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The Regulation of Immigrant Labour in Spain: Ordinary Migration & Selective Migration

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Abstract Purpose. The paper calls for a unitary consideration and a single standard for the conditions of access to the labour market which, respectful of human rights, take into account International Migration Law.

Design/methodology/approach. This paper stands for a more comprehensive configuration of the share of workers annually set and authorised by Spain, combined with less restrictive migration policies, sustained on the basis of the international agreements signed by the Spanish Government and the European Agenda on Migration.

Findings. Despite the difficulties, in recent years International Migration Law is clearly oriented towards promoting respect for and support to the rights of immigrant workers. However, national laws and practices often contradict this trend.

Research limitations/implications. The research contributes to the debate on International Migration Law.

Originality/value. The paper provides further material for an ongoing discussion about how migration laws should benefit migrant workers.

Paper type. Issues paper.

Keywords: *Migration, Labour Law, Labour market, Selective migration, Migration of entrepreneurs and investors, Migration of Highly Qualified Professionals*

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1. Introduction

The attraction of human talent and investment has always been a legitimate aspiration of every society. The way and the terms in which it occurs is of course another issue. From a historical point of view, Spain is not known for retaining its human talent. The most recent example of this can be found in recent data published by the Instituto Nacional de Estadística (INE, Spanish Institute of Statistics), which have revealed that, in 2012, the percentage of young people aged 20-29 leaving Spain – confronted to the reality of an unemployment rate of 56.14 percent within this age group– had increased by 40.9 percent with respect to the previous data of 2008, the first year of the economic crisis in this country.

As is well known, the Amsterdam Treaty (art. 79) granted the European Union (EU) the competence to establish binding rules in relation to the migration of all categories of third-country nationals, i.e. citizens from countries not belonging to the European Union or not especially connected with it. Those Community measures and their transposition to the legislation of each Member State of the Union must obviously conform to the principles and rights acknowledged by the European Convention on Human Rights and the European Charter of Fundamental Rights (Groenendijk, 2014, 313).

In this context, the EU has issued over these years more than fifty directives and relevant legal documents on both the asylum and migration of third-country nationals. Among these normative standards, and according to the subject of the present analysis, it is particularly important to underline the following two directives: a) 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;² and b) Directive 2014/66/EU, of the European Parliament and of the Council, of 15 May 2014, on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.³

In relation to Council Directive 2009/50/EC, the Spanish Government made its transposition, together with that of another eight Community directives on immigration matters, through the passing of Organic Law 2/2009, of 11 December, reforming Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration,⁴ in what has been, so far, the last legislative reform of this

² OJEU L 155/17, of 18 June 2009.

³ OJEU L 157/1, of 27 May 2014.

⁴ OSG No. 10, of 12 January 2000.

Law. For the purposes of this work, it is worth noting that the Explanatory Memorandum of Organic Law 2/2009 already highlighted as one of its objectives that of ‘perfecting the system of legal and orderly channelling of migratory labour flows, reinforcing the correspondence of the capacity of reception of immigrant workers to the needs of the labour market’. This ambition fully matched that of Council Directive 2009/50/EC to contribute to the achievement of the Lisbon Strategy objectives –in particular that of transforming the EU into the most competitive and dynamic knowledge-based economic area in the world– by promoting the mobility of highly qualified workers through the admission of third-country nationals for the purposes of highly qualified employment and stays of no less than three months. The so-called ‘EU blue card’, which authorised its holder –accompanied by their family– to reside and work in the territory of a Member State in the terms laid down in that directive, was thus created for this purpose.

It should also be noted that, in addition to establishing the ‘EU blue card’, Council Directive 2009/50/EC acknowledged the competence of the Member States in maintaining or creating new national residence permits for any employment-related purpose, as well as their right to determine the volume of admission of third-country nationals who enter their territory for the purposes of highly qualified employment. The enactment of Law 14/2013, of 27 September, on the support to entrepreneurs and their internationalization,⁵ a norm that opened a new phase in the evolution of migration law, must be understood in this context.⁶ This law did not focus exclusively on the establishment of new rules in the field of immigration law, but, having the main objective of promoting entrepreneurship, regulated a new selective migration channel to facilitate access to Spain to persons with high professional qualifications or a significant purchasing power.

⁵ OSG No. 233, of 28 September 2013.

⁶ This legal norm was subsequently amended by Law 25/2015, of 28 July, on the second opportunity mechanism, reduction of financial charges and other social measures (OSG No. 180, of 29 July 2015). This law introduced new details into the legal regime, and amended the regulations for investors and intra-corporate transfers. In relation to this specific matter, its Seventeenth Final Disposition stated that ‘through this law, Directive 2014/66/EU, of the European Parliament and of the Council of 15 May 2014, on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfers’ was transposed to Spanish Law.

