Economic Crises and EU Migration Law: a Blast from the Past

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Economic crises and EU migration law: a blast from the past

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1. Introduction

In EU migration law, accounts of crisis and its relation to law flourished in relation to the events which occurred in the in the period of 2015-2016.[1] The increased arrivals of migrants and refugees, and the way in which Member States responded to it, revealed a series of problems inherent to EU migration and asylum law and created a need for change.[2] By turning the focus away from the 2015-2016 migration crisis which has been exhaustively examined in the relevant literature, this chapter will analyse a different crisis at a different historical moment. Specifically, the chapter will revisit the history of EU labour migration policy, and it will demonstrate the effects of the 1970's oil crisis for its development. In so doing, the analysis will show that there is a thread connecting economic crises and EU migration governance which has been overlooked in the relevant scholarship and which has had implications both for migrants' rights and for EU integration in general.

To develop the argument, Section 2 revisits the history of EU migration law and traces its emergence in the early years of Community law. The reader should note that the focus of the investigation is on labour migration to the exclusion of instruments related to asylum and border management. With these delimitations in mind, the historical analysis suggests that the approach of Community institutions to the regulation of EU labour migration was fundamentally altered by the 1970's oil crisis. After that economic crisis, short-termism became the defining feature of EU migration law. Section 3 situates the relevant empirical material within Runciman's theoretical framework on short-termism and democratic governance in times of crisis.[3] In this regard a conceptual clarification is due. The concept of crisis is so broadly used today, that any clear-cut and all-encompassing definition is particularly challenging.[4] For the purposes of the analysis, crisis is understood as 'a situation characterized both by fundamental threat and fundamental choice'.[5] Such a definition manages to capture core elements of the intellectual history of the concept and allows us to relate the economic

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[1] See contributions in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019); Rachael Dickson, *Migration Law, Policy and Human Rights: The Impact of Crisis in Europe* (Routledge 2022); Marco Scipioni, 'Failing Forward in EU Migration Policy? EU Integration after the 2015 Asylum and Migration Crisis' (2018) 25 Journal of European Public Policy 1357.

[2] Initially by the collapse of the Dublin System, Alezini Loxa and Vladislava Stoyanova, 'Migration as a Constitutional Crisis for the European Union' in Smet Stijn and Vladislava Stoyanova, *Migrants' Rights, Populism and Legal Resilience in Europe* (CUP 2022), section 5.3.1 and then by the collapse of Schengen, Jorrit Rijpma, 'Let's not forget about Schengen', EU Migration Law Blog, 12 March 2021.

[3] David Runciman, 'What Time Frame Makes Sense for Thinking about Crises?' in Poul F Kjaer and Niklas Olsen (eds), *Critical Theories of Crises in Europe: From Weimar to the Euro* (Rowman & Littlefield International 2016).

[4] See Reinhart Koselleck and Michaela W Richter, 'Crisis' (2006) 67 Journal of the History of Ideas 357, 399 who mention imprecision and vagueness in the use of the term crisis as a symptom of a historical crisis.

[5] Runciman (n 3) 4.

threat experienced in the 1970s and the way in which the fundamental choice made by the Community institutions has left its imprint on EU migration law to this day.[6] Finally, Section 4 concludes the analysis.

2. Revisiting the History of EU Labour Migration Law

EU migration law literature positions the development of EU migration law in the late 1980's and early 1990's in the context of transnational security cooperation between the Member States.[7] There is a prevalent understanding that before the Maastricht Treaty, the EU had no competence to regulate migration and Member States regulated the area through bilateral agreements, even this view has later been challenged.[8] Specifically, the early determining stages of EU migration law can be traced back to the 1950's and 1960's. A close examination of soft-law material, archival documents and Community law highlights that Community institutions were concerned with the regulation of labour migration a lot earlier, with migrants drawing extensive EU law rights by Association Agreements.[9] Drawing a picture of that history in broad strokes in this section, it is argued that the Community labour migration policy has been fundamentally affected by the 1970's crisis which shaped the short-term approach to EU labour migration that is still at play today. To put it simply, there is an era before and after the 1970's oil crisis as regards the common regulation of labour migration. These two periods will be examined in turn to showcase how the end of post-war growth after the 1970s oil crisis affected the response to migration. Specifically, it will be shown that after this crisis, short-term approaches became prevalent in migration governance. By short-term approach, I refer to the regulation of migration with no regard to the fluctuation of the economy, but rather with emphasis on sovereign control demanding abrupt border closure in case of recession and no consideration of the migrants' position within host societies. This is contrasted with long-term approaches, by which I refer to the regulation of migration with due regard to the fluctuating economic demands of the internal market and safeguards for both migrants and the economy. The way in which short-termism has gained prevalence in migration has had implications not only for the specific policy area, but also for EU integration in general as will be discussed in Section 3.

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[6] Runciman (n 3) 5-6discussing the problems of the definition but also Koselleck and Richter (n 4) 361 who mention that across the legal, theological and medical uses of the concept, it is historically 'applied to life-deciding alternatives meant to answer questions about what is just or unjust, what contributes to salvation or damnation, what furthers health or brings death.'

