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Céline Bauloz

**Blurred Lines: Migration and Mobility
in EU Law and Policy**

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Abstract

While the movement of persons is at the heart of the European construction, it has been conceptualised differently with regard to third-country nationals and citizens of the European Union (EU). In the former case, it is referred to as ‘migration’ and, in the latter, as ‘mobility’. This traditional perception of migration and mobility is however not set in stone but is deemed to evolve alongside the ever-changing migratory reality and interests of the different stakeholders. The present paper examines these traditional conceptions and their development in European law and policy drawing from EU policy documentation as well as both primary and secondary law. It highlights a shift in the migration-mobility discourse from a migration-mobility dichotomy to a migration-mobility nexus where migration is increasingly treated qua mobility. The paper further explores the limits of this analogy and its potential for a more comprehensive rethinking of migration at the EU level.

Keywords

migration, mobility, European Union law and policy, movement of persons, free movement, third-country nationals

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1 Introduction

The movement of persons is at the heart of the European construction or at least it has become so incidentally. What we know today as the European Union (EU) is the result of a market-driven initiative initially led by six European States.¹ As laid down in Article 2 of the 1957 Rome Treaty Establishing the European Economic Community,

It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, and increased stability, an accelerated raising of the standard of living and closer relations between its Member States.²

This Common Market was grounded on four freedoms, namely free movement of goods (Title II), persons, services and capital (Title III). This in turn required abolishing internal borders within the European Economic Community, that is, between the participating States. As laid down in the 1986 Single Act, ‘The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.’³ Free movement of persons was more specifically addressed through the ‘Schengen cooperation’, formally initiated by the 1985 Schengen Agreement⁴ which culminated in 1995 when the 1990 Schengen Implementing Convention took effect.⁵ The Schengen area was thus created to ensure internal free movement of persons through the suppression of controls at common borders of participating States.⁶ This area nowadays comprises 22 EU Member States and four associated States⁷ and is primarily regulated by the Schengen Borders Code.⁸

¹ Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands.

² 298 UNTS 11, 25 March 1957 (entry into force: 1 January 1958).

³ Article 13 modifying Article 8a of the Rome Treaty, Single European Act, 17 February 1986 (entry into force: 1 July 1987), [1987] OJ L 169/1. This provision is now to be found in Article 26(2) of the Treaty on the Functioning of the European Union (consolidated version) [2102] OJ C 326/47.

⁴ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 14 June 1985, in [2000] OJ L 239/13.

⁵ Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 19 June 1990 (entry into force: 1 September 1993), in [2000] OJ L 239/19.

⁶ While Schengen cooperation was originally outside the EU, it became communitarized with the 1997 Amsterdam Treaty (Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997 (entry into force: 1 May 1999), in [1997] OJ C 340/1).

⁷ Among EU Member States, the United Kingdom and Ireland decided not to participate. The other Member States currently not part of the Schengen area are Bulgaria, Croatia, Cyprus and Romania (but all except Cyprus are candidate countries). The four associated States that are not members of the EU are Iceland, Liechtenstein, Norway and Switzerland.

⁸ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105/1, further amended inter alia by: Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council [2013] OJ L 182/1; Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances [2013] OJ L 295/1.

As a result of this historical evolution, although free movement of persons was not the initial objective behind the European construction, it was a prerequisite to achieve the creation of an internal market. The movement of persons has thus become intrinsically embedded within the very European integration.

However, by abolishing internal borders, the then European Community has gone beyond the mere issue of free movement within the Schengen area. The movement of persons has indeed acquired a double dimension: not only an internal one ensuring the free movement of EU citizens but also an external one concerning the movement of third-country/non-EU nationals into the Union. Acknowledged as a matter of intergovernmental concern in the 1992 Maastricht Treaty,⁹ this external manifestation of the movement of persons was officially heralded as an EU competence with the inclusion of migration and asylum within the area of freedom, security and justice in 1999.¹⁰

Since then, this dual notion of movement of persons seems to have translated into a dichotomous vocabulary in the EU where terminologies of ‘mobility’ and ‘migration’ would confront one another. Indeed, while the term ‘migration’ appears to refer to the movement of third-country nationals into the EU (external dimension), that of ‘mobility’ would arguably be limited to the realisation of EU citizens’ right to free movement (internal dimension). This traditional understanding is aptly illustrated by Christina Boswell and Andrew Geddes in their book *Migration and Mobility in the European Union*:

International migration refers to movement from outside the EU by people who are not nationals of a member state. This extra-EU migration is by non-EU or third country nationals (TCNs). EU mobility refers to nationals of EU member states – exercising their right of free movement as EU citizens. The prevailing image for most people when ‘immigration’ is mentioned may well be movement from outside the EU by TCNs.¹¹

However, as further note the two authors, ‘International migration is incredibly diverse, fluid and fast-changing’.¹² In an increasingly globalised world, migratory patterns are indeed an ever-changing reality to which States and other stakeholders have to constantly adapt in light of their interests.

Against this background, the question thus arises whether or not the traditional migration-mobility dichotomy has also evolved over the last decade in EU law and policy. Such a questioning first calls for a closer examination of the traditional conceptions of the two notions (2), paving the way for a more critical analysis of their actual development and potential interactions (3). For so doing, the present paper draws from EU policy documentation setting out the strategic objectives of the Union, such as presidency conclusions of the European Council or Communications of the European Commission, and from primary and secondary EU law.

⁹ 7 February 1992 (entry into force: 1 November 1993), in [1992] OJ C 191.

¹⁰ See Title IV of the Treaty Establishing the European Community, and more specifically Articles 61 to 63, as amended by the Amsterdam Treaty, *supra* note 6.

¹¹ C. Boswell and A. Geddes, *Migration and Mobility in the European Union*, London, Palgrave Macmillan, 2011, p. 3.

¹² *Ibid.*

2 The traditional conceptions of migration and mobility

Before delving into any evolution the notions of migration and mobility might have experienced since a decade, the present section first delineates how these two terms have traditionally been approached and conceived in EU law and policy. With that view, the following analysis builds on the presumption that the two notions are mutually exclusive, examining first that of ‘mobility’ and then the one of ‘migration’ so as to mirror the chronological order in which the EU gained competence over these two issues.