2. Law 14/2013, of 27 September, on the support to entrepreneurs and their internationalization

It is important to underline that the norm facilitating the entry and residence of foreigners ‘on the grounds of economic interest’ (art. 61 of Law 14/2013) was not generated in the context of a reform of the existing legislation on foreign citizens or, more specifically, of its reference norm in Spain: Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration. On the contrary, it was integrated in a law that, according to its Explanatory Memorandum, goes beyond the traditional labour market-oriented approach of immigration policies, to focus on the contribution that immigration can make to the economic growth of the country. This conception of the law is clearly reflected in this statement of the aforementioned Explanatory Memorandum: ‘immigration policies are increasingly becoming an element of competitiveness’. Therefore, this particular approach explains why this law is placed by the legislator in a context determined by the ‘need to undertake reforms favouring economic growth and economic recovery’ and enabling ‘to address structural problems in the business environment in Spain, seeking to strengthen the business fabric in a durable manner’. As its name suggests, the law intends to support, under the current economic crisis, entrepreneurs who develop their activities in Spain, especially during their internationalization processes, by establishing, among other legislative measures, ‘systems especially designed to attract investment and talent, characterised by streamlined procedures and specialised channels’, and allowing to solve the problem associated to the lack of managers capable of leading those internationalization processes. In connection with this justification of Law 14/2013, it is appropriate to take in to consideration the following two facts. In the first place, the use of an ordinary law as a conduit to regulate the entry and stay in Spain of highly qualified professionals reveals an ignorance of the implications that immigration norms have in the field of fundamental rights. Not by chance, the norm regulating the access and stay in Spain of foreign citizens is an organic law –Organic Law 4/2000–, the passing of which requires a qualified majority in the Spanish Parliament, which was not the case of Law 14/2013. One could thus think that the legislative approach of this law is devoid of any consideration on the respect due to the fundamental rights recognised in the Spanish Constitution –all contents concerning fundamental rights must be developed in an Organic Law– and, consequently, to those acknowledged by the Universal Declaration of Human Rights.

Secondly, and in connection with the above, it is interesting to highlight that the law's approach –immigration as an element of competitiveness– has nothing to do with that of Organic Law 4/2000, which considers that 'immigration is a structural and permanent reality' (Monereo Pérez J.L. & Triguero Martínez, L.A., 2012, 5), making thus effective the right to emigration recognised by art. 13 of the Universal Declaration of Human Rights, signed by Spain. The treatment of selective migration is therefore placed in a context devoid of any consideration for the fundamental human rights. It is deemed an issue of economy, linked to the competitiveness of Spanish companies and, ultimately, of Spanish economy itself, since one of the target groups of Law 14/2013 is, in fact, that of the 'investors'. Therefore, art. 61 of this law introduces a new 'international mobility' regime when, as mentioned before, it specifies that access and residence in Spanish territory are granted 'on the grounds of economic interests'.

Which groups of immigrants had the Spanish legislator in mind while configuring this selective migration channel? The law identifies five groups as recipients of this selective channel, from which EU citizens and foreigners whose right to free movement and residence is acknowledged by the EU law –as is the case of the citizens of Norway, Iceland, Switzerland and Liechtenstein– are obviously excluded. Undoubtedly, the identification of those five groups gives an important clue on the idea of capital investment and human talent held by the Spanish legislator.

First of all, the law identified 'investors' as subjects that may enter and remain in Spain under the conditions established by articles 61 et seq. According to this law, the status of investor is acquired by every person intending to make 'a significant capital investment', understood as one including any of the following factors (art. 63):

- a) An initial investment of no less than 2 million euros in Spanish public debt securities, or of no less than 1 million euros in participating or non-participating shares of Spanish capital companies or in bank deposits of Spanish financial institutions. It may also be 1 million euros in investment funds, closed-end investment funds or venture capital funds constituted in Spain, in accordance with Spanish legislation.
- b) The acquisition of real estate in Spain through an investment of no less than 500,000 euros per applicant.
- c) A business project to be carried out in Spain that is proved to be of general interest, which is why the Spanish law establishes that compliance with at least one of the following conditions is necessary: i) the creation of jobs; ii) an investment with a relevant socioeconomic impact on the geographical area where the activity will be developed; iii) a relevant

contribution to scientific and/or technological innovation.

However, the condition of investor is also extended by the Spanish law to all foreign nationals directly or indirectly holding the majority of the voting rights and the power to appoint or dismiss the majority of the board of directors of a company with registered office in a territory that is not considered a tax haven under Spanish law, and making a significant capital investment in this country (art. 63.3 Law 14/2013). The law even establishes that access to the residence visa for investors will be granted to ‘the investor’s appointed representative’ for the management of ‘a project of general interest’, provided that the project meets at least one of the requirements laid down in art. 63.2 c) of the law.

‘Entrepreneurs’ may also benefit from this differential migration channel. For this purpose, the Spanish norm identifies ‘entrepreneurial activity’ – and, consequently, an entrepreneur will be the person who develops it – as ‘any innovative activity of special economic interest for Spain that has obtained a favourable report issued by the relevant Economic and Commercial Office in the corresponding geographical area or by the Directorate-General for International Trade and Investments’ (art. 70.1). The Spanish law also specifies that, for the purpose of the valuation of an activity as ‘entrepreneurial’, ‘the creation of jobs [in Spain] will particularly be taken into account’. It is as well established that, for the assessment of the activity that would justify the entry and residence in Spain of the supposed entrepreneur, such aspects as the following will be valued (art. 70.2): i) the applicant’s professional profile, his training and experience as well as their involvement in the project; ii) the business plan, including the description of the project, product or service, and a market and financial analysis; iii) the added value it represents for Spanish economy, innovation or investment opportunities.

The third category of beneficiaries of this selective migration channel is that of the ‘highly-qualified professionals’ (art. 71). This category includes three different groups of people: a) managers or highly-qualified staff who intend to develop a labour or professional relationship with firms or groups of firms that meet certain characteristics; b) managers or highly-qualified staff participating in a business project under certain conditions; c) graduates and postgraduates of renown and prestigious universities and business schools.

