



Legal Migration Fitness Check

Analysis of gaps and horizontal issues

Annex 4B

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1 Introduction

This paper brings together the final documents for agreement under Task I: D and IV: D.1 (Gaps and horizontal issues) of Specific Contract HOME/2015/AMIF/FW/EVAL/004 under FWC HOME/2015/EVAL/02 Study in support of a Fitness Check and Compliance assessment of existing EU legal migration Directives.

In compliance with the terms of reference, the paper combines work undertaken under Task I D (a preliminary identification of gaps for specific categories of third-country nationals and key (horizontal) issues for further investigation) and Task IV D.1 (in-depth analysis of specific gaps and key issues identified under Task ID plus additional issues identified during the stakeholders' consultation, and draws upon information and results from all other relevant Tasks.

For each gap / issue identified, the paper presents:

- A definition of the problem / gap
- The (legal) definition of the problem / gap
- The scale of the problem / gap
- The response to the problem.

Each gap / issue is thus analysed in the sections below.

2 Third-country family members of non-mobile EU citizens or citizens of associated countries (EEA and CH)

2.1 Problem / gap definition

Family reunification has been one of the main reasons for immigration into the EU for the past 20 years. Three possible scenarios of family reunification with third-country nationals can be observed, for which the applicable rules depend on the status of the 'sponsor'.

- The first scenario is represented by those 'sponsors' who are non-EU citizens residing legally in an EU country and their third-country national family members, and is regulated by the Family Reunification Directive.¹
- The second scenario concerns those 'sponsors' who are 'mobile' EU citizens², namely those EU citizens who move to or reside in another Member State than that of their nationality, and their third-country family members who accompany or join them. This situation falls under the Freedom of Movement Directive.³ "Returning" nationals, i.e. 'mobile' EU citizens who return to their MS of nationality, must, in accordance with the CJEU, be granted equal rights with mobile Union citizens
- The third scenario is not covered by any EU legal instrument and thus falls under the Member States' competence. In this case, 'sponsors' are EU citizens residing in a Member State of which they are nationals, who did not exercise their right to free movement (so-called 'non-mobile EU citizens'), and who wish to reunite with their third-country family members.

¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

² The term EU citizens in the context of this factsheet refers to all citizens of the EU Member States and citizens of associated countries (EEA and CH).

³ 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

This factsheet will focus on the gap in the EU legal framework regarding the **third scenario** and will attempt to identify a number of relevant practical implications. Potential problems include reverse discrimination compared to mobile EU citizens and unequal treatment compared to third-country nationals as experienced by non-mobile EU citizen sponsors.

2.2 (Legal) definition(s) of the problem/gap

In order to better define the problem and identify possible gaps, it is pertinent to lay down the following definitions:

- **Family reunification:** The procedure enabling entry into and residence in a Member State based on a family relationship which is either:
 - a) between a **third-country national residing lawfully in that Member State and his or her non-EU family members** (Family Reunification Directive – which establishes common rules for exercising the right to family reunification in 25 EU Member States (excluding the UK, IE and DK);
 - b) between an EU citizen who moves to or resides in another Member State than that of his/her nationality, or a “returning national and his/her non-EU family members (Free Movement Directive);
 - c) between a **non-mobile EU national and his/her non-EU family members** (national legislation)⁴,
- **A sponsor** can be defined as an EU citizen or a third country national residing lawfully in a Member State and applying for family reunification or whose family members apply for family reunification to be joined with him/her
- **Third country national:** A third country national (TCN) can be defined as any person who is not a citizen of the European Union within the meaning of Article 20(1) of the Treaty on the Functioning of the European Union and who is not a person enjoying the Union right to freedom of movement, as defined in Article 2(5) of the Schengen Borders Code.⁵
- **Reverse discrimination:** This phenomenon signifies that EU Member States treat their own nationals who have not exercised their right to freedom of movement, less favourably than nationals of other Member States or their own nationals who move or have moved between EU Member States, and have returned. Reverse discrimination is possible because EU law and national law on family reunification may provide for different levels of rights for different groups. While family reunification of non-mobile EU citizens falls under national law, family reunification of mobile EU citizens is regulated under EU law.
- **Mobile EU citizens:** In the context of this factsheet, this category refers to citizens of the countries bound by the Free Movement Directive who move to or reside in another Member State than that of their nationality. This includes all EU Member States and the three European Economic Area (EEA) members: Iceland, Norway and Liechtenstein. Switzerland is not bound by the Directive but has a separate bilateral agreement on free movement with the EU which contains the same principles as the Directive.
- **Non-mobile EU citizens:** In the context of this factsheet, this category describes citizens of EU Member States who reside in the country of which they are nationals without having exercised their right to free movement within the Union.

⁴ Available from <http://www.emn.europa.eu> under "EMN Glossary".

⁵ This definition means that nationals of Norway, Iceland, Liechtenstein and Switzerland and third country nationals who are family members of Union citizens are not considered to be third-country nationals.

2.3 Scale of the problem / gap

During 2008-2015 over 5.6 million permits were issued in the EU for family reasons. Permits for family reasons accounted for 29% of all permits issued in 2015. In 2015, EU Member States issued around 2.6 million first residence permits to third country nationals, out of which the highest number was for family reasons (753 thousand, or 28.9 % of all first permits issued).⁶ The first permits issued for family reasons cover two scenarios:

- TCN family member joining an EU citizen (including citizens of EEA countries) or;
- TCN family member joining another TCN.

While available statistics distinguish between sponsors who are EU citizens and sponsors who are third country nationals, there is no specific data distinguishing between mobile and non-mobile EU citizen sponsors. Moreover, data on the profile of non-EU nationals, both sponsors and family members, is limited. A recent study by the European Migration Network (EMN) has observed a general lack of comprehensive data on family reunification, already at national level; there is thus a data gap which needs to be further investigated⁷. Therefore, it is not possible to reliably determine the number of family reunification cases of non-mobile EU citizens across Member States.

When it comes to the question of how many non-mobile EU citizen sponsors actually face reverse discrimination compared to mobile EU citizens?, there are numerous court cases before the Court of Justice of the European Union (CJEU) which give an indication of the scale of the problem.⁸

2.4 Responses to the problem

2.4.1 EU level responses

The application of the Treaty provisions on EU citizenship is conditioned on the existence of a cross-border element. It has been argued that the 'cross-border' link requirement amounts to a reformulation of the "principle of conferral" for the CJEU enforcement of Treaty limits imposed upon the Member States.⁹ In situations without a (intra-EU) cross-border element, the admission and residence conditions as well as the application procedure and most procedural safeguards for family reunification for non-mobile EU citizens, are governed by national law only, as confirmed in several occasions by CJEU case law.¹⁰

Where family members of non-mobile EU citizens have the right to work, they are covered by the Single Permit Directive, in terms of the format of the permit (Article 7) as well as the right to equal treatment (Chapter 3). Those family members who do not have the right to work (such as children) are, however, excluded from these provisions. Furthermore, Member States may choose to give access to certain benefits only to third-country nationals who are actually in employment or have registered as

⁶ Eurostat: http://ec.europa.eu/eurostat/statistics-explained/index.php/Residence_permits_statistics#Residence_permits_by_reason.

⁷ http://www.emn.at/wp-content/uploads/2016/12/00_family_reunification_synthesis_report_final_en_print_ready.pdf

⁸ For example: See, among others, Joined Cases 314-316/81 and 83/82, *Waterkeyn*, [1982] ECR 4337 (goods); Case 298/84, *Iorio*, [1986] ECR 247 (workers); Joined Cases 54 and 91/88 and 14/89, *Niño*, [1990] ECR 3537 (establishment); Case C-97/98, *Jägerskiöld*, [1999] ECR I-7319 (services); Case C-513/03, *Van Hiltten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, [2006] ECR I-1957 (capital). See, also, Case C- 200/02, *Zhu and Chen*, [2004] ECR I-9925 (Article 18 EC).

⁹ C. Ritter, 'Purely internal situations, reverse discrimination, *Guimont*, *Dzodzi* and Article 234' (2006) 31 *European Law Review* 690, 692.

¹⁰ For instance, Joined Cases 35-36/82, *Morson and Jhanjan v. Netherlands*, [1982] ECR 3723; Case C-127/08 *Metock and Others* [2008] ECR I-6241 or Case C-434/09 *McCarthy* [2011].

jobseekers after a minimum of six months of being employed. That is why there is no general access to e.g. social security benefits for family members in the Single Permit Directive. Moreover, this Directive does not provide any harmonisation for admission conditions or procedures regarding family reunification applications; these areas are covered by the Family Reunification Directive which however excludes family members of non-mobile EU citizens from its scope.

2.4.2 National level responses

According to a study of the European Migration Network (EMN)¹¹, in the majority of Member States¹² there are differences in the requirements to be met by third-country national sponsors under the Family Reunification Directive in comparison to those foreseen for non-mobile EU citizen sponsors. In more than half of all Member States (AT, BE, BG, CY, CZ, DE, EE, ES, FI, FR, HR, HU, IE, LU, LV, PL, SI, SK) such requests are treated differently, whereas the rules are largely similar in (some) others (LT, NL, NO, SE).

However, where such differences exist, it appears that **family members of non-mobile EU citizens enjoy more favourable national provisions compared to family members of third-country nationals**. Such provisions may include, for example: a broader definition of family (AT, BE, EE, HU, LV) and/ or waiver of specific conditions that must be fulfilled by family members (age requirement in LT, SK); no income threshold (FI, FR, PL, SE) or a lower reference amount or less onerous assessment of financial circumstances (IE, SI); no waiting period or a shortened one (CY, DE, EE, IE, PL); admission outside quota (AT) or free access to the labour market (CY, HU, IE, LV).

