Chapter 11
Immigration Regulation as a Battleground: The European Union's Anxiety over Federalism

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Abstract The EU is not a federal state but as the competences of the EU have been extended to the field of immigration and as it has adopted an ever increasing number of measures in the field of immigration, the position can be loosely assimilated to that of a federal state. The EU, while consisting of 28 sovereign states which have entered into an international agreement to cede sovereignty in a number of areas to it, nonetheless enjoys a system of law which requires the Member States faithfully to apply EU law in the area of immigration. While some areas of immigration are not regulated by the EU (as yet) such as low skilled migration, many others are.

Once the transitional periods for national implementation of EU directives and regulations have past, the Member States are obliged to apply EU law rather than national law. If the authorities apply the incorrect legal regime, then their courts are under a duty to correct the error and in doubt can request clarification from the Court of Justice of the European Union. In this chapter, I will examine how this system works as regards migration to the EU. I will examine the scope of EU law in the field and how it has been applied in the Member States—where the strengths and weaknesses of the system are and how the legal challenges are resolved. I will seek to draw some broad conclusions on how the EU resolves issues of divergence and difference within the 28 Member States as regards migration.

Keywords Skilled labor migration • EU labor market • Nationals of EU Member States vs. third country nationals • Freedom of movement • Work restrictions

11.1 Introduction

The European Union (EU), established by a series of treaties in the 1950s, does not call itself a federal state. If one were to reduce the concept of federalism to its bare bones, it is a concept used to describe how power is structured within space and who is entitled to exercise it over time where there is a formal recognition of the role of multiple actors and claims which must be defined and where the result is multiple

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S. Baglay, D. Nakache (eds.), *Immigration Regulation in Federal States,* International Perspectives on Migration 9, DOI 10.1007/978-94-017-8604-1_11,

as opposed to centralised (Laursen 2010). The possibility of a federal EU excites quite opposing views, although some might argue that by definition the EU is a sort of federal entity. There are non-governmental organizations in the EU, such as the Union of European Federalists[1] or the Federal Union in Europe,[2] which actively support more federal-style development. Other groups are less positive, even suggesting that the institutions established by treaties are 'federal' rankles. The issues have been well expressed by the contributions to Laursen's book on federalism in the EU which I will not repeat here (Laursen 2010). In this chapter, I will start from examining how immigration is classified and regulated in order to cast new light on just how 'federal' the EU may be considered. Movement of people across borders of state sovereignty in the EU is a matter of substantial struggle and thus provides a particularly revelatory angle from which to examine the question of federalism.

Is the movement of EU nationals from one Member State to another to seek employment labour migration or does the term used by the EU institutions of EU mobility better describe the activity? Does it matter whether the people moving to seek work are nationals of any Member State, of one which only joined the EU recently and in respect of whom transitional arrangements on free movement of workers apply, third country national family members of those EU nationals or others? At the time of writing in 2013, two Member States (Bulgaria and Romania) were enjoying the end of transitional arrangements on the basis of which their nationals did not have the right to go and seek work in any other Member State unless that Member State, in accordance with its national law, has desisted from the application of the transitional measures.[3] In considering the issue of migration and federalism from an EU perspective, it is important to remember that the EU has not stopped growing. Croatia joined the EU on 1 July 2013. There are a number of other candidate countries for EU membership including: Iceland, FYRM Macedonia, Montenegro and Turkey. Potential candidate countries include: Albania, Bosnia Herzegovina, Serbia and Kosovo (a non-state seeks to join a non state group).

Some observers do not count as EU labour migration movement which involves only nationals of one of the Member States moving to live and work in another Member State (Carling 2011; Joppke 2011). The assumption is that nationals of EU Member States are not foreigners and therefore do not engage in intra-EU international migration. The usual term in EU speak for 'foreigners' is third country nationals (as for foreigners), which means anyone who is not a national of an EU Member State. However, this terminology is fraught with difficulties not least as some third country nationals, for instance, those who have an EU national family member, are assimilated to the position of EU nationals. Other third country nationals have rights equivalent to EU nationals as a result of agreements between their states and the EU (for instance Iceland, Norway and Switzerland) while yet others

[1] See http://www.federalists.eu/ (visited 1 July 2012).

[2] See http://www.federalunion.org.uk/federalism/ (visited 1 July 2012).

[3] COM(2011)729 final.

have more limited but important rights of continued access to employment, first access to self employment under privileged rules and protection against expulsion (for instance Turkish nationals under the EEC Turkey Association Agreement 1963 and its 1970 Protocol) (Gutmann 2000).

Leaving aside the above complications, there are two angles to labour migration by third country nationals—first the movement for employment of third country nationals who are already within the EU; secondly the movement of third country nationals into the EU for the purposes of labour migration which have been the subject of EU legislation (Groenendijk 2008a). Both of these forms of migration are regulated mainly or exclusively by EU law, not the law of the (currently) 28 Member States. This may be seen as evidence of a move towards federalism where the power to adopt law in this field has been ceded to an entity other than the nation state, though as I will discuss below there are limitations to this approach. The first is that there is a fundamental question regarding the nature of the EU labour market. Is there one EU labour market or 28[4]? The answer to that question seems to depend on who the individual is, as I will examine below. Secondly, the EU chops up migration into various kinds and types. For EU nationals exercising free movement rights, some acquire rights as workers but others acquire rights as self employed persons and still others as service providers (Condinanzi et al. 2008). I will only refer to these other categories which are wider than labour migration in passing when necessary. For third country nationals the situation is rather complicated as not only has the EU chosen to consider them under the headings of workers, self employed and service providers (and their employees) but also sectorially. When dealing with third country nationals, I will seek to clarify the complexity and what it means for European federalism.