With regard to the first group, managers or highly-qualified staff who intend to develop a labour or professional relationship with companies or groups of companies, the Spanish law links their presence in Spain to the performance of an employment or professional activity in firms or groups of firms with a very specific profile, so this option is not open to any type

of undertaking. More specifically, the Spanish norm considers relevant for these purposes those undertakings or groups of undertakings that display any of the following characteristics: a) an average workforce of no less than 250 workers, during the three months immediately prior to the submission of the application for the residence permit; b) an annual net turnover in Spain of over 50 million euros, or a net equity, also in Spain, of more than 43 million euros; c) an annual average foreign gross investment of no less than 1 million euros in the three years immediately prior to the application submission date; d) a stock value or investment position of over 3 million euros according to the latest data of the Registry of Foreign Investment of the Ministry of Economy and Competitiveness; e) in the case of small and medium-sized businesses established in Spain, the fact that they belong to a sector considered strategic, which is certified by a report issued by the Directorate-General for International Trade and Investment of the Spanish Government.

As pointed out before, participation of the staff in a business project –no mention of companies or groups of companies in this case–, considered and accredited as of ‘general interest’, is also deemed relevant for the purposes of Law 14/2013. However, the project will have to meet the following requirements: a) a ‘significant increase’ in the creation of direct jobs by the company requesting the recruitment; b) the maintenance of employment; c) a ‘significant increase’ in the creation of jobs in the business sector or geographical area where the professional activity is to be performed; d) an extraordinary investment with an ‘important’ social and economic impact on the geographical area where the professional activity is to be developed; e) a relevant contribution to scientific and/or technological innovation; f) the concurrence of interests from the point of view of Spain’s commercial and investment policy.

Fourthly, foreigners who wish to develop training, development, research and innovation activities in public or private entities in Spain may also benefit from this selective migration channel (art. 72). In particular, the Spanish law identifies the following persons: a) research staff, in the terms established in article 13 and the First Additional Provision of Law 14/2011, of 1 June, on Science, Technology and Innovation;⁷ b) scientific and technical staff carrying out scientific research, development and technological innovation work in companies or R&D&I centres in Spain; c) researchers subject to an agreement with public or private research centres, under the conditions set out in the regulations; d) lecturers

⁷ OSG No. 131, of 2 June 2011.

recruited by universities, higher education institutions and research centres, as well as business schools established in Spain, in accordance with the criteria laid down in the regulation.

Fifthly and finally, Law 14/2013 includes as well ‘workers subject to intra-corporate transfers within the same undertaking or group of undertakings’. However, the Spanish norm defines a specific profile for workers who may benefit from the selective migration channel, which involves fulfilling the following requirements: a) an actual business activity; b) a higher education qualification or an equivalent degree, and, where applicable, a minimum professional experience of 3 years; c) a prior and continuous employment or professional relationship of 3 months with one or several of the companies in the group.

It should be noted that the objective of the analysed norm is not only achieved, from the point of view of the Spanish legislator, by creating a specific migration channel for highly-qualified professionals, investors and entrepreneurs,⁸ but by integrating in this channel the so-called ‘intra-corporate transfers’. This is a migration phenomenon in itself, but one with very specific characteristics, since the reason for migration lies in the need of the company with which the immigrant worker has an employment relationship and not so much in personal motivations, as seen in the other three cases.

In relation to this group of immigrant workers, it is important to underline that the legal regime was subject to a significant modification on the occasion of the reform of Law 14/2013 by Law 25/2015. The reason given by the Spanish legislator for this modification was the will to take advantage of the norm to transpose Directive 2014/66/EU (Seventeenth Final Disposition of Law 25/2015). It is not that Law 14/2013 did not reflect some aspects that would later be integrated in the future directive, but it was, evidently, the 2015 Law that culminated the transposition of the Community rule.

In this sense, the 2015 Law registered as a novelty the establishment of two types of residence permits, one for temporary transfers of no more than three years –called ‘EU ICT Intra-corporate transfer work permit’–, and the other for transfers that exceed the aforementioned duration or do not fit into this category. It also specifies –which was not the case in the

⁸ Article 1 of Law 14/2013 defines the object of this law as ‘supporting entrepreneurs and their business activity, to promote their development, growth and internationalization, as well as the entrepreneurial culture and a favourable environment for economic activities, both in their initial stages and in their subsequent development, growth and internationalization’.

original text of the 2013 Law– that such permits may be granted to three specific groups: a) managers, understanding as such every ‘person who has among their duties the management of a company or of a department or sub-division thereof’; b) specialists, meaning a person ‘who has specialised knowledge relating to the activities, techniques or management of the company’; c) and trainee workers, i.e. ‘university graduates who are posted to be trained in the techniques or methods of the undertaking and who receive remuneration for it’.

These intra-corporate transfers may be both individual and collective, so that the law, in its original version of 2013, included the possibility that firms or groups of firms –meeting the requirements of art. 71 a) of Law 14/2013– request the collective processing of the authorizations, according to the planned management of a provisional quota of permits. With the passing of the 2015 Law, however, article 74 of Law 14/2013 was reformed with the purpose of further facilitating the joint management of intra-corporate transfers and established that business organizations may be registered in the so-called Large Companies and Strategic Groups Unit (art. 74.2 of Law 14/2013). This unit is actually a register of companies and groups of companies fulfilling the requirements laid down by the Spanish law in order to request the above-mentioned intra-corporate transfer. With this instrument, the law seeks to expedite the processing of the corresponding visas and authorizations.

