield, *supra* note 48, at 895.
70. Ciupijus, *supra* note 8, at 11; Catherine Dauvergne & Sarah Marsden, *The Ideology of Temporary Migration in the Post-Global Era*, *in* GEOFFREY BRAHM LEVEY & AYELET SHACHAR, THE POLITICS OF CITIZENSHIP IN IMMIGRANT DEMOCRACIES 111, 111 (2015); Ruhs, *supra* note 11, at 63.

services and working conditions seams equal, their rights regarding entry, and stay, to occupational mobility as well as to family reunification are limited.[71] By the way, the restrictions related to family reunion have the side-effect to foster the migrant workers willingness to return to his country of origin.[72] At the same time, the expectation to return to the country of origin hampers the gaining of a long-term residence status, even if they return to the same Member State for the same job with the same employer every year.[73] The granting of socio-economic and labor rights aim at preventing social exploitation, which may occur if long-term residents enjoy a broader range of rights.[74] The means of subsistence, however, are not awarded—they have to be proven when entering the country as a precondition for issuing the residence permit. Unskilled TCN are excluded from housing and family benefits as well. The reason is that they usually receive lower wages and hence are more likely to be in need of these means-tested benefits.[75]

One reason for the privileges of highly skilled workers is the excess demand on world-wide labor markets, which allows them to chose their destination countries. In contrast, an "unlimited supply of migrants willing to accept low-skilled jobs" can be observed.[76] Furthermore, highly skilled workers are attractive because they often create jobs for low skilled workers.[77] In contrast, the legal status of a broad range of labor immigrants is determined by uncertainty, thus demanding a very high degree of flexibility. The continuing application of labor market tests shows a preference for local workers, both in the EU and in Germany, which leads to a partial exclusion of TCN from territorial access and socio-economic rights. Seasonal workers are especially vulnerable—they combine low education, low wages, fixed-term contracts and limited access to enforcement procedures—blocking their route to permanent residence or even gaining of a citizenship status.[78]

Since there are (almost) no free movement rights for TCN, the awarding of rights is limited to the territory of the receiving state,[79] which becomes obvious for the right to reside and work. Usually, civil, political, and social

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71. Martin Ruhs & Philip Martin, *Numbers vs. Rights: Trade-Offs and Guest Worker Programs*, 42 INT'L MIGRATION REV. 249, 250 (2008); Dauvergne & Marsden, *supra* note 68, at 123; Hansen, *supra* note 13, at 21.

72. Ciupijus, *supra* note 8, at 16.

73. Guild, *supra* note 12, at 109.

74. Fudge & Herzfeld Olson, *supra* note 13, at 440.

75. Ruhs & Martin, *supra* note 69, at 255.

76. *Id.* at 254.

77. One can observe that highly skilled and well-paid workers from third countries are even privileged compared to economically inactive EU citizens whose right to free movement has been restricted. Kahanec, *supra* note 4, at 48.

78. Fudge & Herzfeld Olson, *supra* note 13, at 459.

79. Groenendijk, *supra* note 10.

rights of migrant workers are restricted, too.[80] Although equal treatment is basically guaranteed, the principle is fragmented according to the different types of labor immigration. However, the needs-based approach with its priority for employers' interests is not a given fact. The same holds true for the assumption that migrants necessarily have to have fewer rights than citizens or permanent residents.[81] Accepting labor immigrants as persons in need for security and participation would coercively imply a shift to a rights-based approach, guaranteeing equal rights, a secure residence status for family members and the option to become a long-term resident.[82] However, policy still focusses on short-term demands for workers, leaving the long-term consequences of labor immigration aside.[83] However, one has to keep in mind, that we may ask for workers . . . but still human beings will come.

80. Ciupijus, *supra* note 8, at 11.
81. *Id.* at 13; Dauvergne & Martin, *supra* note 68, at 124.
82. Carrera et al., *supra* note 40, at 11.
83. Gümüs, *supra* note 20.

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