[7] Indicatively see the ad hoc group on Immigration set up at the initiative of the UK presidency in 1986, Coordinator's group on the free movement of persons set up following the Rhodes European Council 1998, Trevi ministers group and Immigration ministers group under the Belgian Presidency in 1987. See also Statewatch European Monitoring and Documentation Centre on justice and home affairs in the European Union, 'Key texts on justice and home affairs in the European Union, Volume 1 (1976-1993)'.

[8] Alezini Loxa, *Sustainability and EU Migration Law: What Place for Migrants' Rights* (Doctoral Thesis (monograph), MediaTryck Lund 2023).

[9] Alezini Loxa, *Sustainability and EU Migration Law, Tracing the History of a Contemporary Concept* (Accepted/In press, Cambridge University Press 2024).

2.1 The common approach to labour migration before the 1970's oil crisis

The 1950s and 1960s were characterised by rapid economic development and increased need for labour migration.[10] During that time, migration movements comprised mainly of guest workers, and they were regarded as a short-term phenomenon, regulated by the demands of the market.[11] The need for workers in the industries of the Member States framed the Community migration policy in a very progressive way. First, free movement of workers was included in EU primary law to alleviate Italian unemployment and provide manpower to the industries of the other European states.[12] Due to the open formulation of the Treaties, various authors argued that the relevant provisions could cover non-Community workers as well.[13] At the same time, it appears that the Member States did not perceive the Treaty of Rome as creating an obligation for them to employ Community migrants to begin with.[14] Instead, Member States saw free movement as a labour migration framework that created obligations of preferential treatment to Community migrant workers only as long as national workers were not sufficient to fulfil labour needs. This national perception of the Treaty framework at that time was not very different from what is in place today regarding the principle of Union preferences in the labour market.[15]

This initial framework regulating free movement for Community migrants was put into motion through secondary law adopted in successive steps in 1961, 1964 and 1968.[16] In the

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[10] Programme de politique économique à moyen terme (1966-1970) [1967] OJ 79/1513; Commission of the European Communities, Bulletin of the European Communities (1969) 6 23.

[11] Commission Communication to the Council and the European Parliament on Immigration, SEC (91) 1855 final para 9; James F Hollifield, *Immigrants, Markets, and States: The Political Economy of Postwar Europe* (Harvard Univ Press 1992) 72.

[12] First under Art. 69 ECSC with limitation for skilled workers, and then under Article 48 EEC Treaty. Francesca Fauri (ed), *The History of Migration in Europe: Perspectives from Economics, Politics and Sociology* (Routledge 2015).

[13] DF Edens and Schelto Patijn, 'The Scope of the EEC System of Free Movement of Workers' (1972) 9 Common Market Law Review 322 with a focus on overseas territories; Allan Campbell, *Common Market Law* (Supplement 2/71, Longmans 1971). see Daniel Thym, 'Institutional and Constitutional Framework' in Evangelia Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022) 57 with reference to Simone AW Goedings, *Labor Migration in an Integrating Europe: National Migration Policies and the Free Movement of Workers; 1950-1968* (Sdu Uitgevers 2005) suggesting that this was not the intention of the drafters. The same point is also raised in Daniel Thym, 'Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights in EU Law' in Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Person in EU Law : Rights, Roles, Identities* (Hart Publishing 2016) 122.

[14] European Community Information Service, Press Notice, Common Market takes initial step toward free mobility for workers, 15 June 1961.

[15] Council Resolution of 20 June 1994 on Limitations on Admission of Third -Country Nationals to the Member states for employment [1996] OJ C 274/3, General criteria. The overall approach of the Council was that Member States should in principle refuse entry to all TCN workers. Entry should only be considered in case of vacancies that could not be filled by Community workers or TCN workers already permanently residing in a Member State.

[16] Règlement n° 15 relatif aux premières mesures pour la réalisation de la libre circulation des travailleurs à l'intérieur de la Communauté [1961] *OJ 57/1073;* Directive du Conseil en matière de procédures et pratiques administratives relatives à l'introduction, l'emploi et le séjour des travailleurs d'un État membre, ainsi que de leur famille, dans les autres États membres de la Communauté [1961] OJ 80/1513; Règlement n° 38/64/CEE du Conseil du 25 mars 1964 relatif à la libre circulation des travailleurs à l'intérieur de la Communauté [1964] OJ 62/965; Council Directive 64/240/EEC of 25 March 1964 on the abolition of restrictions on the movement and residence of Member states' workers and their families within the Community [1964] OJ 62/981; Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ 56/850; Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for

secondary law of the period free movement was structured as a labour mobility scheme aimed at addressing the uneven distribution of manpower between the Member States. The economic expansion of the Community was pursued through the 'optimum valorization of the technical abilities of human beings' residing in the Member States.[17] At the same time, in a context of continuous growth, Member States also employed manpower from abroad to fulfil their needs.

In relation to this, the Community concluded Association Agreements with all the main countries that supplied labour to the Community industries.[18] These Agreements did not regulate residence rights for migrant workers, but they did guarantee equal treatment for them and their families in terms of working conditions and social rights in the host state. The provisions of the relevant agreements were not only later found to have direct effect but were also interpreted by the Court as specific expressions of the general non-discrimination provisions found in the text of the Treaties.[19] Next to the Association Agreements, soft law documents produced by the Community institutions emphasised the need for an aligned approach to labour migration. Specifically, the first Commission reports on free movement of workers generally discussed the number of labour migrants employed in Community Member States, regardless of their origin.[20]

The overview of the labour market situation by reference to all migrant workers in general and not exclusively Community migrants continued even after a framework was put in place which prioritized Community workers.[21] Especially during the late 1960s the production capacities of national industries were so closely dependent on labour mobility that there were discussions on including third-country nationals in the Community scheme of mobility in order to meet Community labour needs.[22] Any opening up of the Community labour market in this

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workers within the Community [1968] OJ L 257/2; Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member states and their families [1968] OJ L 257/13.