3. Ordinary migration and selective migration, two concepts that should not be opposed

The aforementioned Directive 2014/66/EU recalls, in its first recital, that the Treaty on the Functioning of the European Union reflects the Community claim for the Community institutions to establish measures in the field of immigration that are fair to third-country nationals. Undoubtedly, as expressed in the preliminary statement of this directive, the globalization of the economy, the expansion of trade and the growth and proliferation of multinational groups have led, in recent years, to a significant increase in the movements of managers, specialists and trainees. This interest in facilitating mobility is also applied to investors, with the purpose of stimulating capital investments from third countries. In fact, the above-mentioned Directive 2009/50/EC is to a great extent a consequence of the logic of establishing mechanisms to respond to the needs of the global economy, and of the interest of the EU to develop as a leading economic area and, ultimately, to attract the best talent and investment at a global level. Hence the adoption of measures such as the

aforementioned 'EU blue card'.

But the interest of the EU and other major economic powers in the world in attracting talent and investment is not to be mistaken with the opportuneness or justification of the establishment of selective migration channels outside the treatment and regulation of ordinary migration, as in the case of Spain –but also of other countries in Europe such as Germany. In this regard, it should be noted that the decision to create a selective migration channel, laid down in Title V of Law 14/2013, and therefore outside the scope of the Law that has ordinarily regulated the phenomenon of migration in Spain –Organic Law 4/2000– in recent years, is made in a context of transformation of the Spanish immigration policy, from being labour-oriented to identifying, starting with the 2013 Law, with economy-oriented selective migration policies.

Not in vain, the 2013 Law, and its subsequent reform of 2015, speak of the Spanish legislator's interest in promoting or facilitating what has been called in Spain 'high-class economic immigration' (Molina Navarrete, C., 2013, 59). In this sense, the law provides the granting of visas for the development of entrepreneurial activities through fast-track procedures, as compared to those established for ordinary migration, or the granting of special permits to hire foreigners with talent. These conditions are in contrast with the already reported passivity of Spanish authorities with regard to the departure from the country of the best-qualified young generation in Spanish history.

In the background, the decision of the Government of Malta, which in November 2013 passed a Law to facilitate the access to Maltese nationality of third-country nationals with some purchasing power and proving to have made investments in this country. As is well known, this situation led to the European Parliament's issue of a resolution entitled 'On EU citizenship for sale', which stated that the consideration of citizenship as a simple commodity is unacceptable and made various recommendations for these new immigration policies that are lately being developed in the Union to be consistent with the values that identify this institution.

Of course, it was not in the spirit of the Spanish law to grant the Spanish nationality to third-country citizens with certain purchasing power –in fact, this new Spanish immigration policy implemented some legal actions that already been taken in countries such as Portugal, Hungary, Greece or Cyprus. But it clearly sent the message that people with high qualifications and relevant purchasing power may easily be provided with a permit to access and stay in the country, to the detriment of those third-country nationals who do not meet the requirements to enter such a select club.

For this reason, and not by chance, this new immigration model is implemented through an ordinary law, which is far removed from the organic law that still today continues to regulate ordinary immigration in Spain. As noted above, the law is as well devoid of any consideration for human rights and the fundamental rights recognised in the Spanish Constitution. Otherwise, the application of this new regime would have required the enactment of a new organic law.

It seems as if ordinary immigration and selective immigration were opposing or at least incompatible concepts; hence the need for their legal development in separate laws of a different nature and hierarchical rank. And yet, they are not.

Not long ago, the European Trade Union Confederation (ETUC) issued, in the framework of these new European migration policies, a document entitled ‘Action Plan on Migration’ (March 2013),⁹ which claimed for a change in Community migration policies in the direction of abandoning the preference for selective immigration channels in favour of measures that are committed to human rights, equal treatment and full integration of third-country nationals as values that should guide the action of the EU. In the case of Spain, the Spanish Economic and Social Council –a consultative body of the Spanish Government–, in its pronouncement on the draft of Law 14/2013,¹⁰ was also reluctant to the regulation of the new selective immigration channel through a different law than the one of reference for immigration issues in Spain: Organic Law 4/2000.

As sometimes noted, selective immigration policies in the EU have in recent years led to a paradox whereby, while ‘economic rationality’ is invoked as a factor for the management of the migration phenomenon, in such a way that ‘the prevailing logic in migration policies is becoming increasingly that of the submission to the demands of the internal market (dominated by economic rationality and commodification)’, Europe is incapable of preventing the existence and, in many cases, expansion of ‘an informal labour market where third-country nationals in an irregular situation are exploited’ (Monereo Pérez, J.L., 2013, 13). As a result, the law generates a first-class immigration procedure that undoubtedly aggravates the differences between groups and causes a clear segmentation of the Spanish labour market between rich and highly-

⁹ See: <https://www.etuc.org/documents/action-plan-migration#.WIEcHVPhC2w>

¹⁰ Pronouncement 6/2013, of June 10. It also stated that ‘(...) the proposed regulation should take into account the legal framework which it aims to change, which in some cases is of an organic nature, and clarify the derogatory scope of the law in order to avoid the overlapping of rules’.

qualified foreigners and poor foreigners. From the perspective of those values that have historically guided the construction of Europe, and despite all the criticism that their implementation may arise, this is simply unacceptable.