Regarding the comparison of provisions for non-mobile EU citizen sponsors to mobile EU citizen sponsors on the other hand, EU provisions according to the Free Movement Directive seem to be generally more favourable than national rules for non-mobile EU citizens.¹³ Indeed, Directive 2004/38/EC grants rights such as access to employment, right of equal treatment, protection against expulsion etc. Furthermore, certain Member States are obliged by legislation or jurisprudence to provide non-mobile citizens with the same rights as mobile Union citizens (examples include CZ, ES, NL, IT).

2.5 Consequences of the problem / gap

Given that **family reunification of non-mobile EU citizens with TCN family members** is not covered under EU law, the following implications should be highlighted:

- **Reverse discrimination:** Depending on the national legal framework, family reunification for non-mobile EU citizen sponsors may fall under less favourable rules than those applicable to mobile EU citizens and TCN sponsors. According to recent CJEU case law, instances of reverse discrimination do not infringe the EU principle of non-discrimination, as this principle is not applicable to purely internal situations.¹⁴

¹¹ EMN Synthesis Report for the EMN Focussed Study 2016 Family Reunification of Third- Country Nationals in the EU plus Norway: National Practices, publication forthcoming in 2017, p 33.

¹² This Report was prepared on the basis of national contributions from 26 EMN NCPs (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Latvia, Luxembourg, Malta, Netherlands, Poland, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom, Norway).

¹³ Nathan Cambien, The scope of EU Law in recent ECJ case law: reversing 'reverse discrimination' or aggravating inequalities? (2012), p. 127.

¹⁴ Nathan Cambien, The scope of EU Law in recent ECJ case law: reversing 'reverse discrimination' or aggravating inequalities?, p. 129.

- **Disparity between TCN family members of non-mobile EU citizens compared to TCN family members of TCN sponsors:** As the study by EMN has shown,¹⁵ certain EU countries might apply more favourable provisions (such as a wider definition of family or unrestricted access to the labour market) to the TCN family members of non-mobile EU citizens compared to TCN family members of TCN sponsors.
- **Disparity between family reunification rules:** Whether or not EU citizens can benefit from the rules of family reunification under the Freedom of Movement Directive depends on the existence of a cross-border element. Purely internal situations fall outside the scope of the Directive. In its numerous judgments, the CJEU has developed a broad approach when it comes to identifying a 'cross-border' element. Some scholars argue that it is very difficult to draw the line between the Treaty provisions on free movement and EU citizenship, which may lead to legal uncertainty.¹⁶
- **Use of the right to free movement with a hidden purpose:** The disparity of treatment between mobile and non-mobile EU citizens, has also led to situations in which EU citizens have used the right of free movement with a hidden purpose. There is evidence that non-mobile EU citizens move to another EU Member State just to benefit from the provisions of the Free Movement Directive as regards family reunification. Such use of the free movement rules is perfectly legal as long as the residence of the Union citizen in the host Member State is genuine and effective

2.6 Preliminary Conclusions

In this final concluding section, the information contained in the fact-sheet is used to provide preliminary answers to a series of evaluation questions which will feed into the overall REFIT evaluation to be conducted in Task IV of the study in support of the fitness check of the EU legal migration acquis.

- **The problem/gap is relevant to the overall objectives of the EU legal migration acquis:**

Introducing more uniform migration rules through the implementation (the legal transposition and practical application) of the Directives is aimed inter alia to increase the EU's attractiveness to the migrants as a destination and facilitate their integration. Family reunification helps to create socio-cultural stability, thus promoting economic and social cohesion - which is a fundamental EU objective. The problem/gap, as described in the previous sections, is thus relevant to the overall objectives of the EU legal migration acquis.

- **The existing EU legal migration Directives only partially respond to the problem:**

The Family Reunification Directive only concerns sponsors who are non-EU citizens residing legally in an EU country and their third-country national family members; therefore, other scenarios, including sponsors who are EU citizens (non-mobile, mobile or returners) are not covered. The Single Permit Directive provides for rights to family members who have the right to work, but certain

¹⁵ http://www.emn.at/wp-content/uploads/2016/12/00_family_reunification_synthesis_report_final_en_print_ready.pdf

¹⁶ N. Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39 Common Market Law Review 731; A. Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 Legal Issues of Economic Integration 43; also see Koen Lenaerts, '*Civis europaeus sum*': from the cross-border link to the status of citizen of the Union, in Online Journal on free movement of workers within the European Union, (2011), p.6.

key aspects of equal treatment can be limited to those who are or have been in employment. Furthermore, that Directive does not cover aspects linked to procedures and admission criteria.

- **No other EU legislation currently responds to the problem**

No other EU legislation currently responds to the problem: the Freedom of Movement Directive refers to 'sponsors' who are 'mobile' EU citizens, namely those who move to, reside in or return to a Member State other than that of their nationality, and their third-country family members who accompany or join them.

- **The way Member States implement the legal migration Directives has mixed effects on the problem**

As indicated, EU Member States may treat their own nationals who have not exercised their right to freedom of movement, less favourably than nationals of other Member States or their own nationals who move or have moved between EU Member States. On the other hand, based on desk research, it seems that family members of non-mobile EU citizens enjoy more favourable national provisions compared to family members of third-country nationals. Such provisions may include, for example, a broader definition of family and/ or waiver of specific conditions that must be fulfilled by family members.

- **There are consequently gaps in the response at EU and national level:**

The lack of any EU legal instrument for those situations in which 'sponsors' are non-mobile EU citizens (who wish to reunite with their third-country family members) means that it is up to Member States to develop initiatives in this area. Based on desk research, it seems that family members of non-mobile EU citizens enjoy more favourable national provisions compared to family members of third-country nationals. However, there is no guarantee this will be the case in the future as Member States remain free to redefine their policy at any moment.

- **There would be added value in addressing the issue at EU level:**

The lack of any EU legal instrument and uncoordinated national initiatives may cause disparity as regards the treatment of third-country nationals and non-mobile EU citizens, disparity between family reunification rules and situations of reverse discrimination and use of the right to free movement with a hidden purpose. There would be added value in addressing the issue at EU level.

2.7 Sources

Legal instruments:

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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

Proposal for a Council directive on the right to family reunification /* COM/2002/0225 final CNS 1999/0258 */

Directive 2011/98/E of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals

to reside and work on the territory of ta Member State and on a common set of rights for third-country workers legally residing in a Member State.

Literature:

Nathan Cambien, The scope of EU Law in recent ECJ case law: reversing 'reverse discrimination' or aggravating inequalities? (2012)

Koen Lenaerts, 'Civis europaeus sum': from the cross-border link to the status of citizen of the Union, in Online Journal on free movement of workers within the European Union, (2011)

EMN Synthesis Report for the EMN Focussed Study 2016 Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices (publication forthcoming in 2017)

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EMN Glossary: <http://www.emn.europa.eu>

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Case C-97/98, Jägerskiöld, [1999] ECR I-7319

Case C-513/03, Van Hilten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen, [2006] ECR I-1957

Case C- 200/02, Zhu and Chen, [2004] ECR I-9925

Joined Cases 35-36/82, Morson and Jhanjan v. Netherlands, [1982] ECR 3723

Case C-127/08 Metock and Others [2008] ECR I-6241

Case C-434/09 McCarthy [2011]

Zambrano (C-34/09) [2011]

3 Medium- and low-skilled workers, other than seasonal workers

3.1 Problem / gap definition

Medium- and low-skilled workers from third-countries, other than seasonal workers, encompass a broad group that can potentially support the EU in addressing existing and future skill shortages that have become a major challenge affecting European competitiveness. Changes in the demographic structure, technological advancements and climate change will significantly impact future employment¹⁷. As emphasised in a recent EU Communication, the EU needs a more proactive labour migration policy to attract third-country nationals (TCNs) with the skills and talents required to address demographic challenges and skills shortages.¹⁸

According to an EMN study on current labour shortages and the need for labour migration from third countries¹⁹, the EU experienced significant labour shortages in the period 2011 – 2014. Most labour shortages were experienced in medium-skilled and low-skilled occupations, such as agriculture and fisheries, and personal care. As shown in Table 1, a number of Member States MS stated that they faced occupational labour shortages in the area of medium-skilled professions, i.e. those not sufficiently covered by Member States or other EU nationals.

Table 1. Top three shortage professions (based on ISCO-08 occupations)

MS	Year	1	2	3
AT	2015	Metal working machine tool setters and operators – Metal turners	(Asphalt) Roofers	Metal working machine tool setters and operators – Milling machinists
HR	2015	Livestock farm labourer	Field crop and vegetable growers	Fitness and recreation instructors and program leaders
CZ	2014	Crop farm labourers	Heavy truck and lorry drivers	Security guards
EE	2013	Drivers and mobile plant operators	Business and administration associate professionals	Production and specialized services manager
FI	2014	Contact centre salespersons	Specialist medical practitioners	Dentists
HU	2014	Mining and Quarrying Labourers	Assemblers	Mechanical Machinery Assemblers
LV	2014	Software developers	Information and communications	Film, stage and related directors and

¹⁷ Cedefop 2016, 'Future skill needs in Europe: critical labour force trends'.

¹⁸ Communication from the European Commission, Brussels, "Towards a Reform of the Common European Asylum System and Enhancing Legal avenues to Europe" 6.4.2016 COM(2016) 197 final; See also the factsheet on attractiveness of the EU

¹⁹ EMN Synthesis Report 2015, 'Determining labour shortages and the need for labour migration from third countries in the EU'

			technology operations technicians	producers
PT	201 4	Sewing machine operators	Waiters	Commercial sales representatives

Source: National reports EMN study 2015 on labour shortages

The table shows that whilst many Member States face shortages in medium- and low-skilled occupations, in some Member States, the shortages are focussed on highly skilled workers, hence providing an overview of the disparate labour market needs of different Member States. However, the share of high-skilled migrants in total employment in the EU remains low compared to similarly developed economies across OECD Member Countries²⁰.

