



**Sarah Progin-Theuerkauf (Project Leader),
Céline Bauloz, Teresia Gordzielik,
Salomé Schmid,
Margarite Helena Zoetewij-Turhan**
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**The Emergence of a European Law
on Foreigners**

Fribourg University
Chair for European Union Law and European Migration Law
Av. de Beaugard 11, 1700 Fribourg, Switzerland

Contact: Sarah Progin-Theuerkauf, sarah.progin-theuerkauf@unifr.ch, T +41 26 300 81 28

Over the last few decades, the regulation of migration of third country nationals has been a central concern for the 28 EU Member States (MS) as well as for Switzerland. In contrast to highly skilled workers, the immigration of low-skilled and/or unskilled workers is politically and economically controversial. Until now, governments have followed a sectorial approach to labor migration, aimed at creating different legal regimes applicable to different categories of migrant workers. Will this approach stand the test of time?

Messages for Decision-Makers

- **Migrant workers are not (only) production factors: they are, above all, human beings. As such, they are entitled to equal treatment, meaning that all migrant workers must be entitled to the same rights as the nationals of the hosting state regardless of their skill level and gender.**
- **Experiences in Switzerland and in the Member States have shown that a sectorial approach to labor migration does not necessarily lead to the desired results with regard to the management of migration flows.**

Blue Card Directive: Regulating the Migration of Highly Skilled Workers

Regardless of their place in the political spectrum, economists and politicians agree that highly skilled individuals migrating to the EU from third countries should be encouraged to come, work and possibly stay in one of the 28 MS. The Blue Card Directive – adopted in 2009, at a time when unanimity was still required for legislation regulating the entry and stay of third country citizens –

provides these migrants with a generous catalogue of rights. The application procedures are short and can be made from within the EU; “Blue Card holders” are allowed to bring their families along and they can move to another MS relatively easily. These rights are further strengthened in the recently proposed Recast Blue Card Directive. Results attained with the Blue Card Directive so far have been mixed, as MS have used this legislation as an instrument to attract highly skilled workers to the EU in remarkably dissimilar ways. Therefore, the proposed Recast Directive aims to bring about a higher degree of harmonization.

Swiss law, independently from the Directive, provides for a similar regime on the entry and stay of highly skilled workers. In particular, the Federal Act on Foreign Nationals explicitly limits the issuance of short stay and residence permits to managers, specialists and other qualified workers.

Facilitated Access for Researchers and Students

Researchers and students are another category of migrants whose (potential) contributions to the economy make them almost as desirable as highly skilled migrants. The conditions for their entry and stay were agreed upon by the EU legislator as early as 2004–2005, allowing

students to stay in the host MS for some time after their studies in order to increase the retention rate of skilled migrants in the EU. This legal regime has been improved and its scope broadened by a new Directive, adopted in 2016, which also covers trainees, exchange pupils, volunteers and au pairs. In general, the Directive provides for easy access, and relatively generous rights during the stay, such as access to the labor market and intra-EU mobility, in line with the idea of an internal market for labor force.

ICT-Directive: Intra-Corporate Transferees Deployed in the EU

A few years ago, in 2014, the Directive regulating the entry and stay of third country nationals that are managers, specialists or trainees employed by a company established outside the EU to an entity of the same undertaking or group of undertakings inside the EU was adopted. Though the employment relations (including working conditions) remain governed by the law of the country of employment, the Directive provides for rights, such as a more beneficial right to family reunification and intra-EU mobility. It is clear from the scheme of the ICT Directive that it aims to promote intra-corporate transfers as well as to maintain a firm grip on these movements.

Also Swiss law foresees a (limited) possibility of short-term migration for intra-corporate transfers: in particular, the Federal Act on Foreign Nationals allows persons who are part of an executive transfer between internationally active companies to apply for a short stay and/or residence permit.

Seasonal Workers Directive: Limited Rights for Unskilled Migrant Workers

The global supply of unskilled labor force is greater than the demand of the EU market. As this demand is fluctuating and unskilled labor force represents a relatively low economic value, unskilled workers do not need to be encouraged to come to the EU. Stronger still: even if the EU economy needs them, MS are not willing to offer unskilled labor force the rights (of residence, family reunification and intra-EU mobility) that are offered to other third country nationals coming to the EU to work. The Seasonal Workers Directive regulating their entry, stay and return clearly targets circular migration. However, it is by no means guaranteed that the intended “circulation” will occur, as the “guest workers programs” in the past resulted in more migration, including irregular forms of migration, rather than less.

The Swiss legislation on seasonal workers (known as “Gastarbeiter” or “saisonniers”) has been abrogated in 2002 as the result of the Bilateral Agreement on the Freedom of Movement of Persons between Switzerland

and the EU. Current Swiss legislation does not allow for the entry and stay of unskilled third country nationals. The experiences made in Switzerland with the seasonal workers regime were negative, on the whole, and it is most unlikely that similar legislation will be introduced any day soon.

Sectorial Approach and Unequal Rights: “... but Some Are More Equal Than Others”

The current regulatory landscape regarding the legal migration of third country citizens to the EU is based on a sectorial approach. It indicates that the most important factor considered by the legislator is the economic value of the migrant labor force. This creates a myriad of legal regimes and fosters inequality amongst different categories of migrant workers. According to international labor and human rights law, however, the EU is bound to consider migrant workers as equals, who are entitled to rights that are at par with those that are granted to the domestic labor force. This regulatory landscape also reinforces the gender inequality among third country nationals who want to access the EU labor market. We conclude that the current EU approach is historically, comparatively, ethically and legally flawed and should therefore be replaced with a more holistic, rights-based approach.

Key Publications

- Posse-Ousmane, Samah. *Les conditions d'admission et de séjour des travailleurs hautement qualifiés dans l'UE*. Berlin: Carl Grossmann Verlag, 2017.
- Progin-Theuerkauf, Sarah. “Unternehmensinterne Transfers in der EU – Eine neue Form der Mobilität für Drittstaatsangehörige.” *Jusletter*, 2016.
- Progin-Theuerkauf, Sarah, and Samah Posse-Ousmane. “L'émergence d'une politique européenne de migration choisie.” In *La Suisse et l'intégration européenne: 20 ans de l'Institut de droit européen*, edited by Institut für Europarecht and Astrid Epiney, 141–69. Zürich: Schulthess, 2015.
- Progin-Theuerkauf, Sarah, and Margarite Zoetewij. “Die Richtlinien zur Arbeitsmigration von Drittstaatsangehörigen in der EU – Eine Analyse im Lichte der Gleichstellung von Mann und Frau.” In *Jahrbuch für Recht und Ethik 2017*, edited by Joachim Hruschka and Jan C. Joerden, 25:281–95. Berlin: Duncker & Humblot, 2017.
- Zoetewij, Margarite. “The Seasonal Workers Directive: ‘... but Some Are More Equal than Others.’” *European Labor Law Journal* 8, no. 1 (2017): 28-44.