[17] Professor Giuseppe Petrilli, Member of the Commission, Chairman of the Social Affairs Group, The Social Policy of the Commission European Economic Community, Bulletin de La Communauté Économique Européenne (1959) 2 6.

[18] Association Agreement with Greece 1961, with Turkey 1963; with Morocco, Algeria and Tunisia 1978, Yugoslavia 1983.

[19] The Court found that such agreements can have direct effect first in Case 12/86, *Demirel / Stadt Schwäbisch Gmünd,* ECLI:EU:C:1987:400. For a detailed analysis of the clauses of the relevant agreements and the case law see Loxa (n 9) chapters 4 and 7.

[20] See Bertrand M.A. (1957), Rapport fait au nom de la Commission des affaires sociales sur la migration et la libre circulation des travailleurs dans la Communauté, Exercice 1957-1958, Première session extraordinaire, Document 5.

[21] See Commission (1965), Libre circulation et migrations des travailleurs dans la Communauté. Bilan annuel des activités de compensation et de placement au sein de la Communauté (art. 25 § 4 du règlement no 15/61 art. 36 § 4 du règlement no 38/64, 48ff; Commission (1966), La libre circulation de la main-d'œuvre et les marches du travail dans la CEE, Rapport établi en application des dispositions des articles 29 et 36 du règlement n° 38/64 relatif à la libre circulation des travailleurs, 36 ff; Commission (1967), La libre circulation de la main-d'œuvre et les marches du travail dans la CEE, Rapport établi en application des dispositions des articles 29 et 36 du règlement n° 38/64 relatif à la libre circulation des travailleurs à l 'intérieur de la CEE, 16-19; Commission (1968), La libre circulation de la main-d'œuvre et les marches du travail dans la CEE, Rapport établi en application des dispositions des articles 29 et 36 du règlement n° 38/64 relatif à la libre circulation des travailleurs à l 'intérieur de la CEE, 34 ff.

[22] Bertrand M.A. (1957) Rapport complémentaire fait au nom de la Commission des Affaires sociales sur la migration et la libre circulation des travailleurs dans la Communauté, Exercice 1957-1958 Première session extraordinaire, Document 11*;* Commission (1960), Synthèse des rapports établis en 1960 sur la situation actuelle du service social des travailleurs migrants dans les six pays membres de la C.E.E.

way would always take place with oversight, so as to not risk the unlimited access of foreign workers to national markets, which was seen as possibly limiting the quality of life for nationals.[23] Similar considerations continued as long as post-war growth continued. For example, the First Medium-term Economic Policy Programme issued by the Commission in 1967 showed that recourse to manpower from non-member countries would become necessary as the years passed. After less than two decades since the establishment of the Communities, the Commission started pushing for comparison of national recruitment policies to establish whether there existed common interests that could form the basis for closer cooperation in this field.[24] Next to this, in the 1974 Action Programme in Favour of Migrant Workers and their Families we find the first explicit articulation of the need for a Community migration policy and for the implementation of non-discrimination between Community and non-Community migrant workers.[25] The idea underlying the approach of the Community institutions was that all migrant workers regardless of origin contribute to the economic development of the Member States, and relatedly to the prosperity of the resident population, and for this they should enjoy a common set of rights.

Overall, before the 1970's oil crisis there existed no clear-cut differentiation between Community and non-Community migrants, as both groups of migrant workers were thought to provide the same contribution to the Community project, and the different action plans put forward were meant to cover both. In the 'golden age' of sustained economic growth from the 1950s to the 1970's the Commission was trying to set up a system that would ensure the best use of human capital available in the Member States. As a result, the paths of regulating migration were aligned for both Community and non-Community migrants, as the main objective served by the regulation of migration was to ensure the functioning of a common labour market. Member States were required to safeguard free movement for Community workers and respect their obligations towards the Community manpower before hiring non-Community workers, while non-Community migrants from associated countries enjoyed protection from discrimination, and in some cases also security of residence rights from Association Agreements.[26] One could add that as long as the Member States' economies needed migrant labour, there was no issue with attributing rights in a coherent way to all migrants regardless of origin.

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[23] Bertrand, Document 11, para 55.

[24] This led to the adoption of Commission Decision 85/381/EEC of 8 July 1985 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries [1985] OJ L 217/25 which was challenged in Joined cases 281, 283, 284, 285 and 287/85, *Federal Republic of Germany and others v Commission of the European Communities*, ECLI:EU:C:1987:351 for lack of competence. The Court confirmed that migration policy fell under the social field and could be regulated by action adopted under Article 118 EC but declared two provisions void as falling outside the community powers. Commission Decision 88/384/EEC of 8 June 1988 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries [1988] OJ L 183/35 was adopted following.