Some have argued that ‘the consolidation of an international status of highly-qualified migrant worker allows to make a further step toward a rapprochement of the rights of nationals and migrants in the still long hierarchical stairway of personal statuses that separates an alien from a citizen’ (Ushakova, T., 2011, 18). But it is important to keep in mind that, by making that step, there is a risk of leaving behind those foreigners who are lacking high-qualifications or who, not being rich, wish or are forced to emigrate. In fact, the irruption in the Spanish legal landscape of Law 14/2013 brought, in a certain way, a darkening of the reference that Organic Law 4/2000 had until then represented. One law for rich or highly-qualified immigrants, the other one for poor immigrants.

In connection with this last reflection, it should not be forgotten that the analyses on the incidence of the labour reforms implemented in Spain on the occasion of the 2008 economic crisis, indicate, not by chance, that Royal Decree 557/2011, of 20 April, approving the regulation of Organic Law 4/2000, after the reform of this Organic Law by Organic Law 2/2009,¹¹ significantly contributed to restrict migration flows to Spain, as well as to increase by somewhat more than 13 percent –the data correspond to the 2012 Labour Force Survey (second trimester)– unemployment among the foreign population as compared to the Spanish population (Camas Roda, F., 2013, 13). Behind this situation is the rigid use of the ‘national employment situation’, a concept that is instrumental to the management of migration flows seeking to legally access the Spanish labour market and responsible for ensuring preference in employment to Spanish and EU citizens and to third-country nationals residing in Spain.

In fact, the 2009 reform of Organic Law 4/2000, and more specifically its later regulatory development (Royal Decree 557/2011), has increased the relevance of the national employment situation in the granting of work permits. One of the ways provided by the law for the access of a non-resident foreigner to the Spanish labour market is determined by the matching of the foreigner’s professional profile with the ‘Catalogue of occupations that are not easily covered’ –the Organic Law, however, excludes from this mechanism a series of groups including researchers,

¹¹ OSG No. 103 (April 30, 2011).

students, victims of gender-based violence, victims of human trafficking, etc. This catalogue allows identifying the jobs that Spain's domestic labour market predictably will not be able to cover, although article 65.1, sixth paragraph, of Organic Law 4/2000 specifies that 'those occupations that, because of their nature, could be covered by persons registered as jobseekers after their participation in training activities scheduled by the public employment services' are excluded from the list. In other words, the aforementioned catalogue does not take into account those professional profiles for which there are no registered suitable jobseekers and only considers the profiles of the unemployed. It thus ignores the possibility of enriching the human capital of this country. As an alternative to this catalogue, the Ministry of Employment and Social Security (art. 39 Organic Law 4/2000) may approve, according to the national employment situation, an annual provision of occupations and determine the number of jobs that may be covered over a period of time through the 'collective management of hiring in the countries of origin', while granting a certain number of visas 'for job seekers' who are children or grandchildren of native Spaniards, or visas referring to certain occupations. In reality, the use that has been made of this migration channel in recent years has been highly restrictive, because not only the number of visas granted has been very small, but the Government's policy since 2012 has limited the recruitment in origin to 'workers for seasonal agricultural campaigns' and to countries with which Spain has signed an agreement for the regulation of migration flows.¹²

In summary, a selective migration channel –with some significant elements of flexibility in its management and requirements– currently coexists in Spain with a regular migration channel, characterised in recent years by restrictions to the access to the Spanish labour market for third-country nationals. It is true that the beneficiaries of the channel enabled by Law 14/2013 are not entitled to a privileged legal status concerning access to nationality or long-term residence, and that, as a rule, they must meet the general requirements for the stay and residence of foreigners in Spain, but it is no less true that this group of people is not affected in their entering the country by the national employment situation, which until now has been the instrument serving Spanish authorities to curb the

¹² See Order ESS/2811/2015, of 22 December, which extends the applicability of Order ESS/1/2012, of 5 January, regulating the collective management of hiring in the countries of origin for 2012 (OSG No. 310, 28 December 2015), until December 31, 2016, thus reasserting the Government's decision not to go beyond that limit. The forecast for 2017 was that this restrictive practice would be again renewed.

admission of immigrants through the channels established by Organic Law 4/2000. In fact, as recognised by the Government itself in an assessment report on the effectiveness of Law 14/2003 after one year of its being in force, ‘the possibility of modifying the general immigration legislation (Organic Law 4/2000) was considered; however, it was deemed more appropriate to establish an ad hoc regulation in an economic law’.¹³

4. The European Agenda on Migration and the future of Spanish Migration Policy

It is the moment to discuss the future in relation to this issue. In this sense, the first task is to assess the level of effectiveness of the analysed Law 14/2013. For this purpose, it is interesting to consult the ‘Report on the Implementation of the International Mobility Section of the Entrepreneurial Support and Internationalization Law of 27 September 2013’,¹⁴ prepared by the Spanish Government in April 2015 in application of the provisions established by the Eleventh Final Disposition of Law 14/2013. These provisions include the annual elaboration of a report on the degree of implementation of section 2 of Title V of the Law, which is precisely the one regulating the new selective migration channel under the heading ‘International mobility’.