To examine these questions in this chapter I am going to divide the subject into three main sections, with relevant subsections. First, I will look at labour migration by EU nationals and their third country national family members within the territory of the EU. This section will be divided into those EU nationals who are not subject to transition restrictions followed by a short section covering the scheme of transitional restrictions. In the second section, I will describe labour migration of third country nationals who have been admitted to the labour market of at least one Member State. How does EU law deal with them? This section will subdivide into five main subsections: long term resident third country nationals; highly qualified workers; researchers; refugees and beneficiaries of international protection and the family members of all of the above. In the final section, I will deal with first access to the labour market for third country nationals who are residents outside the EU. From this examination I will draw some conclusions on the nature of federalism in the EU resulting from the treatment of the movement of workers across state sovereign boundaries.

[4] Soon to be 28 when Croatia joins the EU in 2013.

11.2 Labour Migration and EU Nationals

11.2.1 EU Nationals not Subject to Transition Arrangements

There are two fundamental sources of the right of free movement for EU citizens across the borders of the Member States. Both are contained in the Treaty on the Functioning of the European Union (TFEU) and are the subject of subsidiary legislation (in the form of directives and regulations). The first (in order of appearance in the TFEU but only coming into existence in 1993) is citizenship of the European Union (Article 20 TFEU). The second is the right of free movement as a worker, self employed person or service provider (or recipient) which was the first in time, included in the 1957 treaty. Dealing with the foundation rights in their chronological order, the right to free movement of workers is one of the four freedoms of the European Union. It was included in the first EEC treaty in 1957 and provides that free movement of workers shall be secured in the EU (currently Article 45 TFEU) (Carlier and Guild 2008). The principle, free movement of workers, is defined in Article 45(2) as entailing the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. The original treaty provided for a transitional period for the achievement of free movement of workers until 1968. By that date the Member States were required to make it a reality. Between 1957 and 1968 a series of directives and regulations were adopted by the EU legislator paving the way to free movement of workers. I have examined these in some depth elsewhere (Guild 2011). The definition of rights set out in these measures has remained fairly stable—including wide family reunification rights including with third country national family members, employment access rights and equality of treatment in social and tax benefits (Guild 1999).

Article 45(3) TFEU provides four main rights as the core of free movement of workers:

- First: the right to access offers of employment actually made. This right has been interpreted by the CJEU as including the right to move to any Member State for the purpose of seeking employment even if the individual does not already have an offer of employment.[5]
- Second: the right to move freely within the territory of Member States for this purpose. The CJEU has consistently rejected the questioning of EU work seekers at intra Member State borders regarding the purposes of their movement.[6]
- Third: the right to stay in a Member State for the purpose of employment. This right also includes remaining in a host Member State after employment has ended

[5] C-292/89 *Antonissen* [1991] ECR I-745.

[6] C-68/89 *Commission v Netherlands* [1991] ECR I-02637.

so long as there are continuing rights engaged.[7] As yet it is unclear when these rights end but so long as there is a real chance that the individual will gain work in the Member State his or her right to reside is assured.

- Fourth: the right to remain in a host Member State after employment which may also be a continuation of the right to remain to seek employment (Guild 2004).

The four rights are subject to two limitations, one territorial and the other occupational. Member States are permitted to limit the entry and residence of a national of another Member State to its territory on the grounds of public policy, public security and public health (which can only be applied on first admission). The CJEU has consistently interpreted these limitations restrictively as they diminish the underlying right of free movement.[8] Most commonly pleaded by Member States seeking to expel EU national workers is public policy which includes criminal behaviour. The implementing legislation in respect of expulsion (originally Directive 221/64 which was repealed with the introduction of Directive 2004/38 where the rules are now found) prohibits Member States from using expulsion to achieve economic ends. Thus Member States cannot expel nationals of other Member States simply because they are unemployed and claiming benefits. Where the ground is criminality, the individual needs not only to have been convicted by a duly constituted criminal court but must also be a present and immediate threat to a fundamental interest of society. This is a high threshold which, sadly, is not always respected by all Member States. However, as the law on permissible expulsion it provides substantial protection to workers and work seekers who are nationals of a Member State resident on the territory of another. The grounds of public security (ie terrorism) and public health have not been the subject of jurisprudence at the EU level. They do not seem to be used frequently to justify expulsion.

The protection of EU workers from expulsion by a Member State was strengthened on the revision of rights contained in Directive 2004/38. A three step approach has been incorporated into the law: for the first 5 years, the worker is protected under the rules set out above. After 5 years the Member State must justify any attempt to expel an individual on the basis of serious grounds of public policy or security.[9] After 10 years of residence on the territory of a host Member State, only imperative grounds of public policy may be used as the reason to commence expulsion proceedings against an EU national.

The second exclusion permitted to the Member States by Article 45 TFEU relates to the public sector. Free movement of workers does not apply to employment in the public service. No secondary legislation has ever been adopted (by 2012) to define what this provision means. As a result the questions: what is public service, what is the scope of the exception and how does it apply, have fallen on the CJEU. Once again, following the principle of restricting the scope of exceptions to free

[7] C-22/08 *Vatsouras* [2009] ECR I-4585.

[8] C-157/89 *Pieck* [1980] ECR I-02171.

[9] C-145/09 *Tsakouridis* 23 November 2010.

movement rights, it has defined narrowly the exception.[10] Only where the position involves direct or indirect participation in the exercise of public authority and duties designed to safeguard the general interest of the state may it be restricted to nationals. Further, the criteria must be assessed on a case-by-case basis, taking into account the tasks and responsibilities covered by the post, according to the CJEU.