Third-country nationals can play a key role in meeting labour market shortages in selected sectors, including in ICT, financial services, household services, agriculture, transportation, construction and tourism-related services such as the hotel and restaurant industries²¹. An earlier medium-term forecasts (2006-2015) of skills supply suggested that substantial labour market shifts would occur away from primary and traditional manufacturing sectors towards services and knowledge-intensive jobs²². These sectoral changes would have a significant impact on future occupational skills needs. While there would be a continued demand for high- and medium-skilled workers, labour demand for low-skilled worker will likewise increase²³. Regarding the latter, a significant expansion in the number of jobs is to be expected in the retail and distribution industry. In this context, it is worthwhile noting that even though employment is expected to fall in a number of occupational categories, in particular as regards skilled manual labour and clerks, the estimated net job losses will be offset by the need to replace workers reaching retirement age. About 85% of all jobs openings will be the result of retirement or other reasons which lead to labour inactivity²⁴. Conversely, the tendency on the labour market to replace leaving or retiring workers with high-qualified ones, will lead between 2016 and 2025 to a reduction in the share of those working in elementary occupations with low qualifications (from 44% to 33%); while the share of high-skilled workers working in occupations demanding lower skills levels will from 8% to 14%²⁵.

In most Member States, public and policy debates are characterised by concerns about the use of labour migration as a tool for addressing labour shortages, particularly for the medium- and low-skilled occupation sectors. Therefore, Member States tend to prioritise labour market activation measures for the national labour force, including TCNs already residing in the Member States. According to the abovementioned EMN study²⁶ several Member States see attracting TCNs to fill such labour shortages only as a secondary measure (these include: AT, BE (Flanders), CY, IE, MT, LT and LU).

Due to the difference in current labour market needs across Member States²⁷, some question whether harmonisation of policies at EU level would be effective in addressing

²⁰ OECD Database on Immigrants in OECD Countries (DIOC) 2000/01 and 2010/11.
<http://www.oecd.org/els/mig/dioc.htm>

²¹ Employment in Europe 2008, 'The labour market situation and impact of recent third country migrants.'

²² Cedefop 2008, 'Future skills needs in Europe – medium term forecast.'

²³ Employment in Europe 2008, 'The labour market situation and impact of recent third country migrants'

²⁴ Cedefop 2016, 'Future skill needs in Europe: critical labour force trends'

²⁵ Ibid.

²⁶ EMN Synthesis Report 2015, 'Determining labour shortages and the need for labour migration from third countries in the EU'

²⁷ EMN Synthesis Report 2015, 'Determining labour shortages and the need for labour migration from third countries in the EU'

this issue. There is an argument that the entry and residence of workers is better regulated at national level as national legislation can react more quickly to changing labour market needs.

Whilst the Single Permit Directive covers the application procedure and the right to equal treatment for most categories of third-country workers (excluding some groups covered by other EU legislation, as well as workers posted from third countries), it does not cover admission and residence conditions for those medium- and low-skilled TCNs.

3.2 (Legal) definition(s) of the problem/gap

Third-country workers are defined in Directive 2011/98/EU as: *a 'third-country worker' means a third-country national who has been admitted to the territory of a Member State and who is legally residing and is allowed to work in the context of a paid relationship in that Member State in accordance with national law or practice"*

Furthermore, some definitions of medium- and low-skilled workers focus on their *qualifications*. For example, the International Organization for Migration (IOM) defines low and medium skilled TCNs based **on their educational attainment**. Thereby, the low skilled are defined as those with pre-primary and lower-secondary education (ISCED 0-2) and the medium-skilled as those with upper and post-secondary education (ISCED 3-4).²⁸ With regard to **skills levels**, the International Labour Organisation (ILO) ISCO-08 classification is also used, which differentiates between 10 major groups – highly-skilled from 1 to 3, medium-skilled from 4 to 8, and with low-skilled as 9. The IOM study additionally highlights the issue of highly-qualified TCNs who work in low-skilled jobs in the EU. In a 2007 OECD study, it was highlighted that immigrants are much more likely to hold jobs for which they appear to be over-qualified, suggesting significant skills mismatches²⁹.

3.3 Scale of the problem / gap

Eurostat provides data on first residence permits issued (flow) for remunerated activities. (see Table 2 below). However, the data is not disaggregated by skill level, although data is available for residence permits issued for highly skilled, researchers, seasonal workers and EU Blue Card. First permits issued for remunerated activities.

Table 2. Data on first residence permits issued (flow) for remunerated activities.

	2012	2013	2014	2015
Highly skilled workers	33,321	32,458	35,536	35,279
Researchers	12,680	10,420	10,196	10,851
Seasonal workers	20,323	17,092	188,152	333,370
Other remunerated activities	412,988	469,148	333,612	323,188
EU Blue card	1,646	5,096	5,825	4,910
Remunerated activities reasons - total	480,958	534,214	573,321	707,598

Source: Eurostat [migr_resocc]

Although no harmonised EU data exists on medium- and low-skilled TCNs entering the EU, some proxy data is available. It is estimated that non-EU migrants residing in the

²⁸ IOM (2012), Labour market inclusion of the less skilled migrants in the European Union. Further information on the ISCED levels are available here: [http://ec.europa.eu/eurostat/statistics-explained/index.php/International_Standard_Classification_of_Education_\(ISCED\)](http://ec.europa.eu/eurostat/statistics-explained/index.php/International_Standard_Classification_of_Education_(ISCED))

²⁹ Sopemi, OECD 2007, 'International migration outlook.

EU have a lower than average level of skills and qualifications – i.e. approximately, 45% of TCNs adults are without upper secondary education qualification in comparison with 22% of nationals³⁰. A recent OECD study³¹ based on projections from the EU Labour Force Survey found that “the foreign-born have had a more significant effect in expanding the less educated parts of the work force”. The study further finds that in countries where immigration flows have been significant, migrants have contributed relatively more to the size of the lower-educated labour force than to the higher educated labour force.

It is estimated that in 2010 the immigration population (foreign-born) in EU-15 aged 15 or above was composed of 41% of low-level of education; followed by 33% of middle-level of education and only 26% are highly-qualified. In comparison, in other OECD countries, the share of highly qualified immigrant is higher, at 36%.³²

3.4 Responses to the problem/gap

3.4.1 EU level responses

The conditions of admission and residence of medium- and low-skilled TCNs are not covered by the legal migration Directives, with the exception of seasonal workers covered under Directive 2014/36/EU.

The Single Permit does cover some TCN within this category as regards their application procedure for a residence and work permit, and their rights to equal treatment with nationals. However, there is no harmonised EU instrument on admission conditions for medium- and low-skilled workers.

3.4.2 National level responses

While the majority of MSs acknowledge that migration plays a role in addressing labour shortages, only a few MSs use migration as an key tool in filling gaps in the labour market (e.g. Austria, Germany, France, Spain and Ireland)³³. This is mostly due to concerns about competition with the national workforce. Thus, MSs often prioritise other measures, such as labour market activation of the national workforce or education / training policies to stimulate skills development in shortage areas.

Nevertheless, Member States who have established shortage occupation lists, tend to have a more favourable regulatory framework, which allows labour migrants to apply to work in professions listed as a shortage occupation. This may include exemptions from labour market tests (AT, BE, ES, IE, FR, HR, PL) and quota regimes (IT, EE, HR, PT) as well as reduced minimum income thresholds (EE)³⁴. Furthermore, points-based systems have been put in place in some Member States (AT), and/or bilateral agreements for recruitment of workers (FR) have been adopted in specific occupations with third-countries in order to facilitate access to the labour market³⁵.

3.5 Consequences of the problem/gap

The consequences of a lack of harmonised EU admission and residence rules for attracting low and medium skilled TCNs are difficult to assess in light of the different needs MS face regarding these groups of TNCs. Furthermore, ongoing discussions with regard to migration in the EU where attracting highly skilled TCNs is predominantly

³⁰ Skills and integration of Migrants, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/european-dialogue-skills-and-migration_en.

³¹ OECD (2016). Recruiting immigrant workers: Europe 2016

³² OECD Database on Immigrants in OECD Countries (DIOC) 2000/01 and 2010/11. <http://www.oecd.org/els/mig/dioc.htm>

³³ OECD (2016). Recruiting immigrant workers: Europe 2016

³⁴ According to the EMN (2015) study on determining labour shortages, 21 MS currently produce shortage occupation lists.

³⁵ Ibid.

seen as a necessity to gain competitive advantage compared to other destinations (such as the USA or Canada)³⁶, whereas an inflow of low-skilled groups of TCNs stand in direct competition with native-born workers³⁷.

Although medium- and low-skilled workers have certain sets of rights and procedural guarantees as per the Single Permit Directive, their rights are not guaranteed explicitly in comparison with other preferential categories of workers (e.g. EU Blue Card for the highly skilled), which act as incentives and may include the right to intra-EU mobility, and are based on national legislation.

3.6 Conclusions

- Although the Single Permit Directive guarantees certain rights (including equal treatment with nationals) and procedural guarantees, there is no harmonised EU instrument for admission of medium- and low-skilled workers.
- Statistics show that there is a current need for medium- and low-skilled workers in certain occupations but the particular occupations of need vary significantly across Member States.
- Future labour market trends suggest that the demand for low- and medium-skilled workers will increase, with expansion in the number of jobs is to be expected in the retail and distribution industry³⁸. While employment is expected to fall in a number of occupational categories, in particular as regards skilled manual labour and clerks, the estimated net job losses will be offset by the need to replace workers reaching retirement age. **National response:** Most Member States adopt labour market activation policies for their population (including (re)training) instead of satisfying labour demand through migration from third countries. Public debates frequently refer to the displacement of national workers, especially in the medium- and low-skilled occupations, from migration. Please add on available evidence. There are some Member States that use migration channels from third countries to satisfy labour market demand, and some have adopted flexible labour market tests for certain occupations identified as in need.