The above-mentioned report provides the following data:

Visas and permits issued (Law 14/2013, September 2013 - December 2014)	
Category	Number of visas and permits
- Investors	531
- Entrepreneurs	82
- Highly qualified professionals	1,231
- Training or Research	369
- Intra-corporate transfers	907
Total Categories (art. 61 of Law	3,120

¹³ ‘Report on the Implementation of the International Mobility Section of the Entrepreneurial Support and Internationalization Act of 27 September 2013’, April 2015, p. 22 (see: http://extranjeros.empleo.gob.es/es/destacados/Report_on_the_Implementation_of_the_International_Mobility_Section.pdf).

¹⁴ See http://extranjeros.empleo.gob.es/es/destacados/Report_on_the_Implementation_of_the_International_Mobility_Section.pdf.

14/2013)	
- Family members (art. 62.4 of Law 14/2013)	2,461
TOTAL (Categories + Family members)	5,581

Likewise, the report notes that the estimated value of the investment made due to the work or presence of these persons in Spain has reached 694 million euros, while the creation of jobs is estimated at 12,685 jobs, 8,581 of which were direct employment jobs while the remaining 4,104 were indirectly created jobs.

The valuation made by the Government of the first year after the entry into force of the norm was, as expected, very positive. It underlined the substantial increase of granted permits and visas during the period analysed as compared to those granted in the previous period (September 2012 to September 2013) in categories linked to talent attraction through the procedures for admission and residence laid down in the general rules contained in Organic Law 4/2000.¹⁵ More specifically, it stressed that, in the case of highly qualified professionals, the year-on-year increase after the entry into force of Law 14/2013 was of 230 percent. A 66 percent increment was recorded for intra-corporate transfers, while it reached 266 percent in cases of mobility for reasons of training, research, development and innovation.

Number of permits issued to categories of foreign nationals linked to talent attraction			
Category	Sept. 2012 - Sept. 2013 (Organic Law 4/2000)	Sept. 2013 – Sept. 2014 (Law 14/2013)	Percentage of change
Highly qualified professionals	275	907	229.8
Researchers	50	183	266
Intra-corporate transfers	433	720	66.3
TOTAL	758	1,810	

¹⁵ I.e. residence and work permits for highly qualified professionals, blue card holders (art. 38 ter), researchers (art. 38 bis) and workers posted in the framework of a transnational provision of services.

All in all, the report acknowledges that, while the companies appear to have welcomed with significant interest the possibilities offered by Law 14/2013 on immigration matters, this has not been the case of the entrepreneurs, among which the total number of permits granted (82) only represents 3 percent of the total, a figure that is obviously unsatisfactory. Although the conclusion drawn in the report is that the data reflect ‘the need for greater publicity of the law in this area’, there may be more compelling reasons for it, such as Spain’s currently diminished attractiveness for investors.

There is no doubt that Law 14/2013 has filled a gap in Spanish legislation on migration. As seen in the current work, the issue is not whether the establishment of a selective migration channel responded to an actually perceived deficit. In fact, the study ‘Open for Business’ published by the OECD in 2010 already warned that in 2007-2008, i.e. just before the start of the economic crisis, Spain¹⁶ had lower rates of entrepreneurship among its foreign population than other European countries. As noted before, the issue is therefore how this selective channel is configured and articulated, which is where controversy arises.

In effect, despite the opinion of institutions such as the OECD on the implementation of Law 14/2013, in the sense of considering that ‘this specific model combines a perspective that supports the internationalization of the economy and the promotion of economic growth with the traditional purposes of immigration policies: employment and security’, it is possible to say that this law is particularly focused on the first two aspects –supporting the internationalization of the economy and promoting economic growth–, whereas employment and legal security have been differently managed.

Thus, the concept of employment applied in Law 14/2013 is associated to the generation of employment, as evidenced by the consideration as beneficiaries of this selective migration channel of entrepreneurs and investors. Organic Law 4/2000 used instead a concept linked to the employment needs detected in the Spanish labour market. The logic is obviously different. Only in the case of intra-corporate transfers the concept of employment applied in Law 14/2013 can be considered similar to that of the Organic Law, in the sense that the transfer is justified by the existing demand of the undertaking or group of undertakings to cover a particular position or develop a specific activity.

¹⁶

See <http://www.seipa.edu.pl/s/p/artykuly/91/917/OECD%20Migrant%20Entrepreneurship%202012.pdf>.

As to legal security, the ways in which the two laws face the management of the migration phenomenon are completely different. In the case of Organic Law 4/2000, the aforementioned national employment situation acts not only as a clarifying factor of the workforce needs of the country, but also as a sort of legal barrier that prevents access to the country of workers not meeting the professional profiles referred in it. On the contrary, the legal logic applied in Law 14/2013 is based on the idea that people interested in entering and residing in Spain must apply for it and expose what their intention is and in which conditions they mean to do it –whether as an investor, an entrepreneur, a highly qualified professional, a researcher or a worker appointed for an intra-corporate transfer. The competent administrative body shall determine whether the requirements to access the country as laid down in the legislation and, particularly, in the aforementioned law are met or not, and consequently authorise or deny the foreigner’s access and/or residence in Spain.

The future. Independent of the uncertainty in which the country has recently lived under a caretaker government, it is reasonable to consider that Spanish immigration legislation will be inspired in the coming years by the norms laid down by the European Commission through its European Agenda on Migration (2015).¹⁷ As is well known, this document has its origin in the difficult situation that the European Union is facing with regard to the migration crisis generated by current armed conflicts such as those in Syria, Libya, Afghanistan or Iraq, a crisis that the EU is not being able to manage properly.

