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A Law and Economics Analysis of the German Immigration Law with a Focus on Labour Market Admission[1]

Draft version, comments welcome

Abstract

Although migration economics stresses the potential gains from international labor market liberalization, immigration is a highly controversial political topic playing a dominant role not only in the UK. This paper discusses the German immigration law from a law and economics perspective by applying the rules-based free market approach by Epstein and the more static neoclassical maximization approach by Cox and Posner, which favors restrictions to reduce information asymmetries. With respect to the current German immigration law, there is a clear segmentation – with unrestricted access for EU citizens, while for third-country nationals there is a complex system of rules to gain admission to the German labor market which causes high transaction costs and sets a number of adverse incentives. This holds even for high skilled immigrants. A reform proposal by the Social Democratic Party might help to correct some of the adverse incentives of the current German immigration law. However, it is doubtful whether this proposal will gain the necessary political support to be enacted.

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1. Introduction

Immigration proves dominant in political discussions, not only since the Brexit referendum in the UK. While the immigration of EU citizens is seen as a problem there, debate in Germany is more on how to regulate access of refugees, many of whom are hold more as refugees being driven by poverty than by political reasons. Here the discussion moves between two poles: on the one hand worry about too much inflow of low-skilled people, and on the other hand worry about insufficient immigration of high skilled workers, which are much in need because of the shortage of skilled domestic workers because of the demographic change ahead.

Over the last three decades international division of labour increased enormously on the markets for goods and capital due to far-reaching deregulation and liberalization of entry barriers in these markets, this is not the case in regard to labour markets. Although the majority of economic analyses argue in favour of widespread welfare gains if labour market access would be liberalized internationally, there is only restricted access to national labour markets (see for example Bansak/ Simpson/ Zavodny 2015; Bodvarsson/ van den Berg 2013; Borjas 2014; Chiswick/ Miller 2015).

This holds also for the German labour market notwithstanding of the modernization of the German immigration law following the enactment of the Immigration Act in 2005. This statute contains both the basic regulations of freedom of movement for EU citizens as well as the provisions for immigration of so-called third-country nationals. The Residence Act grants residence titles for employment, family reunification and for humanitarian and political reasons. These residence titles also include work permits for a legal access to the German labout market, even if they may be restricted in regard to time, region or occupation.

Immigration law is the main instrument to regulate admission to the labour market and thus labour supply by non-domestic workers. Therefore this paper asks for the German immigration law how its provisions are to be assessed from a law and economics perspective. Section 2 shows the main legal regulations while section 3 presents two approaches to exemplarily analyse immigration law. They are applied to the German immigration law in section 4. Section 5 summarizes and concludes.

2. German Immigration Law – An Overview

The regulations granting admission to the German labour market are primarily based on one's citizenship. There is a clear segmentation between German nationals and EU nationals enjoying union citizenship on the one hand and third-country nationals on the other hand. Moreover, exceptions apply to citizens form certain countries and with a particular educational and skill

level. In addition, for people immigrating to Germany for other purposes (like family reunification or humanitarian reasons) special rules apply for labour market access.

… German immigration law grants so-called work permits, which in turn grant legal access to the German labor market. Who is entitled to such a work permit depends primarily on one's citizenship. There are different rules applying to EU citizens and to Non-EU citizens, so-called third party nationals. In addition, residential permits which are given for other reasons than immigration to the German labour market also grant access to the latter. Such residential permits are granted primarily for family reunification or for refugees and asylum seekers.

2.1 Admission to the German Labour Market for EU Citizens

Article 12 of the Basic Law for the Federal Republic of Germany grants all German nationals a constitutional right to work.

> **Article 12 Basic Law for the Federal Republic of Germany [Occupational freedom]**
> (1) All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.
> (2) No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all.
> (3) Forced labour may be imposed only on persons deprived of their liberty by the judgment of a court.

Source: BMJV (2017) online at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0063 (last access: 03/01/2017)

Citizens of EU member states enjoy the freedom of movement of workers, which was introduced already at the end of the 1960s.[2] EU citizenship supplements citizenship of the EU member states.[3] According to Art.45 TFEU, EU citizens enjoy freedom of movement of workers (see below). For them, all discrimination based on nationality in labor market regulation is abolished, the same rules as for German nationals hold in regard to employment issues. However, this does not apply to employees in the public service.

> **Article 45 TFEU** (ex Article 39 TEC)
>
> 1. Freedom of movement for workers shall be secured within the Union.
>
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
>
> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
>
> (a) to accept offers of employment actually made;
> (b) to move freely within the territory of Member States for this purpose;

[2] See Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community and Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.
[3] See Art.20 of the Treaty on the Functioning of the European Union (TFEU).

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Source: Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01

However, in 2004 the right of free movement for workers was restricted in Germany for most of the eight primarily Eastern European accession countries due to fears of adverse effects on the German labour market. Unlike Ireland, Sweden and the United Kingdom, Germany used the option to limit labor market access for citizens from these countries until 2011. The same hold for workers from Bulgaria and Romania, which accessed the EU in 2007. They gained full freedom of movement to Germany only in 2014. Croatia, which accessed the EU in 2013, was granted full freedom of movement for workers to Germany in 2015.

Although the *Treaty on European Union* introduced the principle of freedom of movement of people (now Art.21 *TFEU*) in 1993, this did not grant a general residence or settlement entitlement for EU citizens in other member states. Eventually, the *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* clarified the conditions for residence and settlement in other member states. The German *Immigration Act of 30 July 2004* [Zuwanderungsgesetz, M.E.] incorporated this Directive into national law as the *Act on the General Freedom of Movement for EU Citizens (Freedom of Movement Act/EU)* [Freizügigkeitsgesetz, M.E.] in its Article 2.

Sect.2 (2) Freedom of Movement Act/EU lists the purposes under which residential rights are granted for EU citizens, with employment related purposes featuring prominent (see below).

For EU citizens no visa, additional residence titles or other requirements are necessary for entering into Germany and for staying there up to three months according to Sect.4 Sen.1 Freedom of Movement Act/EU. As is the case with German nationals, EU citizens need only a valid identity card or passport (see Sect.2 (5) Freedom of Movement Act/EU). Besides, the general obligation to register with the local resident's registration office holds for EU citizens as well as for German nationals. Since 29 January 2013 no additional administrative registration procedures are necessary for EU citizens.

According to Sect.4a (1) Freedom of Movement Act/EU an entitlement for permanent settlement in Germany can be granted after five years of permanent lawful residence, irrespective of whether the requirements stated in Sect.2 (2) Freedom of Movement Act/EU are

still fulfilled. EU citizens can apply for being issued with a certificate confirming the right to permanent residence, but they do not have to (Sect.5 (5) Sent.1 Freedom of Movement Act/EU.

Section 2 Freedom of Movement Act/EU - Right of entry and residence
(1) EU citizens and their dependents entitled to freedom of movement shall have the right to enter and reside in the federal territory pursuant to this Act.
(2) The following persons are entitled to freedom of movement under Union law:
1. EU citizens who wish to reside in the federal territory as employees or to carry out vocational training,
1a. EU citizens seeking work, for a period of up to six months and exceeding this period only if they can prove that they continue to seek work and have reason to believe that they will find it,
2. EU citizens who are entitled to pursue an independent economic activity (established self-employed persons),
3. EU citizens who, without taking up residence in the federal territory, wish to render services as self-employed persons pursuant to Article 57 of the Treaty on the Functioning of the EU (service providers), provided that they are entitled to provide the services concerned,
4. EU citizens as the recipients of services,
5. EU citizens who are not gainfully employed, subject to the requirements of Section 4,
6. dependents, subject to the requirements of Sections 3 and 4,
7. EU citizens and their dependents who have acquired the right of permanent residence.
…
Section 4 Freedom of Movement Act/EU - Non-gainfully employed persons entitled to freedom of movement
Non-gainfully employed EU citizens and their dependents who accompany the EU citizen or subsequently immigrate to the federal territory to join the EU citizen shall possess the right pursuant to Section 2 (1) if they have adequate health insurance coverage and adequate means of subsistence. If the EU citizen resides in the federal territory as a student, this right shall extend only to his spouse, partner in life and children for whom maintenance is provided.

Source: *Act on the General Freedom of Movement for EU Citizens (Freedom of Movement Act/EU)* http://www.gesetze-im-internet.de/englisch_freiz_gg_eu/index.html

Subsequent immigration of family members

Subsequent immigration of family members to an EU citizen residing in Germany is also regulated by the Freedom of Movement Act/ EU. In this case, not only dependents that are *EU citizens but also third-country nationals* (see section 2.3 below) have the right to enter and reside in Germany (Sect.2 (2) no.6 Freedom of Movement Act/EU).

Dependents are the spouse, the partner in life and relatives in descending line if they are under 21 years of age and in direct descending and ascending line if their maintenance is provided for by the EU citizen (Sect.3 (2) Freedom of Movement Act/EU). According to Sect.3 (1) Sect.3 (2) Freedom of Movement Act/EU they also are entitled to the freedom of movement, like the EU citizen they accompany. Thus, they also are entitled to freely access the German labour market without having to apply for a work permit, for example. If the family members do not follow a gainful employment, however, they are required to have adequate health insurance coverage and secured means of subsistence (Sect.4 Freedom of Movement Act/EU).