The key change which the EU approach to labour migration described above inscribed into the Western European imagination towards the end of the twentieth century is that people have the right to move to sovereign states other than that of their nationality to seek employment and that this is recognised as beneficial to the state as well as the individuals. The labour migrant is entitled to have the objective of improving his or her life circumstances and those of family members without fearing that this motivation will be used against him or her as a reason to reject the application and expel the individual. Further, the free movement of workers as a labour migration paradigm means that the state is not entitled to exercise control over the individual as regards residence and employment unless the state can justify the interference on the basis of public policy, public security or public health. The entitlement to move or not to move belongs to the individual (Guild 1999). The state can only seek to interfere with that right where the state can justify its action on grounds over which it does not have interpretative control (that belongs to the CJEU). However, this does not constitute an entitlement of the kind which international law requires for effective citizenship that the individual always has the right to enter and live in his or her country of nationality. Exclusions are still possible but there is a reversal of the state sovereign logic which approaches in its results some aspects of federalism.

The second fundamental source of the right of free movement is citizenship of the European Union (Article 20 TFEU) (Vink 2005). This was created in 1991 (coming into effect in 1993). Article 21(1) TFEU provides that the every citizen of the Union shall have the right to move and reside freely within the territory of the Member States. However, this right is subject to the limitations and conditions laid down in the Treat(ies) and by measures adopted to give them effect. Three directives, all now replaced, were adopted in 1990 which provides a right of residence for students, the economically inactive and pensioners but all on the basis that the citizens were economically self sufficient and that they have sickness insurance. These rights are now found in Directive 2004/38. While the economically active already had the right of free movement and residence as described above, this development in 1990 and consolidated in the 1991 treaty changes, extended the right of free movement and residence to all EU nationals. While the economically active were subject to the specific conditions set out above, the economically inactive where not only subject to the same limitations but also to two further requirements—economic resources at least at the level of social assistance and sickness insurance. According

[10] 152/73 *Sotigiu v Deutsche Bundespost* ECR [1974] 153; 149/79 *Commission v Belgium* ECR [1980] 3881.

to the CJEU citizenship of the Union is destined to become the fundamental status of all nationals of the Member States.[11]

What happens in practice in the EU? According to the EU's statistical agency, in 2010 of an EU total population of over 500 million, only 12.3 million live in a Member State other than that of their underlying nationality.[12] Bearing in mind the diversity of unemployment rates, according to Eurostat the lowest unemployment rates in September 2011 were recorded in Austria (3.9%), the Netherlands (4.5%) and Luxembourg (4.8%), and the highest rates in Spain (22.6%), Greece (17.6% in July) and Latvia (16.1% in the second quarter of 2011), that the unemployed do not move is surprising.[13] Third country nationals form the largest group of non-nationals living in the Member States amounting to 20.2 million.

11.2.2 Those Subject to Transitional Arrangements

From six original Member States in 1957, the EU currently has 28 Member States. The first enlargement in 1973 brought Denmark, Ireland and the UK in. Although there were concerns about immigration, in particular of Black and Asian British nationals to France and the Netherlands (Böhning 1972), in fact the movements do not appear to have been substantial. In any event, no transitional restrictions were placed on the free movement of workers. The next enlargement, in 1981 brought Greece into the EU. Fears of substantial movement of workers from Greece to other Member States lead to the inclusion of a temporal restriction on the free movement of workers for 7 years. This restriction did not affect the right of Greeks to move to other Member States immediately for other economic purposes such as self employment. Further it was accompanied by strict protections for Greek workers already admitted to the labour market of other Member States.

The third enlargement in 1986 of Portugal and Spain was similarly limited by a transitional arrangement against free movement of workers for 7 years. As in the case of Greece, the self employed were not subject to a limitation. The transitional restrictions were actually lifted a year early in light of German reunification. When Austria, Finland and Sweden joined the EU in 1995 no transitional restrictions were applied. Ten states joined the EU in 2004. No transitional restrictions were placed on workers from the two island states, Cyprus and Malta exercising their free movement rights as workers. For the other eight states (EU8),[14] transitional arrangements were included in the accession treaty whereby their nationals would be subject to

[11] C-184/99 *Grzelczyk* [2001] ECR I-6193.

[12] EUROSTAT *Statistics in Focus* 34/2011, Luxembourg 2011.

[13] EUROSTAT http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics#Recent_developments_in_unemployment_at_a_European_and_Member_State_level visited 21 November 2011.

[14] Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia and Slovenia.

national immigration law as regards movement of workers for the first 2 years, then a review would take place. Following the review, a further 3 years of restrictions were available for Member States. Where Member States feared a grave disruption to their labour market they could apply a further 2 year restriction to EU8 nationals access to their labour market. In the event, most Member States lifted restrictions on EU8 workers within 3 years of accession (Currie 2008; Burrell 2009). The only states to use the final 2 year period were Austria, Germany and the UK.

In 2007 Bulgaria and Romania joined the EU and their nationals have been made the subject of the same restrictions as regards workers as the EU8.[15] Transitional restrictions on their nationals were lifted on 1 January 2014. Croatia joined the EU on 1 July 2013 and its nationals are subject to a seven year transitional restriction on movement for work. Future enlargements of the EU are likely also to include transitional arrangements as regards workers, except as regards Islands. In respect of Turkey, the Commission suggested that long (and possibly indefinite) arrangements might have to be made. In terms of the political motivation of restrictions, protection of the Member States labour markets seems to be the driving force.[16]

The right of EU national workers to seek employment anywhere in the EU is premised on the idea that the EU has one labour market which is part of the internal market (Barnard and Scott 2002). However, transitional restrictions on free movement of workers are based on the opposite approach that there is a segmented labour market, one belonging to each Member State. This is clear as workers subject to restrictions but who gain access to the labour market of a Member State applying restrictions acquire free access to the labour market of that Member State only after 12 months' employment. Nationals of acceding Member States become citizens of the Union immediately on accession. They are entitled to move and reside anywhere in the Union on any ground other than employment. If they obtain authorisation to take employment in any Member State applying restrictions, even after those restrictions must be lifted the worker is limited to one Member State only—the one where he or she completed the 12 months employment. Thus, the practice of free movement of workers includes at its heart a deep ambiguity about the nature of the EU labour market. But this ambiguity is temporally limited to the length of the transitional arrangements.

