



# Trends and Gaps in the Academic Literature on EU Labour Migration Policies

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## Abstract

This paper provides an overview of the ‘state of the art’ in the academic literature on EU labour migration policies. It forms part of the research agenda of Work Package 18 of the NEUJOBS project, which aims at reviewing legislation and practices regarding the labour market inclusion and protection of rights of different categories of foreign workers in European labour markets.

Accordingly, particular attention is paid to the works of scholars who evaluate the status of rights of third-country national workers in relation to labour market access, employment security, social integration, etc., in European legislation on labour immigration. More specifically, the review has selected those scholarly works that focus specifically on analysing the manner in which policy-makers have addressed the granting of rights to non-EU migrant workers, and the manner in which policy agendas – through the relevant political and institutional dynamics – have found their translation in the legislation adopted.

This paper consists of two core parts. In the first section, it reviews the works of scholars who have touched on these research questions with respect to the internal dimensions of EU labour migration policies. The second section does the same for the external dimensions of these policies. Both sections start off by analysing the main trends in the literature that reviews these questions for the internal and external dimensions of European migration policies as a whole, and then move on to how these ‘trends’ can (or cannot) be found translated in scholarly writings on labour migration policies more specifically. In the final section, the paper concludes by summarising the main trends and gaps in the literature reviewed, and indicates avenues for further research.

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## Introduction

This paper provides an overview of the ‘state of the art’ in the academic literature on EU labour migration policies. It forms part of the research agenda of Work Package 18 of the NEUJOBS project, which aims at reviewing legislation and practices regarding the labour market inclusion and protection of rights of different categories of foreign workers in European labour markets. The paper pays particular attention to the works of scholars who evaluate the status of rights of third-country nationals in relation to labour market access, employment security, social integration, etc., in European legislation on labour immigration.

For this purpose, the review has selected those scholarly works that focus specifically on analysing the manner in which policy-makers have addressed the granting of rights to non-EU migrant workers, and the manner in which policy agendas – through the relevant political and institutional dynamics – have found their translation in the legislation adopted. Accordingly, the paper does not aim at providing a comprehensive overview of the complete state of knowledge on EU labour migration policy, but rather seeks to give a synthesised evaluation of the main trends and debates on the different policy choices to be made (and how these have been made) in this legislation. A recurrent research question in these works is the extent to which EU policy-makers and policies have, or have not, sought to guarantee the protection of migrants’ fundamental rights when these are in tension with ‘state interests’, such as border control or perceived needs and gaps in the protection of national labour markets.

Whereas this is by no means the only theoretical approach informing studies on EU labour migration legislation, it is certainly a very influential one and variations of the research question(s) above reverberate in a substantial number of scholarly works accounting for the gradual development of EU policies in this area. Moreover, as substantiated below (section 1.1), it is also a particularly appropriate approach to the study of this legislation in view of the considerable imprecise categorisations that characterise EU policies on immigration for employment-related purposes, and the differential protection of migrants’ rights that this sectoral approach entails.

This paper consists of two core parts. In the first section, it reviews the works of scholars who have touched on these research questions with respect to the internal dimensions of EU labour migration policies. The second section does the same for the external dimensions of these policies. The term ‘internal dimensions’ is used to define all EU legislation covering the conditions for entry, residence and rights for immigrants, and to separate it from the ‘external dimensions’ by which the paper denotes those migration policy dimensions that intersect with

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the domains of international relations and foreign affairs.<sup>1</sup> Both sections start off by analysing the main trends in the literature that reviews these questions for the internal and external dimensions of European migration policies as a whole, then move on to how these ‘trends’ can (or cannot) be found translated in scholarly writings on labour migration policies more specifically. The scope of discussion in this paper is limited to those forms of migration falling under the personal scope of EU labour migration legislation (not covering discussions on intra-EU mobility, third-country nationals who are family members of EU citizens, asylum-seeking migration, etc.). That notwithstanding, scholarly debates covering the entirety of EU migration law in a broad sense are taken into account in sections 1.1 and 2.1 for the analytical purpose of tracing the origins of a number of ideas that have influenced the academic discussions on labour migration legislation.

Accordingly, section 1.1 begins by considering the writings of scholars who have queried the various political and organisational motives and dynamics characterising migration policy-making at the EU level, and the manner in which these motives and dynamics subsequently reverberate in the adopted legislation. This is a very well-developed body of literature that is connected to such theories and themes as the securitisation of migration, critical migration studies, the ‘fortress Europe’ debate and others. Next, in sections 1.2 and 1.3, the EU’s categorisation of different sets of labour migration movements is shadowed, and the paper initially considers the works on high-skilled labour migration and subsequently the literature on lower-skilled labour migration. As the research that critically reviews the construction of (dominant) policy narratives and their influence on legislation in this first set of migration policies has not yet reached a very developed stage, section 1.2 focuses on revealing and explaining this gap in the literature. Conversely, in view of the extensive and well-founded debates on the status of migrants’ rights *vis-à-vis* other policy concerns in the literature on lower-skilled labour migration, section 1.3 pays particular attention to the different arguments of the main scholarly works guiding these debates.

The second section, analogous to the first, begins by considering the literature that has analysed how different policy interests have been framed in the external dimensions of EU legislation in the area of migration and asylum. This again is a rather developed body of literature that is closely related to the arguments of the theories reviewed in the first section (1.1). Subsequently, section 2.2 reviews how the research questions of the works on the external dimensions of EU migration policies are reflected in the writings on the external dimensions of EU labour migration policies specifically. In the final section, the paper concludes by summarising the main trends and gaps in the literature reviewed, and indicates avenues for further research.

Finally, it is important to mention that in view of its nature as a review of the ‘state of the art’ in literature on EU labour migration policies, the scope of this paper has been confined to both the scope of EU policies in this area (see above) and – more specifically – the scholarly discussions on these policies in the available literature. Accordingly, a number of important topics and themes are not covered in this text, either because they remain within member states’ national competences (*and no EU legislation exists*) or because they have been understudied in the academic literature. Such themes include, among others, topics that are currently high on the agenda of labour economics scholars – for instance, the need for care workers and green-skill labour supplies, and more generally the socio-ecological transition – but which have not (to date) been addressed by the migration studies literature. These topics, however, are to be addressed in further research under Work Package 18.