2.1 Mobility

Among the two notions of migration and mobility, the traditional understanding of the latter is the most straightforward as it constitutes a pillar of the Common Market and the European construction. As noted above, mobility has been understood as the natural consequence of EU citizens’ right to free movement. The content of ‘mobility’ has thus been contingent on the personal scope of free movement which, initially limited to movement for the purpose of employment,¹³ was subsequently extended to all nationals of EU Member States,¹⁴ as reaffirmed with the establishment of the EU citizenship by the 1992 Maastricht Treaty.¹⁵ Article 21(1) of the Treaty on the Functioning of the European Union now provides that ‘[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by measures adopted to give them effect’.¹⁶ Today, these rights are most notably governed by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.¹⁷ The Directive prescribes a right of entry into Member States for all Union citizens and family members.¹⁸ Their right of residence is then free of any conditions for a period up to three

¹³ For a detailed account of the origins and development of the right to free movement, see for instance: E. Baldoni, ‘The Free Movement of Persons in the European Union: A Legal-Historical Overview’, PIONEUR Working Paper No. 2, July 2003, available at:

http://www.aip.pt/irj/go/km/docs/aip/documentos/estudos%20publicacoes/centro%20documentacao/Capital%20Humano/ILivre_Circulacao_Trabalhadores/A3.Projecto_Pioneer/Free_Movement.pdf (last visited 18 December 2015).

¹⁴ See Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28; and Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students [1990] OJ L 180/30.

¹⁵ See Article 8 of the Treaty on European Union (1992 Maastricht Treaty, *supra* note 9) on citizenship of the Union and Article 8a on ‘the right [of EU citizens] to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect’.

¹⁶ See *supra* note 3. See also the *Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens* [2010] OJ C 115/1, Section 2.2 which reaffirms that: ‘The right to free movement of citizens and their family members within the Union is one of the fundamental principles on which the Union is based and of European citizenship.’

¹⁷ Article 7(1)(a), (b) and (c) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77. The same conditions apply to family members be they nationals of a Member State or not (Article 7(1)(d) and (2)). The meaning of ‘family members’ is however limited to the spouse, the partner in registered partnership, the direct descendants of less than 21 years old or dependent or dependent direct relatives (Article 2(2)(a)-(d)).

¹⁸ See Article 5(1) for EU citizens and Article 5(2) and (3) for family members. According to this last provision, family members of EU citizens who are not nationals of a Member State may nevertheless be required to have a visa for entering a Member State by virtue of Regulation (EC) No 539/2001 or national law.

months.¹⁹ For residence of more than three months, three alternative scenarios condition residence of Union citizens and their family members. They shall: a) be workers or self-employed; b) ‘have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State’ and have a ‘comprehensive sickness insurance cover’; or c) be ‘enrolled at a private or public establishment, accredited or financed by the host Member State [...] for the principal purpose of following a course of study, including vocational training’ and ‘have a comprehensive sickness insurance cover and [...] sufficient resources for themselves and their family not to become a burden on the social assistance system of the host Member State’.²⁰

Against this historical legal development, the notion of mobility does not only depict the exercise of free movement of EU workers but also that of any EU citizens and members of their family within the Union. Nevertheless, the initial focus on free movement for the purpose of employment still permeates to a certain extent the conception of intra-EU mobility. Since the turn of the century, a major strategic objective of the Union (known as the Lisbon Strategy) has indeed been ‘to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.’²¹ Enhancing the mobility of certain category of EU nationals – in particular students, teachers, researchers and workers – has thus been established as a strategic tool with this view.²² As the European Commission underlines,

Achieving the Lisbon objectives of more and better jobs, greater social cohesion and a dynamic knowledge-based economy requires an adaptable labour force. More mobility on the labour market, be it mobility between jobs or between Member States, is integral to this ambition, and improving skills levels and removing barriers to mobility are essential in this context.²³

¹⁹ Save for the holding of a valid identity card or passport according to Article 6(1). This also applies to family members ‘in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen’ (Article 6(2)).

²⁰ Article 7(1) and (2).

²¹ Presidency Conclusion, Lisbon European Council, 23 and 24 March 2000, para. 5 (2000 Lisbon Conclusions).

²² See most notably, European Commission, *Communication from the Commission to the Council, Realising the European Union’s Potential: Consolidating and Extending the Lisbon Strategy*, COM(2001) 0079 final, 7 February 2001; European Commission, *Communication from the Commission to the Council, New European Labour Markets, Open to All, with Access for All*, COM(2001) 116 final, 28 February 2001. For the European Council, see: Presidency Conclusions, Nice European Council Meeting, 7, 8 and 9 December 2000, para. 26; Presidency Conclusions, Stockholm European Council, 23 and 24 March 2001, paras. 10, 12 and 13; Presidency Conclusions, Barcelona European Council, 15 and 16 March 2002, paras. 7, 9, 26 and 33; Presidency Conclusions, Brussels European Council, 20 and 21 March 2003, EU Doc. 8410/03, 5 May 2003, paras. 34, 40, 43 and 47; Presidency Conclusions, Thessaloniki European Council, 19 and 20 June 2003, EU Doc. 11638/03, 1 October 2003, para. 45; Presidency Conclusions, Brussels European Council, 25 and 26 March 2004, EU Doc. 9048/04, 19 May 2004, para. 41; Presidency Conclusions, Brussels European Council, 17 and 18 June 2004, EU Doc. 10679/2/04 REV 2 CONCL 2, 19 July 2004, paras. 43 and 47, ‘European Youth Pact’ annexed to Presidency Conclusions, Brussels European Council, 22 and 23 March 2005, EU Doc. 7619/1/05 REV 1 CONCL 1, 23 March 2005; Presidency Conclusions, Brussels European Council, 23 and 24 March 2006, EU Doc. 77751/1/06 REV 1 CONCL 1, 18 May 2006, paras. 21, 23 and 74; Presidency Conclusions, Brussels European Council, 14 December 2007, EU Doc. 16616/1/07 REV 1 CONCL 3, 14 February 2008, paras. 42 and 50; Conclusions, European Council, 1 and 2 March 2012, EU Doc. EUCO 4/3/12 REV 3 CO EUR 2 CONCL 1, 8 May 2012, paras. 11 and 18; ‘Compact for Growth and Jobs’, para. 3(l), annexed to Conclusions, European Council, 28 and 29 June 2012, EU Doc. EUCO 76/12 CO EUR 4 CONCL 2, 29 June 2012; Conclusions, European Council, 18 and 19 October 2012, EU Doc. EUCO 156/12 CO EUR 15 CONCL 3, 19 October 2012, para. 2(i); Conclusions, European Council, 27 and 28 June 2013, EU Doc. EUCO 104/13 CO EUR 9 CONCL 6, 28 June 2013, para. 2(d); Conclusions, European Council, 24 and 25 October 2013, EU Doc. EUCO 169/13 CO EUR 13 CONCL 7, 25 October 2013, para. 17; Conclusion, European Council, 20 and 21 March 2014, EU Doc. EUCO 7/14 CO EUR 2 CONCL 1, 21 March 2014, para. 10.

²³ European Commission, *Communication from the Commission to the Council, Commission’s Action Plan for Skills and Mobility*, COM(2002) 72, 8 February 2002, p. 4.