11.2.3 Family Members

After access to the territory and labour market, family reunification is one of the overwhelming preoccupations of migrant workers. The right to live with the family

[15] European Commission *Report on the Functioning of the Transitional Arrangements on Free Movement of Workers from Bulgaria and Romania* Brussels 11 November 2011, COM(2011)729 final.

[16] European Commission: Communication from the Commission to the Council and the European Parliament—Recommendation of the European Commission on Turkey's progress towards accession COM(2004) 656.

members in the host Member State engages all those who move for employment whether young or old. When the original treaty was negotiated, it seems that the main interest in family reunification came from the Italian delegation. The right to family reunification was included in even the earliest directives applicable during the transitional period before 1968 (Guild 1999). In practice, it is third country national family members of migrant EU nationals who form the source of some friction in a number of Member States. The reason for this is twofold. First, the group of family members with which an EU national has an entitlement to family reunification when he or she moves to another Member State as a worker is large. It includes spouses, registered partners (if recognised in the host state), direct descendants of either party who are under 21 and if dependent of any age, dependent relatives in the ascending line of either party (Article 2(2) Directive 2004/38). Secondly, Member States are obliged to facilitate entry and residence of any other family member who, in the country from which they have come, are dependents or members of the household of the Union citizen with the primary right of residence or where serious health grounds strictly require the personal care of the family member by the Union citizen (Article 3(a) Directive 2004/38). Finally, there is also a facilitation obligation regarding partners with whom the Union citizen has a durable relationship duly attested (Article 3(b) Directive 2004/38). Where the EU national is a worker, the Member State cannot apply sickness insurance or resources requirements. The family is entitled to any social benefits which are available for own nationals of the state under the principle of equal treatment in social and tax advantages. Similarly, these family members cannot be subject to a requirement to meet integration conditions either before or after arrival in the state. The family members also have immediate access to employment. The same rules apply to the Member States own nationals who have moved as workers to another Member State and then seek to return to their home Member State and be joined by third country national family members.[17]

The sticking point for a number of Member States is that these rules are more generous than those which they apply to their own nationals seeking family reunification with their third country national family members (Walter 2008). This phenomenon is known as reverse discrimination and is problematic for Denmark, Ireland, the Netherlands and the UK (Handoll 2009).

The fact that nationals of a state may have better family reunification rights when they are outside their state of nationality indicates that a federal practice is at work. The law on family reunification which Member States must comply with for nationals of other Member States (or indeed their own nationals returning after living in another Member State) is not controlled by the state authorities but only implemented by them. Thus an authority outside the state provides family reunification rights directly to individuals whose rights are implemented by the state authorities. As a federal arrangement of powers between different entities within a single legal

[17] C-370/90 *Surinder Singh* ECR [1992] 265; C-291/05 C *Eind* [2007] ECR I-10719.

structure this example fits particularly well but for the fact that Member States can exclude their own citizens who have never exercised a free movement right from its enjoyment.[18]

In the following two sections (3) and (4) I will examine how EU law regulates the right of migrants (third country nationals) to work in the EU Member States. By this I mean the regulation of those third country nationals who have already been admitted to at least one Member State under national law (or possibly EU law) and those who are seeking admission for the first time to the EU territory. In so far as the EU labour market is one single labour market, I must look at which third country nationals are subject to EU regulation on access to that single market. I will do this in section 11.3. In so far as the EU labour market consists of 28 separate labour markets in respect of which access to one of these labour markets does not give any access to any of the others, one could say that the federal effect is much more limited. I will examine EU regulation of third country nationals first access to the labour market of one single Member State in section 11.4.

In both sections I will examine the same five EU regulations, the only ones at the moment which cover labour market access of third country nationals (other than those associated with an EU national principal). These are:

- Directive 2003/109 on long term resident third country nationals;
- Directive 2009/50 on the entry and residence of highly qualified third country nationals;
- Directive 2011/95 (replacing Directive 2004/83) on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection;
- Directive 2005/71 on the admission of third country nationals for research purposes;
- Directive 2003/86 on family reunification for third country nationals.

By examining the two separate systems of regulation—that of the EU's approach to first admission and that of the treatment of third country nationals already admitted, one can see the extent to which there has been a federal move of authority to adopt legislation which operates consistently across the common territory (in other words where EU legislation permits third country nationals access to the labour market of the 28 Member States as if this were one single labour market as it is for EU citizens). Alternatively one can analyse to what extent EU legislation remains captured in the labour market of each separate Member State and thus while there is a common set of rules they are applied by national authorities in strict isolation from one another and there is no mutual recognition of the consequences of the decision of each national authority on the territory of the other 27 Member States.

[18] C-256/11 *Dereci* (not yet reported) 15 November 2011.