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<sup>1</sup> This dividing line was adopted for the analytical reason of demarcating different fields of research. In other words, it should not be thought of as absolute in any sense as this would not do justice to the more complex policy and political realities that characterise this area of legislation.

## 1. Internal dimensions

### 1.1 Academic literature on EU migration policies

The academic literature has paid extensive attention to the positioning of migrants' rights *vis-à-vis* other state concerns in migration policy-making at the EU level. In this section, the paper highlights some of the core discussions in these writings. To begin with, the analysis of mechanisms by which differing interests and stakes in the area of migration legislation have been 'framed' at the EU level has been most clearly put forward by the 'securitisation' thesis developed by scholars such as Bigo (2002) and Huysmans (2000, 2006). Drawing on the critical security studies literature, these authors have explored the ways in which the framing of migration at the EU level has been increasingly impregnated with security concerns. According to Huysmans for instance, the security framing of migration emerged as early as the 1980s, when policy responses to immigration were conceived of within frameworks related to other security issues, such as terrorism and drugs (e.g. the Trevi Network) (Huysmans, 2006, p. 72). As such, a security continuum was articulated in a way that incorporated migration and connected it with borders, terrorism and crime – legitimising the adoption of policy measures that would otherwise have been considered infringements of civil liberties (ibid.).

Similarly, Guiraudon's venue-shopping thesis contends that European integration in the area of migration policies has been driven by the strategies of national officials seeking the policy forum most suitable for the formulation of restrictive policy objectives (Guiraudon, 2000). To escape from constraints imposed on them by the judicial control of national courts, parliamentary scrutiny, attention from pro-migrant NGOs, competition from other ministries, etc., bureaucrats have created transnational cooperation mechanisms at the EU level, which have allowed them to frame migration policy issues in a manner that emphasises elements of control over 'internal free movement' (ibid., p. 267).

Building on the securitisation/critical security approach described above, a third approach to the analysis of selective policy-making mechanisms on migration that is of much relevance to the present overview is Guild's notion of critical migration studies (Guild, 2009). The author coined the term to challenge the idea that our understanding of migration is neutral. Instead, she argues, the way in which the state constructs cross-border movements of individuals is highly relevant to our perception of the migration flows under review. To clarify, as the foreigner (in itself already a state-constructed term) is given a certain statute by state authorities, he or she is automatically endowed with a set of normatively charged labels, as different state-determined categories are more or less amenable to being connected with discourses of insecurity, border control, etc. (e.g. 'tourist' vs. 'illegal immigrant').

This last notion is especially applicable to studies of EU labour immigration policies. The 'cataloguing' of foreign workers into various categories is a defining feature of EU legislation in this area, which has created diverse arrangements, or sets of rules, for different categories of economic immigrants (highly skilled workers, researchers and students, inter-company transferees and low-skilled seasonal workers). In direct application of her own critical migration studies concept, Guild has criticised the selective and sectoral nature of EU legislation in this area for taking on a market approach to human beings (Guild, 2011, p. 218). The particular categorisation of economic migrants by EU legislation, she argues, has justified the differential treatment of migrant workers depending on their perceived value for European labour markets (ibid.). Third-country nationals who are highly qualified workers are given better rights than workers who are lower skilled.<sup>2</sup> The paradoxical outcome of these mechanisms is that the

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<sup>2</sup> These rights take the form of security of residence, equality of wages, access to social benefits and family reunification (Guild, 2011, p. 216).

economically stronger are privileged, while the economically weaker enjoy fewer rights. Moreover, the separation between ‘good’ and ‘poor’ labour migrants is of questionable merit, for two reasons: first, lower-skilled migrants can be as needed as highly skilled individuals, depending on the labour market sector under review; and second (and in connection) there is a high degree of differentiation with regard to the needs of local labour markets across the Union territory (ibid.; see also Carrera, 2007, p. 2; Carrera & Sagrera, 2009, p. 34). Moreover, in what he denounced as an excessively utilitarian and economically-oriented approach towards labour immigration, Carrera pointed out that definitions in European labour migration laws on who is to be regarded as a highly skilled migrant are too diverse and malleable in nature.<sup>3</sup> This leaves them subject to expectations regarding the “degree of profit that the immigrant could bring to the receiving state” and hindering the granting of legal security to the foreign worker (Carrera, 2007, p. 2).

What seems to be the driving force behind the sectoral approach taken by EU policies in this area is the idea that the desirability of highly skilled individuals instigates a ‘global competition for talent’, and therefore requires the adoption of good conditions for these migrants to encourage them to move to the EU (instead of somewhere else). Conversely, lower-skilled migrants are thought of as readily available in large numbers, and thus do not necessarily need to be attracted through the creation of good conditions. Rather to the contrary, migrants ascribed to this framework are more easily associated with perceived security risks, such as the endangering of states’ social security systems or the undermining of wages and working conditions in their host countries (see also Guild, 2009, pp. 132-135). As a result, these lower-skilled workers are made subject to constraints that are aimed at ensuring that their stay is of a temporary nature, and – accordingly – are prevented from taking part in any policy programmes aimed at promoting social settlement and integration (Guild, 2011, p. 218).

In the next two sections, this paper trails the EU’s sectoral approach, and explores in further detail how different sets of academic works have reviewed the manner in which the relationship between migrants’ rights and state interests have been framed for different categories of labour migrants covered by EU legislation. Section 1.2 reviews the main scholarly discussions regarding legislation on highly skilled migration, whereas section 1.3 looks at the controversies surrounding legislative frameworks for lower-skilled migrants.