According to the need to define ‘a set of core measures and a consistent and clear common policy’,¹⁸ the European Agenda on Migration has identified four levels of action on which the migration policy of the Union will be built in the medium term:¹⁹ a) the reduction of incentives for

¹⁷ European Commission: ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration’, COM (2015) 240 final.

¹⁸ European Commission: ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration’, COM (2015) 240 final, 2.

¹⁹ It is important to bear in mind that the common policy of the Union in the field of asylum, visas, border control and immigration has its origin in Title V (Area of freedom, security and justice) of the Treaty on the Functioning of the European Union. However, Protocols 21 and 22 of the Treaty establish that the United Kingdom, Ireland and Denmark do not participate in the Council’s adoption of the measures to be implemented under that title of the Treaty. It is for these three states to decide whether

irregular migration; b) border management, with the focus set on saving lives and securing the Union's external borders; c) a strong common asylum policy; d) a new policy on legal migration. As regards this last level of action, the Commission considers that the future European migration policy must be based on the strong increase that the demand of qualified workforce has experienced in the last few years –23 percent between 2012 and 2015– and on the estimated 17.5 million people by which the working-age population in the European Union will decrease during the next decade. There is, therefore, a clear commitment to orient the Community migration policy toward the attraction of qualified migrants, which is ultimately a further development of the selective migration channels.

In this regard, the Community document suggests several lines of action for the future: a) development of European programs designed to attract the best talent, such as Horizon 2020 and Erasmus+; b) drafting of a directive on the mobility of students and researchers, which is already a reality: Directive (EU) 2016/801 of the European Parliament and of the Council, of 11 May 2016, on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast);²⁰ c) revision of the Directive on blue card holders (Directive 2009/50/EC); d) improvement of the legal security of highly qualified foreign professionals in the services sector who need to travel to the European Union for brief periods of time; e) revision of the Community Code on Visas, i.e. Regulation (EC) No. 810/2009 of the European Parliament and of the Council, of 13 July 2009, establishing a Community Code on Visas (Visa Code), and establishment of a new type of visa, the 'touring visa';²¹ f) implementation of tools to identify the

or not they wish to join in the adoption and implementation of the measures approved by the Commission in this matter.

²⁰ OJEC L 132/21 (May 21, 2016). This directive includes as well, with effect from 24 May 2018, the derogation of both Council Directive 2004/114/EC, of 13 December 2004, on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, and Council Directive 2005/71/CE, of 12 October 2005, on a specific procedure for admitting third-country nationals for the purpose of scientific research, although the Community standard recalls the obligation of the states to transpose both directives to their domestic law prior to their disappearance (art. 41 of Directive 2016/801/EU).

²¹ This new visa is addressed to third-country nationals who are exempted from the visa requirement, as well as to those who are subject to it, having a legitimate interest in travelling through the Schengen area for more than 90 days over a period of 180 days

economic sectors and professions that are facing, or will face, recruitment difficulties or skill gaps, as well as improvement of the existing tools, like the European Job Mobility Portal (EURES); g) development of an ‘expressions of interest system’ in conjunction with the Member States of the Union, which will allow making an automatic initial selection of potential migrants through the use of verifiable criteria, while employers are invited to identify priority applicants from the pool of candidates, so that migration only takes place when migrants have a firm job offer;²² h) support to the development of the countries of origin (Regional Development and Protection Programs).

However, the whole Agenda is built on the basis of a principle that has been central to the Community migration policy from virtually its beginnings, as is the affirmation of the competence in this matter of the Member States of the Union, with the Union assuming a secondary role in support of the actions of these states in the area of migration. Obviously, in the case of Spain –as with the other Member States– the State is called upon to take on a leading role that, beyond the transposition of Community directives that have recently seen the light or of those that may be subsequently generated, confers the capacity to make important decisions on the setting of the national migration legislation.

In the light of the approach of the aforementioned European Agenda on Migration, the future legislative action of the Spanish State may draw on these guidelines:

a) First of all, the claim of the European Agenda on Migration to formulate a new policy on legal migration, which puts the emphasis on the regulation of qualified migration and its streamlining, should lead to rethinking the Spanish legal design that deals separately with ordinary migration (Organic Law 4/2000) and selective migration (Law 14/2013). This should be an opportunity to integrate in a single norm, i.e. Organic Law 4/2000 or a new one that would replace it, the legal regime regulating both ordinary and selective migration.

This legislative integration would also have the virtue of repositioning qualified migration in the same legal area in which ordinary migration is

(Proposal for a Regulation of the European Parliament and of the Council establishing a touring visa and amending the Convention implementing the Schengen Agreement and Regulations (EC) No. 562/2006 and (EC) No. 767/2008, COM (2014) 163 final).

²² As pointed out by the Agenda itself, ‘this would create an “EU-wide pool” of qualified migrants, accessible to both employers and Member States’ authorities, but with the actual selection and admission procedure remaining national, based on Member States’ actual labour market needs’.

located, linking it to the principles and rights recognised by the Universal Declaration of Human Rights, the European Convention on Human Rights or the European Charter of Fundamental Rights. This would break the aseptic legal logic applied in Law 14/2013 and built on the aforementioned assertion that ‘immigration policy is increasingly becoming an element of competitiveness’, which justified the establishment of a selective channel of entry and residence of foreigners ‘on the grounds of economic interest’ and which seemed to forget the right to emigration recognised by art. 13 of the Universal Declaration of Human Rights.