[25] Action Programme in Favour of Migrant Workers and their Families COM(74)2250 final; Council Resolution of 9 February 1976 on an Action Programme for Migrant Workers and Members of Their Families [1976] OJ C 34/2. While these measures are strictly speaking adopted after 1973, it took some time for the effects of the oil crisis to be reflected in law.

[26] See for example the case law on Decision 1/80 implementing the EEC-Turkey Agreement analysed in view of migrant's rights in Loxa (n 9) chapter 7. See also Case C-416/96, *Eddline El-Yassini*, ECLI:EU:C:1999:107 on a limited right to remain as long as someone is in employment in view of the non-discrimination clause of the EEC-Morocco Association Agreement.

2.2 The common approach to labour migration after the 1970's

The impetus driving a uniform approach to the Community regulation of migration only lasted as long as growth lasted. Specifically, by the early 1980s and with the effects of the oil crisis experienced by the Member States, the category of 'workers' slowly became differentiated based on nationality. Member States hesitated to extend rights to all migrants, for fear that they could not guarantee social progress for their own citizens. Instead of equal rights for all migrants engaged to the project of growth, the Council shifted its approach and instead referred to equal opportunities to make a contribution.[27] And while the rights of Community workers were already developed by that stage and were informed by a type solidarity between the different Member States that were all implicated in the same development project, this type of solidarity could not extend to migrants whose state of origin was not implicated in the project at all. In this context, we see a shift in the approach to labour migration with short-termism guiding the Council and restricting any long-term approach to regulating labour migration by the Commission.

Specifically, the period following the 1970's crisis began with national bans to migration as means to address national unemployment.[28] Next to these national bans, or perhaps due to their appearance, the approach in the Council shifted and the emphasis was now put on the present economic needs (or lack thereof) in the Member States. The approach of the Council is brought to the fore by juxtaposition to the Commission and its various proposals to regulate migration. Especially after the adoption of the Single European Act and with awareness of the constantly changing socio-economic circumstances, the Commission emphasized the need to create a system that could accommodate and regulate the fluctuation of population movements and, relatedly, labour demand and supply in Member States.[29] At the same time the Commission also demanded maximum protection for legally resident migrants so as to promote their social advancement and social cohesion within Member States.[30] Contrary to that, the Council continuously rejected any attempt for regulation as long as there was no labor demand to be covered. Instead through series of resolutions adopted in 1994 on migrant workers, self-employed migrants and migrant students, the Council emphasized national competence over migrant admission and the need to maintain, and if necessary, reinforce restrictive measures on admission.[31] By following such an approach, the Council was not concerned with the constantly changing economic circumstances and their interaction with labour migration but rather with the lack of unlimited demand for labour at times when

[27] Council Resolution of 16 July 1985 on Guidelines for a Community Policy on Migration [1985] OJ C 186/3.
[28] See the 1994 Council resolutions but also retrospective analysis in Communication from the Commission, On Immigration, SEC (91) 1855 final, para 17; Commission, DG Employment, Industrial Relations and Social Affairs, Unit: Freedom of movement, Migration policy, Immigration Policies in the Member States: Between the need for Control and the Desire for Integration, Working Document, Summary Report of the information network in migration from non-EC Countries (RIMET) year of reference 1991, V/1020/92, 23. See also David O'Keeffe, 'The Free Movement of Persons and the Single Market' (1992) 17 European Law Review 3.
[29] On Immigration, SEC(91)1855 final para 69.
[30] ibid paras 3, 69.
[31] Council Resolution of 30 November 1994 relating to the limitations on the admission of third country nationals to the territory of the Member states for the purpose of pursuing activities as self-employed persons [1996] OJ C 274/7. 1994, Council Resolution of 20 June 1994 on Limitations on Admission of Third -Country Nationals to the Member states for employment [1996] OJ C 274/3; Council Resolution of 30 November 1994 on the admission of third-country nationals to the territory of the Member states for study purposes [1996] OJ C 274/10.

geopolitical events pointed to the potential creation of more migrant movement. Specifically, increased unemployment and political instability pointed to potential movements from the Mediterranean.[32] In addition to this, the fall of the Soviet Union and the process of accession of the Central and Eastern European Countries pointed to the potential of increase in labour migration.[33] Towards the mid-1990s, growth began to slowly resume, and this created extra demand for labour in specific sectors.[34] In parallel, a new challenge appeared; that of an ageing EU population which would no longer be able to support the development needs of the Member States.[35] All these were taking place in a period of continued national unemployment next to settled migrant communities, which were increasingly facing racism and xenophobia.[36] What was missing was not the understanding of the relation of labour migration to the economic needs of Member States. Rather what was missing was a long-term perception behind the function of migration in contemporary societies.[37]

The prevalent short-termism led to the rejection of two Commission Proposals that were put forward with the aim of creating a system that has inbuilt guarantees to ensure the development of the Member States in changing economic and demographic circumstances.[38] Acknowledging that the economic growth of the 1950s and 1960s would not return, and that the current labour market situation would not allow for a liberal migration policy, the Commission remained realistic as to the fact that the zero immigration target envisioned by Member States could not be realized. In the explanatory memorandum of the first Proposal of 1997, the Commission suggested the creation of a system that could ensure the continued benefits of migration for the EU development project. The idea behind this system was to allow the market to function, while avoiding an increase in labour force at a time when unemployment was already a problem in the Member States.The proposal envisioned a framework for the conclusive regulation migration at EU level and addressed admission of migrants for employment, independent economic activity, training, study, non-gainful activity, family

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[32] Commission of the European Communities, Directorate General for Information, Europe Information Development, The countries of the Greater Arab and Maghreb and the European Community. DE 68, January 1991; Commission Communication, The future of relations between the Community and the Maghreb, SEC(92)401 final. See also Commission Communication, Strengthening the Mediterranean Policy of the European Union: Establishing a Euro-Mediterranean Partnership, COM(94)427.