Accompanying family members or subsequently immigrating family members who are third-country nationals need a visa for entering into Germany according to the Residence Act,

however, no charges are imposed on the visa. If they have valid passport or identity card they can stay for up to three months in Germany (Sect. 2 (4) to (6) Freedom of Movement Act/EU). A residence card valid for five years should be granted to dependents who are not EU citizens confirming their residence status (Sect.5 (1) Freedom of Movement Act/EU). Sect.5a Freedom of Movement Act/EU states what documents have to be provided for applying for a residence card. After five years of residence, dependents who are either EU citizens or third-country nationals have the right of permanent residence (Sect.4a (1) Freedom of Movement Act/EU), with Sect.4a (2) to (7) Freedom of Movement Act/EU listing a number of derogations from this general rule.

Usually, EU citizens do not have to turn to the immigration office or to any other public agency other than to those to which also German nationals residing in Germany have to turn to. If public authorities assume fraudulent abuse of rights by EU citizens, like in regard to social benefits for example, the authorities have to provide the evidence. Thus, the burden of proof lies with them.

2.2 Admission to the German Labour Market for Citizens from the European Economic Area and from Switzerland

According to Sect.12 Freedom of Movement Act/EU, citizens from the European Economic Area (EEA) are treated equally to EU citizens in regard to freedom of movement. Island, Liechtenstein and Norway are members of the EEA.

Swiss Citizens also enjoy freedom of movement, however they have to apply for a special residence permit according to Sect.28 Residence Ordinance [Aufenthaltsverordnung, M.E.].

Therefore, in the following we subsume EEA and Swiss nationals under the term “EU citizens”.

2.3 Admission to the German Labour Market for Third-country Nationals

Third-country nationals are all people who are neither German nationals, nor EU citizens nor citizens from the EEA or from Switzerland. While EU citizens and those treated equally to them do not need either a visa or a work permit to enter Germany and to get admission to the German labour market, things become much more complicated for citizens from other countries. The *Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (Residence Act)* [Aufenthaltsgesetz, M.E.] is section 1 of the *Immigration Statute of 30 July 2004*. It covers the main regulations on immigration for foreigners to whom the *Act on the General Freedom of movement for EU Citizens* does not apply. That is the residence and work

entitlements granted by the Residence Act do not apply to EU citizens. The *Employment Regulation of 6 June 2013* [Beschäftigungsverordnung, , M.E.] contains important additional regulations in regard to getting a work permit. In contrast to EU citizens, third-country nationals have to turn to the foreigners' registration office for applying for a residence title. In addition, for getting a work permit, in most cases the Federal Employment Agency [Bundesagentur für Arbeit, M.E.] is also involved.

As a general rule, third-country nationals need a *visa* for entering Germany. For this they have to apply in their home country or in their country of residence. Besides, they need a *residence title* for staying in Germany. There are different residence titles depending on one's purpose of stay. Finally, to get admission to the German labor market, third-country nationals need a residence title which entails a *work permit*. Whether a work permit is granted depends primarily on the level of the applicant's education and skills. But there are a number of different rules for different occupations and for citizens form certain countries. In addition, also the current labor market situation plays a role in whether a work permit is granted or not.

Sect.1 Residence Act states as its legal purpose to regulate immigration to Germany according to the "capacities for admission and integration and the interests of the Federal Republic of Germany in terms of its economy and labour market". The law knows four different purposes for granting residence titles: for educational purposes, for economic activity, for humanitarian reasons and for the purpose of family reunification.

(1) Residence titles

The main requirement for entering Germany and getting granted a residence title, is having successfully applied for a visa (see Sect.6). This requires a valid passport and proof of secured means of subsistence (Sect.5 (1)). According to Sect.2 (3) subsistence is assumed to be secure if one can earn one's living, has health insurance coverage and does not rely on social transfers. There are exceptions in regard to the latter, like for example children's allowances or child-raising benefits as well as social benefits derived from own contributions to social insurance systems. Besides, no reasons for deportation should exist.

There are four main resident titles (see Sect.4), for which one can apply. The residence permit (Sect.7) and the EU Blue Card (Sect.19a) are both temporary residence titles, while the settlement permit (Sect.9) and the EU long-term residence permit (Sect.9a) are permanent residence entitlements. Permanent residence titles imply unrestricted admission to the German (and/ or EU) labour market, while this is not the case with a temporary residence permit. Access can be restricted not only with respect to time, but also in regard to a specific employer,

occupation and /or region. The temporary *residence permit* is limited in time. It is issued for a concrete employment contract, for example. It can be extended several times. A permanent *settlement permit* is granted at the earliest after five years of temporary residence, which requires having been granted temporary residence permits before. Besides in contrast to EU citizens, third-country nationals have to meet a number of additional conditions for obtaining a permanent settlement permit. For example, a third-country national has to fulfill the following requirements: (1) secured means of subsistence, (2) payment of at least 60 months of social security contributions to the statutory German pension scheme (or to a comparable pension scheme), (3) a valid work permit, (4) German language skills (at the level B1 of the Common European Framework of Reference for Language (CEFR) see Sect.2 (11)), (5) basic knowledge of the German legal and social system and (6) sufficient living space (for the full list including some exceptions from the requirements see Sect.9 (2) Residence Act).

With the *EU Blue Card* of Sect.19a Residence Act the Council Directive 2009/50/EC of 25 May 2009 on Highly Skilled third-country Nationals and the Single Permit Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 had been implemented into German law in 2012. It is a temporary residence permit for a maximum of 4 years. For certain skill levels it is easier to obtain than the residence permit according to Sect.7 Residence Act. In addition, it allows to stay in most EU member states without visa for up to 90 days (excluded are the United Kingdom, Ireland, and Denmark) and to stay in a non-EU country for up to 12 months. Besides, it reduces the waiting time required for getting a permanent residence title from 60 months to 33 months if German language skills at the level A1 of the CEFR are demonstrated, respectively to 21 months if one has language skills at the level B1 of the CEFR (Sect.19a (6) Residence Act) In addition, a consent by the FEA for a particular employment contract is not required.

The *EU long-term residence permit* is a permanent residence title similar to the settlement permit, allowing to engage in economic activity, but with some differences in the requirements (Sect.9a Residence Act). While no contributions to social security systems are required, a fixed and regular income and sufficient living space must be given. It again requires at least 5 years of residence in Germany of in the EU.

(2) Residence Titles for Job Search and Employment

Part 4 Sect.18-21 Residence Act contains the main regulations referring to the grating of a residence title for employment purposes. Sect.18 (1) Sent.1 states that a work permits should only be issued by taking into consideration the German labour market situation and the current

level of unemployment. Accordingly, as a general rule for granting a work permit the following requirements have to be met: (1) a legal provision for admission to the German labour market exists, (2) there is a concrete job offer, (3) there is no preferential employee available for this job, that is neither a German national nor an EU citizen, and the working conditions are not (FEA 2015, p.5). According to sect.39 Residence Act the Federal Employment Agency (FEA) is responsible for granting approval for a work permit for a third-country national by carrying out the so-called priority check and by determining whether there are preferential employees available. If the FEA gives its consent, the work permit is limited to the duration of the employment contract, however, up to a maximum of 3 years. To decide whether approval can be granted, the future employer has to provide information about the job offer, including working hours, wage, vacation etc. to the competent local FEA branch. There is a timeframe of 14 days within which the FEA has to decide. If there is no German national, EU citizens or national from the EEA or from Switzerland who is entitled to preferential treatment, the FEA must grant its consent. Preferential treatment might also involve long-term unemployed or others who are in need of special support for re-integrating them into the labour market. Besides, depending on the decision of the FEA, the work permit can be restricted to a specific employer, occupation and/ or region. All such restrictions are stated in the residence title granted.

All in all, to obtain a residence title for employment requires the involvement both of the immigration office and of the competent branches of the FEA as well as of the future employer. To add to the complexity, in some cases there are additional statutory requirements to be met for obtaining a work permit while in others there are less strict requirements, allowing for easier access to the German labour market. Thus, whether and how easy admission to the German labour market is, depends primarily on the level of education and skill and on the specific occupation. In the following, the main requirements for different skill levels are presented.

Unskilled workers that is, foreigners with no vocational training and no degree in higher education do not obtain a work permit even if they have a contract with a future employer and the priority check is positive. Only in case that there is a bilateral agreement with another country and/ or another special legal provision exists, unskilled workers are granted a work permit (Sect.18 (3) Residence Act). Accordingly, no residence title is granted for job search.

Skilled workers with professional vocational training can obtain a temporary work permit with the consent of the FEA according to the regulations of Sect.6 Employment Regulation and Sect.18 (4) Residence Act. This is routinely the case if one acquired one’s vocational training

in Germany (Sect.6 (1) Employment Regulation). Subsequent to one's vocational training in Germany, a third-country national can obtain a temporary residence permit for seeking a job in this profession for a maximum of 12 months (Sect.17 (3) Residence Act). If the foreigner acquired his or her professional qualification abroad, its equivalence to German vocational qualifications must be recognized and the posting of the foreign worker most not be detrimental to the German labour market. A concrete job offer must exist and the FEA must give its consent after carrying out the priority check (Sect.6 (2) Employment Regulation). If the occupation is on the so-called *Positive List* issued by the FEA, the priority check is dropped. The *Positive List* states for which professions there are shortages in which regional districts of the FEA. The *Positive List* is updated twice a year. It is based on the *Fachkräfteengpassanalyse* ("skilled workers shortage analysis", own translation M.E.) by the FEA. Positions in professions which are listed there do not require a priority check by the FEA. In addition, if there are bilateral recruitment agreements, a residence permit is also granted without priority check.