At the same time, this integration would help resolve undesirable situations, such as those affecting the migration of researchers and highly qualified professionals, which, depending on its characteristics, is sometimes regulated by Organic Law 4/2000 –which, as noted above, regulates in arts. 38 bis and 38 ter the migration of researchers and highly qualified professionals– and sometimes by Law 14/2013.

b) Secondly, the approach of the European Agenda on Migration, which favours qualified migration, recommends a rethinking of the terms in which Organic Law 4/2000 is formulated. Should this law, or its successor, continue to be the legislative reference in the area of migration, it would be logical to reform or reformulate it, not only in order to integrate into a single norm ordinary migration and qualified migration, but to incorporate as well new realities related to the need of temporary or short-term residence. In this regard, it should not be forgotten that, even if the improvement of competitiveness within the European Union and, particularly, in Spain, requires the contribution of highly qualified professionals, the incorporation of workers with lower qualifications will also continue to be necessary, if only because the European population – and the Spanish one is not an exception– is progressively aging, so that in the near future people with all kinds of qualifications will be needed. Finally, the regulation of an ordinary migration channel will remain necessary, not only as a means to cover the specific needs of the country, but also as a realization of the right to emigrate acknowledged by the Universal Declaration of Human Rights.

c) Thirdly, although the 2009 reform of Organic Law 4/2000 intended to add to the Spanish migration model certain principles and a stability that it did not enjoy until that moment, while supporting the social integration of migrants and their recognition as subjects of the law and holders of the fundamental rights, the subsequent economic crisis led to the adoption of a series of legislative measures that have finally restricted the rights of migrant workers in an irregular situation. This is a something that Spain

must solve in the medium term, because it does not comply with the conventions and treaties signed by this country in the field of humanitarian law. But, at the same time, it puts the focus on an issue that should not be overlooked and is linked to the growth of the phenomenon of irregular migration in Spain, and to the defensive response of the Spanish Government when it tries to induce people in this situation to leave the country by denying them the status of holders of certain rights while increasing controls in the workplace.

Irregular migration in Spain is a reality that in some cases speaks of this country as a place of transit to other destinations, especially in northern Europe, while in others it is the migrant's final goal. In this latter case, it is important to note how immigrants in an irregular situation residing in this country significantly contribute to the maintenance of Spanish economy, even if performing low-skill jobs in the majority of cases. To the extent that this is so, reality evidences a bad configuration of the aforementioned 'national employment situation', as well as of the 'collective management of hiring in the countries of origin', which, as pointed out before, have been used throughout these years as defensive instruments against the successive waves of migrants rather than as tools for the safety management of migration. In the case of the 'national employment situation', it should be open to accommodate migrants with qualifications that do not exist in this country –curiously enough, this is possible in the case of highly qualified professionals, as allowed by Law 14/2013, but not envisaged for persons with medium-qualifications–, and much more in tune with the real workforce needs of the Spanish labour market. With regard to the 'collective management of hiring in the countries of origin', it seems reasonable to assume that it has to overcome the dynamics that restrict the use of this tool to the field of agriculture, so that consideration should be given to its implementation in the case of other productive sectors.

5. Conclusions

This reflection on the regulation of labour migration in Spain concludes as it started: by stating that the attraction of human talent and investment is undoubtedly a legitimate aspiration of all societies. The question is, however, how it is performed, because it is clear that in this case the end does not justify the means. As pointed out in previous pages, the concepts of regular migration and selective migration should not be considered incompatible, as it happens in Spanish legislation when the legislator decides, in a non-innocent way, to enact a regulation –Law 14/2013,

subsequently amended by Law 25/2015– that establishes a selective migration channel different from the one that has historically regulated migration movements in Spain –Organic Law 4/2000. In addition, the regulation of this selective migration channel is dispossessed of any consideration relating to human rights, because otherwise the issue would have been placed within the scope of the above-mentioned Organic Law. It is understood that the future Spanish legislative action should be marked by the approach of the European Agenda on Migration. And, in that context, one of the first aspects that need to be overcome is the legislative separation established by the Spanish Government between regular migration and selective migration. Consequently, one of the first legislative measures to be adopted in this field would be the integration of Law 14/2013 in Organic Law 4/2000, and the legislative development of the principles contained in the above-mentioned European Agenda. In any case, in the medium-term the legislative action in this field will undoubtedly be conditioned by the reform of the Directive on the European Union blue card,²³ the proposal of which, made by the European Commission, was published precisely on the dates on which the Fifth International Conference on Precarious Work and Vulnerable Workers was held in London. As is well known, this reform has its origin in the failure, in recent years, of the European Union’s strategy to attract highly skilled workers. Likewise, the future legislative and governmental action should be marked by the approach of the ‘Action Plan for the integration of third-country nationals’,²⁴ which was also lately disclosed and will certainly have an impact on an issue that is becoming increasingly relevant for the standardization of the management of migration flows as is the integration in European societies of third-country nationals migrating to the European Union.

²³ 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 (OJEC L 155/7, June 18, 2009).

²⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: ‘Action Plan on the integration of third-country nationals’, COM (2016) 377 final.

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