While ‘labour mobility’ has been the prime focus, it has later been complemented by ‘knowledge mobility’.²⁴ In March 2008, alongside the four founding freedoms, the Council created a ‘fifth freedom’ to ‘remove barriers to the free movement of knowledge’ in the EU, inter alia based on ‘enhancing the cross-border mobility of researchers, as well as students, scientist, and university teaching staff’.²⁵ Labour and knowledge mobility are now fully part of the Europe 2020 Strategy,²⁶ replacing the Lisbon Strategy.

The potential of intra-EU mobility was particularly highlighted in the follow-up of the 2008 economic crisis when the Union suffered from higher unemployment rates. As affirmed by the EU Council in 2009:

The rapid increase in unemployment is a cause of great concern. It is important to prevent and limit job losses and negative social impacts. Stimulating employment, in particular by promoting the acquisition of the new skills required by new jobs, is also a priority. Building on solidarity and allowing social protection systems to fully play their role as automatic stabilisers are key to restoring and strengthening confidence and help pave the way for recovery. Mobility has also proven to significantly contribute to economic growth. [...]²⁷

Hence, for the Union, mobility is not only a consequence of the right of free movement of EU citizens. It is also perceived as a much desired form of movement because of its positive impact over the economy and, ultimately, the Common Market. In other words, from a mere consequence of EU citizens’ right to free movement, intra-EU mobility has become an explicit strategy of the Union on its own.

2.2 Migration

While migration formally entered the EU legal and policy sphere quite recently compared to mobility, it has since 1999 become a central concern of the Union. As emphasised in the Presidency Conclusions at the 1999 Tampere European Council, the effective enjoyment of EU citizens’ free movement within the Union ensured by the abolition of internal borders was concomitant with the establishment of an area of freedom, security and justice:

²⁴ In addition to the Presidency Conclusions cited in supra note 22 and referring to the mobility of students, teachers and researchers, see Conclusions, European Council, 4 February 2011, EU Doc. EUCO 2/1/11 REV 1 CO EUR 2 CONCL 1, 8 March 2011, para. 19: ‘Europe needs a unified research area to attract talent and investment. Remaining gaps must therefore be addressed rapidly and the *European Research Agenda* completed by 2014 to create a genuine single market for knowledge, research and innovation. In particular, efforts should be made to improve the mobility and career prospects of researchers, the mobility of graduate students and the attractiveness of Europe for foreign researchers.’

²⁵ Presidency Conclusions, Brussels European Council, 13 and 14 March 2008, EU Doc. 7652/1/08 REV 1 CONCL 1, 20 May 2008, para. 8.

²⁶ European Commission, *Communication from the Commission, Europe 2020, A Strategy for Smart, Sustainable and Inclusive Growth*, COM(2010) 2020 final, 3 March 2010, pp. 6, 13 and 18.

²⁷ Presidency Conclusions, Brussels European Council, 19 and 20 March 2009, EU Doc. 7880/1/09 REV 1 CONCL 1, 29 April 2009, para. 19. See also Presidency Conclusions, Brussels European Council, 18 and 19 June 2009, EU Doc. 11225/2/09 REV 2 CONCL 2, 10 July 2009, para. 26.

The European Union has already put in place for its citizens the major ingredients of a shared area of prosperity and peace: a single market, economic and monetary union, and the capacity to take on global political and economic challenges. The challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all.²⁸

As further noted in the Tampere Conclusions,

This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union.²⁹

In other words, the abolition of internal borders redirected the attention of the EU and its Member States to the external borders of the Union while calling for the establishment of a common policy on asylum and migration.³⁰ In this regard, the Tampere Conclusions planted the seeds of the EU policy on migration that has since been followed and, by extension, determined how migration was to be understood in the EU for the years to come.

The last excerpt of the Tampere Conclusions lays down the point of departure to grasp the EU understanding of migration. The mere assertion that '[i]t would be in contradiction with Europe's traditions to deny such freedom to *those whose circumstances lead them justifiably to seek access to our territory*'³¹ already implies that some third-country nationals have a 'justifiable' claim for entering and staying in the EU. Hence, the core understanding of migration is founded on the presumption that some deserve access to the EU in contrast to others; a premise that has materialised in the inclusion-exclusion dichotomy of 'legal v. illegal' migration.³²

If the scope of migration in the EU encompasses both 'legal' and 'illegal' forms, its very content is in turn dependent on what 'legal' and 'illegal' migration means. The reasoning however reveals

²⁸ Presidency Conclusion, Tampere European Council, 15-16 October 1999, para. 2 (1999 Tampere Conclusions).

²⁹ *Ibid.*, para. 3.

³⁰ See Article 61(a) of the Treaty Establishing the European Community as amended by the 1997 Amsterdam Treaty (supra note 6) which refers to measures on external border controls, asylum and immigration as 'flanking measures' of free movement of persons in the then European Community.

³¹ 1999 Tampere Conclusions, supra note 28, para. 3 (emphasis added).

³² The present paper refers to the dichotomy 'legal v. illegal' as the one originally used by the EU. The one of 'regular v. irregular' is however usually favoured by the doctrine emphasising that individuals cannot be illegal but only irregularly entering or staying with the Union. The terminology of 'illegal migration' has also been depicted by some as a consequence of the securitisation of migration. See for instance, D. Schlentz, 'Did 9/11 Matter? Securitization of Asylum and Immigration in the European Union in the Period from 1992 to 2008', University of Oxford, Refugee Studies Centre, Working Paper Series No. 56, January 2010; J. Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU*, London, Routledge, 2006; C. Boswell, *European Migration Policies in Flux: Changing Patterns of Inclusion and Exclusion*, Oxford, Wiley-Blackwell, 2003; S. Lavenex, *The Europeanization of Refugee Policies: Between Human Rights and Internal Security*, Aldershot, Ashgate, 2001.

here tautological for what is ‘legal’, or ‘justifiable’ in the words of the European Council, determines *a contrario* what is ‘illegal’. Legal and illegal migrations thus constitute ‘two sides of the same coin’ to the extent that they are intimately intertwined at both the internal and external levels of the EU common migration law and policy.³³

On the EU internal plane, legal migration refers to movements of third-country nationals to the Union as regulated under EU law. Adopting a sectoral-approach for managing migration,³⁴ the entry to and residence in the EU of six main categories of third-country nationals are now regulated at EU level:³⁵ first, those migrating for the purpose of family reunification;³⁶ second, students, pupils in exchange programmes, unremunerated trainees and volunteers;³⁷ third, researchers;³⁸ fourth, highly-skilled workers;³⁹ fifth, seasonal workers;⁴⁰ and, sixth, intra-corporate transferees.⁴¹ While the first category reflects existing obligations of Member States to maintain family unity (most notably under Article 8 of the 1950 European Convention on Human Rights),⁴² the other five address educational, research and economic migration. This is indeed at the core of the EU Lisbon Strategy and the Europe 2020 Strategy which both strive to enhance the Union’s competitiveness and attractiveness.⁴³ In connection to migration, the objective is to ‘optimis[e] the benefits of legal

³³ As underlines Andrew Geddes with respect to migration flows, ‘Migration flows defined as irregular or illegal are closely linked to policies that define other flows as regular. [...] They are, in effect, two sides of the same coin and are closely connected to the underlying economic, social, political, demographic and environmental drivers of migration within sending and destination states.’: A. Geddes, ‘International Migration in the Present and Future European Union’, Brazil, Konrad Adenauer Stiftung, October 2013, p. 5, available at: <http://www.kas.de/brasilien/en/publications/35586/> (last visited 11 November 2015).