Furthermore a temporary work permit can also be granted for skilled workers in so-called *shortage occupations*, if the respective salary for a particular job offer meets a certain minimum standard (Sect.2 (3) Employment Regulation, FEA 2015, p.7). In this case the consent of the FEA is required.

Contract workers

According to Sect.29 (1) Employment Regulation so-called contract workers can get a work related residence permit for a maximum of 3 years. Contract workers are employees of companies with their registered office outside the EU. Based on intergovernmental agreements, quota for guest workers are agreed upon which are modified annually according to the German labour market situation. There is no priority check. Currently there are agreements with Bosnia Herzegovina, Macedonia, Serbia and Turkey. In 2015 there were about 6.500 guest workers in Germany (BAMF 2016a, pp.77f.)

For *highly skilled third-country nationals* there are a number of special regulations. They facilitate the granting of a work permit and/or reduce the time necessary before a permanent residence title is granted. The latter implies unlimited access to the German labour market.

According to Sect.16 (1) Sent.1 Residence Act, a residence permit is granted "for the purpose of studying at a state or state-recognized university or a comparable educational establishment". The right to employment is limited to a maximum of 120 days per year while being enrolled in a higher education institution (see Sect.16 (3) Residence Act with more detailed provisions). Following the successful completion of one's studies, the temporary residence permit can be

extended for job search in the respective profession up to a maximum of 18 months (Sect.16 (4) Residence Act). During this time economic activity as an employee or as self-employed is permitted.

Foreigners who hold a degree from a higher education institutions from abroad can apply for a residence permit to seek employment in Germany for up to 6 months, if the following requirements are met: (1) the foreign higher education degree is recognized in Germany, (2) there are secure means of subsistence and (3) health insurance coverage. In contrast to foreigners who completed their education at a German institution, not only the time for job search is restricted, but there is also no economic activity allowed during this time. Thus, the residence permit according to Sect.18c Residence Act does not include a work permit.

Foreigners with a recognized foreign university degree comparable to a German university degree can obtain a temporary residence permit including a work permit if they have a concrete job offer in their line of study and if the FEA gives its consent (Sect.2 (3) Employment Regulation).

If the third-country national graduated from a German higher education institution or if his or her minimum annual gross salary is at least two thirds of the annual assessment ceiling for the statutory pension scheme, there is no priority check by the FEA (Sect.2 (2) No.2 Employment Regulation). The FEA can grant its consent to give a EU Blue Card to natural scientists, mathematicians, engineers, physicians and academic specialists in ICT and to other highly skilled third-country nationals in shortage occupations, even if their minimum annual gross salary is only 52 per cent of the annual assessment ceiling for the statutory pension scheme. *Inter alia* the EU Blue Card facilitates getting a permanent residence title (see above).

In addition, for third-country nationals who graduated from a German higher education institution there is another fast track to get a permanent settlement permit with unrestricted access to the German labour market after 24 months of temporary residence (Sect.18b Residence Act). They have to meet the following main requirements: they have a temporary residence title for 2 years, an employment adequate to their university degree, and have paid 24 months into the German statutory pension scheme or into an equivalent pension scheme.

A temporary residence permit for research purpose can be granted to third-country nationals who are engaged in scientific research without the consent of the FEA (Sect.20 Residence Act and Sect.5 Employment Regulation). In this case the research institution where the research is carried out has to state that it will bear any costs of subsistence arising from an unlawful stay

of the researcher after the residence permit has expired. During its stay employment outside the research project is allowed for a maximum for three months within a year.

Another fast track for getting immediately a permanent settlement permit is available for highly qualified foreigners according to Sect.19 Residence Act. This regulation aims at "1. researchers with special technical knowledge or 2. teaching personnel in prominent positions or scientific personnel in prominent positions" (Sect.19 (2) Residence Act).

According to Sect.3 Employment Regulation, consent of the FEA is not required for granting a residence title for some types of managers at the executive level of a company. For executives and specialists at lower ranks, the consent of the FEA is necessary, but there is no priority check (Sect.4 Employment Regulation).

Self-employed entrepreneurs get a residence permit for the purpose of self-employment if "1. an economic interest or a regional need applies, 2. the activity is expected to have positive effects on the economy and 3. personal capital on the part of the foreigner or a loan undertaking is available to realise the business idea" (Sect.21 (1) Sent.1 Residence Act). A number of different local or regional actors are involved in assessing whether the business idea is viable: "The competent bodies for the planned business location, the competent trade and industry authorities, the representative bodies for public-sector professional groups and the competent authorities regulating admission to the profession concerned shall be involved in examining the application" (Sect.21 (1) Sent.3 Residence Act). The residence permit is limited to a maximum of 3 years. If the business proofs successful and ensures a secured subsistence of living, a permanent settlement title is granted thereafter (Sect.21 (4) Residence Act). Special regulations exist for self-employed professionals and for graduates from German higher education institutions or researchers with a residence permit (Sect. 21 (2) and (5) Residence Act).

For *third-country nationals from specific countries* consent by the FEA can be given independent of their skill level, their occupation and without priority check. This is the case for citizens from Andorra, Australia, Canada, Israel, Japan, the Republic of Korea, Monaco, New Zealand, San Marino and the United States (Sect.26 (1) Employment Regulation). In 2015 only about 8.000 employees fall in this category. A similar rule exists for citizens from Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro and Serbia for the period 2016 to 2020 (Sect.26 (2) Employment Regulation). However, a residence permit will only be granted if the respective person has not claimed asylum in Germany 24 months before the application for a residence permit for the purpose of employment is filed (for exceptions see Sect.26 (2) Sent.3 Employment Regulation). In 2015 about 420 work permits were issued according to this

provision. In all these cases, unskilled or low skilled workers, too, get a chance of getting a residence permit without a priority check being performed.

Special rules apply for being granted a residence permit for temporary employment for specific occupations, for posted workers and for guest workers. (For an overview see FEA 2015 and the respective sections in the Residence Act and Employment Regulation).

Compared to the free movement of EU citizens the German regulations for third-country nationals to get admission to the German labour market are much more complex. At the same time, a clear segmentation is there, with a rather low chance for unskilled to get a residence permit, even if he or she finds an employer with a job offer. Even in this case, the priority check by the FEA is necessary giving preferential treatment to German nationals, EU citizens and Citizens from the EEA and Switzerland.

(3) Residence Titles for Humanitarian Reasons and Labour Market Admission

Part 5 of the Residence Act also regulates admission to the German labour market for asylum seekers and refugees which are in Germany for political or humanitarian reasons. Again, admission to the labour market depends on the respective residence title an applicant has. The latter in turn depends on the stage of the asylum procedure (for details see *Asylum Act*) (current procedure, procedure closed with a positive decision, procedure closed with a negative decision).

Applicants for asylum under a current procedure get a residence permit (permission to reside, Aufenthaltsgestattung, M.E.). Recognized asylum seekers get a – usually – temporary residence permit for 3 years which can be repeatedly extended and which contains an unrestricted work permit (Sect.25 (1) and Sect.26 (1) Residence Act). In this case no consent of the FEA must be sought for employment (Sect.31 Employment Regulation). Similar regulations apply if the asylum seeker is granted refugee status or subsidiary protection status (Sect.25 (2) Residence Act). A settlement permit can be granted after 3 years with consent by the Federal Office for Migration and Refugees or after 7 years if the necessary conditions for this are met (Sect.25 (3) and (4) Residence Act).

If the asylum procedure is decided negatively, in certain cases deportation might be banned and a residence permit for one year (with the possibility of repeated extension) be granted (Sect.25 (3) and Sect. 60 Residence Act). In this case a work permit can be granted. Sect.32 Employment Regulation states the detailed conditions under which this applies. Similar regulations hold for third-country nationals who are required to leave the country, but whose deportation cannot be realized (Sect.25 (4) and (5) Residence Act). Sect.61 Asylum Act states that an asylum seeker

even with a negative decision can take up employment after 3 months waiting period if the FEA has granted approval. Whether the FEA carries out a priority check depends on the regional labour market situation. Whether preferential treatment to German or EU nationals shall be given, is decided by the single Länder for single regional labour market districts.

Table 1 summarizes the main aspects of how access to the labour market and to the instruments for active labour market integration are regulated in the asylum procedure.

Table 1: Provisions regarding Labour Market Admission for Asylum Seekers and Refugees[4]

Residence status	**Access to employment**	**Access to vocational training**	**Access to active labour market**
Current procedure: Asylum applicants with permission to reside (Aufenthaltsgestattung**)**	ban on employment for 3 months, then unrestricted without priority check in 133 districts of the employment agency and with priority check in 23 districts after 15 months: no priority check[2] after 4 years: unrestricted	after 3 months	after 3 months
Procedure closed with a positive decision: Person is granted a residence permit (Aufenthaltserlaubnis), for a term between 1 and 3 years depending on the protection status granted • Right of Asylum (Sect.25 (1) Residence Act) • Refugee protection or subsidiary protection (Sect.25 (2) Residence Act) • Prohibition on deportation (Sect.25 (3) Residence Act)	Unrestricted	unrestricted	unrestricted

[4] For more details see BAMF (2017a).