3.7 Sources

OECD (2016). Recruiting immigrant workers: Europe 2016

Communication from the European Commission, Brussels, "Towards a Reform of the Common European Asylum System and Enhancing Legal avenues to Europe" 6.4.2016 COM(2016) 197 final; See also the factsheet on attractiveness of the EU

EMN Synthesis Report 2015, 'Determining labour shortages and the need for labour migration from third countries in the EU'

IOM (2012), Labour market inclusion of the less skilled migrants in the European Union. Further information on the ISCED levels are available here:

[http://ec.europa.eu/eurostat/statistics-explained/index.php/International_Standard_Classification_of_Education_\(ISCED\)](http://ec.europa.eu/eurostat/statistics-explained/index.php/International_Standard_Classification_of_Education_(ISCED))

³⁶ EMN Synthesis Report 2015, 'Determining labour shortages and the need for labour migration from third countries in the EU'

³⁷ Employment in Europe 2008, 'The labour market situation and impact of recent third country migrants.'

³⁸ Cedefop (2014), 'Skills Mismatch: more than meets the eye'.

Jaumotte, F. et al, (2016), Impact of migration on income levels in advanced economies, International Monetary Fund, 2016.

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4 Self-employed workers

4.1 Problem / gap definition

Defining self-employed workers

Self-employed workers are generally understood as persons starting a business without being in a contractual relationship with an employer and carrying out an economic activity in self-employed capacity.³⁹ Although there is no commonly accepted definition, the type of business activity of the self-employed can usually be distinguished to two broad and in some cases overlapping categories:

- ‘traditional’ self-employment, commonly linked to low skilled jobs (e.g. ethnic food stores, cleaning, transport) and
- businesses which require innovation, highly skilled work and adoption and application of new technology (e.g. start-ups).

However, it should be noted that there are no encompassing definitions (also in terms of industries) of ‘innovative entrepreneur’ and ‘start-ups’ as this is a very dynamic process whereby in the modern knowledge economy a lot of the traditional industries (e.g. taxis, ethnic food stores) are being transformed in new ways (e.g. Uber taxis, delivery of fresh foods).⁴⁰

Attracting entrepreneurs in the EU

The EU has recognised the potential of the contribution that third-country national self-employed workers, in particular entrepreneurs admitted for business purposes into the EU for boosting economic growth and development of knowledge economy.⁴¹

Regulatory and support frameworks as well as a better climate for entrepreneurship have been implemented to entice qualified migrant entrepreneurs from other regions of the world to come to Europe. However, the EU lags behind other countries like the US, Canada or East Asia.⁴² European migrant businesses are mainly micro-businesses with no or very few employees, and comparatively small in terms of turnover and profit.

While the **problems faced by self-employed third-country nationals** seeking to enter and stay in Europe may differ, depending on whether they are existing business owners or entrepreneurs with start-up plans, the following issues have been identified as causing particular difficulties for these groups⁴³ (however it should be noted that some issues are more general and could apply to other categories of migrants):

³⁹ The Eurostat definition of ‘self-employed persons’ is persons who are the sole or joint owner of an unincorporated enterprise (one that has not been incorporated i.e. formed into a legal corporation) in which s/he works, unless they are also in paid employment which is their main activity (in that case, they are considered to be employees).

⁴⁰ ICF commissioned research for DG HOME “Admission of migrant entrepreneurs” 29 April 2016 [the study has not been published]

⁴¹ See European Commission (2012b), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘Entrepreneurship Action Plan 2020 - Reigniting the entrepreneurial spirit in Europe’, COM(2012) 795 final; European Commission’s Network (2008), ‘Supporting Entrepreneurial Diversity in Europe – Ethnic Minority Entrepreneurship/ Migrant Entrepreneurship: Conclusions and Recommendations of the European Commission’s Network (ECN) “Ethnic Minority Businesses”’, ENTR.E.1./TJ D(2008); European Council (2014), ‘Conclusions of the European Council of 26 and 27 June 2014’, EUCO 79/14; and European Commission (2016b), Minutes from the Conference on Migrant Entrepreneurs of 23 February 2016.

⁴² Gropas, R. (2013), ‘Migration and Innovation: Why is Europe Failing to Attract the Best and Brightest?’, March 2013. Available at: <http://globalgovernanceprogramme.eui.eu/migration-and-innovation-why-is-europe-failing-to-attract-the-best-and-brightest/>

⁴³ European Migration Network (2015).

- The complexity of the application procedure with regard to the stages of admission and stay, which in some cases is considered to be rigid, slow and requiring (too) much supporting documentation;
- Restrictive admission criteria, for example, having to evidence the viability of the planned business activity, that sufficient financial credit is in place to start a the business; that minimum qualifications criteria are met; or that the business is of benefit to the national economy (which may limit activities to a particular economic sector or regions in the country);
- Some applicants may be confused by the range of different permits and visas in place (both within and across Member States) or perceive there is a lack of clarity which may form a barrier;
- During their stay, self-employed third-country nationals may encounter hurdles in the start-up phase such as lack of familiarity with the functioning of local labour markets and with local business regulatory frameworks; language barriers and unfamiliar levels of bureaucracy;
- Restricted entitlements to welfare payments in some Member States;⁴⁴
- Difficulties in accessing local business associations and networks;
- Complex regulatory regimes, in particular for those not familiar with them;
- Restricted access to information and support;
- Greater difficulties in accessing financing products from formal institutions such as banks (even where specific start-up capital is an entry requirement, limited access to formal finance support can leave migrants at a disadvantage as compared to native entrepreneurs);⁴⁵
- Limited access to the European single market for their products as a result of limited rights to intra-EU mobility. However, this issue does not arise if products can be provided online.⁴⁶

Some of the **main problems faced by Member States** in attracting and admitting third-country nationals for business purposes identified in EU policy documents⁴⁷ concern the design and implementation of appropriate policies. In particular, the following challenges have been reported by Member States:⁴⁸

- The complexity of administrative procedures for admission to Member States and difficulties coordinating among competent authorities in charge of the implementation of economic and immigration policies;

⁴⁴ This is according to the European Commission's Network (2008), which may be outdated: According to the 2014 EMN Study "Migrant Access to Social Security and Healthcare", several social welfare provisions apply in the same way to migrant self-employed as to other third country nationals or to national self-employed. The provisions that do not apply the same usually only concern a minority of the EU Member States, these being access to **healthcare** benefits (as long as they meet the residence or contribution-based conditions. In a few they must take out a voluntary or commercial insurance), the earnings-related **statutory pension schemes** also cover self-employed workers, as long as they pay sufficient contributions, although the conditions for their access often vary; **survivors' benefits**. The access varies with regard to **invalidity benefits** and **accidents at work and occupational diseases** insurance. In some Member States, self-employed persons are not insured against this risk, while in other Member States, self-employed persons can be compulsorily insured. Finally, self-employed third-country nationals enjoy weaker protection **against the risk of financial difficulty** when they lose their jobs, although increasing numbers of Member States have extended unemployment protection to this group as well.

⁴⁵ European Commission (2012c).

⁴⁶ These restrictions also apply to third-country investors as outlined in the factsheet on investors.

⁴⁷ See e.g. European Migration Network (2015), 'Admitting TCNs for business purposes'; European Commission's Network (2008); European Commission (2016b).

⁴⁸ European Migration Network (2015).

- Difficulties in balancing facilitation of entry and stay for business owners with the necessary security measures to counteract the risk of bogus economic activities being set-up by third-country nationals;⁴⁹
- Difficulties in measuring the potential added value to the national economy of a business plan (when developing selective admission criteria) while facilitating the entry and stay of genuine third-country business owners.

4.2 Legal definition(s) of the problem/gap

The category 'self-employed' is not a homogeneous group and there is no universally agreed definition of self-employment.

All EU Member States regulate self-employment. National laws of the Member States show considerable variety with regard to the definitions and categories of third-country nationals admitted for self-employment, usually employing an instrumental definition to whatever purpose the immigration to the host country is taking place (for example 'innovative entrepreneur' or 'start-ups'). Member States thus design and implement specific programmes and incentives for these groups according to national priorities and needs.

In migration policy terms, these different economic realities have also been translated differently. In the 2015 EMN study three types of schemes for business owners can be distinguished: (i) wider category of self-employed person (BE, CY, CZ, DE, EE, ES, FI, FR, IE, IT, LU, LV, PL, PT, SE, SI). (ii) special visas/residence permits for 'innovative entrepreneurs' (AT, EE, ES, FR, IT, HU, LT, NL, SK, UK) among which; (iii) special start-up schemes for graduates (ES, FR, IE, UK).

The fact-sheet uses the term business owner and entrepreneur inter-changeably. The concept of 'entrepreneurship' is not a strictly defined one and can vary widely. A common understanding is that an entrepreneur is a person who sets up a business and is not employed by an employer. Given that their enterprises can also be corporates, entrepreneurs would only be partially included in the group of self-employed, according to the above Eurostat definition of 'self-employed person'. They are nonetheless fully included in the context of the present factsheet, because, in their entirety, they are subject to the same lack of harmonisation of admission and stay regulations as are the self-employed.

Within the group of migrant entrepreneurs, some Member States have introduced special admission schemes to attract innovative and start-up entrepreneurs. This sub-category is composed of third-country nationals who are talented and/or highly skilled, meeting the criteria set by a Member State and admitted on a visa or residence permit to set up a tech-driven or innovative business. This would exclude third-country nationals who intend to set up businesses such as restaurants and retail shops.