## **1.2 Literature on highly skilled migration: The ‘global race for talent’**

As touched on above, a principal driving force behind EU legislative developments on foreign workers who are highly skilled is the so-called ‘global race for talent’. This notion refers to the burgeoning competition among industrialised states to attract the ‘best and brightest’ migrants worldwide. Driven by anxieties related to international competition for innovation, progress and economic growth generally speaking – combined with concerns about ageing populations and shortages in specific, skilled labour-market sectors<sup>4</sup> – governments have increasingly started to think of highly qualified migrants as a ‘scarce good’ to be brought in before they are lost to a competitor country. The US, Canada and Australia were the first to adopt proactive migration policies to this effect, from the mid-1960s and early 1970s onwards. EU countries (and the EU as a whole) are relative newcomers in the race, starting with the German Green Card system and the UK Highly Skilled Migrant Programme, both adopted in the early 2000s, which then

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<sup>3</sup> These definitions often do not depend on the educational or professional qualifications of the immigrant, but rather rest on discreet factors that are in the hands of the state (e.g. the salary level the worker is expected to obtain) (ibid.).

<sup>4</sup> Most notable in this respect are the medical sector, the IT sector and engineers.

inspired other European governments<sup>5</sup> to follow suit (see Shachar, 2006, pp. 167-199 for a detailed overview). More recently, a number of Asian countries with rapidly advancing economies, such as Taiwan, South Korea, Singapore, China and India, have also joined the hunt for talent by actively recruiting as well as luring back their most highly skilled emigrants (*ibid.*; see also Papademetriou et al., 2008). Shachar has provided an excellent overview of the gradual expansion of this global competition and the dynamics underlying these developments. The author documents how the zero-sum conception of the race for talent has led to copycat games in governments' selective immigration policies, justifying the adoption of favourable provisions aimed at attracting such 'scarce human resources' (Shachar, 2006; see also Papademetriou et al., 2008).

In view of this global competition context dominating policy agendas on highly skilled labour migration, it is not surprising that the vast body of literature analysing EU legislation in this area has – either more or less explicitly – taken over the competitive rationale underlying these policies. Central research themes found in most studies on this topic are primarily reviews of the aptness of European legislative initiatives to attract highly qualified migrants, and correspondingly, evaluations of the relative successfulness of European initiatives in this regard when compared with the policies in place in competitor states (most notably the US and Canada). These two broad research themes can be further subdivided into questions concerning, for instance, i) the relation between natural advantages (e.g. language, economic situation, existing migration networks and the geographical location of a state) and policy measures (i.e. can they compensate for one another?) (see for instance, Zaletel, 2006, pp. 628-630; Papademetriou et al., 2008, p. 25; Geis et al., 2008); ii), analyses of the composition of skilled migration flows to different countries (Geis et al., 2008; Manolo, 2006; Zaletel, 2006); and most importantly, iii) comparative reviews of different policy instruments adopted by different states (*ibid.*; Zaletel, 2006; Hailbronner & Kosloski, 2008; Wiesbrock & Hercog, 2010; Martin, 2012). Especially this latter sub-question is much in vogue. The aspects of comparison in such studies frequently revolve around first, the eligibility criteria states use to select migrants and second, the rights or benefits (or both) granted to highly skilled immigrants (Wiesbrock & Hercog, 2010).

With regard to the first aspect of comparison, the literature has most commonly grouped states' selection mechanisms into two competing models, namely the 'points-based' vs. the 'employer-led' selection system. Whereas points-based systems, controlled by the state, seek to admit economic migrants based on such talents as language skills, work experience and education, employer-driven selections allow a greater role for employers, who can select the workers they need subject to government regulations (Papademetriou & Sumption, 2011). Academic analyses have revealed, for both systems, a number of advantages and disadvantages. In brief, whereas points-based systems have the benefit of providing both policy-makers and prospective migrants a transparent set of procedures, because employers are less involved in the selection of workers these systems simultaneously contain the potential pitfall of admitting immigrants who are not able to put their skills to use in jobs at their skill level upon arrival (*ibid.*; see also Hailbronner & Koslowski, 2008). This possible pitfall is precluded in employer-driven systems, which inherently guarantee that immigrants will have a job when they arrive. These systems, however, entail the danger that employers will manipulate the system to attract cheaper labour or that workers will become too dependent on their employers (and hence more vulnerable) (*ibid.*). All in all, over the past years, a consensus seems to have evolved in academic analyses as well as in actual state practices that 'hybrid systems' borrowing ideas from both sets of models provide for the most optimal policy outcomes (*ibid.*).

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<sup>5</sup> More specifically, Sweden, the Netherlands, France, Norway and Ireland (Shachar, 2006, p. 194); see also Papademetriou & Sumption (2011), p. 4.

Regarding the second aspect of comparison, the rights/benefits that are most often singled out by studies concern the right to family reunification (and rights granted to family members upon arrival), followed by employment and social security rights, and finally the possibility to acquire permanent residence. Yet many academic analyses of the rights granted to highly skilled migrants mirror – once more – the international competition logic, and the related, competitive policy agendas of industrialised states, in reviewing the relative attraction-value that can be accorded to each of these rights. As a result, rather than critically assessing the merit of granting such rights *an sich*, too often the review focuses on what way the availability of any of these rights can positively influence the decisions of highly skilled persons to emigrate to the state at hand (see for instance, Zaletel, 2006; Wiesbrock & Hercog, 2010). Particularly the rights to acquire a permanent residence status and citizenship are often thought of as possessing a high attraction value (Shachar, 2006; Manolo, 2006; Zaletel, 2006; Papademetriou et al., 2008, p. 27). Illustrative of this mirroring practice is for instance Zaletel’s account of the policy failures and successes of the US, UK and German entry schemes for highly skilled migrants, which are – among others – attributed to whether the schemes provide the possibility to acquire long-term residence, the right to family unification and flexibility in allowing migrants to choose their (next) employer (Zaletel, 2006, pp. 627-628). These logics are also present, for instance, in analyses of the EU Blue Card Directive (see for example, Wogart & Schüller, 2011, p. 4).