Table 1 continued

Residence status	Access to employment	Access to vocational training	Access to active labour market policies[1]
Procedure closed with a negative decision: persons with a temporary suspension of deportation status e subject to special conditions for access to the labour	ban on employment for 3 months, then unrestricted without priority check in 133 districts of the employment agency and with priority check in 23 districts after 15 months: no priority check[2] after 4 years: unrestricted	Unrestricted (if no ban on employment was issued by the aliens authority)	after 3 months

[1] Active labour market policies include access to recruitment services of the Federal Employment Agency, qualification, allowances for employers, further training and special trainings, for example.
[2] There is no priority check if one has a recognised university degree or vocational qualificator and if this occupation is on the Positive List of the Federal Employment Agency (as at August 2016).

Source: Own compilation following BA/Agentur für Arbeit Traunstein (2015, pp.2f.) and Integration Act of 31.July 2016

(4) Resident Titles for Family Reunification and Labour Market Admission

Family reunification is another important reason for migrating to Germany. According to Article 6 (1) German Basic Law "Marriage and the family shall enjoy the special protection of the state".

Subsequent immigration of a third-country national *to an EU citizen* is regulated in the Freedom of Movement/EU Act (see section 2.1 above). Subsequent immigration of a third-country national *to a German or third-country national family member* residing in Germany is regulated in Sectt.27 to 36 Residence Act. Sect. 27 (1) Residence Act states that dependents should be granted a residence permit to subsequent immigration for joining their family. According to Sect.27 (5) Residence Acts the respective residence permit entails the right of employment for the family member.

However, not every family member is granted a residence permit. According to Sect.28 (1) Residence Act a residence permit for *subsequent immigration to join a German national* is provided for a spouse, a minor, unmarried child of a German and a parent of a minor unmarried German. A settlement permit shall be granted after living in Germany based on a residence permit for three years if the family still lives together and German language skills are sufficient (Sect.28 (2) Residence Act).

Compared to the rights granted to the subsequent immigration of third country nationals to EU citizens, the rules in the Residence Act restrict the circle of the family members entitled to

family reunification, but it requires only 3 and not 5 years of residence until they acquire an independent permanent settlement title (see section 2.1 above).

A residence permit *for subsequent immigration to join a third-country national* has to be granted if the latter holds a residence title, there is enough living space available and the means of subsistence are secured (Sect.29 Residence Act). There are additional regulations concerning the subsequent immigration of a spouse (Sect.30 and 31 Residence Act), a minor, unmarried child (Sect.32-35 Residence Act) and the parent of a minor foreigner who holds a residence permit (Sect. 36 (1) Residence Act), while other family members are granted a residence permit only to avoid particular hardship (Sect. 36 (2) Residence Act).

2.4 The Development of the German Immigration Law

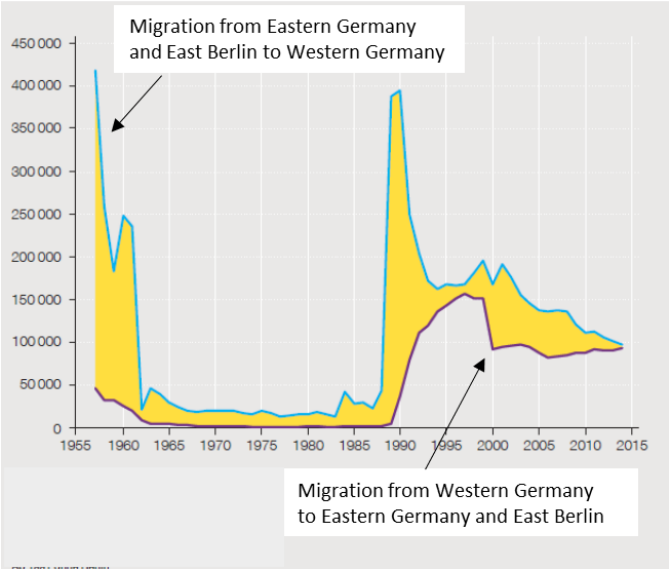
German migration history and policy is characterized by different stages (see Butterwegge 2004). While Germany was a sending country during the 19th and early 20th century with about 5 million emigrants, following the Second World War about 13 million displaced persons resettled to Western Germany. In the 1950s and 1960s there had been special guest worker programs - in particular with Italy (1955), Spain and Greece (1960), Turkey (1961), Morocco (1963), Portugal (1964), Tunisia (1965) and Yugoslavia (1968) (Butterwegge 2004). The migrants only had a temporary residence permit, after which they should re-migrate to their home countries. As a consequence of the economic downturn at the beginning 1970s, a ban on recruitment of foreign workers took effect in 1973. At that time about 2.6 million foreign workers lived in Western Germany. Although this number decreased significantly due to the economic crisis, quite a number of former guest workers stayed, with subsequent immigration of family members dominating the following years. They got a temporary residence permit according to the *Aliens Act of 1965*. In 1983 an *Act to promote return migration* was enacted. There was no active migration policy at that time. Eventually, after long-lasting political debates on migration policies, a new *Aliens Act* was introduced in 1991. On the one hand it facilitated the naturalization of migrants born or grown-up in Western Germany and of long-time residents and gave independent residence rights to spouses and children of refugees. On the other hand it tightened rules for deportation and increased the scope of the Aliens Authorities to discretionarily decide on the residence status of migrants.

Already the mid-1980s saw a huge inflow of asylum seekers and refugees to Western Germany, which led to very emotionalized political campaigns on the misuse of the rather liberal German Right of Asylum by so-called ‘poverty refugees’ during the 1980s and early 1990s. This led to strict restrictions of the Basic Right on Asylum as stated in sect.16 of the German Basic Law

in 1993. In addition, the *Asylum Procedure Act* and the *Asylum Seekers' Benefit Act* also took effect in 1993.

With the fall of the Berlin Wall and the collapse of the Soviet Union, Germany not only experienced the reunification leading to huge migration flows from Eastern to Western Germany by about 1.2 million people between 1991 and 2014 (in 2016 internal migration is nearly balanced (see Figure 1), but also to an inflow of about 2.5 million ethnic German repatriates with German ancestors or from former German settlement regions in Eastern Europe (Spätaussiedler, M.E.) (see Table 2).

Figure 1: Migration between Eastern and Western Germany, 1957 - 2014



Source: Destatis und WZB (2016, p.21, Figure 3) (own translation, M.E.).

Table 2: Immigration of Ethnic German Repatriates to Germany

	1950-1989	1990-2000	2001-2012	Total 1950-2012
Poland	1,238,312	204,562	2,296	**1,445,170**
Romania	242,322	186,901	1,046	**430,269**
(Former) Soviet Union*	255,301	1,724,665	381,519	**2,361,485**
Other countries	263,756	8,663	115	**272,534**
Total	**1,999,691**	**2,124,791**	**384,976**	**4,509,458**

*) The Soviet Union dissolved on December 21, 1991.

Source: Worbs et al. (2013, p.29, Table 2-1) (own translation, M.E.).

At the same time the contradictions in regard of the status of long-term migrants became much clearer, but this led only to rather minor reforms in regard to naturalization and family reunification in an *amendment to the Aliens Act* in 1996. Only with the reform of the citizenship law in the *Nationality Act* in 2000 and the implementation of the *Immigration Act* in 2005 a

major change in the German aliens and migration law and policy took place, reversing the former restrictive attitude into a rather liberal one. The *Nationality Act* replaced the *ius sanguis* by the *ius solis*. According to the former one has to be borne by German parents or else married to a German national to acquire German citizenship. In contrast to that the latter grants German citizenship to every child born in Germany independent of the nationality of its parents. However, dual citizenship is restricted: according to the Nationality Act children with dual citizenship have to decide until the age of 23 whether to keep the German citizenship by giving up the other, else they losing it. The *Asylum Act* of 2008 contains provision for the asylum procedure.

The *Immigration Act* is a made up of different laws, with its Article 1 being the *Residence Act* (see section 2.3 above) and its Article 2 being the *Freedom of Movement Act/ EU* (see section 2.1 above). Other articles include amendments of former Acts and Regulations. It also implements European directives into German law. This holds in particular for the directives implemented in the *Freedom of Movement Act/ EU*, but also for some other directives like the 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, which was implemented in 2012 in the *Residence Act*. The ongoing modifications in the German immigration law liberalised labour market access more and more also for foreigners without a university degree that is, for foreigners with a skilled vocational qualification recognized in Germany, however given certain requirements are met (see SVR 2014, Table A.9, p.77).

In its 2015 Annual Report the Expert Council of German Foundations on Integration and Migration assessed the development of the German migration law in comparison to a number of other countries (SVR 2015). It found that with the introduction of the *Immigration Act* in 2005, migration policy in Germany had fundamentally changed. Until then, the political consensus had been that Germany is no immigration country, despite all the evidence to the contrary. But in particularly due to the broad public discussion of the demographic changes ahead and their expected impact on labour markets and social security systems, the majority of citizens accepts that there is a need of immigration of high skilled workers. Since the other EU member states all show more or less similar demographic developments, it is clear that the labour demand cannot be permanently met by immigration from other EU countries. While there is no scope for how to implement the free movement of EU citizens in national law, there is much broader scope of how strict or liberal to implement the directives concerning immigration of third-country citizens into national law. In this respect, compared to a number of other EU member states, Germany followed a rather liberal path, stating only the lowest

minimum requirements (for more on this see SVR 2015). In the EU-28 the labour force encompasses about 215 million people aged 15 to 64 years (BA 2016a, Anhangtabelle 4). In 2015 in Germany there were 30.1 million employees subject to social security contributions, of which 9% were non-German citizens. Of these 55% were EU citizens and 45 % third-country nationals (see Table 3).