The fact-sheet does not cover another, closely related, category - migrant investors. Migrant investors are covered in a separate fact-sheet and refer to 'third-country nationals meeting the criteria set by a Member State and admitted on a long-stay visa to a Member State for the purpose of making a (substantial) financial investment either in financial products or in a business but without involving in the day to day operations or in the management of business'.⁵⁰

Finally, the fact-sheet does not cover third-country national business persons who arrive in an EU Member State to provide a service. These 'international service providers' include the six different categories of "natural persons" providing services as contained in the EU's schedule of specific commitments of the General Agreement

⁴⁹ Overall, the European Migration Network (2015) has found little evidence of *systemic* misuse / abuse of business migration channels across the EU.

⁵⁰ Ibid

on Trade in Services (GATS) and the EU free-trade agreements. While some of these categories (for example 'independent professionals') may overlap in Member State legislation with the self-employed category that is addressed in this fact-sheet, international service providers are considered to be conceptually different for the purpose of this study. In particular, international service providers, unlike the migrant business owners and start-up entrepreneurs whom we consider here, are not seeking a 'residence status' in the EU.

4.3 Scale of the problem / gap

In order to analyse the scale of the identified problems, data on two general aspects is required, particularly:

- Data on the number of applications by third-country nationals for entrance/residence permits for self-employed activity, including admissions;
- Number and share of existing migrant self-employed/businesses compared with EU nationals.

However, comprehensive statistical information on third country nationals applying and admitted for the purpose of self-employment is scarce and not fully comparable across countries due to the different data sources, quotas, and the existing different sub-categories, or since some self-employed categories have been introduced too recently (along with the corresponding scheme or programme) to be able to provide such comprehensive information.⁵¹

Nevertheless, some numbers have been made available, e.g. for specific EMN studies. This information may be indicative for the scale of the problem.

Number of applications and admissions

According to the European Migration Network Study (2015), over the period 2009 – 2013, as regards immigrant business owners, there is no general trend in all Member States. In 2013, the number of applications for residence permits for immigrant business owners ranged from 77 (EE) to 4,670 (LT), while the number of residence permits granted from 54 (EE) to 4,179 (LT).

As regards permits granted under a national scheme for entrepreneurs,⁵² the UK has issued the highest number of permits, perhaps also because the scope is relatively large. The annual average number of visas issued by the UK between 2010 and 2015 was 2,648; 350 by France;⁵³ 82 by Spain; 40 by Italy; 52 by Denmark; and 30 by Ireland. When accounting for residence permits per 100,000 of the total population, the relative amount of issued visas remains similar with the highest number of start-up visas issued in the UK (with 8.5 in 2014 start-up visas granted per 100,000 of total population); followed by a distant 0.7 in Ireland and 0.5 in Denmark.

Share of existing migrant self-employed/ businesses compared with EU nationals

Studies suggest that in several Member States the share of third-country national entrepreneurs in total employment is higher than for others.⁵⁴ Figures from 2012 indicate that while in half of EU Member States non-nationals were "less likely to be self-employed than the native-born population", in seven EU Member States (BE, CZ,

⁵¹ European Migration Network (2015); European Commission's Network (2008); and Organisation for Economic Co-operation and Development (OECD) (2010), 'Main Findings of the Conference on Entrepreneurship and Employment Creation of Immigrants in OECD Countries, 9-10 June 2010'.

⁵² The following statistics are compiled in ICF (2016), 'Admission of migrant entrepreneurs' [unpublished].

⁵³ During that period, France issued 300 permits issued under the residence permit for skills and competences and 50 under the Paris Tech Ticket scheme. Currently, France issues up to 70 Paris Tech Tickets yearly.

⁵⁴ See for example European Commission's Network (2008); European Commission (2012c), 'Integration Dossier N° 2: Immigrant self-employment and entrepreneurship 2012'; ICF (2016).

DE, DK, FR, HU, and UK⁵⁵) the rates for self-employment of migrants are higher compared to natives, highlighting the entrepreneurship potential of migrants.⁵⁶

In most OECD countries, migrants have been found to be slightly more likely to start businesses than their native-born peers. Across OECD countries, between 2007 and 2008, 12.6% of migrants were self-employed, compared with 12.0% of natives.⁵⁷ As an example, in the Netherlands the share of third-country national entrepreneurs increased by over 3 percent in the period of 1998-2008, in Austria it increased by 2 percent, and there was a slightly smaller increase in Germany by 1.3 percent. However, during the same period the annual number of new migrant entrepreneurs in Germany almost doubled (from 49 000 in the period of 1998-2000) and rose to over 100 000 per year (in the period of 2007-2008). There has been a similar development in Spain with 77 000 new entrepreneurs, Italy with 46 000 and France with 35 000 new entrepreneurs per year.⁵⁸

As well as admitting new migrants for the purpose of undertaking self-employment and enterprise creation, Member States may also permit migrants who are already in the territory of a Member State to change their status. Figures on the **change of status into business owners** from 2013 vary from up to 5 in Austria to 1657 in the Czech Republic in 2013 and 3303 in the United Kingdom, where 72% of foreign nationals changed their status from worker to business owner, and 26% from student to business owner.⁵⁹

4.4 Responses to the problem

4.4.1 EU level responses

Right to access to self-employment activities for specific categories of TCNs is regulated by four EU legal migration Directives as illustrated in the table below. This is subject to possible restrictions at discretion of the EU Member States. The LTR Directive grants equal treatment to TCNs with nationals as regards access to among others self-employed activity. The Family Reunification Directive allows sponsor's family members access to self-employed activity. The Student Directive and the Students and Researchers Directive allow students outside their study time to exercise self-economic activity. As for the latter Directive, after the completion of their studies or research, students and researchers have the possibility to stay in the Member States for at least nine months in order to seek employment or set up a business.

In addition to the above-mentioned recast Students and Researchers Directive of 2016, **the Blue Card recast proposal allows** holders to exercise a self-employed activity in parallel with their Blue Card occupation as a possible gradual path to entrepreneurship. This entitlement does not change the fact that the admission conditions for the EU Blue Card have to be continuously fulfilled and, therefore, the EU Blue Card holder must remain in highly skilled employed activity.

⁵⁵ In the UK, the business share of TCN entrepreneurs is higher than the UK average in certain sectors (professional, scientific and technical activities, as well as information and communication activities). In fact, it is estimated that a quarter of start-ups in Tech City, the leading company in London supporting digital technology business across the UK, were founded by migrant entrepreneurs.

⁵⁶ Organisation for Economic Co-operation and Development (OECD), European Commission (2014), 'The Missing Entrepreneurs 2014'.

⁵⁷ Desiderio, M. V. (2014), 'Policies to support immigrant entrepreneurship', *Migration Policy Institute*.

⁵⁸ A similar increase was seen in the UK, from 45 000 to almost 90 000 per year in the same period. In the UK, in 2014, one in seven of all companies was run by migrant entrepreneurs. Migrants were responsible for 14% of SME job-creation, while they represent 12.5% of the population. See Johnson, L., Kimmelman, D. (2014), 'Migrant entrepreneurs: building our businesses, creating our jobs', *Centre For Entrepreneurs & DueDil*; and Rienzo, C., Vargas-Silva, C. (2014), 'Migrants in the UK: An Overview', *The Migration Observatory at the University of Oxford*.

⁵⁹ European Migration Network (2015).

Table 3. Coverage of self-employed workers in EU instruments

Directive 2003/109/EC "Family Reunification"	Directive 2004/114/EC "Students"	Directive 2003/109/EC "Long term residents" as amended	Directive (EU) 2016/801 "Students and Researchers"
Right of access to employment and self-employed activity			
<p>Article 14</p> <p>1. The sponsor's family members shall be entitled, in the same way as the sponsor, to: [...]</p> <p>(b) access to employment and self-employed activity.</p>	<p>Article 17(1)</p> <p>Economic activities by students</p> <p>1. Outside their study time and subject to the rules and conditions applicable to the relevant activity in the host Member State, students shall be entitled to be employed and may be entitled to exercise self-employed economic activity.</p>	<p>[Provided for as part of the right to equal treatment]</p> <p>Article 11</p> <p>Equal treatment</p> <p>1. Long-term residents shall enjoy equal treatment with nationals as regards:</p> <p>(a) access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration</p>	<p>Article 24(1)</p> <p>Economic activities by students</p> <p>1. Outside their study time and subject to the rules and conditions applicable to the relevant activity in the Member State concerned, students shall be entitled to be employed and may be entitled to exercise self-employed economic activity, subject to the limitations provided for in paragraph 3.</p>
Restrictions to the right of access to employment and self-employed activity			
<p>Article 14(2) and (3)</p> <p>2. Member States may decide according to national law the conditions under which family members shall exercise an</p>	<p>Article 17(1), (2), (3) and (4)</p> <p>1. [...] The situation of the labour market in the host Member State may be taken into account.</p> <p>2. Each Member</p>	<p>Article 11</p> <p>Equal treatment</p> <p>[...] 3. Member States may restrict equal treatment with nationals in the following cases:</p> <p>(a) Member States</p>	<p>Article 23</p> <p>Teaching by researchers</p> <p>[...]</p> <p>Member States may set a maximum number of hours or of days for the</p>

Directive 2003/109/EC "Family Reunification"	Directive 2004/114/EC "Students"	Directive 2003/109/EC "Long term residents" as amended	Directive (EU) 2016/801 "Students and Researchers"
<p>employed or self-employed activity. These conditions shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labour market before authorising family members to exercise an employed or self-employed activity.</p> <p>3. Member States may restrict access to employment or self-employed activity by first-degree relatives in the direct ascending line or adult unmarried children to whom Article 4(2) applies.</p>	<p>State shall determine the maximum number of hours per week or days or months per year allowed for such an activity, which shall not be less than 10 hours per week, or the equivalent in days or months per year.</p> <p>3. Access to economic activities for the first year of residence may be restricted by the host Member State.</p> <p>4. Member States may require students to report, in advance or otherwise, to an authority designated by the Member State concerned, that they are engaging in an economic activity. Their employers may also be subject to a reporting obligation, in advance or otherwise.</p>	<p>may retain restrictions to access to employment or self-employed activities in cases where, in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or EEA citizens</p>	<p>activity of teaching.</p> <p>Article 24(3)</p> <p>3. Each Member State shall determine the maximum number of hours per week or days or months per year allowed for such an activity, which shall not be less than 15 hours per week, or the equivalent in days or months per year. The situation of the labour market in the Member State concerned may be taken into account.</p>

4.4.2 National level responses

Designing and implementing programmes and schemes to attract and admit third-country nationals for business purposes is a growing phenomenon. Member States⁶⁰ do so according to their national need by providing incentives and facilitating entry

⁶⁰ For example, Denmark, France, Ireland, Italy, the Netherlands, and Spain, have introduced special schemes for 'innovative' start-ups and entrepreneurs in the EU from 2013 to 2016. .

and stay. Therefore, the relevant national legal frameworks differ across Member States.