11.3 Third Country Nationals Resident Within the EU[19]

11.3.1 Long Term Resident Third Country Nationals

In 1999, on revision of the EU treaties, the Union was given expanded competence to adopt legislation in the field of visas, border controls, asylum and immigration.[20] Under this new competence, a number of measures had to be adopted within a 5 years period (ie by 2004). A measure on long term resident third country nationals was not among those. However, it was nonetheless among the first which the EU adopted under the heading of legal migration. Directive 2003/109 created the conditions under which third country nationals are entitled to an EU status of long term resident third country national and the benefits which apply to holders of the status. According to the directive, its personal scope includes all third country nationals whose residence has not been formally limited (Groenendijk 2007). This limitation on scope is potentially problematic. While the original directive excluded refugees and beneficiaries of subsidiary protection, an amendment in 2011 has brought that group within the scope.[21]

As regards acquisition of the status the most important conditions are that the individual has resided lawfully in a Member State for 5 years, has sickness insurance and stable and regular resources. Member States are permitted to apply an integration measures requirement on the acquisition of the status. The main rights which the directive provides for third country nationals, including the right to equal treatment in employment, apply only within the Member State where the status is acquired, once again reinforcing the impression that the EU consists of many labour markets, not one single one. However, in addition to the creation of the status, the directive aims also at facilitating intra-EU movement of long term resident third country nationals. These provisions are contained in Chapter III of the Directive. Although Article 14 states that a long term resident may reside in a second Member State to exercise an economic activity, a number of limitations are available to the Member States' authorities to make access to the labour market difficult. First, Member States are allowed to examine their labour market and apply their national procedures regarding requirements for filling vacancies or for exercising economic activities. They may also give preference to EU nationals and to third country nationals assimilated to the position of EU nationals, effectively family members, and third country nationals who reside legally and receive unemployment benefits in the Member State (Article 14(3)). If the Member State had quotas on third country

[19] Denmark does not participate in any of the measures discussed in in these sections as a result of a protocol to the treaties. Ireland and the UK are entitled to choose whether they will to opt in or out. By the end of 2012, they had chosen not to participate in any of the measures discussed in sections 3 and 4 with one exception. The UK participates in the Qualification Directive 2004/83 but has opted out of the re-cast. All of the intra-EU mobility provisions discussed here are subject also to a requirement that the individual is not a threat to public policy, public security or public health.

[20] Now Articles 78 and 79 TFEU.

[21] Directive 2011/51.

nationals' access to their labour market when the directive was adopted on 25 November 2003, they could maintain those quotas and apply them to these third country nationals as well. Second, there is no automaticity in obtaining the right to reside and work in a second Member State for a long term resident third country national. The individual has to apply for a permit and prove that he or she has sickness insurance, stable and regular resources and possibly also complies with integration measures if these were not applicable in the first Member State of residence (Article 15(2) and (3)). Finally, Member States are permitted to restrict a long term resident from changing employment from that authorised in the residence permit for a period of 12 months (Article 21(2)).[22] Clearly, as regards this group of persons, there are 25 quite different labour markets in the EU though the boundaries among them are intended to be permeable.

The European Commission issued its report on the implementation of the directive in September 2011.[23] The Commission notes that transposition by the Member States has been less than ideal and fails the objective of the measure. Some Member States are applying quotas of dubious conformity with the directive. Others are applying income requirements which are higher than permitted by it. Clearly intra-EU mobility for third country nationals who do not enjoy a family relationship with a migrant EU national is substantially circumscribed.

11.3.2 Highly Qualified Migrants

On 25 May 2009 the EU finally adopted the first measure designed to admit third country nationals to the EU from outside the 25 participating Member States.[24] The so called Blue Card Directive (Directive 2009/50) had to be transposed by the Member States into their national law by 19 June 2011 according to Article 23. It may seem somewhat surprising that the EU adopted a measure to allow third country nationals to move around the EU and seek employment (see above Directive 2003/109) in 2003 but did not manage to agree on any rules on first admission of third country nationals for employment until 6 years later. This is undoubtedly the result of sensitivities in a number of large Member States about control over access by foreigners to their labour markets. It is worth recalling that in the Lisbon Treaty which entered into force on 1 December 2009, a new provision was added, Article 79(5), which places a limitation on the EU competence on labour migration (amongst others) whereby Member States are entitled to continue to determine the volumes of admission of third country nationals to their territory (not elsewhere in the Union) for the purpose of seeking work.

[22] This could also include re-employment for the first 12 months.

[23] COM(2011) 585 final.

[24] Directive 2003/109, discussed above only applies to third country nationals who have already completed 5 years residence in one Member State and thus not to first admission to the territory of the Member States.

According to its preamble the directive is intended to contribute to the EU's programme aimed at becoming the most competitive and dynamic knowledge-based economy in the world (preamble (3)). From this it is clear that the directive reflects the intention of the legislator that the EU has only one economy not 28. It is also intended to address labour shortages by fostering admission and mobility (preamble (7)). The use of the two terms is helpful as it provides some guidance on how one is to refer to immigration from outside the EU into the EU (admission) and movement of third country nationals around the 28 Member States for employment purposes (mobility). The mechanism by which these objectives are to be achieved is through the facilitation of admission of highly qualified workers and their families by establishing a fast-track admission procedure and by granting them equal social and economic rights as EU citizens. Below in I will consider the rules under this directive for first admission to the EU labour market. Here, I will only consider mobility within the EU for those already admitted.

Article 18 provides that after 18 months of legal residence in a Member State, a person admitted to that Member State as a Blue Card holder may move to another Member State for the purpose of highly qualified employment. Highly qualified employment is defined as employment of a person who is performing genuine and effective work as an employee, paid and has adequate and specific competence as proven by higher professional qualifications (Article 2(b)).[25] The second Member State is entitled to re-examine whether the conditions of high qualification and work are fulfilled and the individual is not entitled to commence work until so authorised (Article 18(2)). So, the objective of a common labour market for highly qualified migrants is not really achieved. While there is movement towards the objective, Member States are still permitted to place substantial obstacles in the way of the Blue Card holder who seeks to exercise the mobility right.

11.3.3 Refugees and Beneficiaries of International Protection

Directive 2011/95 was adopted on 25 November 2011. It replaces in part Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection. The original directive was adopted on 29 April 2004 (2 days before 10 Member States joined the EU). It covers two different cases—refugees as defined in the UN Convention relating to the status of refugees 1951 and its 1967 Protocol (the Refugee Convention) and beneficiaries of subsidiary protection whose right to protection arises from multiple sources including the UN Convention against Torture 1989, the European Convention on Human Rights and elsewhere. The re-cast Directive defines persons recognised as refugees or granted subsidiary protection as beneficiaries of international protection.