Table 3: Employees according to Citizenship (30.06.2015)

	Total	In percent
Total	**30,771,297**	**100**
German citizens	27,925,888	90.8
Non-German citizens	2,829,470	9.2
EU Citizens	1,565,110	5.1
Third-country nationals	1,264,360	4.1

Source: Own compilation according to BA (2016b, Table 2).

Nevertheless, there remains a clear segmentation in the current German immigration law and its rules regulating labour market admission. Following the priority EU law, EU citizens and their dependents enjoy freedom of movement and free admission to the German labour market. In contrast to that, third-country nationals have to fulfill the requirements of the German Residence Act, which are quite complex. Not surprisingly, there is only a small number of residence titles issued to third-country nationals for employment reasons (7%), while the majority is for family reunification (12%) or for humanitarian reasons (35%) In total 518,802 residence titles were issued in 2014 (BAMF 2015b, p.79, Figure II-e,).

Depending on the statistics used, between 28.000 and 70.000 residence permits for employment were issued in 2015 (see Table 4 and BAMF 2016b, p.17, Table 6). Of these only about 15% to 20% were issued to foreign researchers or to third-country nationals with a university degree.

Following from these data, the complexity of the immigration law for third-country nationals seems to be overwhelming, leading to low numbers of residence permits issued to university graduates and highly skilled workers.

Table 4: Immigration of Skilled and Highly Skilled Third-country Nationals

Residence title	2009	2010	2011	2012	2013	2014	2015
Sect.18 (4) Res.Act Skilled workers	14,816	17,889	23,912	23,191	17,185	19,515	18,994
Sect.19 Res.Act High Skilled workers	169	219	370	244	27	31	31
Sect.19a Res.Act and sect.2 (1) No.2a Empl.Reg. EU Blue Card, certain occupations	-	-	-	1,387	2,786	3,099	3,786
Sect.19a Res.Act and sect.2 (1) No.2b Empl.Reg.or sect.2 (2) Empl.Reg. EU Blue Card, shortage occupations	-	-	-	803	1,865	2,297	3,006
Sect.20 Res.Act Researchers	140	211	317	366	444	397	409
Sect.21 Res.Act Self-employed	1,024	1,040	1,347	1,358	1,690	1,781	1,782
Total	**16,149**	**19,359**	**25,946**	**27,349**	**23,997**	**27,102**	**28,008**

Res.Act = Residence Act, Empl.Reg. = Employment Regulation

Source: BAMF (2016a, p.90, Table.3-17) (own translation, M.E.).

This is also mentioned as one of the main reason by the German Social Democratic Party as they presented a *Draft Immigration Statute* in November 2016 to the public (for the following see SPD Bundestagsfraktion 2016). But this draft has not yet been introduced to the German parliament. By implementing a hybrid point system based on an annual contingent of work permits, modelled according to the Canadian immigration system, university graduates and high skilled workers should be offered a more transparent and less complex system for admission to the German labour market. The procedure should work as follows: (1) A foreign worker applies at an online platform to a point-based ranking scheme. In five categories a maximum of 100 points can be reached, with a minimum threshold for 65 points for university graduates and 60 points for high skilled workers. Labour market demand is given high priority by awarding 25 points if an applicant has a job offer according to his or her qualification. Human capital aspects consider formal qualifications (with a max. of 35 points for university graduates and a max. of 30 points for high skilled workers) and language skills (for high skilled workers German language skills are weighed higher than for university graduates). Finally, belonging to the age cohorts younger than 50 years can account for up to 10 points, and other factors making successful integration more easily, like graduating in Germany or having work experience in Germany, as well as family ties to Germany, account for up to another 15 points (SPD Bundestagsfraktion 2016, p.36f.). (2) A ranking is generated by the applicants, with those within the limits of the quota being invited by one of the German representations abroad to apply for a visa to Germany. The representations abroad then check the accuracy of the statements made in the online application and carry out a security check. In addition, the Federal

Employment Agency has to give its consent which should be granted after a positive check on whether the working conditions are equivalent to comparable positions in Germany. There is no priority check. (3) If these procedures are positive, the applicant gets a three year residence permit for work in Germany. After these three years a permanent settlement permit is possible. In addition, immigrants successful in this procedure can bring with them their spouse and children, given a secured living. However, in the first five years of residence in Germany access to certain social security benefits, for which no contributions are paid, is limited.

The quota for the number of foreigners should be fixed each year by the German Bundestag and Bundesrat, taking into account the respective labour market situation. For the first year after introduction, the SPD proposal suggests the quota to be set to 25.000 work permits.

The draft statute also includes the possibility to get a one year residence permit for job search through this point system, if the quota is not yet exhausted. In addition, it facilitates access for skilled workers with a job offer in allowing them to carry out the procedure for recognizing the equivalence of their skills with German occupations during their first year of work in Germany. So far, this procedure has to take place before getting a residence permit for work. Moreover, the draft extends the possibility for skilled workers with no formal vocational qualifications to enter the German labour market by referring explicitly to the European Qualifications Framework for Lifelong Learning (EQF n.d.). Based on the job description of an applicant's job offer, it is possible also to recognize informally acquired vocational skills. This gives also foreigners from countries with no formal vocational training system a chance of entering the German labour market.

For the beginning, the access to the German labour market by this point-based system should be parallel to the regulations of the Residence Act (see section 2.3 above), but over time regulations should be integrated into this new points-based immigration system (SPD Bundestagsfraktion 2016, p.13).

3. Two Normative Approaches to the Economic Analysis of Immigration Law

Although there is a broad literature on migration economics, which roots in labour economics, international economics and financial economics,[5] so far there is no coherent theory of the economic analysis of immigration law.[6] Therefore, in the following we present two different

[5] For an overview see Bansak/ Simpson/ Zavodny (2015), Bodvarsson/ van den Berg (2013), Borjas (2014, 2015), Chiswick/ Miller (2015), Constant/ Zimmermann (2013).
[6] See for example Chang (2015) where only 4 out of 24 articles deal with immigration law as such, while the other 20 articles are about migration economics.

approaches by Epstein and Cox/Posner which then are applied to analyse the German immigration law in section 4.

3.1 The Rules-based Free Market Approach by Epstein

Epstein (2013) presents a classical liberal market-based approach for assessing the US immigration law. To this end the uses an analogy of free trade of goods and free immigration of workers. Starting with a closed economy, firstly, he presents the necessary rules for welfare enhancing competition on markets for goods and services. Secondly, he integrates international trade, while finally applying the resulting findings to immigration of workers.

Starting-point of his analysis is the assumption that the main objective of maximum welfare can be gained by a legal and economic order that is based on private autonomy and freedom of contract, since independent parties will only contract voluntarily if this is advantageous for both sides. This however, does not mean that there might arise negative effects from such contracts for third parties. Therefore, the question is raised what types of externalities should be legally allowed or not (Epstein 2013, p.202f.). Following the market failure theory, Epstein argues that all technological negative externalities should be prohibited (that is contracts at the negatives of third parties, deception and cheating) as well as all restraints of competition by cartelization or restraints of free market access by competitors. In contrast to such technological externalities, it is necessary for the market mechanism to work that pecuniary externalities do not lead to an entitlement to compensate for potential loss. Therefore, rivals have to bear losses in profits or sales. Accordingly, trade based on individual freedom of contract might entail negative distributional effects. However, overall competition should generate higher welfare gains for all compared to a mechanism in which cost-benefit calculations among all the actors involved are carried out for each transaction (Epstein 2013, pp.203-207).

Following these findings, Epstein (2013, pp. 207-210) asks in a next step what modifications should be made given an open economy with international trade. While all citizens within a state have the same rights, this is not the case in regard to foreigners:

> "Just as the owner of private property is entitled to exclude all others from his possessions, so the government in charge of a nation is entitled as a matter of principle to exclude all other individuals, and the goods and services of all other individuals, from within its borders" (Epstein 2013, 208).

What then does this statement mean for international trade and in particular, what kind of trade policy is best suited to maximize the welfare of the citizens? According to Epstein, the same principles should be followed as those best in a closed economy:

> "Once the matter moves from the question of sovereign entitlement to the question of sound policy, the same conclusion that holds domestically applies internationally. If the issue is trade in goods and services: use internationally the same regime of freedom of contract, subject to the same limitations applied domestically. The corollaries thus follow from the basic premise. (…) Prevent those actions that pose threats of the use of force and fraud against local inhabitants by keeping, for example, contaminated goods from being sold in domestic markets. Enforce the antitrust laws against foreign monopolistic practices. Resist cartelization efforts by foreign nations …" (Epstein 2013, 208f.).

Each limitation of private freedom of contract not only hurts foreign competitors, but also domestic actors, since they are not allowed to purchase goods at lower costs or in better quality. Thus, the trade policy of a country should follow the same rules as those effective in domestic competition. Domestic competitors should get no special protection for loss of sales or profits by foreign rivals through quotas, customs duties or other restrictions on free trade. Otherwise the long-term competitiveness of domestic companies is endangered:

> "As a matter of first principle, it is clear that no private firm should ever be allowed to block by force trades entered into by its competitors. In like fashion, no nation should act as an agent for domestic groups by imposing similar restrictions, for the forcible interference with advantageous relations is as questionable in international relations as it is when done by private individuals" (Epstein 2013, 209f).