In the 2015 EMN study three types of schemes for business owners can be distinguished: (i) special visas/residence permits for 'innovative entrepreneurs' (AT, EE, ES, FR, IT, HU, LT, NL, SK, UK)⁶¹; (ii) special start-up schemes for graduates (ES, FR, IE, UK) and (iii) wider category of entrepreneur/self-employed person (BE, CY, CZ, DE, EE, ES, FI, FR, IE, IT, LU, LV, PL, PT, SE, SI)⁶². The categories of the TCNs covered under the particular residence permits/visas are presented below⁶³.

- **Special visas/residence permits for 'innovative entrepreneurs and start-ups'**: In all of the examined EU Member States, special visas/residence permits for 'innovative entrepreneurs and start-ups' exist. There are no encompassing definitions of 'innovative entrepreneur' and 'start-ups' but these are defined by different admission criteria and thresholds (which are examined in detail in Section 3). The threshold for 'innovativeness' (examined in detail in Section 3.1.5) is differently defined and set in EU Member States. In two Member States, there are sectoral limitations - life science, ICT, design and clean-tech and sustainable energy (**DK**) and ICT (**IE**).

With the exception of **the United States (US)**, there are special visas for entrepreneurs in place in all of the examined international schemes. Special international schemes for entrepreneurs were adopted much earlier than those of EU Member States. Since 1976, **Australia** has envisaged the category of foreign entrepreneur into the national legislation and since 1999 in **New Zealand** and 2003 in **Singapore**, while in the EU the first scheme was adopted in 2008 in the **UK**, followed by **Ireland** in 2012 and **Spain** in 2013.

- **Residence permits for general self-employment activities**: In three EU Member States (**IT, NL, ES**), residence permits for general self-employment activities (meaning not limited to specific sectors or industries or requiring 'innovation'). A self-employment permit existed in **Denmark** which was abolished with the introduction of 'Start-up Denmark' scheme in 2015. The general permits for self-employment are defined broadly to comprise a wide range of self-employed activities, for example "TCNs who practice a profession or operate a business on a self-employed basis" (definition **NL**) or "exercising industrial, professional, artisan or commercial activity; or setting up corporations or partnerships" (definition **IT**). Under Dutch legislation, the allowed legal forms are sole traders, general partnerships and private limited liability companies. General self-employment visa/residence permits do not exist in Ireland and the **UK**.

In the non-EU countries, only **Canada** has a self-employment permit ('Self-employment persons programme') which is limited to farmers, cultural activity individuals and athletic activity individuals.

- **Special start-up schemes for graduates**: Special entrepreneurship schemes for graduates have been introduced in **Denmark** ('Establishment Card' introduced in January 2015), **Ireland** (12 month immigration permission also for foreign STEM graduates introduced in 2014) and **UK** ('Graduate entrepreneur' established in 2008). The Danish 'Establishment Card' is granted to TCNs who have a Danish master's or a PhD degree and want to establish a business with no sectoral limitations.

⁶¹ Slovakia aims to introduce schemes as well, however it is not operational yet.

⁶² European Migration Network (2015), Study on Admitting third country nationals for business purposes, pp. 15-16

⁶³ ICF study (2016)

- **'Umbrella' residence permits which are targeted to a wider group of TCNs:** 'Umbrella' residence permits which comprise a wider group of TCNs are in place in two EU Member States (FR and ES). In **France**, the 'Residence Permit for Skills and Talents' (to be replaced by the 'Talent passport' in November 2016) includes a wider range of 9 categories covered with entrepreneurs being one of them. Similarly, in **Spain**, the national scheme introduced under the Law 14/2013 covers four categories of third country nationals, for whom the legislation facilitates entry and/or stay in Spanish territory on grounds of economic interest: entrepreneurs, investors, highly qualified workers and researchers.

The rights granted to migrant entrepreneurs vary across Member States. While most Member States grant the right to family reunification,⁶⁴ access to the labour market for family members,⁶⁵ and access to social benefits,⁶⁶ only three Member States⁶⁷ offer an accelerated access to citizenship.

An IOM study of 2008⁶⁸ concluded that Member States which implement measures which address existing difficulties holistically, by providing migrants with a combined offer of training and regulatory advice, social capital, a microcredit, and facilitated access to business funding and working spaces, are best suited to support migrant entrepreneurs and their businesses.⁶⁹

A 2014 EMN study on migrant access to social security highlighted the restrictions in place in certain Member States as regards access to social security for self-employed workers. For example, in BG, MT and PL self-employed workers cannot access healthcare benefits and must take out voluntary or commercial insurance. In BG and CY, self-employed workers are not covered by benefits in respect of accidents at work. In BE, CY, EE and PL, self-employed workers are excluded from compulsory unemployment insurance.⁷⁰

4.5 Consequences of the problem / gap

Although there is no specific scheme at EU level, several national admission schemes are in place in the Member States to attract self-employed.

Other negative consequences of the current system have been highlighted:⁷¹

- **Consequences for self-employed third-country nationals:** Less favourable business conditions (e.g. no access to financial credit or to risk insurance) may not allow the full economic potential of such businesses to grow and hinder its success, productivity, longevity. Access to social welfare for self-employed third-country nationals is restricted in some Member States.
- **Consequences for Member States:** As it can be seen from Table 3 above, Member States may restrict the access to self-employment for certain categories of TCNs covered by the EU migration acquis. Restrictive admission

⁶⁴ AT, BE, CY, CZ, DE, ES, EE, FI, FR, HU, IE, IT, LT, LU, NL, PT, SE, SI, SK, UK.

⁶⁵ AT, BE, CY, CZ, DE, ES, EE, FI, FR, HU, IE, IT, LT, LU, NL, PT, SE, SK, UK.

⁶⁶ AT, BE, CZ, DE, EE, FR, HU, IT, LT, LU, PL, PT, SE, SI, SK.

⁶⁷ CY, FR, SI.

⁶⁸ International Organisation for Migration (IOM) (2008), 'Comparative Study of the Laws in the 27 EU Member States for Legal Immigration Including an Assessment of the Conditions and Formalities Imposed by Each Member State for Newcomers'.

⁶⁹ European Commission (2012c).

⁷⁰ EMN Study on Migrant access to social security and healthcare, EU Synthesis Report (2014) https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/final_synthesis_report_migrant_access_to_social_security_final_3july2014_en.pdf

⁷¹ European Migration Network (2015).

criteria for self-employed third-country nationals may prevent migrant entrepreneurs from contributing to economic growth and job-creation and diversifying the supply of goods and services. On the other hand, although there seems to be little evidence of systematic misuse / abuse of business migration channels across the EU, the lack of more sophisticated mechanisms to detect cases of bogus enterprises⁷² may result in misuse with a negative effect on the market and, as evidenced in national debates, may also raise social tensions.⁷³

- **Consequences at EU level:** There are currently complex admission and stay criteria for migrant business people at Member State level. Simplifying these could contribute to bringing greater competition and flexibility to EU markets.

4.6 Preliminary Conclusions

- **The existing Directives exacerbate the problem as they do not offer an admission route for third-country national self-employed persons.** The resulting divergence in admission and stay conditions for self-employed workers across Member States is an obstacle to attracting migrant entrepreneurs. While some of the Directives grant the holders of the respective permits (Long-Term Residence Directive and Family Reunification Directive) the right to work in self-employed activities, other Directives, including the Student and Researchers Directive make this an option for Member States. The ICT, Single Permit Directive and the Seasonal Workers Directive moreover explicitly exclude self-employed workers. Even where third-country national holders of certain EU permits are granted the right to work in self-employed activities, their rights (e.g. to certain forms of social protection) can be restricted by Member States.
- **The way Member States implement the Directives is likely to exacerbate the problem, given the options they have to restrict the rights of self-employed workers.** This statement will need to be confirmed once the results of the national research undertaken in Task II are available.
- **No other EU legislation exists to respond to the problem.** Exploratory work on an EU instrument to attract innovative entrepreneurs is on-going.
- **Currently there are gaps in the response at EU and national level.** The absence of a specific entry route for third-country national entrepreneurs at EU level means that self-employed workers must rely on national permits/schemes to enter the EU. While the majority of Member States have some sort of visa / permit for third-country national self-employed workers, only a few Member States have a 'scheme' to attract specifically innovative start-ups.

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⁷² Aside from the initial control at admission stage, cases of misuse / abuse of the migration channel are only manifest upon renewal of the residence permit or when specific inspections are carried out (European Migration Network, 2015).