[25] In their turn, higher professional qualifications are defined as meaning qualifications attested by evidence of higher education qualifications or by at least 5 years professional experience of a level comparable to higher qualifications and relevant in the profession or sector.

However, the directive does not address the issue of intra-EU mobility. As far as the provisions of the directive are concerned, beneficiaries of international protection have access only to the labour market of the state which recognised or granted their status. I will deal with this below in section 11.4. They only acquire mobility rights if they can fulfil the conditions of the long term residents' directive as it has been adjusted to include them.[26] Thus this Directive falls within the group which confounds a federal approach to migration in the EU. Although there is EU legislation which must be applied in respect of the subject matter, the adjudication of an application for entry to the labour market by the authorities of one Member State has no consequence for labour market access for the individual in any other Member State.

11.3.4 Researchers

The admission to the EU of third country national researchers is regulated by Directive 2005/71. It also covered intra-EU mobility, albeit in a rather cursory manner. Researchers are defined as third country nationals holding appropriate higher education qualifications which give access to doctoral programmes and who are selected by a research organisation to carry out a project for which the qualifications are required (Article 2(d)). Article 13 of the directive provides that researchers admitted in accordance with it shall be allowed to carry out part of their research in another Member State. Where the researcher stays in another Member State for less than 3 months he or she remains covered by the academic arrangements in the first Member State provided he or she has sufficient resources. Where the stay in a second Member State will last more than 3 months, then the second Member State may require the researcher to jump through most of the hoops which applied to him or her in the first Member State including finding a host institution, obtaining a hosting agreement etc. which I describe below in section 11.4. This group of migrants are similarly subject to a limited degree of federalism as, although the Directive which regulates their admission to each Member State is singular, the decision on implementation of that Directive by the authorities of each Member State has limited consequences as regards labour market access in any other Member State.

11.3.5 Family Members of Third Country Nationals

The EU legislator adopted a directive on the admission of third country national family members of third country nationals residing in the EU in 2003 (Directive 2003/86). It sets out the conditions for admission to the territory and access to the labour market of these persons. I will look at the provisions on first access to the labour market for these third country nationals below in section 11.4. The rules on

[26] Directive 2011/51 which extends the application of Directive 2003/109 to beneficiaries of international protection.

intra-EU labour mobility for the family members of third country nationals can be found in two different places—first, Directive 2003/109 on mobility rights of third country nationals and secondly, Directive 2009/50 on highly qualified migrants a both of which I have discussed above regarding the movement of the principal. I will deal here, however, with the intra-EU mobility rights of family members of both categories.

The third country national family members of third country nationals resident in the EU get access to the labour market of a Member State other than the first one which admitted them depending on the movement of their principal (ie the third country national who invited them to the EU at all). Article 16 of Directive 2003/109 provides that where a third country national moves to another Member State under the directive, those family members who had already joined him or her in the first Member State and who fulfil the conditions of Article 4(1) Directive 2003/86 are entitled to accompany or join the principal. The permitted family members are limited to spouses (one per principal only) and minor children (defined as below the age of majority of the host Member State and unmarried, but including adopted and custodial children). Member States may include wider family members to join a third country national holding long term resident status but they are not required to do so. Member States are also permitted to require the family members (spouses and children) to show that they have stable and regular resources which are sufficient to maintain themselves without recourse to the social assistance of the state or that the long term resident has such resources and sickness insurance covering all risks in the second Member State (Article 16(4)(c)) (Groenendijk et al 2006).

The question of access to employment is fairly convoluted. Article 21(3) Directive 2003/109 provides that family members of a long term resident third country national who moves to a second Member State are entitled to the rights contained in Article 14 of Directive 2003/86 (family reunification) once they have their residence permits. Article 14 of Directive 2003/86 provides that these family members may have access to employment but Member States may limit this to the same employment right as that of the sponsor or principal. Article 14(2) further provides that Member States may place conditions on access to employment for these family members (presumably including a ban) limited to 12 months. During that 12 month period, the second Member State is entitled to examine the situation of its labour market before authorising a family member to take employment.

The family members of highly qualified migrants who entered the first Member State in accordance with the provisions of Directive 2009/50 (Blue Card holders), are covered by Articles 18 and 19 Directive 2009/50. Only if the family was constituted in the first Member State may the family members move under these provisions to a second Member State with their principal. However, family members are entitled to move to a second Member State for the purpose of highly qualified employment after 18 months of legal residence in the first Member State. There is no possibility of conditions or delay in access to the labour market but there is a limitation to highly qualified employment. Family members of beneficiaries of international protection do not get any mobility right to live and work in a second Member State until their principal acquires such a right under Directive 2011/51.

Similarly, for family members of researchers moving among Member States there are no provisions regarding labour market access.

For family members of third country nationals resident in one Member State and seeking to move to another Member State, the same limitations apply to access to the labour market as for their principal.

11.4 First Access to the EU Labour Market: Access to One Member State Only

Following from the previous section which examined the situation of third country nationals who have been admitted to the territory of one Member State and whether they are able to access the labour market in any other Member State, in this section I will move geographically beyond the EU and examine the application of EU migration legislation to third country nationals who are seeking to access the labour market of any one Member State for the first time (usually in the context of arriving or seeking to enter the EU).