Whereas the mirroring of set policy agendas in academic analyses of legislation is – for obvious reasons – always difficult to support, it is especially problematic with regard to this very last point. Unquestioningly taking over the ‘global competition’ policy framing in this area prevents further reflection on the granting of rights to migrants depending on their perceived economic value, and the implications of this practice for the rights of lesser skilled migrants. It also obscures reflections on the manner in which states or the EU (or both) conceive of their own attractiveness *vis-à-vis* (wanted) third-country nationals. Laudable exceptions in this regard deserve mentioning. One is Shachar’s account of the race for talent, which reflects on the prospects for those individuals who do not fit the inordinately narrow definition of talent adopted by governments (Shachar, 2006, p. 204). Another is Wiesbrock & Hercog’s paper (2010), which ends by stating that “from a human-rights perspective” the utilitarian distinction between high and low-skilled labour in EU legislation is open to criticism. Concerning the issue of constructing attractiveness *vis-à-vis* foreigners, Carrera & Wiesbrock revealingly trace the manner in which traditional rights and benefits granted within the scope of EU citizenship (i.e. the freedom to move and non-discrimination on the basis of nationality) were gradually transferred to EU migration legislation regarding those non-EU nationals perceived as beneficial to Europe’s economy, in order to promote the EU’s attractiveness as a destination for these specific categories of foreigners (Carrera & Wiesbrock, 2010, pp. 22-25). Finally, looking specifically at the role of private actors in the construction of dominant policy agendas, Menz has critically reviewed the manner in which employers’ associations have actively shaped and strengthened the rhetorical link between global economic competitiveness and the need for (selective) liberalised policies on labour immigration (Menz, 2009).

Overall, however, academic analyses of legislation on highly skilled migrants are not sufficiently distant from the policy framing underlying this legislation. The standard policy narrative on the ‘global race for talent’ has instigated a dominant focus on comparative reviews of policies adopted in different states. This is particularly problematic when it comes to analyses of the rights granted to migrants, which – in accordance with policy agendas – are regarded as assets to be distributed for the purpose of enhancing a state’s attractiveness, rather than being made subject to a critical evaluation on the basis of human rights considerations. Although understandable, as individuals subject to this legislation are generally not deprived of any of their fundamental rights (rather to the contrary) and therefore this legislation can be thought of as requiring less scrutiny regarding respect for fundamental rights’ standards, a gap in the



literature emerges, as not enough attention is paid to the implications of the policy-constructed relationship between ‘skills and rights’ for those migrants who have lesser skills.

### **1.3 Literature on lower-skilled migration: The return of guest-worker programmes?**

Whereas the scholarly literature on migration policies for the highly skilled can be accused of paying insufficient attention to the framing practices underlying the allocation of rights to foreign workers, this is not the case when it comes to analyses of policies aimed at regulating the movements of lower-skilled labour. In contrast, the principal discussions reverberating in the analyses of these policies involve the ethics of allocating a limited set of rights to those migrants perceived as less valuable to the economy.

Policies on lower-skilled migrants tend to focus predominantly on designing schemes that are circular or temporary in nature, and able to guarantee the eventual return of the (less-wanted) lower-skilled foreign worker. Such policy goals, however, stand in direct contradiction of policy objectives aimed at encouraging the social inclusion and integration of foreign workers in their host societies. Remarkably, precisely those rights that are used as commodities to attract highly skilled labour are left out of legislation on lower-skilled labour as a means of – inversely – discouraging the prolonged stay of these foreign workers. Indeed, policies on low-skilled labour migration generally provide very little protection for the right to family reunification, for employment and social security rights or for rights connected to political and civic integration, all three of which would profoundly challenge the capacity of the state to control the temporariness or circularity of lower-skilled immigration. Especially the possibility to acquire permanent residence, the main tool used to attract highly skilled migrants, is – evidently – the antithesis of policy schemes aimed at guaranteeing the eventual return of the foreign workers. It is perhaps not surprising that, in view of their manifest absence, fundamental rights enjoy a prominent position in most academic analyses of legislation on lower-skilled labour migration. Notably, while analyses of legislation on highly skilled migration do not generally compare this legislation with the policies in place for lower-skilled migrants (save for the exceptions outlined above), writings on lower-skilled migration often do refer to the legislative frameworks in place for higher skilled migrants in order to strengthen their criticisms regarding this legislation (e.g. Castles, 2006; Carens, 2008; Pécoud, 2009).

In the subsections below, this paper reviews the scholarly writings on the connection between rights granted to lower-skilled migrants in their host societies and the desire of states to enforce the temporariness of these migrants’ stays. This connection, its normative worth and actual effectiveness, has been at the core of a lively scholarly debate in the literature dealing with low-skilled labour migration, which can be traced back all the way to the 1980s when scholars such as Castles and Waltzer criticised the guest-worker programmes of the mid-1940s up to the 1970s (Castles, 1986; Waltzer, 1983).<sup>6</sup> In view of the extensiveness of this discussion, the review is limited to summarising the principal arguments around two main lines of debate: first, the question of whether states are actually capable of setting up and effectively managing temporary migration programmes; and second, what the normative costs are of limiting rights for temporary migrants. As the two questions are conflated in the sense that, as elaborated above, the limitation to fundamental rights protection of lower-skilled migrants is regarded as a

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<sup>6</sup> Although current temporary schemes for labour migration obviously differ significantly from the guest-worker programmes of the mid-20<sup>th</sup> century, it is generally acknowledged that they share a number of common elements. Especially notable in this regard is the setting-up of regulatory schemes that fall short of protecting the fundamental rights of migrant workers, which is connected to the focal point of this literature review (for a comparison of earlier and current temporary schemes for labour immigration, see Castles, 2006).

principal tool for effectively managing the ‘temporariness’ of such migration, the arguments reviewed overlap in a number of ways.