³⁴ A more comprehensive approach was initially suggested by the European Commission, that is, ‘a horizontal framework covering conditions of admission for all third-country nationals seeking entry into the labour markets of the Member States’, but was met with resistance by EU Member States (European Commission, *Communication from the Commission, Policy Plan on Legal Migration*, COM(2005) 669 final, 21 December 2005, p. 5). See European Commission, *Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities*, COM(2001) 386 final, 5 Sep. 2001.

³⁵ Although not regulating the entry of third-country nationals, two additional instruments also form part of the EU legal framework of ‘legal migration’ and address the treatment of long-term residents (Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44 (Long-Term Residents Directive)) and the EU single working and residence permit (Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L 343/1).

³⁶ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

³⁷ Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training of voluntary service [2004] OJ L 375/12 (Students Directive).

³⁸ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289/15 (Researchers Directive).

³⁹ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17 (Blue Card Directive).

⁴⁰ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375 (Seasonal Workers Directive).

⁴¹ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of intra-corporate transfer [2014] OJ L 157/1 (Intra-Corporate Transferees Directive).

⁴² European Convention on Human Rights, ETS No. 005, 4 November 1950 (entry into force: 3 September 1953).

⁴³ See the 2000 Lisbon Conclusions, *supra* note 21, para. 5 and European Commission, *Europe 2020, A Strategy for Smart, Sustainable and Inclusive Growth*, *supra* note 26. As underlined in *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union* (EU Doc. 16054/04 JAI 550, 13 December 2004, p. 10): ‘Legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy.’

migration’⁴⁴ in order for the EU ‘[t]o remain an attractive destination of talents and skills’⁴⁵ and to ‘meet[...] the needs of the labour market [...] to help[...] reduce skills shortages’.⁴⁶

However, if the core content of the notion of ‘migration’ in EU law and policy is clearly defined, its outer limits are rather imprecise. Indeed, while ‘legal migration’ primarily embraces ‘immigration’,⁴⁷ it is less obvious whether it covers as well ‘asylum’ or if the latter constitutes a distinct and own-standing notion. A median approach seems to be followed by the 1999 Tampere Conclusions which referred to the ‘common EU asylum *and* migration policy’⁴⁸ as ‘separate but closely related issues’.⁴⁹

The contours of legal migration are in fact only fully revealed when looking at the other side of the coin, namely at ‘illegal’ migration. From that perspective, while legal migration defines what illegal migration is, the latter also shapes the contours of the former. Hence, legal migration does not only cover immigration, but also asylum and short-term stays through Union’s uniform visas which both constitute regular avenues to enter and stay in the EU.⁵⁰ By contrast, illegal migration refers to all remaining instances of movement of persons that do not fall within legal migration.

Such an understanding of migration is reflected in the comprehensive migration policy the EU strives to achieve encompassing ‘all aspects of migration’, be they internal or external.⁵¹ Its external migration policy more specifically focuses on cooperation with third countries most notably with the view to gather information on irregular migration flows, trafficking and smuggling networks and return of third-country nationals irregularly in the EU.⁵² To secure such cooperation, the EU advances a – more or less – ‘balanced partnership with third countries’ through, for instance, visa facilitation for their nationals.⁵³

⁴⁴ Conclusions, European Council, 26 and 27 June 2014, in EU Doc EUCO 79/14 CO EUR 4 CONCL 2, 27 June 2014, para. 5.

⁴⁵ *Ibid.*, para. 6.

⁴⁶ Presidency Conclusions, Brussels European Council, 13 and 14 March 2008, *supra* note 24, para. 14. See also Presidency Conclusions, Brussels European Council, 14 December 2007, *supra* note 22, para. 19: ‘There is a close link between migration, employment and the Lisbon Strategy for Growth and Jobs. The European Council acknowledges that migration can have a significant impact on growth potential and employment growth, labour markets, adjustment capacity, productivity, competitiveness and public finances, whilst stressing that immigration is no substitute for structural reform. An effective immigration policy should be considered in the light of skills shortages and labour market requirements.’ See also, European Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Communication on Migration*, COM(2011)248 final, 4 May 2011, p. 3; European Commission, *Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration*, COM(2015) 240 final, 13 May 2015, p. 14.

⁴⁷ The notion of ‘immigration’ is here understood as regular migration for the purpose of labour, research, studies or family reunification as reflected in Article 78(2) of the Treaty on the Functioning of the European Union on the ‘common immigration policy’ and in European Commission, *A European Agenda on Migration*, *op. cit.*, fn. 46, pp. 14-17.

⁴⁸ 1999 Tampere Conclusions, *supra* note 28, Section A (emphasis added).

⁴⁹ *Ibid.*, para. 10.

⁵⁰ See Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243/1, amended by Commission Regulation (EU) No 977/2011 amending Regulation (EC) No 810/2009 of the European Parliament and of the Council establishing a Community Code on Visas (Visa Code) [2011] OJ L 258/9, Regulation (EU) No 154/2012 of the European Parliament and of the Council of 15 February 2012 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code) [2012] OJ L 58/3, and Regulation (EU) No 610/2013, *supra* note 8.

⁵¹ Presidency Conclusions, Brussels European Council, 21-22 June 2007, EU Doc. 11177/1/07 REV 1 CONCL 2, 20 July 2007, para. 16. See also European Commission, *Communication on Migration*, *supra* note 46.

⁵² See below section 3.2 on Mobility Partnerships.

⁵³ Presidency Conclusions, Brussels European Council, 14-15 December 2006, EU Doc. 16879/1/06 REV 1 CONCL 3, 12 February 2007, para. 24(a).