Once again, the argument which I am making here is that there is a hybrid sort of federal move going on. On the one hand, there is one single common regulation which applies to the Member States regarding access to the labour market by third country nationals which indicates a federal move vis-à-vis the Member States as the authorities of those Member States are no longer competent to adopt legislation which conflicts with its EU counterpart. On the other hand, the application of the EU measure by the authorities of any one Member State has no consequence for the other Member States. The individual must start the whole procedure all over again from the start if he or she seeks to move from one Member State to the other and obtain labour market access. This evidences a degree of autonomy of the national authorities which is less indicative of a federal move.

11.4.1 Workers

The only EU measure which in 2012 directly provides for the admission of third country national workers to take up employment in a Member State is the Blue Card Directive (2009/50). While the Commission has made a number of proposals for admission of other kinds of workers (intra-company transferees, seasonally workers, trainees) by the end of 2013 none had been adopted. Under the Blue Card Directive, highly qualified third country nationals (see above for the definition) who fulfil the conditions set out in the directive must be issued a Blue Card (Article 7). The scope of the directive is limited in Article 3 to exclude anyone who is seeking or has sought international protection, researchers, third country national family members of EU nationals and those who have long term residence status. It permits Member States to issue residence permits for any purpose of employment outside the Blue

Card scheme (in which case intra-EU mobility does not apply—Article 3(4)). The criteria for admission include:

- A valid work contract for highly qualified employment;
- Permission to exercise a regulated profession (if relevant);
- Evidence of high qualification (or work experience);
- A valid travel document, visa application etc;
- Evidence of sickness insurance for all risks.

Member States are permitted to apply limitations of volume of admissions of third country nationals under this category (Article 6). The individual who fulfils the criteria is entitled to a Blue Card and in the event of rejection of the application a right to procedural safeguards (Article 11). After 5 years of work and residence the Blue Card holder is entitled to a long term residence permit under Directive 2003/109 (see above) on which it is noted that he or she was a Blue Card holder (Article 17(2)). This labour migration measure treats the EU territory as 25 separate ones (three Member States do not participate: Denmark, Ireland and the UK) which only converge into one after 5 years, with a relaxation of rules after 18 months (see section 3.4).

11.4.2 Researchers

The first admission of researchers to the EU Member States is governed by Directive 2005/71. The application must be sponsored by a state approved research organization which has a hosting agreement with the researcher (Article 6). The researcher must present the relevant documents to receive a visa. There are no provisions for the researcher to take employment, only to carry out research. Article 11 permits researchers to teach in accordance with national legislation though this may be subject to a maximum number of hours. Researchers are entitled to equal treatment with nationals as regards working conditions including pay and dismissal (Article 12(b)). Once again, for researchers, the EU space is segmented and limited regarding labour market access.

11.4.3 Beneficiaries of International Protection

By the same competence which gave the EU power to adopt legislation in the field of immigration, power to adopt legislation on asylum was also extended to the EU institutions. The objective is to create a Common European Asylum System over a series of phases which started in 1999. At the moment the Common System is still one based on the principle of minimum standards. Thus Member States are entitled to maintain higher standards than those required by the measures in the System but must conform at least to the lowest standards. What interests me here is the content of that protection and specifically access to employment.

According to Article 26 of the Directive, Member States are obliged to authorise these persons to engage in employed or self-employed activities subject to rules generally applicable to the profession or to the public service as soon as protection has been granted. Access to the labour market is a requirement under Articles 17–19 Refugee Convention as regards refugees (Edwards 2011). However, there is no clear counterpart as regards beneficiaries of international protection arising from other sources. The right to employment also includes the right to vocational training, workplace experience and counselling services. Member States must facilitate full access. Beneficiaries of international protection are entitled to the protection of national law on remuneration, access to social security systems and other conditions of employment. In the first directive on the subject, there was the possibility for Member State to limit access to employment for beneficiaries of subsidiary protection (though not for refugees). When the Commission examined the practices of the Member States in applying the Directive[27] it discovered that the vast majority of Member States authorised access to the labour market to all beneficiaries of international protection. Only three Member States (Cyprus, Germany and Luxembourg) applied a limitation as regards beneficiaries of subsidiary protection. Nonetheless, the Commission did find problems with the transposition of employment related obligations relating to educational opportunities in a number of Member States. When the directive was renegotiated with the intention of harmonising the rights of refugees and beneficiaries of subsidiary protection a common minimum standard was reached. Thus for beneficiaries of international protection, again, the EU labour market consists of 25 separate segments to which they will have access only to one.

11.4.4 Family Members of Third Country Nationals

Directive 2003/86 was the first substantive measure to be adopted after the EU legislator had been given the competence to make law in the field of immigration and asylum in 1999. It was heralded by the Commission as a substantial success although in the legislative process, it was required to return to the drawing board and submit a new substantially different draft three times before the directive successfully passed the Council (at that time the European Parliament did not have co-decision powers with the Council). First access to the EU for family members of third country nationals is premised on the sponsor holding a residence permit issued by a Member State valid for at least 1 year and to have reasonable prospects of obtaining the right of permanent residence (Article 3).[28] Those seeking international protection are excluded though family members of recognised refugees are included. As mentioned in section 11.3, family members are limited to a spouse and

[27] COM(2010)314 final.

[28] Article 8 permits Member States to delay family reunification until the sponsor has stayed lawfully for 2 years in their territory, and there is a derogation where national law so provided at the same of adoption of the directive of a waiting period of 3 years.

children (with a fairly wide definition of children) who are minors under national law and unmarried. Member States may admit other family members but are not required to do so. The sponsor must have adequate accommodation for the family, sickness insurance in respect of all risks for the family members and stable and regular resources sufficient to maintain the family without recourse to social assistance (Article 7). Member States are also permitted to require family members to comply with integration measures under national law (Article 7(2)). This seems to include integration measures which must be completed abroad before a visa will be issued.

Once admitted to the host Member State, the family members gain access to employment which can be limited to the same access to employment as the sponsor (Article 14(1)(b)). This permission can be delayed for a maximum of 12 months during which the Member State may examine the situation of its labour market before permitting employment of these family members. Further, employment may be restricted to first degree family members.