[33] HAEU, GJLA-246, Commission of the European Communities, Directorate General External Relations, Task force Enlargissement, Enlargement and the Community's Relations with its Mediterranean Neighbours, Brussels 2 March 1992, RDM/m 4; Commission Communication, On Immigration, SEC(91)1855 final paras 8-9.

[34] See retrospective description of the 1990s trends in migrant employment in Commission Communication, On a Community immigration policy COM(2000)757 final, Annex 1, The Demographic and Economic context.

[35] Commission Communication, On immigration and asylum policies, COM(94)23 final para 9

[36] The Parliament was pushing for different measures to address this issue. See initially European Parliament, Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the findings of the inquiry, Evrigenis Report and indicatively, Parliament resolution on racism and xenophobia, adopted on 10 October [1991] OJ C 280. The Council also issued declarations on the matter. See Maastricht European Council, Presidency Conclusions, 16.12.1991, Annex 3 Declaration on racism and xenophobia; Corfu European Council 24-25 June 1994, Presidency conclusions, Annex III: Implementation of the Franco/German initiative against racism and xenophobia and Resolution of the Council and the representatives of the Governments of the Member states, meeting within the Council of 5 October 1995 on the fight against racism and xenophobia in the fields of employment and social affairs [1995] OJ C 296/10.

[37] Cf. Hein de Haas, *How Migration Really Works: The Facts about the Most Divisive Issue in Politics* (Basic Books 2023).

[38] Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States COM(97)387 final.

reunification, and the attribution of progressive rights to long-term residents. This proposal was eventually withdrawn in 2001 and replaced by a second proposal for a Directive which sought to harmonize the admission of migrants for the purpose of paid employment and self-employed activities.[39] The aim was to provide rights to migrants, while allowing Member States to limit admission for economic migration in case of limited labour demand. Specifically, the framework would permit a quick reaction to changing economic and demographic circumstances, and admission would be allowed only if there was an economic need on behalf of the Member States, or if such migrants had a beneficial effect to the national economies. This proposal was eventually withdrawn in 2006, after failing to gather support from the Council, which did not want to address the matter of horizontal admission for all categories of migrants.

It is not clear as to why these proposals were rejected by the Council, i.e., whether the issue was the need of Member States to maintain competence on regulating migration, the assumed risks for their economies, or the fact that the proposals, especially the 1997 one, would lead to a system of residence and movement equally extensive to that applicable to EU migrants. In any case, at least until the early 2000's the only measure that was adopted on migration was the regulation on admission of students, which came with no economic cost, and which still incorporated specific limits to avoid the possibility of students entering the EU to find employment. These different approaches on the function of migrants for EU economies blocked every attempt to harmonize admission until the 2000s, but they did allow the adoption of instruments guaranteeing a minimum set of rights to migrant workers.[40] Following these, the Commission only put forward proposals that could gather support by the Council. This how we have ended up with the sectoral legislation which is in place today and which has been criticized not only for failing to secure the rights of migrant workers but fundamentally for not promoting any market efficiency in the way in which migrants have residence and (ineffective) free movement rights under EU law.[41]

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[39] 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)0386 final

[40] See Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/ 44.

[41] On the relevant legislation see Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects, and au pairing (recast) [2016] OJ L 132/21; 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 an intra-corporate transfer [2014] OJ L 157/1; 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 2009) and Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L 382/1 (Blue Card Directive 2021); 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. On the fragmented and inefficient nature of the legislative instruments see Commission Staff Working Document, Executive Summary of the Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5; Resolution of 20 May 2021 on new avenues for legal labour migration (2020/2010(INI)) [2022] OJ C 15/196; Resolution of 25 November 2021 with recommendations to the Commission on legal migration policy and law (2020/2255(INL)) [2022] OJ C 224/69. See also European Parliament Research Service, Recast of Directive 2003/109/EC: Status of third-country nationals who are long term residents in the EU, EPRS BRI(2024)757361.

Behind the current incoherent system of regulation that neither supports migrants' rights nor does it effectively serve the needs of the EU economy is the persistence of short-termism behind decision making in EU politics. The above brief historical reconstruction of the EU labour migration policy hints to the opposing approaches of the Commission and the Council in relation to EU law-making. Specifically, in the regulation of entry and rights for non-EU migrants the Commission has emphasised the need to guarantee the more efficient allocation of resources and the proper functioning of the EU economy. Each proposal that has been put forward by the Commission included safeguards that could guarantee the functioning of such system, including in cases of recession.[42] In contrast to the Commission's approach, the Council has been taking into account economic considerations related to the specific economic circumstances at national level. Relating migrant rights to the achievements of economic objectives was emphasized only during the years prior to the oil crisis.[43] Thereafter the Member States have repeatedly acknowledged the need to commit to the common project of growth in political declarations, but when it comes to the negotiation of specific legal instruments, the focus turns to ensuring economic growth in the short-term and within each national setting.[44]