Against this background, it is apparent that migration is traditionally conceived by the EU as a dual notion striving a dual objective. On the one hand, legal migration refers at the very least to immigration, and most notably to certain categories of third-country nationals whose admission and stay in the EU participate to its economic growth. On the other hand, illegal migration addresses those unwanted within the EU by erecting legal walls to obstruct their arrival to and stay in the Union. Among this twofold objective, it is notable that the one to fight irregular migration has taken a predominant place in EU law and policy. The breadth of measures adopted with this view is telling, ranging from external border control for preventing irregular arrivals,⁵⁴ to stringent visa requirements complemented by carrier sanctions,⁵⁵ preventive and repressive measures against smugglers and human traffickers,⁵⁶ sanctions on employers hiring irregular migrants⁵⁷ and return of those irregularly in the EU.⁵⁸

3 The EU migration-mobility nexus: migration as mobility

The traditional understanding of migration and mobility in EU law and policy denotes how the two notions have been conceptualised as distinctive for each retains its specific personal scope of application. It is however striking that both mobility and legal migration have so far focused on the

⁵⁴ Rules on control of the external EU-borders are laid down in the Schengen Borders Code (Regulation No 562/2006 and amendments in supra note 8). The operational aspects of border control have been addressed by the EU through the creation of a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, commonly referred to as Frontex (see Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1, amended most notably by Regulation (EC) No 863/2007 of the European Parliament and of the Council of 22 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2007] OJ L 199/30, Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L 304/1, and Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ L 189/93).

⁵⁵ See Regulation (EC) No 810/2009, supra note 50, amending Regulations listed in supra note 50. It is noteworthy that most countries source of (irregular) migrants are listed as countries whose nationals require a visa to enter the EU. See Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt of that requirement [2001] OJ L 81/1, amended multiple times since then. For an updated visual mapping of these countries, see: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm (last visited 18 December 2015). Concerning carriers sanctions, see Annex V of the Schengen Borders Code, supra note 8, Article 26 of the 1990 Convention Implementing the Schengen Agreement, supra note 5, and Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L 187/45.

⁵⁶ See most notably Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/17, Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/1, and Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1.

⁵⁷ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24.

⁵⁸ Returning third-country nationals irregularly in the EU is primarily achieved through two main measures: first, by laying down common rules for EU Member States in Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98; and, second, by adopting readmission agreements with third countries. For the list of these agreements, see: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission/index_en.htm (last visited 18 December 2015).

same ‘categories’ of individuals albeit with respect to EU citizens for the former and third-country nationals for the latter. On the one hand, the emphasis is placed on labour and knowledge mobility, that is, on workers, students, teachers and researchers. On the other hand, internal migration law and policy has so far been concerned with similar addressees, though from third countries, such as workers (highly skilled, seasonal and intra-corporate transferees), students and researchers.

Such a convergence questions the premise over which the traditional conception of these two notions is grounded: to which extent are they truly distinct and mutually exclusive? This common wisdom does indeed not stand closer examination of the relationship between the two concepts as mobility appears to have influenced migration within the EU and across its external borders.

3.1 Migrants’ mobility within the EU

If intra-EU mobility is a right of EU citizens, it is not their exclusive privilege. Albeit more circumscribed, mobility of third-country nationals within the EU is indeed promoted in some secondary legislation in the field of migration. This is the case for long-term residents, students and researchers, highly skilled and intra-corporate transferees.⁵⁹

First, the 2003 Long-Term Residents Directive explicitly underscores the role of mobility for long-term residents under these terms:

Establishing the conditions subject to which the right to reside in another Member State may be acquired by third-country nationals who are long-term residents should contribute to the effective attainment of an internal market as an area in which the free movement is ensured. It could also constitute a major factor of mobility, notably on the Union’s employment market.⁶⁰

Against this background, the Directive lays down a right for long-term residents to reside for more than three months in the territory of a Member State other than the one which granted them the long-term residence status for (self-)employment, educational/vocational or other purposes.⁶¹ The conditions for residence in the second Member State are then similar to those in the first Member State.⁶² Such an exercise of mobility also applies to refugees and subsidiary protection beneficiaries

⁵⁹ For a detailed and enlightening analysis of intra-EU mobility of these third-country nationals (except for intra-corporate transferees), see Y. Pascouau, ‘Intra-EU Mobility of Third-Country Nationals: State of Play and Prospects’, European Policy Centre, Discussion Paper, April 2013.

⁶⁰ Recital 18 of the 2003 Long-Term Residents Directive (supra note 35). Persons eligible for long-term residence status are defined as third-country national having ‘resided legally and continuously within [a Member State’s] territory for five years immediately prior to the submission of the relevant application’ (Article 4) and who have ‘stable and regular resources which are sufficient to maintain [themselves] and the members of [their] family, without recourse to the social assistance system of the Member States concerned’ and a ‘sickness insurance’ (Article 5(1)). Member States may impose integration conditions (Article 5(2)) and may refuse to grant such a status on grounds of public policy or public security (Article 6(1)). For more detailed analyses of the Long-Term Residents Directive, see most notably: D. Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship: An Analysis of Directive 2003/109*, Leiden, Martinus Nijhoff Publishers, 2011.

⁶¹ Article 14(1) and (2) of the 2003 Long-Term Residents Directive.

⁶² See Article 15 of the Long-Term Residents Directive. On the eligibility conditions for long-term residence status, see above n. 60.

who are long-term residents, though, in practice, the demanding requirements of eligibility for long-term residence may well be an obstacle to its enjoyment.⁶³

Second, facilitation of intra-EU mobility for students and researchers is affirmed in both the 2004 Students Directive⁶⁴ and the 2005 Researchers Directive, the latter specifying its importance in ‘establishing the role of the European Research Area at world level’.⁶⁵ In this view, the two directives lay down conditions for exercising such a mobility. According to the Students Directive, mobility applies to ‘a third-country national who has already been admitted as a student and applies to follow in another Member State part of the studies already commenced, or to complement them with a related course of study in another Member State’.⁶⁶ In addition, he/she has to: a) fulfil the general admission conditions for studying in the EU Member States;⁶⁷ b) present full documentary evidence of his/her academic record and the course to be followed, and c) be ‘participat[ing] in a Community or bilateral exchange programme or [be] admitted as a student in a Member State for no less than two years’.⁶⁸ As for third-country nationals admitted as researchers under the terms of the Researchers Directive, they shall be allowed to undertake part of their research in another Member State. The conditions for so doing distinguish between research up to three months⁶⁹ and over three months.⁷⁰ The possibility of intra-EU mobility for students and researchers would normally further be increased with the upcoming adoption of a Recast Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing.⁷¹

Third, the 2009 Blue Card Directive takes a similar stand on the importance of mobility for highly qualified workers.⁷² As laid down in Recital 7,

This Directive is intended to contribute to achieving the[...] goals [of the Lisbon Strategy] and addressing labour shortages by fostering the admission and *mobility* – for

⁶³ See the 2011 Directive, *supra* note 35. See in this sense, C. Bauloz and G. Ruiz, ‘Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?’, in V. Chetail, P. De Bruycker and F. Maiani (eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, The Hague, Brill/Nijhoff, 2016, pp. 266-267.