The admission of family members of recognised refugees is also covered by the Directive but the conditions are relaxed specifically as regards the conditions of accommodation, resources, sickness insurance and integration measures. A requirement that the refugee applies for family reunification within 3 months of his or her recognition may be applied but not the requirement to complete integration measures. Similarly no residence requirement for the sponsor can be applied (Article 13). These family members enjoy access to employment in the same way as the third country national family members of other third country nationals. As their principal is permitted to take employment, so are they.

According to the Commission's report on the implementation of the Directive[29] some Member States, such as Austria, the Netherlands, Malta and Germany, limit access to employment of family members exactly as stated in the Directive. This means there are three categories depending on the sponsor's status—no access, access only with a work permit or free access. Other Member States, including Estonia, Finland, France and Luxembourg, do not impose restrictions. At the time of the report, the Commission noted that seven Member States used the 12 month delay provision (including Austria, Cyprus, Germany, Greece, Hungary, Slovenia and Slovakia).

There are no provisions for the family members of researchers under Directive 2005/71 to take employment.

11.5 Conclusions

In this chapter I have looked at the EU's legislation regarding labour migration in order to understand the extent to which the EU has one or 28 labour markets for the purposes of migrants seeking access. This is important for the investigation of federalism in the EU as a feature of immigration in federal states is that admission

[29] COM(2008)610 final.

of people to one part of the federal entity has legal consequences for their status anywhere on the federal territory. Thus the more 'complete' the EU's internal market for people to move and reside the greater the convergence of the EU to a federal model may be. In order to undertake this study, I looked first at the legal regime relating to nationals of EU Member States and their family members moving across intra-EU borders looking for and taking work. Here it is clear that EU legislation operates to promote a single common EU labour market where nationals of any Member State accompanied by their third country national family members can move freely and seek employment anywhere. While there are occasional teething troubles, the system may be considered to have a federal element. The constituent parts of the EU cannot unilaterally decide to protect their labour markets from nationals of other Member States (transitional arrangements notwithstanding).

On the other hand, when one examines EU legislation relating to third country nationals who are not family members of EU nationals, one encounters a bewildering array of measures which seem to be divided up on the basis of principles which are unclear and overlapping. Third country nationals who are admitted to the EU in accordance with national legislation of a Member State come under one set of rules regarding intra-EU labour mobility once they have completed 5 years' residence in one Member State and fulfilled various conditions. In 2011 beneficiaries of international protection were finally added to this group. Highly qualified migrants admitted to any Member State under EU rules have rather qualified EU employment mobility rights after 18 months' work and residence in one Member State. Researchers have very limited employment mobility rights after admission to one Member State under EU legislation. Family members of any of these groups tend to follow the rule of their principal or are excluded from intra-EU employment mobility rights altogether (such as the family members of researchers).

First admission to the EU labour market for third country nationals coming from outside the EU is similarly subject to a wide diversity of conditions, requirements and restrictions. Depending on what the individual is likely to be doing his or her access to the territory and labour may be facilitated or limited. Further, first admission of third country nationals to EU territory is always limited to one Member State even where that admission is regulated by EU law. Thus for the third country national seeking to enter the EU for the first time, the EU labour market consists of 28 different national markets to which access is granted only to one even if the same rules are applicable in 25. Access to the labour market of more than one Member State is usually a benefit which the third country national may acquire after a period of time—18 months for the Blue Card holders, 5 years for long term resident third country national, beneficiaries of international protection and their family members.

The nature of the EU labour market for third country nationals is thus dependent on the passage of time. It commences as a highly segregated place cut into national labour markets with impermeable borders among them. But as time goes on these borders begin to dissolve until the 5 year mark where they become passable, albeit subject to obstacles.

What does this picture tell us about federalism in the EU? Space and time do not reveal a clear image. If a federal state is one where there is a convergence

of space and regulation over movement of persons including for the purpose of economic activities (of which the most sensitive is usually employment) then the EU is a place of struggles around federalism. While the movement of persons for economic activities is almost completely regulated by the supranational entity for the purposes of some people—EU nationals and their third country national family members—for others there is a highly complex regime. To understand whether a specific individual is entitled to rely on the supra national regulatory regime or is subject to the national one is not always self evident. Indeed, in many cases there will be overlap between the two, as I have outlined above. While the objective in the EU is to achieve one common European migration scheme, three Member States have chosen to remain outside the system, Denmark, Ireland and the UK. The EU appears to be a partially federalized entity for some aspects and in some spaces of migration regulation but not others. This incomplete picture is further complicated by the variable geometry of the EU's geography in this area where whole parts are claiming state sovereignty against the rest.

What is the result of the complexity which I have described for our general theme of migrants' rights? Complexity in the regulation of migration is usually suspect as behind it is the differentiation of people according to often quite arcane criteria into groups with different types of rights. Thus as I have shown in the first part of this chapter, EU nationals are the subject of fairly straight forward rules which apply to all of them as soon as they leave their Member State of origin. The main difference lies between those who are economically active and those who are not. Only the later must show that they are economically self sufficient and have health insurance in order to justify their right of residence. Third country nationals, however, are carved up into increasingly complicated groups each covered by different legislation (directives and regulations). The outcome of the separation is that people have very different rights as regards access to the labour market. This is complicated even further as there is a very uncertain federal move in respect of them. The assessment by the authorities of each Member State in respect of many of these categories of people has no element of mutual recognition. The authorities of every Member State remain sovereign to assess for the purposes of that Member State whether the individual shall get access to the labour market of their Member State. The result for the foreigner is few rights which are harder to exercise. In the EU context, the more federal the approach to labour migration, the greater the rights for the individuals concerned.

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