In a sense, the above dissonance between the Council and the Commission also points to the limits of solidarity between Member States when the EU project does not deliver unhindered growth for all the members of the club.[45] The problem is aggravated by the fact that economic considerations in the Council are shaped by the immediate economic circumstances on the ground, with no thought to how to align migration with future needs of national economies. Furthermore, even though the Council is supposed to reflect the collective political interests of Member States in the common EU project, national considerations predominate.[46] Especially regarding non-EU migrants, when Member States are up against national unemployment or recession, it is impossible for them to agree on any migration-related measure that could lead to the attribution rights. This is, of course, also connected to the shared competence on migration and the fact that even if Member States can foresee the demand for workers, they know that they can fulfil this demand through national migration law measures.[47] What this short-termism means for the quality of EU law making, but also for EU integration will be explored in the next section.

3. Timeframes of crisis, disadvantages of short-termism and EU Migration Law

Following the historical reconstruction of EU labour migration policy in the previous section, the following should have become clear. The first is the intimate connection of EU labour

[42] For a detailed analysis of the relevant proposals see Loxa (n 9) chapter 6.
[43] Loxa (n 9) chapter 3.
[44] ibid chapter 6.
[45] See also Xavier Groussot and Eleni Karageorgiou (eds), 'Special Issue on the principle of Solidarity' (2023) 6(2) Nordic Journal of European Law.
[46] See on this Neyer Jürgen Neyer, 'Saving Liberal Europe: Lessons from History' in Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds) *The Future of Europe: Political and Legal Integration Beyond Brexit* (Hart Publishing 2019) 24.
[47] See for example parallel schemes allowed for highly skilled workers which some Member States make extensive use of. Commission Staff Working Document, Executive Summary of the Fitness Check on EU Legislation on legal migration SWD(2019)1055.

migration policy and economic crises experienced by the Member States. The second is the defining effect of the 1970's oil crisis for the Council's short-termism in law-making on migration. With these in mind, the historical development of EU labour migration law will be situated in a broader theoretical discussion on crisis, governance and short-termism which can gain insight from critical theories on crisis and specifically, from the work of Runciman. [48]

Runciman has demonstrated the conceptual ambiguities inherent to the idea of crisis, he has connected them to the temporal ambiguities and he has argued for the effects of crisis for democratic governance in ways that could find analogous application in the area of EU migration, but also of EU integration more broadly.[49] To do that, Runciman begins by drawing on Koselleck's work on the concept of crisis and its ambiguities. According to Koselleck crisis can be 'can be conceptualized as both structurally recurring and utterly unique'.[50] Runciman builds on this tension inherent in the idea of crisis and, unlike Koselleck, whose work drew on the period of 20th century and revolutionary settings, Runciman instead focuses on the concept's evolution in the twenty first century and in democratic settings.[51] A central concern for him is the hardship to pin down a specific time frame of crisis and the interaction between different temporal conceptions of crisis. Rather, he argues that 'a distinctive feature of the contemporary understanding of crisis is the interplay and mismatch between different time frames, which creates problems for thinking about our long-term future'.[52] To show this feature, he identifies specific difficulties or background problems behind the inability to pin down the time frame of crisis.[53] Following, he goes on to identify another series of problems which he considers relevant in relation to crisis experienced in a contemporary context of democratic settings; these are the mutually reinforcing problems of ubiquity, unpredictability and durability.[54]

Drawing on Alexis Tocqueville and his work on American democracy, Runciman reminds us that 'the short termism of democratic politics creates long-term advantages because it means that no crisis is ever allowed to reach its moment of truth (and, therefore its moment of ultimate danger)'.[55] By following a short-term approach and focusing at the problems at hand, crises are downplayed into a series of more manageable problems.[56] As Runciman suggests, the worst- case scenario is 'forestalled by never being encountered in full'.[57] While acknowledging the importance of this aspect of short-termist democracy, Runciman also identifies a series of disadvantages that follow. First, he points to the consequences short-term responses can have as they are fragile and susceptible to failure.[58] Second, he suggests that

[48] Runciman (n 3).
[49] ibid.
[50] Koselleck and Richter (n 4) 374.
[51] Runciman (n 3) 4.
[52] ibid.
[53] ibid pages 4-7. He calls the difficulties definitional, experiential, and perspectival. The first relates to the difficulties of definition, the second on the dependence of the time frame upon the various groups who experience the crisis, and the third one relates to the perspective of those who did not experience the crisis at all.
[54] Runciman (n 3) 7–11.
[55]ibid 14; Alexis de Tocqueville, *Democracy in America* (Harvey C Mansfield and Delba Winthrop eds, University of Chicago Press 2002).
[56] Runciman (n 3) 12.
[57] ibid.
[58] ibid.

once the durability of democracy is revealed (which is the long-term advantage of short-termism), it can become self-defeating.[59] By applying Tocquevilles' insights on the inherent problems of democracy to the 2008 crisis and beyond, Runciman argues that the adaptability and flexibility which was key in addressing the worst of the crisis, is also the reason behind the absence of longer-term solutions.[60]