### **1.3.1 Is ‘circularity’ achievable?**

To begin with, regarding the first question, a considerable amount of scholarly attention has been spent on reviewing why a number of previous, temporary migration programmes (e.g. a number of earlier guest-worker schemes in Europe, the US Bracero Program and others) failed in their goal of ensuring the temporariness (i.e. the eventual return) of lower-skilled migrants, and how others managed to be more successful in this regard (e.g. the Canadian Agricultural Seasonal Workers’ Program and contemporary programmes in Asian states, such as in Thailand, Taiwan and Singapore or the United Arab Emirates) (see for instance, Basok, 2000; Schiff, 2004; Newland et al., 2008; Castles, 2006; Ruhs, 2003; 2006). Common answers to this question involve such elements as the effective governmental administration of recruitment procedures and employment contracts (Basok, 2000; Schiff, 2004, Ruhs, 2006), (vs.) the inherently complex and un-regular nature of human mobility (Cornelius et al., 1994; Castles, 2004; 2006), the number of migrants covered by the programme (Basok, 2000; Newland et al., 2008) and most notably the rights accorded to migrants. To our knowledge, this last element is not left out in any of the studies touching upon the above question, and a broad consensus seems to exist on the finding that the protection of universal, fundamental rights as provided for in Western liberal democracies is a core hindrance to governments’ ability to guarantee the eventual return of temporary migrant workers.

Indeed, a number of scholars have argued that one of the prime factors accounting for the ‘failure’ of post-war guest-worker programmes in Europe to ensure their temporal nature was the gradual diffusion of universal liberal norms and civil rights from the 1960s onwards, and the functioning of rights-based politics and judicial review enforcing these rights, which limited the enforcement responses available to Western governments (Hollifield, 1992; Soysal, 1994; Cornelius et al., 1994; Castles, 2006). Conversely, contemporary examples of ‘successful’ temporary labour schemes – those where migrants return to their home countries – are found in non-democratic Asian and Persian Gulf states, where governments adopt harsh sanctions for overstayers and use draconian measures to prevent integration (Agunias, 2006, pp. 36-37; Newland et al., 2008). This finding can be attenuated somewhat in the sense that support can be found in the literature for the idea that some rights’ protectionist measures regarding, for instance, (governmental) control over good living and working conditions for migrant workers in their host societies, can actually be conducive to the success of temporary working programmes (e.g. in the sense that they can counter desertion of the programme by workers or alleviate downward competition at the lowest echelons of national labour markets) (Basok, 2000; Newland et al., 2008). Other rights, however, such as the right to family reunification, are generally acknowledged as running counter to the objective of ensuring ‘temporariness’ (ibid.; see also Hollifield, 1992; Soysal, 1994).

### **1.3.2 Is it justifiable to limit migrants’ rights to achieve ‘circularity’?**

The second question that has been at the basis of extensive academic discussions in the literature on lower-skilled migration policies is whether (and the extent to which) it is justifiable to limit the protection of fundamental rights for lower-skilled migrants, as do some temporary labour-migration programmes. A number of scholars have argued that, in order to provide an answer to this question, one needs to adopt a pragmatic, broad perspective that takes into account not only a strict assessment on the basis of the liberal norm frameworks of Western societies, but also reviews the positions and interests of all the parties concerned. These are, most notably, the migrant workers themselves, but also employers in host societies, as well as

sending countries. In that sense, authors such as Ruhs, Chang, Martin, Bell & Piper have argued that even if at a theoretical level the restriction of migrants' rights is difficult to sustain from a normative point of view, current practical realities provide moral arguments that could justify such restrictions nevertheless (Chang, 2002; Ruhs & Chang, 2004; Bell and Piper, 2005; Ruhs & Martin, 2008). To clarify, although the development of their arguments differs, these scholars support the overall idea that temporary programmes impinging on migrants' rights can be normatively validated on the basis that the alternative (of not providing for such temporary schemes) is even more problematic.

To begin with, as Ruhs & Martin (2008) establish, the relationship between the "numbers of migrants" and the rights accorded to these migrants is characterised by a trade-off: countries with large numbers or shares of low-skilled migrant workers offer them relatively few rights, while smaller numbers of migrants are typically associated with more rights.<sup>7</sup> Any normative and policy discussion of temporary programmes, they argue, should carefully consider the existence of this trade-off (Ruhs & Martin, 2008, p. 261). In other words, according to these authors, it should be acknowledged that the more rights a state grants to migrants, the fewer number of labour migrants can be admitted by that state (and vice versa).

The debate about 'equal rights' then needs to take a broad approach, taking into account – to begin with – that the movement of people is mostly driven by global inequality (*ibid.*; see also Martin, 2006; Ruhs, 2006). Temporary guest-worker programmes that allow for a high number of migrants to be admitted are therefore to be interpreted as opening up opportunities for such immigrant workers to enter the global labour market. Conversely, in the absence of such programmes these opportunities would be restricted to only a few skilled migrants, and would result in other, potential guest-worker migrants remaining in their home country where their situation is likely to be worse (Chang, 2002; Ruhs, 2006; Schiff, 2004). In an earlier article, Martin summarises this idea as follows: "What is worse than being exploited abroad? Not being 'exploited' abroad" (Martin, 2006, p. 40). A variation of this reasoning then contends that unequal rights in guest-worker programmes can be justified if they, in effect, improve the situation of the guest-worker migrant, as decided by the migrant worker him/herself (Bell & Piper, 2005; Ruhs & Martin, 2008). All too often, Ruhs & Martin contend, rights-based approaches to migration overlook the potential of migrants' agency, i.e. migrants' capacity to make independent, economically maximising decisions when faced with limited options (*ibid.*, pp. 258-259; see also Bell & Piper, 2005).

A second, related argument also builds on the 'alternative is worse' logic to contend that the absence of such programmes would only further support illegal immigration and the undocumented employment of migrants in many Western societies (Martin, 2006; Ruhs & Martin, 2008). According to Ruhs & Martin, for instance, irregular migration represents nothing less than the extreme end of the numbers vs. rights trade-off (*ibid.*, p. 258). This is problematic for a number of reasons, not least because it is known that in the absence of work authorisation and labour protection regulations, migrants may fall victim to situations of far-reaching exploitation in which employers are able to impose conditions or limit wages (or both) according to their own wishes (Martin, 2006).