⁷³ European Migration Network (2015).

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5 Investors

5.1 Gap definition

EU level

Currently, there is no harmonised EU legislation which regulates the admission of investors in the EU. The area of investment (including foreign direct investment) is part of the EU common commercial policy (Art.206 and Art.207 of Treaty of the Functioning of the European Union). The EU's investment policy is centred on providing investors with market access, with legal certainty and with "a stable, predictable, fair and properly regulated environment in which to conduct their business".⁷⁴

Regulation No 1219/2012 on establishing transnational arrangements for bilateral investment agreements (BIAs) between EU Member States and third countries grants legal security to the existing BIAs between EU Member States and third countries until they are replaced by EU-wide investment deals. It also allows for the Commission to authorise Member States to open formal negotiations with a third country to amend or conclude a BIA under certain conditions. The EU is concluding free trade agreements and negotiating investment agreements with some third countries. Whereas the EU is currently negotiating stand-alone agreements with China and Myanmar, investment chapters are being negotiated in the context of FTAs with India, Singapore, Japan, the United States, Egypt, Tunisia, Morocco, Jordan, Malaysia, Vietnam and Thailand. For example, the aim of the agreement with China is to remove market access barriers to investment and provide a high level of protection to investors and investments in EU and China markets. One of the aims of the EU's investment policy is also to "facilitate the movement of investment-related natural persons ("key personnel)".⁷⁵ The facilitation of movement of investment-related natural persons has been a point of discussion in EU FTA negotiations with third countries (e.g. India).⁷⁶

National level

18 Member States⁷⁷ have been identified which have in place specific admission provisions for investors where **investment of a minimum threshold is most commonly a condition for obtaining the permit**. The table below presents a short overview of national admission schemes for investors. In addition, Finland has introduced plans to develop residence permits for investors, entrepreneurs, and specialists from third countries, a Government Proposal on the subject is planned in December 2017. The conditions for admission and the duration and renewal periods vary significantly across Member States. The most common condition in these admission schemes is a minimum amount of investment in a company registered in the Member States and/or state bonds. In some cases, such as in the Netherlands, the investment has to have an added value for the national economy which is subject to assessment or as in Bulgaria, the investment threshold is significantly lower when investing in economically disadvantaged areas. Family reunification is usually allowed and facilitated under such schemes. In the case of Cyprus and Malta, successful applicants are granted citizenship. The duration of the residence permit granted to investors varies considerably, from 1 year (Croatia, the Netherlands) to 10 years (in connection with one of the permit categories in France).

⁷⁴ http://ec.europa.eu/trade/policy/accessing-markets/investment/index_en.htm

⁷⁵ *ibid*

⁷⁶ Tomer Broude (ed.) (2011), *The Politics of international economic law*; Cambridge University Press

⁷⁷ Please note that this Fact-sheet does not cover admission of entrepreneurs but only admission schemes for investors where investment of a minimum threshold is most commonly a condition for obtaining the permit

Table 4. Overview of national admission schemes (residence permits and visas) for investors

Member State	Type of visa/residence permit	Year of introduction	Short overview
BG	A prolonged residence permit may be granted to foreigners who possess a visa D		<p>Main conditions:</p> <ul style="list-style-type: none"> have invested a sum not less than BGN 600 000 have made investments in economically disadvantaged areas of not less than BGN 250 000 <p>Permission for a permanent residence may receive aliens:</p> <ul style="list-style-type: none"> who has invested more than 1 000 000 BGN <p>other conditions also apply</p>
CZ	Residence permit for investors	To enter into force second half of 2017	It will introduce a new concept of migration a programme designed for the purpose of significant economic benefits, amongst others, for the Czech Republic.
CY	Scheme for Naturalization of Investors in Cyprus by exception		<p>Main conditions:</p> <ul style="list-style-type: none"> The applicant must have purchased state bonds of the Republic of Cyprus of at least €5,0 million. Investment in financial assets of Cypriot companies or Cypriot organizations: The applicant must have purchased financial assets of Cypriot companies or Cypriot organizations (bonds/ securities/ debentures registered and issued in the Republic of Cyprus) of at least €5,0 million. <p>Other conditions apply</p>
DE	<i>No specific residence permit for investors but</i> residence permit for the purpose of self-employment		<p>Main conditions:</p> <ul style="list-style-type: none"> existence of an economic interest or a regional need, foreseeable positive effects of the activity on the economy and secured financing
EE	Temporary residence permits for foreign investors	2017	Investors who have made investments in Estonia that exceed one million euros
FR	Residence permit for exceptional and economic contribution		The applicant must provide documents proving that the criteria of article R. 314-6 of the Code on Entry and Residence of Foreigners and Right of Asylum (CESEDA) are met, i.e. the creation or

			saving of at least 50 jobs or investment of EUR 10 million
HR	Residence permit for a substantial investment in a business		Substantial investment in a business
HU	Preferential residence and long-term residence rights for high net worth investors	1 st January 2015	Invested in special state bonds from €300,000
LV	Residence permit for investors	January 2015	A new five-year temporary residence permit may be issued to a third-country national upon purchase of interest-free state securities for a value of 250,000 euros, and payment of 25,000 euros into the state budget
LT	Temporary residence permit		Investing into a company registered in Lithuania and is involved into the management of that company.
LU	Authorisation of stay for investors	8 th February 2017	A new bill modifying the existing Immigration Law ⁷⁸ aims to: adapt existing legislation in the domain of legal migration, introducing an authorisation of stay for investors, softening conditions for family reunification and modifying dispositions regarding the change of status of students.
MT	Citizenship by investment	October 2013	Capped at 1,800 participants Main conditions: minimum investment of €650,000 other conditions and due diligence apply
NL	Residence permits for investors		Main conditions: minimum amount of €1,250,000 in a company that is based in the Netherlands investment has an added value for the Dutch economy (determined through a points-based system) ⁷⁹ .
ES	investor visa and residence		The duration of renewals has been extended to five years and a new category,

⁷⁸ On 8 February 2017, bill n°6992 was passed in Parliament

⁷⁹ <https://ind.nl/en/other/Pages/Investing-in-the-Netherlands.aspx>

	permit		investor representative, has been created
PT	A residence permit for purposes of performing investment activities		The type is a Residence permits for investment activities. The title is valid for one year and renewable for two years.
RO	Romanian Investor Visa		Main conditions: minimum amount of Euro 100.000 in Romania in a business that will create at least 10 permanent jobs for a period of minimum 5 years.
IE	Immigrant Investor Programme		Main conditions: A net worth of at least €2 million and at least €500,000 (depending on the investor option chosen) ready for investment
UK	Tier 1 Investor visa	2010	Main conditions: have at least £2,000,000 investment funds to apply for a Tier 1 (Investor) visa.

Sources: official government web-sites presenting information on the permits; EMN Annual Policy Report 2016 and corresponding national reports; EMN Annual Policy Report 2015 and corresponding national reports; EMN Ad-Hoc Query No. 2016.1017 'Residence permits for foreign investors'

5.2 Scale of the problem/gap

According to economic theory, investment plays a crucial role in establishing businesses, creating jobs at home and abroad, as well as in setting up global supply chains. According to UNCTAD World Investment Report 2016, with flows of \$576 billion, Europe became the world's largest investing region both in terms of FDI inflows and outflows.

The importance of attracting investors has been emphasised in EU policy documents. In its trade policy, the European Commission (EC) points out that attracting investors to the EU brings many benefits, including job creation, transfer of skills and technology as well as boosting trade.⁸⁰ In a Communication issued in 2010, the European Commission emphasised that the EU cannot afford to 'take a backseat in the global competition to attract and promote investment from and to all parts of the world'.⁸¹ Furthermore, a recent Commission Communication on the Digital Single Market (DSM) underlines that achieving the DSM in Europe is a prerequisite for attracting investment in digital innovations and for faster business growth in the digital economy and in particular, "investments in the production of digital products, from components to devices and software, for consumer markets and in web and data platforms and relevant applications and services"⁸². The importance of attracting investment has also been emphasised in other sectors.

Statistics on admission of immigrant investors

Statistics on immigrant investors are provided by Member States. However, comprehensive statistical information on third country nationals applying and admitted for investment is scarce and not fully comparable across countries due to the different data sources. Further, Eurostat does not publish statistics on migrant investors; hence, EU-wide data on this group of migrants is missing. The following statistics have been provided by Member States in an EMN Ad-Hoc Query⁸³.

Table 5. Statistics on number of residence permits/visas for investors issued

Member State	2010	2011	2012	2013	2014	2015
France (Exceptional and economic contribution" residence permit)			4	2	3	
Hungary				434		
Lithuania					1,141	
Portugal			2	494	1,526	766
Spain				from 28/9/2013 to 31/12/2015: 1,281		
Ireland			54			
UK –main applicant	211	331	470	565	1,172	
UK –dependent	372	529	920	1,038	1,823	

*The cells shaded with vertical lines means that there is no data available, while the cells shaded in grey designates the countries which do not implement EU legal migration acquis

⁸⁰ http://ec.europa.eu/trade/policy/accessing-markets/investment/index_en.htm

⁸¹ COM(2010)343 final, 7th July 2010 Towards a comprehensive European international investment policy

⁸² COM (2016) 180 final

⁸³ EMN Ad-Hoc Query No. 2016.1017 'Residence permits for foreign investors'

As it can be seen from the limited data available, the number of permit granted vary significantly (from very few granted in France to 1,526 granted in Portugal in 2014) which confirms that the thresholds and assessment criteria differ to a large extent across Member States.