I suggest that Runciman's analysis of the short-termism of democratic governance in situations of crisis finds perfect application in the area of EU migration law. Over 50 years after the oil crisis we are still suffering from overreliance on short-termism to avoid the worst which is predicted but never arrives in the area of migration. The implications which Tocqueville and Runciman identified in relation to short-termism and democracy can be extended by analogy to this specific policy area of EU law and provide new input on the problems of EU integration. While the advantages of short-termism are clear, that is EU integration moving forward, the disadvantages are also embedded in this area and fundamentally set it up for failure. In a more abstract sense, this proposition also relates to Streek's suggestion on the 1970's oil crisis as a prelude to an ongoing crisis.[61]

As to the first implication of short-termism for the fragility of the solutions offered to crisis the following should be noted. The resolution of the 1970's oil crisis through a closure of borders and banning of migration took place under a fundamentally short-term horizon failing to see the broader relation of labor migration and economic development. The fragility of such solution took attention away from structural issues of the economy and gave room to populist responses blaming migration as the scapegoat for every economic downturn.[62] At the same time the sectoral regulation which is the result of such short-termism fails to achieve the objectives of aligning EU migration law to the needs of the market and is constantly revised.[63] Effective mobility of migrant labour in the internal market is constantly demanded and is constantly failing.[64]

On the second implication of the self-defeating nature of short-termism, we would have to relate EU labour migration, crisis governance and competence. The self-defeating nature of short-termism for democracy identified by Runciman would in our case be extended by analogy

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[59] ibid.
[60] ibid.
[61] Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Patrick Camiller and David Fernbach trs, 2nd edn, Verso 2017).
[62] Cf Haas (n 37).
[63] Indicatively the first Directives on Students and Researchers (Directives 2005/71 and 2004/114) were revisited less than a decade after their first adoption (The Commission proposal was issued in 2013 and led to the adoption of Directive 2016/81). The Blue Card Directive also lasted less than a decade for a revision that did not bring much change (Directive 2009/50 was recast by Directive 2021/1883 while the proposal to recast was issued in 2016). The Single Permit Directive adopted in 2011 has had a better fate with its revision proposed in 2022 and the recast just agreed in April 2024. See most recent attempt of the Commission to shape a regular migration policy that can address the economic needs in Commission Communication, Attracting skills and talent to the EU COM(2022)657 final.
[64] As attested also by the most recent attempt to revise the Long-term residents directive with uncertain outcome, Proposal for revision of Long-term residents Directive COM(2022)650 final 4, Explanatory memorandum Articles 16-18. See also Council Document, Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast) - Presidency compromise text, ST 10528/1/23 REV 1, Brussels 21 June 2023 already limiting some elements of the Commission proposal. See also European Parliament Research Service, Recast of Directive 2003/109/EC: Status of third-country nationals who are long term residents in the EU, EPRS BRI(2024)757361.

to the self-defeating nature of short-termism for EU integration. This is due to two reasons. First, the way in which EU migration law has developed points to the institutional failure to perceive labour migration as an issue of common and shared concern among the Member States.[65] The shared competence of the EU on migration means that Member States can eventually admit the labour they need to keep their economies running via national migration schemes. This allows them to individually cover labour demands and to achieve the needed growth without regard to growth on the collective level. The existence of and insistence in national frameworks, which do not guarantee sufficient rights to migrants, create barriers to the development at EU level. Where a position could be filled internally by the movement of a person from one Member State to another, this is now subject to barriers and delays that make it no different from entering the EU for the first time and effectively adversely affecting integration in a common labour market. Second, Runciman reminds us that the short-termism of western democracies in the ways the address crises is characterized by smugness and panic at the same time. Specifically, he has suggested that 'The knowledge that Western democracies have come to possess that they can survive whatever the world throws at them could yet prove their fatal flaw.'.[66] We could argue the same about the EU, with various scholarly works praising the EU for its success in addressing the crises that have been experienced through short-termism and potentially controversial (from a democratic perspective) decisions.[67] However, especially in the area of migration, populists have started to draw on this durability to portray the EU as both the cause of the crisis and the one unable to provide any substantive solutions to crisis.[68] It is uncertain for how long this situation can be sustained.

Finally, a third effect of short-termism, which has not been identified by Runciman, but which is a cause of concern as regards the short-termism of EU law is the effects of incoherence and injustice it produces. Specifically, the short-termism which has guided the EU response to labour migration has resulted in instruments flawed with internal and external incoherence. Apart from incoherence in the terms used in the various instruments with prime example being the reference to integration in an intelligible way, there is also vast differentiation in the rights migrants gets from different instruments.[69] The rights migrants enjoy under EU migration law are defined horizontally in the Single Permit Directive and differentiated based on the function of different categories of migrants for the EU economy with more rights attributed to those