Finally, Epstein asks whether the result changes if not markets for goods but for labour are analysed. Starting with the finding of migration economics that immigration of workers show net benefits for the receiving countries, in his view immigration law should be modelled according to the same principles than regulations allowing for free international trade:

> "…having open borders with respect to labor mobility to promote the same form of competition in labor markets that is found in product markets" (Epstein 2013, 211).

If there is free access for workers across borders, international migration flows will equalize marginal productivity of labour over different locations. International mobility of capital will not have the same effect.

Therefore, restraints on the free movement of labour are reasonable only to prevent negative technological externalities and restraints of competition, but not to protect domestic workers from wage competition by foreign workers. To cope with the possible negative distributional effects redistribution by means of a (progressive) tax system should take place (Epstein 2013, S.206). Thus, immigration law following such a liberal market-based approach should entail regulations

> "…that allows new laborers to come into the United States, with no promise of citizenship, so long as they have proof that they can support themselves while here. That condition should not limit these foreign persons to serving as employees for a sponsoring employer. Letting foreign entrepreneurs enter the country could easily expand job opportunities for other workers in firms organized, funded, or staffed in whole or in part by foreign

> entrepreneurs. (…) what is needed is a per se rule on the use of foreign laborers. If there is need for any aggregate limitation, it is better done by a bid system than a case-by-case allocation" (Epstein 2013, 217).

This said, Epstein does not rule out that immigration of foreign workers cannot be equated with inflow of goods produced abroad, since there are other types of externalities involved. These justify additional restrictions, however, they should restrict labour market access only if necessary. More often, regulations in other fields are more appropriate. For example, free movement of labour might lead to problems with public goods like public health (risks due to contagious diseases) or public security (risks caused by immigration of terrorists). There might be additional negative externalities due to congestion of public services like education or social security benefits. However, such problems can be better addressed by tailor-made restrictions on access to these goods and services than by a general ban on labour market access for foreigners.

Furthermore, there might be special problems for wealthy smaller states. If there is an incentive for foreigners to gain citizenship rights, there might be domestic changes endangering the specific institutions of a country. As a consequence he advocates for decoupling labor immigration and naturalization issues. The Gulf States, for example, do not allow labour migrants permanent residency, nor marriage with domestic citizens nor naturalization.

> "What the program does is separate out the economic issues from the political issues by allowing extensive activity on the former without making any commitments on the latter. It is possible to run the partition system in ways that disentangle economic competition from political issues, such that the question remains how best to address those competitive issues" (Epstein 2013, 215).

In regard to the US immigration law Epstein finds that its complexity is mainly a means of protecting American workers from competition by migrants. Therefore, it does not meet the principles stated by him for a welfare maximizing immigration law.

As a result, Epstein (2013, 222) finds that freedom of contract and the implicit openness for international trade and immigration shows positive welfare effects. But interest groups are successful in the political process in introducing restrictions both on free trade and free immigration. Accordingly, most countries have similar welfare reducing restraints. However, Epstein is convinced that "(t)he nation that liberalizes its policies along the lines suggested here will do well no matter what policies other nations adopt on their own" (Epstein 2013, 222).

To summarizes, without denying market failures and negative distributional consequences Epstein stresses the importance of a rule-based, the freedom of contract respecting migration policy which does not give in to distributional interests.

3.2 The Static Neoclassical Maximization Approach by Cox and Posner

Cox and Posner (2007, 2009 and 2012) present a static neoclassical maximization approach, which also sees market failures as the main reason for regulating immigration.[7] But while Epstein points to negative technological externalities, Cox and Posner focus on information asymmetries and the resulting market imperfections.

In both approaches the state (the government) the ultimate competence to grant rights to non-citizens (outsiders), which can differ fundamentally from those granted to citizens (insiders). In both approaches the ultimate objective for optimal regulation of immigration is to maximize the welfare of the citizens. However, Epstein follows a market-based approach, where the state only sets the fundamental rules for competition and does not interfere in the market process from case to case. In contrast to that, Cox and Posner (2009) derive the optimal migration law from the 'value' individual migrants have for the citizens (Posner 2013, p.290f.).

Cox and Posner (2007) see the state similar to an employer. Accordingly, immigration law is seen in analogy

> " … (1) as a screening device for distinguishing desirable migrants and undesirable migrants, just as employers use screening devices for distinguishing desirable job applicants and undesirable job applicants and (2) as a method for controlling the behavior of migrants after they are admitted, just as employers use contracts to control workers" (Posner 2013, p.205).

The individual regulations of the immigration law should help to solve the problems resulting from information asymmetries between migrants and citizens, since

> „… the problem for the state is that migrants have private information both about their characteristics and about their behavior. The state needs to elicit that information in order to advance its goals" (Posner 2013, pp.295f.).

Thus, public immigration authorities are confronted with the same problems as an employer in regard to recruiting a worker, about whose characteristics and behavior information is limited ex ante. However, such information imperfections can be reduced by so-called screening activities ex ante – that is before contract conclusion – like searching for additional information, and ex post – that is after contract conclusion – by optimal contract design like fixed-term employment contracts for a start (Posner 2013, p.296).

Applying this approach from labour economics to immigration regulation analogous to workers, migrants fall into two groups where "the good type of immigrant is the immigrant with two major characteristics: (1) skills that are valuable for domestic employers and (2)

[7] In the following we mainly refer to the overview article by Posner (2013) in which he presented the main arguments developed by Cox and Posner (2007, 2009, 2012) in a very concise way.

assimilability" (Posner 2013, p.297). For high skilled immigrants their level of skills is crucial, while for low skilled immigrants the question of whether they can assimilate is decisive: „… given the surfeit of unskilled workers around the world, the goal then is to choose immigrants who are most readily integrated in society" (Posner 2013, p.297). To give access to the US only to immigrants from the target group, it is the strategy of the government "… to condition admission on proof that a potential migrant belongs to the right type" (Posner 2013, p.297).

Provisions of the immigration law which should reduce the informational advantages of applicant immigrants can be classified accordingly as belonging to the ex ante approach or to the ex post approach, with the former adequate to select the optimal immigrants from the high skilled applicants and the latter adequate to choose the welfare-maximizing immigrants from the low skilled applicants:

> „Under the ex ante approach, the government examines information about characteristics of the potential migrant that exist at the time of entry: education, language skills, past experience in the United States, criminal record, and so forth. (…) Under the ex post approach, the government permits the migrant to enter on a temporary or conditional basis and then extends the period of the visa if the migrant shows that he can prosper in the United States - by obtaining a job, making relationships, joining community organizations, learning English, and engaging in other actions that demonstrate assimilability" (Posner 2013, pp.297f.).

To cope with the problem of moral hazard that is of behavioural changes after being admitted to the US, optimal contract theory can be applied (Cox and Posner 2009). By monitoring such moral hazard behavior can be reduced or even prevented (Posner 2013, p.298). In regard to immigration law provisions to cancel residence permits and deportation in case of criminal delicts fall under this category.

Depending on the economic situation and the business cycle the value of immigrants might decrease for the receiving country over time. Accordingly, residence rights could be designed discretionary to take into account such changes, thus terminating residency independent of the behavior of an immigrant (Posner 2013, pp.299f.). However, there are constraints for the receiving country to apply such one-sided decisions in a discretionary way. Immigration entails direct and indirect costs for migrants. Besides, investing in country-specific activities like language acquisition by immigrants also has benefits for the receiving countries. Therefore, rational migrants will apply only if they are granted legal certainty for their stay so that they do not end up in a hold-up position where their investment does not pay off (Posner 2013, pp.294f.). Thus, the receiving country should design ist immigration laws accordingly:

> "… the government benefits if migrants make country-specific investments. But migrants will be reluctant to make country-specific investments if they believe that they may be

> removed for any reason or no reason (…). Thus, it is important for the state to commit in advance that it will remove migrants only under specified conditions, including bad behavior by the migrant, but also - if it is desirable - economic downturn and war" (Posner 2013, p.299).

But just as the discretionary character of the immigration law derived from the changing value of certain migrants for the receiving country can account for a limitation of their rights, the contrary might be the case for such immigrants who are deemed particularly valuable, like for example very high-skilled migrants:

> „… rights should increase as the migrants' value for the country increases, especially where it is desirable to encourage country-specific investment - which is likely to be the case for skilled workers and not, or less so, for unskilled workers. It will also make sense to expand the rights of migrants as their residence in the host country lengthens" (Posner 2013, p.299).

Cox and Posner (2012) also discuss the merits of delegation in the US migration law to third parties like employers, family members, federal jurisdictions as also resulting from information imperfections (Posner 2013, pp.300-302). Such delegation is optimal if decentral actors have better information or more incentives to acquire information than the central bureaucracy. However, such delegation involves agency problems, since objectives by principals and agents will not be congruent.

Immigrating to the US for employment reasons requires so-called sponsoring of an applicant by a potential employer.

> "… in doing so, they signal their support for the applicant to the government and provide evidence that the applicant meets the various criteria for admission. (…) The logical explanation for this approach is that employers have both better information about the skills of potential migrants and better incentives to distinguish the good types and the bad types because the good types will contribute more to their profits" (Posner 2013, p.300).