A third and final argument contends that guest-worker temporary programmes would also be more beneficial to sending states. The logic here is that temporary programmes would be able to

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<sup>7</sup> The primary reason for this trade-off is that rights can create costs for employers, and rising labour costs are typically associated with a reduced demand for labour (Ruhs & Martin, 2008, p. 260). A second reason stems from the political imperative in most high-income countries to minimise the fiscal costs of low-skilled immigration, either by keeping migrant numbers low or by restricting migrants' access to the social welfare system (*ibid.*).

increase the benefits that can be reaped from migrants' remittances, as these can be better regulated and migrants anticipating their eventual return would be more prone to invest in their home societies (Ruhs & Martin, 2008; Collyer, 2004; for an overview of literature exploring these dynamics in different regions, see Agunias, 2006, pp. 6-13). In addition, such programmes would also reduce problems related to 'brain drains' for the obvious reason that they envisage the eventual return of the migrant workers (*ibid.*). Moreover, in the event of the migrant worker having acquired skills during his/her stay abroad, the programmes could even amount to 'brain gains' (Agunias, 2006, pp. 6-13).

These three sets of arguments, however, have been countered on the basis that they end up justifying states' policies towards low-skilled workers, which – driven by domestic political and economic concerns – dehumanise the migrant worker, framing him or her as no more than an economic unit that can be channelled at the service of economic demands and relativising his or her fundamental rights in the process. In direct response to the arguments of Ruhs, Castles asks, "Is it acceptable to trade off worker rights for economic gains?" (Ruhs, 2006; Castles, 2006, p. 749). The negative answer to this question is what groups together most critiques on the 'pragmatic viewpoint' advocated in the writings reviewed above (Castles, 2006; Vertovec, 2007; Carens, 2008; Pécoud, 2009). Pécoud, for instance, summarises such viewpoints as follows:

Advocates of alternative [non-rights-based] approaches argue that this is a matter of political realism and that pragmatism is required if one wants to avoid an 'all or nothing' situation that would leave little room for improvement. ...Yet, this also amounts to a relativisation of rights, not understood as "universal, indivisible and inalienable" [cf. Universal Declaration of Human Rights] but as tradable items in the negotiations between governments and migrants, which opens the door to substantial inequalities in the treatment of migrants (Pécoud, 2009, p. 350).

The most forceful critique of the above arguments, however, has been put forward by Carens (2008). In an essay revealingly entitled "Live-in Domestic, Seasonal Workers, and Others Hard to Locate on the Map of Democracy", he systematically reviews each of the rights typically restricted to temporary foreign workers (i.e. the right to acquire permanent residence, the right to family reunification, and a number of social and economic rights, see above) and assesses the arguments for restricting these rights to temporary immigrants (*ibid.*). Departing from the normative logics underlying the protection of these rights as provided for in Western states, he concludes that – with the exception of some social and economic rights that function on the basis of contributory schemes – their restriction cannot be morally justified either on the basis of the foreign worker's non-citizen status or on the temporality of his/her stay if this temporality exceeds a stay of around three months and/or if this temporal stay is recurrent. Overall, restricting such fundamental rights to temporary migrants would be problematic because such practices would violate the state's own understanding of morally acceptable conditions of employment (*ibid.*, p. 421).

In direct confrontation with the authors cited above, Carens concludes his essay by countering the three 'alternative is worse' arguments. First, he asserts that one cannot proclaim that migrants' own agency should top state regulations (i.e. if migrants are willing to accept limited rights themselves, they should be given the responsibility to do so), without simultaneously questioning the entirety of state interventions in employment relations for local workers (*ibid.*, p. 440). Second, it is not correct to argue that in the absence of temporary programmes irregular migration would only be induced further, if the existence of irregular migration is in fact a state-regulated, social choice (as opposed to a natural inevitability) (*ibid.*, pp. 440-442). Third, the idea that temporary migration schemes can be supported on the basis that the moral costs of offering limited rights to migrant workers are outweighed by the moral gains from the

redistributive effects of the remittances of these migrants, which help reduce global poverty, is problematic for two reasons. To begin with, in any conventional understanding of the morality requirements of justice, it cannot be violated solely on the basis that the course of action under review is ‘morally admirable’.<sup>8</sup> Next, if one is to pursue this line of argumentation entirely – i.e. that rich states are obliged, as a matter of justice, to admit as many temporary foreign workers as possible because this would transfer resources to the poor states – it becomes questionable whether states are actually morally entitled at all to choose or limit whom to admit to their territories (*ibid.*, pp. 443-444).

## **2. External dimensions**

In this section, the paper continues to build on the focal lines identified above to review the way in which academic analyses have critically analysed the relationship between the protection of migrants’ fundamental rights and states’ internal as well as external policy agendas in the external dimensions of EU labour migration policies. Analogous to the above overview, this section initially considers the literature that has looked at this relationship within the external dimensions of EU migration policies generally speaking (section 2.1). Then it moves on to how the core ideas of these writings have been translated in the works of authors analysing the external dimensions of EU labour migration policies more specifically (section 2.2).

### **2.1 Academic literature on the external dimensions of EU migration policies**

Building on the analyses reviewed in section 1.1, numerous scholars have sought to extend the arguments of these works to studies of the external dimensions of these policies (Guiraudon & Lahav, 2000; Zolberg, 1999; Van Selm, 2002; Boswell, 2003; Lavenex, 2006). More particularly, Guiraudon’s venue-shopping thesis and the writings of scholars within the securitisation school of thought have been used as a basis for analyses of migration management policies with an external relations’ dimension.