⁶⁴ Recital 16 of the 2004 Students Directive (*supra* note 37).

⁶⁵ Recital 17 of the 2005 Researchers Directive (*supra* note 38).

⁶⁶ Article 8(1) of the 2004 Students Directive.

⁶⁷ These conditions are laid down in Articles 6 and 7 of the 2004 Students Directive. Article 6(1) requires the third-country national to present a valid document and a parental authorisation in case of a minor, have a sickness insurance, not constitute a threat to public policy, security or health and, if so requested, provide proof of payment of the application fees. Article 7 adds more specific conditions, requiring the third-country national to: a) be ‘accepted by an establishment of higher education to follow a course of study’; b) provide evidence of sufficient resources for his/her subsistence, study and travel costs; c) if required, evidence of ‘sufficient knowledge of the language of the course to be followed’; and, d) if required, provide proof of payment of establishment’s fees.

⁶⁸ Article 8(1) of the 2004 Students Directive.

⁶⁹ For research visits up to three months, Article 13(2) of the 2005 Researchers Directive provides that ‘the research may be carried out on the basis of the hosting agreement concluded in the first Member State, provided that [the researcher] has sufficient resources in the other Member State and is not considered as a threat to public policy, public security or public health in the second Member State.’

⁷⁰ According to Article 13(3) of the 2005 Researchers Directive in the case of research visits over three months, ‘Member States may require a new hosting agreement to carry out the research in that Member State’ and, in any case, the hosting agreements conditions (Article 6) and general admission conditions (Article 7) but be met.

⁷¹ European Commission, *Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing (recast)*, COM(2013) 151 final, 25 March 2013, p. 7, Explanatory Memorandum. See also Articles 26 to 28 of the Proposal.

⁷² See Recital 6 of the 2009 Blue Card Directive (*supra* note 39).

the purposes of highly qualified employment, of third-country nationals for stays of more than three months, in order to make the Community more attractive to such workers from around the world and sustain its competitiveness and economic growth.⁷³

From that perspective, the Directive promotes the mobility of highly skilled workers by establishing a right to reside in a second Member State for the purpose of highly qualified employment.⁷⁴ In such a case, highly qualified workers are nevertheless subjected to the same admission criteria as in the first Member States, which *inter alia* require a valid work contract of at least one year, a document attesting fulfilment of the conditions to exercise a regulated profession or the required qualifications for unregulated professions, a valid travel document, a visa (if required) and a residence permit, and proof of a sickness insurance.⁷⁵ In addition, the third-country national must not be considered to pose a threat to public policy, security or health⁷⁶ and have a contract for a work whose gross annual salary in the host Member State is not inferior to the salary threshold determined by that Member State (i.e., ‘at least 1,5 times the average gross annual salary in the Member State concerned’).⁷⁷

Fourth, intra-EU mobility forms an integral part of the 2014 Intra-Corporate Transferees Directive, as clearly articulated in Recital 25 under the following terms:

This Directive aims to facilitate mobility of intra-corporate transferees within the Union (‘intra-EU mobility’) and to reduce the administrative burden associated with work assignments in several Member States. For this purpose, this Directive sets up a specific intra-EU mobility scheme whereby the holder of a valid intra-corporate transferee permit issued by a Member State is allowed to enter, to stay and to work in one or more Member States in accordance with the provisions governing short-term and long-term mobility under this Directive. [...] ⁷⁸

A whole chapter of the Directive is then devoted to intra-EU mobility of ‘[t]hird-country nationals who hold a valid intra-corporate transferee permit issued by [a] first Member State’, laying down conditions for short-term mobility (for a period up to 90 days in any 180-day period per Member State) and long-term mobility (for more than 90 days per Member State).⁷⁹ Short- and long-term mobility must be exercised for the purpose of stay and work ‘in any other entity, established in the

⁷³ Emphasis added.

⁷⁴ Article 18(1) of the 2009 Blue Card Directive.

⁷⁵ Article 5(1)(a)-(e) of the 2009 Blue Card Directive.

⁷⁶ Article 5(1)(f) of the 2009 Blue Card Directive.

⁷⁷ Article 5(3) of the 2009 Blue Card Directive.

⁷⁸ ‘Intra-corporate transfer’ is defined by Article 3(b) of the 2014 Intra-Corporate Transferees Directive (supra note 41) as ‘the temporary secondment for occupation or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third-country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States’. Admission criteria as intra-corporate transferee are laid down in Article 5 of the Directive.

⁷⁹ See Chapter V, and more specifically Article 20 of the 2014 Intra-Corporate Transferees Directive which provides that: ‘Third-country nationals who hold a valid intra-corporate transferee permit issued by the first Member State may, on the basis of that permit and a valid travel document and under the conditions laid down in Article 21 and 22 and subject to Article 23, enter, stay and work in one or several second Member States.’

[second Member State] and belonging to the same undertaking or group of undertakings'.⁸⁰ In both cases, the second Member State may subject stay and work on its territory to the fulfilment of more specific requirements, such as notification by the host entity in the first Member State and transmission of particular documents and information.⁸¹

Such an extension of intra-EU mobility beyond EU citizens is intimately linked to the EU objective of integration of third-country nationals. As already laid down in the 1999 Tampere Conclusions, 'The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens.'⁸² Such comparable rights also include that of free movement as enshrined in the Treaty on the Functioning of the European Union. Its Article 79(2)(b) provides that measures shall be adopted by the European Parliament and Council with respect to 'the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States'. The importance of integration was clearly underscored by the European Commission in its Proposal for a long-term residents directive back in 2001:

The Commission considers that full integration also entails the right for long-term residents to reside in other Member States [...]. A genuine area of freedom, security and justice, a fundamental objective of the European Union, is unthinkable without a degree of mobility for third-country nationals residing there legally, and particularly for those residing on a long-term basis.⁸³

However, integration alone cannot explain why these third-country nationals have been afforded some degree of free movement within the EU. The extension of intra-EU mobility needs here to be approached against a double objective: not only that of integration, but also that of economic growth and competitiveness of the EU. The pursuit of this last objective has clearly been pivotal in broadening the scope of intra-EU mobility to long-term residents, highly qualified workers and intra-corporate transferees. For the Commission, 'The mobility of long-term residents can [...] make for better utilisation of employment reserves available in different Member States', thereby contributing to reducing 'employment shortages in certain sectors of the economy' and to

⁸⁰ Articles 21(1) and 22(1) of the 2014 Intra-Corporate Transferees Directive.