As a consequence, the following principal agent-problem arises:

> "Employers want to make profits, not advance national welfare, and so they will, for example, invest inadequately in screening where they expect migrants to quit shortly after admission" (Posner 2013, pp.300f.).

Following Posner, the provision of the US immigration law that "… making the migrant's continued presence in the country (roughly) conditional on continued employment with the sponsoring employer" (Posner 2013, p.301) is a – partial – solution to this agency problem. Additional provisions could be

> "… for example, employers may have little interest in ensuring that workers are likely to assimilate as long as they contribute to the bottom line. One can imagine rules that would improve employers' incentives, for example, by making them financially responsible when sponsored migrants commit crimes or stop work" (Posner 2013, p.301).

3.3 A short comparison

Comparing the liberal market-based approach by Epstein to the economic analysis of immigration law with the static neoclassical approach by Cox and Posner shows both similarities and differences.

Both approaches are normative, they do not aim at a positive explanation of why and how the current US immigration law came about, but how the given regulations should be assessed from a normative economics point of view. In addition, both postulate without questioning it that the government of a country is entitled to grant rights to foreigners in regard to access the country and what activities to follow there. Both approaches postulate as the ultimate objective of the government to maximize national welfare. However, they differ in their underlying notion of competition. Epstein follows a liberal market-process oriented approach according to which the state should only provide for the basic legal rules ensuring competition to work. Given legal certainty, individual liberty and freedom of contract will bring about maximum welfare for all, notwithstanding shot-term losses for single actors. This includes immigration law and immigrants competing with domestic labour. In contrast to that, Cox and Posner follow a notion of competition according to which legal rules should be changed whenever the value of immigrants for the receiving country changes whatever the reason so as to maximize national welfare. This implies broad discretionary scope for the government and permanent interventions in labour market regulation, for example. Both approaches to not assume governments to be self-interested.

But even though both approaches focus on market failure as the main reason for regulating immigration, from their analyses follow fundamentally different legal rules for immigration to be optimal.

For Epstein, individual freedom of contract will maximize not only in regard to the domestic economy, but also with respect to international trade and freedom of movement. Regulations are only necessary in case of public goods, negative technological externalities and to ensure free market access and to prevent restriction on competitions. In addition, rivals not successful in competition should be prevented from pushing through their distributional self-interest by restricting immigration law. Thus, Epstein advocates a rule-based policy. In contrast to that, discretionary case-by-case decisions would constrain the market mechanism from working, thus allowing distributional interests to dominate. Nevertheless, Epstein sees such interests dominating migration laws in many countries: „It is only the dysfunctional public choice dynamic within virtually all countries that leads to the same suboptimal approach for the same reason" (Epstein 2013, p.222).

Cox and Posner concentrate on information imperfections, while not discussing other forms of market imperfections. They see the single regulations of the US immigration law as optimal solutions for given information problems in regard to the characteristics and behavior of migrants. They do not deny that there are also information imperfections given for the state which they see as being optimally solved through delegation to third parties, although this might imply principal agent problems. In contrast to Epstein, they do not mention interest groups being able to push through their distributional interests by limiting competition. Cox and Posner do not discuss the possibility of state failure, they implicitly assume that the government is able to discretionary set legal rules for immigration in a way that always maximizes the net benefits of the US citizens. By restricting freedom of movement "(m)igrants will reduce their country-specific investments relative to an absolute guarantee, but the level will be *optimal* given the government's uncertainty about the future" (Posner 2013, p.299) [author's own emphasis].

Finally, Cox and Posner address the importance of integration by immigrants to the receiving country, which Epstein does not mention at all.

4. The Economic Analysis of the German Immigration Law …

In the following we apply the two approaches presented in section 3 to the German immigration law following its presentation in section 2.

4.1 … for EU Citizens, for EEA Citizens and for Citizens from Switzerland

Following Epstein' liberal rules-based free market approach, the German immigration law for EU citizens and those treated equally from EEA countries and from Switzerland is exemplary. EU citizens and those treated equally enjoy unrestricted freedom of movement for labour. Thus, they have unlimited access to the German labour market, independent of individual characteristics (like a particular qualification or skill level) or of the respective economic situation or business cycle. There are no limits on the freedom of contract between employer and employees other than those which are valid for German citizens, too. There is no priority check nor has a labour contract be checked on comparability by the FEA before immigration is allowed. Accordingly, EU citizens compete on a level playing field with German citizens. Potential externalities, in particular with respect to social benefits are addressed by Sect.2 Freedom of Movement Act/EU, which restricts certain social transfer payments. Accordingly the German immigration law for EU citizens is rule-based, restriction by domestic competitors are not possible. Thus, freedom of movement should increase competitiveness and thus lead to higher welfare.

In contrast to that, it seems doubtful when following Cox and Posner whether this unregulated access of foreign workers maximizes national net benefits in each instant. However, Cox and Posner presume quantitative restrictions on labour market access so the question arises for them according to which criteria workers work permits should be issued so as to select the best available applicants. Since there is no statutory restriction on access for EU citizens to the German labour market, this approach does not apply.

But one can use the argumentation of Cox and Posner for an economic justification of Sect.2 (2) Freedom of Movement Act/EU according to which a permanent settlement permit can be granted after 5 years. Firstly granting only a temporary residence permit, while a permanent settlement permit can be awarded after some time serves two purposes from an economic point of view. It sets incentives for immigrants to make country-specific investments, which pay off only after a longer stay in the receiving country – like it is the case with language skills. In addition it allows the receiving country to collect information about quality and behavior of an immigrant ex post to distinguish between the "good type" (Posner 2013, p.296) from the less productive one.

4.2 … for Third-country Nationals

In contrast to EU citizens and those treated equally, third-country nationals have to meet a number of requirements to get access to the German labour market. As described in section 2.3 and 2.4 above the requirements depend mainly on the skill-level.

For unskilled third-country nationals there are three ways to get admission to the German labour market. The mechanism given in the Residence Act *to get a residence permit for employment* requires one to belong to certain countries for which special agreement exist (like Albania and the successor states of the former Republic of Yugoslavia) and that one has a concrete job offer by a German employer. To find such a job, no residence permit for job search is issued, but of course one can enter Germany on a tourist visa to this end. In addition recruitment agencies operate in the respective countries. Another way is by *family reunification*. Third-country nationals which are directly related to an EU citizen enjoy freedom of movement for the German labour market according to EU law as implemented in the Freedom of Movement Act/EU. Third-country nationals directly related to a German national also enjoy freedom of movement according to the provisions of the Residence Act. If third-country nationals are directly related to another third-country national who has a residence title, they only get a residence permit if secured means of subsistence can be proven. This also grants unhindered access to the German labour market. A third way to get access to the German labour

market also for unskilled workers is through the *asylum mechanism*. Applicants with a positive decision have unrestricted access to the German labour market for the time granted in their residence permit. Applicants for *a*sylum as well as persons whose application is negatively decided can get unrestricted access to the German labour market independent of their qualifications and educational level depending on certain restrictions (see Table 1 in section 2.3 (3) above). These regulations have been modified discretionarily again and again over time depending for example on the labour market situation, the number of asylum applicants and public opinion and domestic politics. Given the high number of asylum seekers entering Germany in 2015/16 and the positive labour market situation with a high number of vacancies for low skilled workers and severe problems in some industries to fill apprenticeship training positions, requirements for admission for applicants as well as for persons with a temporary suspension of deportation were eased with the Integration Act in mid-2016. However, by changing implementing regulations the Federal states [Bundesländer, M.E.] can interpret these provisions discretionarily. Given the pending elections ahead and the domestic public debate on migration by third-country nationals, this is indeed happening, although small and medium-sized companies lobby for an easy access of highly motivated third-country nationals.

Skilled workers can more easily get a residence permit for employment according to the Residence Act. However, they have to overcome a number of barriers first. As a rule (1) one must find an employer with a concrete job offer for an occupation that is in line with one's vocational qualifications. (2) These must be recognized as being equivalent to German occupations. The relevant documents have to be provided in German translation, with the recognition procedure being carried out by different organizations like the Chambers of Commerce or Chambers of Crafts, depending on the respective occupation. A decision should be reached within 3 months after submission of the complete documents. As the data show, the mean is 59 days for making a decision, with 80% of all request being settled within 3 months (Vollmer 2015, pp.23f.). (3) The priority check by the Federal Employment Agency (FEA) must be negative in that no German or EU citizen is available for this job offer. To this end, the job is put online at the job portal of the FEA. If within 2 weeks there are not German or EU applicants the priority check is passed. In a number of cases there is no need for such a priority check, this holds in particular if the respective occupation is on the current *Positive List* of the FEA, showing regional skills shortages. But even in this case, (4) usually the FEA has to consent the job contract by checking that payment and working conditions are comparable to the local labour market. Following these steps, the Aliens Authority decides on the issuance of

a residence permit, which can be extended in a number of cases, and eventually leading to a permanent settlement title.

For *university graduates* this procedure is facilitated in a number of ways, allowing easier access to the German labour market. They also face easier access to a permanent residence title, which then implies unrestricted labour market admission.

The same holds for a number of occupations as well as for posted workers or for workers from countries where special intergovernmental agreements exist with Germany.