To begin with, in direct application of her own thesis, Guiraudon (in co-authorship with Lahav) connected the (then) emergence of new forms of external cooperation on migration to states’ desire to circumvent liberal normative constraints on their ability to control migration at the national level (Guiraudon & Lahav, 2000). Using Zolberg’s concept of “remote control”, the authors argued that international cooperation on migration with neighbouring and sending countries, and the ‘shifting out’ of responsibilities to non-state actors, such as shipping companies, airline carriers and private security agencies, was aimed at ensuring that unsolicited foreigners did not even reach the receiving state and could therefore not claim any judicial protection (*ibid.*; Zolberg, 1999). Gluing the different logics together, they stated that migration policies in the 1990s sought to increase states’ abilities to control migration through a threefold dynamic: a shift of powers upward to the EU (then the EC) level, downward to local authorities, and outward to third countries and non-state actors (Guiraudon & Lahav, 2000, p. 176).

Picking up on this logic of shifting up, down and out, Lavenex, in a 2006 article, explained the internationalisation of migration control as the continuation of established patterns of relocating migration control (Lavenex, 2006). She argues that, while the shifting up to the European level was motivated by the ambition of national migration ministers to strengthen their control capacities in the face of normative, political and institutional constraints at the national level, as these sorts of constraints increasingly started characterising policy-making at the EU level owing to deepening supranationalism, ministers relocated the locus of these powers again,

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<sup>8</sup> As a result, democratic states are not morally free to use the effect of remittances on international poverty as a justification for overriding their duties within their respective jurisdictions (*ibid.*, p. 443).

shifting ‘outwards’ this time (ibid.). Similarly, Boswell – building on both the securitisation as well as the venue-shopping bodies of literature – traced the gradual development of the EU’s external migration policy agenda throughout the 1990s, arguing that this development was born out of officials’ sense of frustration at the limits of migration control (Boswell, 2003). In what she describes as a “natural continuation of a Europeanization of migration control that was already underway”, she particularly focused on how different institutional actors at the national and EU levels – and the competences they hold *vis-à-vis* one another – can account for the particular shaping process of this external agenda (ibid.).

In a slight variation of the above theses, Geddes has postulated that the dynamics underlying the incremental ‘externalisation’ of migration policies, and the manner in which these are framed, are to be found in the domestic migration interests of the EU or member states (or both) (Geddes, 2005). He asserts that internal changes, such as those of labour markets, populations and welfare states, give meaning to international migration, and as such provide the domestic roots of the external dimension of EU actions in the areas of migration (ibid.). Depending on their perceived value – or conversely, threat – to societies’ labour markets, welfare states or even abstract notions of belonging and identity, migrants will have different experiences at the territorial borders at which they seek entry to that state’s society (ibid.). Phrased differently, the external dimensions of EU migration policies are shaped by states’ desires to consolidate territorial borders (and project them onto third countries) as a way of reducing the flows of those forms of migration defined as unwanted, while conversely maintaining openness to other kinds of migrants, especially the highly skilled (ibid., pp. 801-803).

## 2.2 Literature on the external dimensions of EU labour migration policies

The arguments of the literature reviewed in the subsection above can be found reverberating in scholarly analyses of EU external policies with a specific focus on labour migration. To begin with, a number of works have criticised the EU’s approaches in this area – most notably the Global Approach to Migration (GAM), and the Mobility Partnerships and discourses on circular migration that emerged in its aftermath – from being too greatly defined by member states’ (restrictive) domestic agendas. These agendas are said first to be driven by security concerns regarding border control, and second to take a utilitarian approach to economic migrants in seeking to ensure, above all, the temporality of (lower-skilled) workers’ stay (see above).

In this regard, several scholars have pointed at the discrepancy between, on the one hand, the official discourses on these ‘mobility’ policy instruments and on the other hand their actual contents and practical application, which appear to favour most of all a repressive approach to human mobility originating from developing states (Collett, 2007; Chou, 2009b; Triandafyllidou, 2009; Carrera & Sagrera, 2009; Urbano de Sousa, 2011; Weinar, 2012). Drawing attention to, among others, the condition of ‘cooperating on the fight against irregular migration’ imposed on third countries before collaboration on facilitated access for their citizens to the EU can be undertaken, Collett summarises the mobility packages foreseen in the GAM as “merely a new twist on a set of external relations which the EU has been pursuing for decades...[and an] externalization agenda through which Europe shifts the burden of policing the entry of migrants into the EU onto neighbouring countries” (Collett, 2007, p. 2). Similarly, Chou, building on Huysmans and Geddes (see above), assesses the mobility partnerships as articulated and formulated with the dominant objective of achieving internal and external security (Chou, 2009b). A key explanatory variable that most authors touch on when accounting for the prevalence of member state (security-driven) agendas within these external instruments is that the most important elements mobility partnerships could offer (e.g. access to national labour markets, skills recognition) are still exclusive national competences. Hence, such partnerships cannot but amount to hollow political declarations at the EU level, as their contents

depend exclusively on the enthusiasm of individual member states (Collett, 2007; Papademetriou & Sumption, 2011; Weinar, 2012).

In connection with the above, a second criticism of the EU's mobility partnerships relates to the fact that they reflect another restrictive agenda of member states, i.e. a focus on ensuring the temporary nature (or return) of migration movements of (lower-skilled) workers (Collett, 2007; Carrera & Sagraera, 2009; Wiesbrock & Schneider, 2009). Based on analyses of EU policy discussions and documents on circular migration and mobility partnerships, Carrera & Sagraera conclude that the circularity envisaged in EU policies constitutes nothing but another management strategy, which "does not have freedom of movement or mobility at the heart of its ambitions, but rather acts as another mechanism for controlling migration in a temporary and non-permanent fashion" (Carrera & Sagraera, 2009, p. 20). Similarly, Wiesbrock and Schneider criticised these discourses and policies for not succeeding in actually ensuring the intended circularity by failing to focus on the one component that would ensure such a movement in circles, i.e. the option to return (Wiesbrock & Schneider, 2009).

Overall, the common element found in both sets of criticisms is the argument that the dominance of security-driven domestic agendas among the member states (with regard to either border controls or labour market protection) has led to a framing of circular migration within the external dimension of these policies that overshadows rights-based elements, such as the portability of pension rights, family reunification and social integration (e.g. Weinar, 2012; Wiesbrock & Schneider, 2009; Carrera & Sagraera, 2009).