⁸¹ See Articles 21 and 22 of the 2014 Intra-Corporate Transferees Directive. Concerning short-term mobility, the optional condition of prior notification by the host entity laid down in Article 21(2) may include to present: '(a) evidence that the host entity in the second Member State and the undertaking established in a third country belong to the same undertaking or group of undertakings; the work contract [...]; (c) where applicable, documentation certifying that the intra-corporate transferee fulfils the conditions laid down under the national law of the Member State concerned for Union citizens to exercise the regulated profession to which the application relates; (d) a valid travel document [...]; and (e) where not specified in any of the preceding documents, the planned duration and dates of the mobility' (Article 21(3)). Within 20 days following the notification, the second Member State may then object to the mobility of the intra-corporate transferee if: (a) the admission criteria of Article 5(4) or conditions (a), (c) and (d) of Article 21(3) are not met; (b) the application is based on fraudulent or falsified documents; and (c) the maximum duration of stay has already been reached. Such short-term mobility shall however not be granted to intra-corporate transferees posing a threat to public policy, security or health (Article 21(9)). Similar conditions may be applied by the second Member State in case of long-term mobility (see Article 22(2)(a)), while decision shall be taken by the second Member State within 90 days (Article 22(2)(b)) during which the intra-corporate transferee is allowed to work subject to certain conditions (Article 22(2)(d)). As for short-term mobility, the second Member State may then reject the application if the conditions are not fulfilled (Article 22(3)).

⁸² 1999 Tampere Conclusion, *supra* note 28, para. 18. See also the *Stockholm Programme*, *supra* note 16, Section 6.1.4.

⁸³ European Commission, *Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents*, COM(2001) 127 final, 13 March 2001, para. 5.6 of the Explanatory Memorandum.

increasing the competitiveness of the Common Market.⁸⁴ While such a consideration also underpins highly qualified workers' right to stay and work in a second Member State,⁸⁵ it is expressly acknowledged by the European Commission with regard to intra-corporate transferees whose 'transfers of skills [is to be facilitated] both to the EU and *within the EU* in order to boost the competitiveness of the EU economy'.⁸⁶ As for students and researchers, their mobility outside and within the EU participates to the 'need to ensure smart, sustainable and inclusive growth' in Europe, thereby promoting its competitiveness.⁸⁷

In sum, when it comes to third-country nationals, the prospect of labour and knowledge integration seems to be the key determinant for advancing intra-EU mobility so as to foster the policy objectives determined under the Lisbon Strategy and refined in the Europe 2020 Strategy.

3.2 Mobility of migrants across external borders

While the traditional conception of mobility as intra-EU mobility has become extended to certain categories of migrants, the last decade has witnessed the emergence of a new meaning attached to the notion of mobility, that of mobility across external borders or 'extra-EU mobility'. This novel understanding of mobility was for the first time expressly set out in the Commission's 2008 Communication *Strengthening the Global Approach to Migration*. As noted the Commission,

The Global Approach reflects a major change in the external dimension of the European migration policy over recent years, namely the shift from a primarily security-centred approach focused on reducing migratory pressures, to a more transparent and balanced approach guided by a better understanding of all aspects relevant to migration, improving the accompanying measures to manage migratory flows, *making migration and mobility positive forces for development*, and giving greater consideration to decent work aspects in policies to better manage economic migration.⁸⁸

But it was with the Commission's *Global Approach to Migration and Mobility* in 2011 that the conception of migration as mobility across the external borders of the EU truly gained momentum. '[O]rganising and facilitating legal migration and mobility' was heralded as one of the four pillars of the Global Approach.⁸⁹ The semantic emphasis on mobility was explained by the Commission in the following terms:

⁸⁴ *Ibid.*, para. 5.8. of the Explanatory Memorandum.

⁸⁵ European Commission, *Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment*, COM(2007) 637 final, 23 October 2007, p. 2, Explanatory Memorandum.

⁸⁶ European Commission, *Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer*, COM(2010) 378 final, 13 July 2010, p. 2, Explanatory Memorandum.

⁸⁷ European Commission, *Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing (recast)*, supra note 71, p. 2, Explanatory Memorandum.

⁸⁸ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the Global Approach to Migration: Increasing Coordination, Coherence and Synergies*, COM(2008) 611 final, 8 October 2008, p. 3 [emphasis added].

⁸⁹ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility*, COM(2011) 743 final, 18 November 2011, p. 7.

The Global Approach must become *more strategic* and *more efficient*, with stronger links and alignment between relevant EU policy areas and between the *external and internal dimensions* of those policies.

Mobility of third-country nationals across the external EU borders is of strategic importance in this regard. It applies to a wide range of people, e.g. short-term visitors, tourists, students, researchers, business people or visiting family members. It is thus a much broader concept than migration. Mobility and visa policy are interlinked [...]. Visa policy is an influential instrument of forward-looking policy on mobility [...]. Therefore, it is now necessary to take full account of the links between the common EU visa policy for short stays, Member States national policies concerning long stays and the Global Approach to Migration. This is a key reason to expand the scope of this policy framework to include mobility, making it the Global Approach to Migration and Mobility (GAMM).⁹⁰

Hence, the notion of ‘mobility’ has entered the vocabulary of the EU external common migration policy. By so doing, the idea seems to dissociate the notion of migration from the negative connotation it has acquired following years of restrictive measures to manage migration in the Union and which disproportionately focused on illegal migration. This somehow required reframing the terms of the debate so as to emphasise the benefits of migration for EU Member States, countries of origin and migrants. As eloquently formulated by Andrew Geddes,

Thus EU intervention in the field of migration policy is linked to the particular construction of the virtues of mobility in the content of economic liberalisation. It is also linked to a more general interest at international level in new approaches to migration that could focus on the stimulation of temporary flows and the pursuit of the so-called ‘triple win’ whereby new migrations schemes can benefit sending and receiving states and also migrants themselves [...].⁹¹

As implied by Geddes, the ‘virtues of mobility’ have more particularly been advanced in the context of temporary migration and partnerships with third countries. Concerning temporary migration, it is noticeable that recent secondary legislation involving short-term migration have been framed against the terminology of mobility. This is for instance the case of the 2014 Intra-Corporate Transferees Directive which, as noted by the European Commission, concerns the ‘mobility of intra-corporate transferees’.⁹² The benefits of mobility have also been emphasised in the framework of the 2014 Seasonal Workers Directive. Although relying on ‘circular migration’ to depict facilitated re-entry procedures of seasonal workers,⁹³ this notion has been defined as ‘a form of migration that is managed in a way allowing some degree of *legal mobility back and forth*

⁹⁰ *Ibid.*, p. 3 [internal references omitted; original emphases].

⁹¹ A. Geddes, ‘International Migration in the Present and Future European Union’, *supra* note 33, p. 3.

⁹² European Commission, *Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer*, *supra* note 86, p. 3, Explanatory Memorandum.

