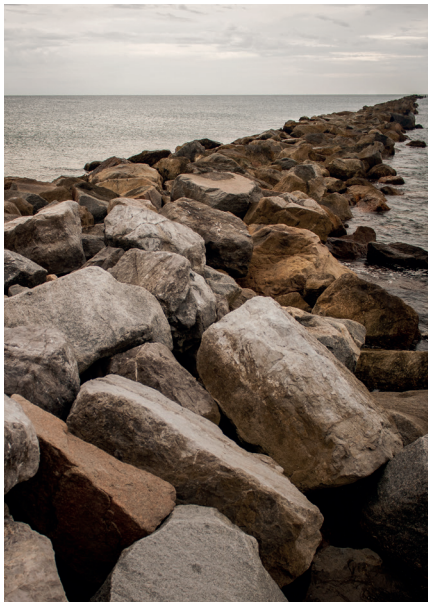

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The Emergence of a European Law on Foreigners

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On the basis of article 79 of the Treaty on the Functioning of the European Union, TFEU (Common Immigration Policy), eight different directives* have been adopted since 2003. Some of these instruments are transversal, but most of them pursue a labour market oriented and categories-based approach. This project analyses these emerging tools of the EU's Common Immigration Policy, their design, objectives and implementation. It also studies the impact of these new instruments on Switzerland – as a Non-EU Member State, but associated "à la carte" in certain areas.

Research Questions

Our project has identified global research questions (a) and created two different sub-projects (b). Moreover, the project has identified transversal subjects (c) that are of interest for the whole project.

Global Research Questions (a)

- How does EU law regulate legal migration of third country nationals into the EU?
- Which categories of migrants are addressed? Which categories are missing?
- What are the objectives of these instruments? Are they fulfilled?
- How are these instruments implemented? Where do practical problems appear and why?
- How are the notions of "migration" and "mobility" used in these instruments?
- Are the existing instruments coherent? Should there be a more comprehensive legal framework?
- Does supranational regulation have any added-value for managing legal migration when compared to purely national systems (like in Switzerland)?
- What is the impact of the EU instruments on Switzerland? To what extent are they already binding or could be subject to future bilateral agreements? Can they be a source of inspiration? Comparing the different legal regimes: Does the EU regime work better than the Swiss regime or vice-versa? Where and why? Is it possible to identify pull factors?

In a first step, the project has clarified fundamental aspects of EU Migration Policy, especially the use of the concepts of "migration" and "mobility" in EU law. Margarite Helena Zoeteweij now analyzes specific issues of the new EU instruments on legal migration. She currently focuses on the seasonal workers directive, establishing a new form of circular migration and protecting fundamental rights of low skilled migrant workers.

Sub-Projects (b)

The two sub-projects are dealing with one or several of the global research questions from a specific angle.

The first sub-project (Teresia Gordzielik) questions the potential of managing migration through the social assistance system. It critically analyses EU strategies of harmonization concerning access to Member States' social assistance in order to decrease pull factors and to avoid incentives for migrants to come to the EU. Comparison is made with the Swiss legal framework so as to question the

added-value of managing migration at the EU level and, more specifically, of such an EU harmonization of access to social assistance.

The second sub-project (Samah Posse-Ousmane, doctoral student, not financed by the NCCR) focuses on labor migration in the EU and Switzerland.

Transversal Questions (c)
Transversal questions address (among others) fundamental rights of migrants, the interaction of EU law with the European Convention on Human Rights (ECHR) , family reunification, the added value of a single permit, the principal of equal treatment, the rights related to the security of residence (long-term residents), integration measures and return.

Methods

The project will firstly use the **general legal method**, which can be normative-descriptive (analysis of primary and secondary legal sources, i.e. court decisions, articles) and/or application-oriented (for example through a dialogue with practitioners and by taking into account statistical data). Secondly, the research project opts for a **comparative approach**, by analyzing different legal regimes (within the same legal order or between different legal orders). Thirdly, the project strives to incorporate an **interdisciplinary perspective**, either by providing legal conclusions useful for other disciplines or by taking up results of other projects in order to draw the relevant conclusions for the legal regime.

Preliminary Findings

The rules on legal migration are the most emblematic illustration of the transformation experienced by migration regimes in Europe in recent years. Originally an exclusive competence of national states, the "management" of legal migration of third country nationals has become a supranational issue falling under the competences of the EU. Legal migration is in the heart of the migration-mobility nexus in the EU, as it combines elements of "traditional" immigration policy with new concepts of mobility (so far only used for EU citizens), for example in the long-term residents directive. That is why we focus on the regulation of legal migration by third country nationals in(to) the EU.

The EU's legal framework on legal migration of third country nationals is fragmented and the instruments adopted so far are rather weak and incomplete. The whole system lacks of coherence. There are three transversal instruments (the Directive on long-term residents, the Directive on family reunification and the Directive on a single permit). The other instruments address specific categories of workers (students, researchers, highly qualified, seasonal workers, intra corporate transferees). Some instruments contain new concepts that need to be further examined. For example, the long-term residents Directive gives third country nationals a new form of mobility, also called "citizenship light", and the intra-corporate transferees Directive provides for an intra-EU mobility scheme. The seasonal workers Directive has created a new system of "circular migration".

The EU system did not replace national migration laws in the member states, but has just added another level of legislation to the national level. However, the whole process resembles the situation before the adoption of the horizontal Directive 2004/38 (Citizenship Directive) regarding the mobility of EU citizens. It seems probable that the EU Commission will come up with the proposal of a new horizontal instrument on legal migration of third country nationals in the EU in the near future, even though the whole legal process is lengthy and complicated.

Switzerland as a Non-EU member is only associated to some aspects of EU Law via bilateral agreements. This includes the Agreement on the Free Movement of Persons and the Schengen and Dublin Association. It is important to compare the Swiss legal regime to the one within the EU in order to identify the most suitable legal regime and possible pull factors linked to it.

* The different directives are:
1 Directive 2003/109/EC on long-term residents
2 Directive 2003/86/EC on family reunification
3 Directive 2004/114/EC on students, pupils, trainees and volunteers
4 Directive 2005/71/EC on researchers
5 Blue Card Directive 2009/50/EC on an approved EU-wide work permit
6 Directive 2011/98/EU on a single permit for third country nationals (TCN)
7 Directive 2014/36/EU on seasonal workers
8 Directive 2014/66/EU on intra-corporate transferees

Publications

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