Following *Epstein*, the complexity of the provisions regulating labour market admission for third-country nationals cannot be justifies alone by recourse to limit negative technological externalities. It implies high information and transaction costs both for the job applicant as well as for the domestic employer. This results in severe barriers of entry to the German labour market for potential workers. Accordingly, this can be read as a means of market foreclosure to reduce competition and to ensure distributional rents by domestic labour supply.

In contrast to that, using the arguments provided by Cox and Posner a number of these provisions can be interpreted as means to reduce information asymmetries about characteristics and behavior of non-domestic labour, which might reduce resulting market imperfections. However, such means should be applied only if the resulting benefits are higher than the costs involved so that they lead to positive net benefits for domestic citizens. In this view, the rules to gain labour market access should ensure that only the most productive persons are selected from those applying. Thus the more valuable a third-country national is from the point of view of the domestic economy, the easier he or she should be granted a long-term residence and work permit. In addition, Cox and Posner argue that for high skilled workers means to reduce ex ante information asymmetries about their characteristics should play a prominent role in the selection process, while for low skilled workers means to reduce ex ante information asymmetries about their behavior after immigrating, that is their ability to assimilate, should be in the focus.

In principle, there is no admission for unskilled workers to Germany from third countries. Thus, incentives are strong to apply for a residence title for family reunification or for humanitarian reasons which also grants admission to the German labour market. To restrict incentives for an inflow of unskilled family members, a number of provisions apply. In particular, usually only spouses and children are allowed to follow subsequently. To prevent negative externalities for the social security and the tax-financed transfer systems, in most cases secured means of

subsistence and sufficient living space have to be proven. And finally, to ensure the ability to integrate in Germany at least language skills on the A1 level of the CEFR are required.

Admission to the German labour market is also granted for unskilled persons if they are recognized in the asylum procedure. Thus, there are also strong incentives to try this access for admission for third-country nationals. In 2015 more than one quarter of all applications for asylum were filed by persons from Serbia, Macedonia, Bosnia and Herzegovina, Montenegro, Albania and Kosovo who had no realistic chance of being given a positive decision on their asylum application (with nearly 90.000 of the more than 120.000 applicants coming from Albania and Kosovo, see BAMF 2016c, p.18). To correct incentives and prevent immigrants from these countries to use the asylum procedure to seek admission to Germany, a temporary exception is enacted in the Employment Regulation granting labour market admission even for unskilled workers without priority check by the FEW as long as they can present a domestic job offer (Sect.26 (2) Employment Regulation and section 2.3 above). As the current figures in particular on asylum applications from Albania and Kosovo show the incentives work, since figures have decreased enormously (BAMF 2017b, p.1).

As a consequence both due to the rather positive labour market situation and the change in migration policies as described in section 2.4 above, integration of refugees in the labour market is now supported more than in the past. Ban on employment is shortened and provisions of active labour market policies are open also for refugees given certain requirements are met (see section 2.3 (3) above). This holds in particular for refugees from certain countries where the probability of a positive decision on their asylum application is very high, given the situation in their home country. Currently, this is the case for refugees from Syria.

While low skilled persons have only a very limited chance to get a residence title for employment, the main part of the respective legal provisions address skilled and high skilled persons. Thus, the complexity generated by the multilevel procedure to get a residence permit for employment as described above can be seen as a means to ensure to select only the most productive workers. Not only have they to provide a job offer by a domestic company which delegates at least some competence on checking their skills and qualifications, and thus their employability from state authorities to private actors. What is more, an immigrant’s vocational qualification or university degree has to be recognizes by the competent German bodies as being equivalent to formal qualifications attainable in Germany. This raises time and transaction costs for immigration. Since the German educational and training system relies heavily on formal certifications, this increases uncertainty and discretionary scope in deciding on skills and

qualifications of immigrants from countries with rather informal educational systems without elaborated vocational training systems. Domestic employers bear the resulting costs from these recognition procedures in part, since they cannot be sure that the FEA and the Aliens Authority will in the end accept the immigrant applicant they have chosen for a certain job.

Since there are no quotas for immigrants to Germany - as it is the case in the US, the priority check of the FEA can be seen as an instrument to discretionary ensure that employment by immigrants is compatible with the German labour market situation. The *Positive List* which states shortage occupations grants exceptions to this procedure, thus reducing time and transaction costs for checking on the admission of immigrants with scare and thus more valuable skills. However, it is questionable whether this additional check on the labour market situation is really necessary and why it should not suffice that an immigrant presents a job offer by a domestic company. The FEA usually has to consent to the employment of an immigrant. This consent is granted only if the concrete work contract offers wage and working conditions comparable to that available for domestic employees for similar jobs. Since such an offer makes sense for the employer only if there are no domestic workers available, because it entails higher costs for him, too. Thus, the economic rationale behind both the priority check as well as the rather complex and resource-intensive practice to filter shortage occupations for single regional labour market districts by the FEA seems to be to raise additional barriers for employment by increasing costs for both parties in an employment relation.

A vast number of provisions favour high skilled workers by providing them with easier admission and giving them a fast-track to a permanent settlement title with then unrestricted access to the German labour market. From pint of view of Cox and Posner this seems to be reasonable. Firstly, it allows to cope with ex post behavioural information asymmetries. Secondly it sets incentives for immigrants to undertake long-term country specific investments, like acquiring the German language. Such investments increase productivity, but require a long-term perspective to pay off. Although this should set positive incentives to attract high skilled workers, the complexity of the system seems to make it not that competitive – at least when looking at the figures for residence titles issued to highly skilled immigrants (see section 2.4 above).

5. Summary and Outlook

Current German immigration law shows a clear segmentation with unrestricted access for EU citizens, while for third-country nationals there is a complex system of rules to gain admission to the German labor market which causes high transaction costs and sets a number of adverse

incentives. This holds even for high skilled immigrants. A number of requirements must be met, like a job offer by a domestic employer which suits the qualification of the immigrant, no priority for German or EU citizens for that position or skills shortages in a particular occupation and regional labour market district.

The two approaches to the economic analysis of immigration law both justify restrictions of labour market admission for immigrants with market failure (negative technological externalities resp. information imperfections. However, applying these approaches to the segmented German immigration law yields contrary results. The liberal market-based approach of Epstein favours a rule-based, the freedom of contract respecting immigration law, which should promote a country's competitiveness and thus the welfare of its citizens. From this perspective the unlimited freedom of movement for EU citizens is positive. And there is no sound argument why third-country nationals should be treated differently. According to this view, the complexity of the admission regulations applying to third-country nationals only limits market access and thus restrains competition. Whether this has much impact, given the effective unlimited access of EU citizens to the German labour market seems to be very questionable.

In contrast to that the static neoclassical maximization approach by Cox and Posner justifies even complex immigration regulations to reduce information imperfections. They favour a discretionary approach, according to which regulations should depend on the respective value of an immigrant for the domestic population. However, when applied to the German immigration law for third-country nationals the respective rules imply to carry out very time consuming bureaucratic procedures, resulting in very high information and transaction costs. In addition, the complexity of the legal rules as well as the uncertainty resulting from the discretionary power of the different agencies involves, again increase information imperfections.

The reform proposal by the Social Democratic Party on introducing a point-based hybrid admission procedure for high skilled workers might help to correct some of the adverse incentives of the current German immigration law for third-country nationals. According to the draft proposal it provides a more transparent admission procedures with clear requirements. The invitation to apply for a visa, which will be expressed only if one's ranking position lies within the quota, allows for a more rule-based and less resource consuming access. In general, the priority check by the FEA should be abandoned, thus, reducing costs resulting from the uncertainty involved in the decision of the FEA. Moreover, more weight is given to domestic

employers' entrepreneurial choices, reducing bureaucratic impact and relying more on market mechanism and less on administrative planning.

That the still necessary official recognition of an immigrant's qualification might take place within the first year of his or her stay in Germany also reduces uncertainty and costs for both the applying immigrant as well as the domestic employer. In addition, the temporary residence required before issuing a permanent settlement permit is reduced to 3 years, with additional facilitations for family reunification. These provisions should also attract in particular younger immigrants for which a long-term perspective including their family is of particular importance.

However, it is doubtful whether this point-based hybrid system really decreases complexity of the German immigration law for third-country nationals. Since it should supplement, but not replace the current complex system of admission rules to the German labour market, it might introduce additional complexity, although it pursues the contrary objective. Moreover, it is doubtful whether this proposal will gain the necessary political support to be enacted. Neither Epstein nor Cox and Posner present a positive theory of the evolution of immigration law. However, a number of authors argue that distributional concerns of the electorate of the receiving country have to be taken into account for the immigration law in place (see for an example Freeman/ Kessler 2008 or Hanson 2009). Thus, actual immigration law is not necessarily optimal form a pure normative economics point of view.

Following the findings of migration economics, liberalizing labour markets should result in overall welfare gains. However, the distributional effects would be but uneven. Therefore to mitigate the tension between efficiency and distribution what is missing are mechanisms to compensate those that lose from international migration and liberalizes labour market access. Following Hatton (2007) and Sykes (1992, 2013) mechanisms must be developed on a global basis, to foster international cooperation in regard to migration. Institutional arrangements to promote collective action – for example similar to the World Trade Organisation – are required to overcome the obstacles of exploiting the welfare generating effects of migration. However, given the current global political climate, which is more in favour of protectionisms, it is doubtful whether and when such institutional change will occur.

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