A second related set of arguments in the literature on the external dimensions of EU labour migration policies that reflects the logics of the writings on these external dimensions (reviewed in section 2.1 above) centres on the observation that the contents of the external dimensions of EU labour migration management are tied to the particular institutional set-up and the dominant actors in these policies. The connection with the previous arguments is put by Urbano de Sousa as follows: "*Cette sensibilité (des États membres, plus enclins à collaborer à une approche sécuritaire) se traduit dans la nature juridique des Partenariats pour la mobilité*" [This sensitivity (of member states more inclined to collaborate around a securitarian approach) translates itself in the jurisdictional set-up of the mobility partnerships] (Urbano de Sousa, 2011, p. 344; see also Carrera & Sagraera, 2009, pp. 29).

With regard to this 'nature juridique', the institutional set-up of the mobility partnerships (which are established through joint declarations) is such that it only allows for non-binding measures to be adopted. Yet as Carrera & Sagraera note, the soft-law character of these joint declarations excludes them from the normal, institutional general principles (democratic control by the European Parliament and judicial scrutiny by the Court of Justice) and the rule of law principles usually applicable to EU legislation (Carrera & Sagraera, 2009, pp. 28-30). This, they contend, has the effect of placing the individuals affected by these policies (third-country national workers) in a more vulnerable position with regard to the protection of their security and social rights (ibid.). Focusing on the actors in these policies, authors such as Chou and Guild have built on the 'shifting out' logics of Guiraudon & Lahav (2000) to record how the particular format of the external dimensions of EU labour migration policies is also shaped by the important role of private actors (through the enforcement of employers' and carriers' sanctions), and the dominance of officials from foreign affairs ministries (Chou, 2009a; Guild, 2011). Guild, for instance, concludes her analysis as follows: "The move of power to control labour migration from state borders and sovereign decisions to EU mechanisms appears to facilitate the move beyond the borders to mechanisms of immigration control embedded in third countries, the high seas (i.e. beyond sovereign territory) and into the private sector" (Guild, 2011, p. 225).

### 3. Conclusion – Beyond trends and gaps to future research agendas

This paper has provided an overview of the ‘state of the art’ in the literature on the relationship between migrants’ fundamental rights and other state objectives, and the manner in which the particular framing of this relationship in dominant policy agendas subsequently reverberates in the legislation adopted. The overview suggests that, in spite of some important exceptions (discussed further below), there is a considerable amount of research that critically reflects on official constructions and dominant narratives regarding the policy dilemmas, and eventual choices made, in the area of EU labour migration legislation. Overall, the arguments of the key writings on the position of migrants’ fundamental rights in the internal and external dimensions of EU migration policies (reviewed in sections 1.1 and 2.1, respectively) have found a significant resonance in the works of scholars who seek to scrutinise the different policy logics at work in legislation on labour migration policies.

That is to say, core ideas developed by authors such as Guiraudon, Huysmans, Bigo, Guild and others (section 1.1) have been successfully adapted by other scholars to the study of the external dimension of these policies (section 2.1). Subsequently, these ideas have found their application primarily in the literature on legislation pertaining to lower-skilled labour migration (section 1.3), which at its core is defined by a lively debate on the permissiveness of balancing out migrants’ rights to achieve a number of other (control-oriented) state objectives. They have additionally featured in the writings on the external dimensions of EU labour migration policies, which relate to the above discussion on the position of migrants’ rights and which critically review the gap between political rhetoric and operational practice (section 2.2). All in all, the application of these theories to the study of labour migration legislation and the mutual engagement across the different subtopics of research mentioned has generated an interesting body of insights that can add to our understanding of a number of contemporary challenges for the governance and legitimacy of EU labour migration policies. In view of the currently difficult situations of many European labour markets, and further changes to labour market structures and needs that are expected to emerge from the socio-ecological transition, well-informed understandings of the legislative frameworks designed to deal with these challenges hold an extra added value.

Still, a notable absentee of these interesting cross-fertilisation exercises is the literature on legislation regarding highly skilled migration (reviewed in section 1.2). To a certain extent, one could explain the remarkable isolation of this research from larger debates regarding the status of migrants’ rights by taking into account the particular nature of this legislation. In this respect, member state agendas are not characterised by restrictive urges, but – to the contrary – seek to provide the best possible conditions in order to attract as many talented workers as possible. As a result, the eventual policies adopted represent, in and of themselves, fewer challenges to discussions on the playing-out of rights-based vs. control-oriented policy objectives. The failure to engage with other schools of thought on migration policies generally speaking or different categories of labour migration legislation is problematic, however, for two reasons. First, it obscures the framing of policy dilemmas through official narratives of the issues at stake (*in casu* the need to partake in ‘the global race for talent’), and – in connection – implies buying into rather ill-informed constructions of this type of employment-related immigration (and its state-imposed distinction from so-called ‘lesser skilled’ immigration). As such, and second, it inhibits the development of a progressive accumulation of knowledge and stocktaking of the status of migrants’ rights in policy agendas and law-making with regard to EU labour migration legislation as a whole.

Whereas, as indicated above, writings on lower-skilled migration do transcend the confines of their subject matters by contrasting the legislation on this form of migration with the legislative frameworks in place for highly skilled workers, the same does not hold for the literature on



highly skilled migrants, which tends to take official policy discourses at face value. Further research on the manner in which EU policies have constructed and justified the 'generous' framework for highly skilled migrants, and separated this framework from the policies in place for lower-skilled migrants, would provide a valuable contribution to the overall literature on political and organisational motives and dynamics driving EU migration policy-making in this area. For a start, such research would offer a new field of application to which the existing knowledge could be tested. In addition, it would help fill in the missing gap, which currently inhibits an overall stocktaking of these driving mechanisms in the area of labour migration as a whole. Moreover, such research would also further facilitate the comparative approach taken by a number of scholars who critically review the more restrictive policies towards lower-skilled workers. In view of the lively, continuing discussion regarding the normative permissiveness of restricting the rights of lower-skilled migrants (section 1.3), such new insights may be of high added value.

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