⁹³ See Recital 34 of the 2014 Seasonal Workers Directive, *supra* note 40, and Article 16 for the scope and content of such facilitated re-entry procedure.

between two countries'.⁹⁴ For the Commission, mobility in the form of circular migration 'will potentially benefit the country of origin, the EU host country and the seasonal workers him/herself'.⁹⁵

This triple-win situation sought through circular migration is one of the constituting pillars of Mobility Partnerships adopted by the EU with third countries. Introduced in 2006 as 'Mobility Packages',⁹⁶ they have formally been launched as Mobility Partnerships in 2007⁹⁷ and described in the Stockholm Programme 'as the main strategic, comprehensive and long-term cooperation framework for migration management with third countries'.⁹⁸ These Mobility Partnerships can be seen as the culmination of migration and mobility dialogues with third countries⁹⁹ and have so far been concluded with eight countries, namely Armenia, Azerbaijan, Cap Verde, Georgia, Jordan, Moldova, Morocco and Tunisia. They are presented as 'balanced partnership[s]',¹⁰⁰ based on temporary (and circular) migration and visa facilitations in exchange of the third country's involvement in fighting illegal migration, including through readmission agreements.¹⁰¹

However, in practice, these Mobility Partnerships end up being unbalanced to the detriment of third countries as they remain a way for the EU to extraterritorialise the management of (irregular) migration flows. Moreover, as underlined by Sergio Carrera and Raúl Hernández I Sagrera, they are 'fundamentally driven by economic interests, the perceived labour market and needs/demands of the participating EU member states'.¹⁰² Against this observation, the authors conclude that:

This favours a policy facilitating the mobility of only those TCNs [third-country nationals] who are deemed 'useful' or profitable for the economic security of the receiving state because of their skills, competences of capacity to fill labour market shortages. Thus, mobility partnerships are also 'insecurity partnerships' for TCNs and the very coherency of the EU's labour immigration policy.¹⁰³

In other words, these partnerships are more about mobility as far as their name is concerned than their very content. As noted above, the term mobility here offers a convenient way to depart from

⁹⁴ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, On Circular Migration and Mobility Partnerships between the European Union and Third Countries*, COM(2007) 248 final, 16 May 2007, p. 8 [emphasis added].

⁹⁵ European Commission, *Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purpose of seasonal employment*, COM(2010) 379 final, 13 July 2010, p. 10, comment on proposed Article 12.

⁹⁶ See European Commission, *Communication from the Commission to the Council and the European Parliament, The Global Approach to Migration One Year On: Towards a Comprehensive European Migration Policy*, COM(2006)735 final, 30 November 2006, p. 7.

⁹⁷ See European Commission, *Communication, On Circular Migration and Mobility Partnerships between the European Union and Third Countries*, supra note 94.

⁹⁸ *Stockholm Programme*, supra note 16, p. 28.

⁹⁹ 'The proposal to negotiate an MP [Mobility Partnership] should be presented once a certain level of progress has been achieved in the migration and mobility dialogues, also taking into consideration the broader economic, political and security context.': European Commission, *The Global Approach to Migration and Mobility*, supra note 89, p. 10.

¹⁰⁰ Presidency Conclusions, Brussels European Council, 14-15 December 2006, supra note 53, para. 24(a).

¹⁰¹ See for instance European Commission, *The Global Approach to Migration and Mobility*, supra note 89, p. 11.

¹⁰² S. Carrera and R. Hernández i Sagrera, 'The Externalisation of the EU's Labour Immigration Policy: Towards Mobility or Insecurity Partnerships?', Centre for European Policy Studies, Working Document No. 321, October 2009, p. 2.

¹⁰³ *Ibid.*, p. 2.

the negative connotation attached to migration especially for inducing third countries to cooperate.¹⁰⁴

Be that as it may, Mobility Partnerships illustrate the broadening of the traditional conception of mobility which evolved from intra-EU mobility to extra-EU mobility.

4 Conclusion

With the objective to analyse the contemporary conceptions of migration and mobility in EU law and policy, the present paper reveals a shift from the traditional migration-mobility dichotomy to a proactive migration-mobility nexus. Far from being mutually exclusive, the two notions now interact with one another. Such interaction seems predominantly due to a broadening of the meaning of mobility which has progressively got emancipated from mere intra-EU mobility of EU citizens. On the one hand, mobility has retained its internal nature but has been extended to certain categories of third-country nationals. On the other hand, mobility has acquired a new external dimension with the view to facilitate most notably temporary and circular migration.

The policy objectives of the Union as defined in the Lisbon and Europe 2020 Strategies appear to have provided the impetus to such a shift in the migration-mobility discourse. These objectives have required to reconceptualise migration as a positive force for the Union's economy, rather than a plague that needs to be contained and combated. The analogy of migration with mobility has nonetheless its limits for the time being. Indeed, it has so far been undertaken in a piecemeal fashion: intra-EU mobility is not yet fully available to all third-country nationals regularly in the Union and extra-EU mobility seems to remain limited to temporary forms of immigration.

Hence, to date, a more coherent approach to the migration-mobility nexus still has to materialise where migration would be more extensively re-thought in terms of mobility. This does not only imply enhancing the mobility of certain categories of third-country nationals, but going beyond pick-and-choose strategies so as to open broader legal avenues of migration to the Union. Time has indeed come for the EU to get out of its logics of securitisation and exclusion. These are counterproductive for they indiscriminately impact all third-country nationals, including those seeking asylum,¹⁰⁵ and fuel irregular migration routes the EU combats. As the United Nations Special Rapporteur on the Human Rights of Migrants, François Crépeau, rightly acknowledges, 'Migrants will come, no matter what [...]. The EU will only be able to regain control of its borders

¹⁰⁴ Similarly, Carrera and Hernández i Sagrera remark that: 'The EU's official discourses have argued that mobility partnerships exemplify a transition from a policy approach exclusively worrying about security towards one indenting to favour labour mobility into the EU. This line of rhetoric has most probably been the reason these agreements or joint declarations have been officially labelled as "mobility" partnerships and not "security" partnerships. By qualifying them in the context of mobility, the EU strategy has presented them in a more attractive fashion to third states, which perhaps would not be so keen to cooperate if the partnerships were presented as dealing with more of the same: i.e. the security of the EU and its member states (readmission, return and border control).': *ibid.*, pp. 18 and 19.

¹⁰⁵ See E. Guild, C. Costello, M. Garlick and V. Moreno-Lax's study: *Enhancing the Common European Asylum System and Alternatives to Dublin*, European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE 519.234, 2015, especially pp. 18 and ff. See also, E. Guild, C. Costello, M. Garlick and V. Moreno-Lax, 'The 2015 Refugee Crisis in the European Union', Centre for European Policy Studies, Policy Brief No. 332, September 2015.

if it banks on mobility. Banking on mobility means that the overall goal is to have most migrants using official channels to enter and stay in Europe.’¹⁰⁶

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