[65] See Paul Craig, 'Institutions, Power, and Institutional Balance' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) raising the same point also for the migration crisis.
[66] Runciman (n 3) 14; David Runciman, *The Confidence Trap: A History of Democracy in Crisis from World War I to the Present* (Revised edition, Princeton University Press 2018).
[67] Dermot Hodson, *Circle of Stars: A History of the EU and the People Who Made It* (Yale University Press 2023); For a more nuanced long durée account see Luuk van Middelaar, T*he Passage to Europe: How a Continent Became a Union* (Liz Waters tr, Yale University Press 2013).
[68] See Natascha Zaun and Ariadna Ripoll Servent, 'Perpetuating Crisis as a Supply Strategy: The Role of (Nativist) Populist Governments in EU Policymaking on Refugee Distribution' (2023) 61 JCMS: Journal of Common Market Studies 653; see also Gregor Noll, 'Viciously Circular: Will Ageing Lock the European Union into Immigrant Exclusion?' in Stijn Smet and Vladislava Stoyanova (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022).
[69] See Loxa (n 8) 322–331 for a detailed overview of the matter; See also Sara Iglesias Sánchez, 'Free Movement as a Precondition for Integration of Third-Country Nationals in the EU' in Elspeth Guild, Kees Groenendijk and Sergio Carrera (eds), *Illiberal liberal states : immigration, citizenship, and integration in the EU* (Ashgate 2009); See earlier Kees Groenendijk, 'Legal Concepts of Integration in EU Migration Law' (2004) 6 European Journal of Migration and Law 111 with reference to free movement as well.

who are needed more.[70] Essentially the legal system put in place attributes more rights to those who are seen as crucial for the development of the EU project.[71] It can hardly be imagined that fair treatment to migrants, as demanded by Article 79(1) TFEU, implies differentiated attribution of rights based on how crucial a migrant is for the EU economy. In parallel, while there is an understanding of the need to promote mobility for certain individuals crucial to the project of growth, the economic fears of Member States, their short-term approach to migration and their possibility to attract such individuals by parallel national schemes has led to the introduction of so many conditions for the exercise of mobility rights that in practice it is hard to meet them all.[72] Such an unfair model of attribution of rights makes no sense in view of long-term considerations. To put it simply, we might know what type of migrants the EU economy needs today, but we cannot predict what type of migrants will be most needed in the future.

Overall, we see that the short-termism of the Council in the area of migration risks both the durability of the solutions offered and the durability of the EU due to institutional failure and lack of legitimacy. At the same time this short-termism also produces unfair results which cannot and should not be accommodated by a system based on the rule of law, the protection of human rights and respect for human dignity under Article 2 TEU.

4. Conclusion

While EU scholarship has examined in great depth the so-called migration crisis of 2015-2016, this chapter revisited the history of EU labour migration law in order to emphasise the effects of the 1970's oil crisis for the development of the relevant legal area. The purpose was to demonstrate an existing thread between economic crises and their effects for migration governance in the EU which has been understudied from a legal perspective.

To do so the chapter began by a historical reconstruction of EU labour migration, and it suggested that the Community institutions followed a fundamentally different approach to migration before and after the 1970's oil crisis. The economic threat experienced by the Community industries at the time lead to a short-termist response that has been guiding the Council's position, but also law-making in the area from the 1980s onwards. By identifying the 1970's oil crisis as the crucial period behind the establishment of short-termism in EU migration governance, the chapter connected this area to a broader understanding of the 1970's as the beginning to an ongoing crisis.[73]

Relating the relevant empirical material to the theoretical framework of Runciman on crisis, short-termism and its effects for democratic governance, it appears that short-termism

[70] 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. See also the recast version voted by the Parliament in April 2024 on first reading and pending for adoption in the Council.

[71] These are highly-skilled workers. See Loxa (n 8) 293.

[72] The problems persist even after the adoption of the recast Blue Card Directive, cf Tesseltje de Lange and Zvezda Vankova, 'The Recast EU Blue Card Directive: Towards a Level Playing Field to Attract Highly Qualified Migrant Talent to Work in the EU?' (2022) 24 European Journal of Migration and Law 489.

[73] Streeck (n 56).

has had significant implications not only for EU migration law but for EU integration at large which are structured around three major fault lines.

The first is the fragility of the solutions offered as a response to a crisis. From the 1970s onwards migration has been framed as a scapegoat for every economic downturn. This has meant the impossibility to adopt common legislation that can offer a reasonable and long-term solution to the migration demand in the Member States. The second is the self-defeating nature of the solutions offered. While the durability of the EU seems to be achieved through the short-term approaches to migration, the institutional failure to perceive migration as an issue of common concern leads to blocked integration and feeds into populist representations of the EU.[74] The third and final fault line relates to the incoherence and injustice that are entrenched in the relevant framework. The instruments of EU migration law are characterized by great internal and external incoherence, and they create different rights based on how much a migrant is needed for the EU economy. Such an unfair model of attribution of rights not only sits uneasily with the foundational values of EU primary law, but also it becomes self-defeating in as there is no concern on how migrant labour might have a role to play in an anticipated green and just transition.[75]

In a broader political reality that does not seem promising, one can only hope that insights gained by looking at the past and bringing to the fore the problems which arise by short-termism can inform political debate, or even lead to legal change with due consideration for the long-term future.[76]

[74] Cf Ronan McCrea, 'Forward or Back: The Future of European Integration and the Impossibility of the Status Quo: Forward or Back: The Future of European Integration' (2017) 23 European Law Journal 66; See also Loxa and Stoyanova (n 2) for a different account with a focus on constitutional deficits in EU asylum law.

[75] See Anneleen Vandeplas et al, 'The Possible Implications of the Green Transition for the EU Labour Market', European Economy Discussion Pappers, Publication Office of the European Union 2022.

[76] See Armida van Rij et al, 'How will gains by the far right affect the European Parliament and EU?' Chatham House Explainer, 11 June 2024. Cf Bill Davies, 'Why EU Legal History Matters- A Historian's Response' (2013) 28 American University International Law Review 1337.