5.3 EU/national responses

Concerns regarding the uneven playing field in the area of admission of investors have been raised at EU level. Following the decision of Malta in October 2013 to introduce citizenship for investors, a debate was held in the European Parliament in 2014 entitled 'EU citizenship for sale'. The main concern was that granting national citizenship by extension guarantees EU citizenship. Art. 9 and 20 of the TFEU stipulate that the EU citizenship shall be 'additional to and not replace national citizenship' – namely, individuals possessing the citizenship of any of the Member States can claim benefits from the rights attached to EU citizenship, while the Member States have the sole prerogative to decide on their membership. The rights attached to EU citizenship have amplified with the Treaty of Amsterdam and the Lisbon Treaty to include the rights of free movement, diplomatic protection, linguistic rights, and rights of direct representation in the municipal and European Parliament elections. The outcome of the EP debate was a resolution (2013/2995[RSP]), ascertaining that the matters related to citizenship are indeed an area of exclusive competence of the Member States, but that in regulating their membership, Member States should "live up to the responsibilities they hold in safeguarding the values and objectives of the Union".⁸⁴

5.4 Consequences of the problem/gap

Although granting national residence permits/visas for investors does not automatically give the right to intra-EU mobility, or in the case of a visa the right to reside long term in a Member State and subsequently obtain long-term residence status and/or acquire citizenship. The different sets of requirements that Member States have in place may result in distortion and '**visa/residence permit/citizenship shopping**' risks whereby TCNs apply to the Member States with the lower sets of requirements as an entry channel and access to the EU.

As highlighted above, some of the national admission schemes for investors (e.g. the Netherlands, Bulgaria) include, as a condition, demonstrating added value for the development of the economy. In this respect, such investment admission instruments are geared towards boosting the *national* economy which although aimed at economic development and growth at national and thus by extension EU level may give rise to conditions for the distortion in the competition of the European Single Market. Furthermore and similarly to attracting highly qualified workers and entrepreneurs (evidenced by the growing number of national schemes introduced in this area), there is a level of competition for attracting talents among Member States⁸⁵. Competition without harmonised regulation could result in a 'race to the bottom' where Member States aim to attract investment at the possible cost of attracting irregular investors seeking to launder money in Europe or undertake other illicit practices. These aspects need to be taken into account when considering introducing an EU harmonised instrument for attracting investors.

In the face of global competition for talent and investment, having different national schemes can be confusing to investors in terms of their residence and mobility rights in the EU (e.g. no one-stop-shop provision of information⁸⁶). National residence

⁸⁴ Resolution 2013/2995[RSP] <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2014-0017&language=EN>

⁸⁵ Evaluation and Impact Assessment of the EU Blue Card, available at: europa.eu/rapid/press-release_IP-16-2041_en.htm

⁸⁶ Investment does not appear to be included as a category on the EU immigration portal web-site

permits do not grant investors intra-EU mobility rights as granted in the categories covered by other EU Directives. This can be an influencing factor to investors whether to move to the EU.

5.5 Preliminary Conclusions

In this final concluding section, the information contained in the fact-sheet is used to provide preliminary answers to a series of evaluation questions which will feed into the overall REFIT evaluation to be conducted in Task IV of the study in support of the fitness check of the EU legal migration acquis.

- **No EU harmonised approach to the admission of investors**

As outlined above, there is no harmonised EU instrument for admission of investors although the facilitation of movement of investment-related natural persons has been included as a point of discussion in EU FTA negotiations with third countries.

- **Skewed national approaches result in an uneven playing field**

At the same time, most Member States have adopted national residence permits and visas for the admission of investors. These schemes vary significantly in terms of their design (e.g. duration, admission of family members and other rights) as well as the conditions applied, including varying thresholds of minimum investment required.

Potential concerns of 'visa/residence permit/citizenship' shopping

- The different sets of requirements that Member States impose may result in distortion and 'visa/residence permit/citizenship shopping' risks whereby TCNs apply to the Member States with the lower sets of requirements (e.g. level of investment) as an entry channel and access to the EU.

Risk of misuse of investment channels in the absence of a harmonised approach

- Where Member States are free to attract investors in a situation of competition, in the absence of a harmonised regulation, the door may be open to irregular investors /money launderers who could in time obtain access to the whole of the EU territory through mobility rights. In this respect, a key challenge is to strike a balance between selective admission criteria able to prevent and reduce abuses and yet provide for favourable channels for genuine third-country investors and business owners.⁸⁷

Possible distorting effect of the level playing field through focus on 'national interest'

Admission schemes which are nationally motivated with conditions attached to 'national interest' and development of national sectors may have implications for the distortion of the European Single Market in terms of the increasing level of competition among Member States to attract talent and investment.

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<https://www.gov.uk/tier-1-investor/overview>

6 International service providers not linked to commercial presence (contractual service suppliers and independent professionals) (excluding ICTs that are covered by Directive 2014/66/EU)

6.1 Problem/gap definition

With the increasing internationalisation of business, coupled with changing patterns of mobility resulting from the liberalisation of services, designing and implementing policies and schemes to attract and facilitate the admission of TCNs for business purposes is a growing phenomenon⁸⁸.

While Member States strive to make their immigration schemes “business friendly”, immigration authorities are at the same time called upon to ensure a balanced approach, providing for effective border controls and measures to prevent abuse and detect fictitious/bogus or other illegal/criminal activities, while minimising the negative impact on existing businesses and, by extension, on their national economies⁸⁹.

There are already several coexisting schemes that regulate the immigration of TCN who enter the EU for business purposes: e.g. from intra-corporate transferees (now covered by Directive 2014/66/EU), to investors and service providers with no commercial presence in the EU (not covered by EU legislation).

While there are no comprehensive EU schemes regulating the entry into the EU of TCNs for business purposes, including TCNs wishing to perform service transactions in the EU, Member States design their own policies to manage the entry and stay of TCN, picking and choosing measures and criteria they deem will best meet their national interests as well as the needs of business persons⁹⁰. However, the lack of comprehensive EU schemes in this regard implies a number of costs for EU consumers and the EU economy as a whole, as well as for the international service providers. The absence of EU wide schemes means that there is no intra-EU mobility for these types of TCN, and therefore no possibility for the European Single Market to take full advantage of the business opportunities created by non-EU investors or service providers.

More specifically in what regards international service providers, most Member States do not have specific legislation or programmes to facilitate their entry. There are some exceptions (e.g. The Netherlands).

As far as Member States in the Schengen Area are concerned, short-term entry visas usually regulate their entry⁹¹:

- Visa type C: valid for maximum 90 days in the course of a period of 180 days
- Visa type D: valid for longer than 90 days with one or more entries in the Schengen Area and free circulation in Schengen countries other than the issuing one for a period of not more than 90 days per half-year and only if the visa is valid.

Issues arise as regards the suitability of the existing visa regimes for international service providers, in particular as regards the suitability of the length and costs of the procedures attached to the granting of such visas. This is dealt with in more detail under the ‘consequences’ section below.

⁸⁸ Admitting third-country nationals for business purposes, European Migration Network, 2015

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ http://www.esteri.it/mae/en/ministero/servizi/stranieri/ingressosoggiornoinitalia/visto_ingresso/tipologie_visto_durata.html

6.2 (Legal) definitions of the problem/gap

Under Directive 2014/66/EU on Intra-corporate transfers (ICT), EU legislation covers TCN professionals (managers, specialists) transferred to the EU for work by a business entity with a commercial presence in the EU and graduate Trainees (GT) (persons with a university degree who are being transferred for career development purposes or to obtain training in business techniques or methods; designated "employee trainees in the ICT Directive).

Outside of ICT, other types of TCN professionals not seeking access to employment as employees (either on a temporary or permanent basis), residence or citizenship in the EU are however not covered by EU legislation. These TCN professionals are mostly covered by Mode 4 of the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) and EU Free Trade Agreements (FTA). Mode 4 relates to the temporary movement of natural persons (TMNP) for service transactions.

According to GATS, there is no specific definition of the types of movement that Mode 4 can apply to. It covers all international temporary movements to provide services, whether developing to developed countries, developed to developing, or between developed or developing countries and including highly skilled, less skilled or unskilled⁹².

However the EU commitments under GATS and in the existing FTA have defined the categories⁹³ of professionals that are covered by Mode 4. The EU commitments are also limited to highly-skilled professionals, with some exceptions in FTA (strictly defined in the text of the agreements, when they exist).

This analysis focuses on TCN employees sent by a firm from outside the EU (and without a commercial presence in the EU) and on TCN independent professionals who move to the EU for service provision for a period over 90 days. TCN investors and business visitors for establishment purposes (BVEP) are therefore not covered here.

Hence the categories of TCN professionals under GATS Mode 4 covered in this analysis only include:

- Business sellers (BS)
- Contractual service suppliers (CCS)
- Independent professionals (IP)

It is important to note that these categories are not necessarily mutually exclusive. For instance, CCSs can be IPs: this normally refers to professionals and specialists carrying out an activity for which a service contract was obtained in the territory of the Member State where the service is to be provided. The commitment relates only to the service activity which is the subject of the contract⁹⁴.

CCSs can also be engaged in the supply of a service on a temporary basis as employees of a juridical person supplying the service, with no commercial presence in the territory of the Member where the service is to be provided; whereby they receive remuneration from their employer while abroad and may not engage in other employment in the territory of the Member where the service is to be provided⁹⁵.

⁹² http://www.migrationdrc.org/publications/briefing_papers/BP4.pdf

⁹³ See: Admitting third-country nationals for business purposes, European Migration Network, 2015. Categories include: Business visitors for establishment purposes (BVEP), Intra-corporate transferees (ICT), Graduate trainees (GT), Business sellers (BS), Contractual service suppliers (CCS), Independent professionals (IP)

⁹⁴ A QUICK GUIDE TO THE GATS AND MODE 4, OECD — WORLD BANK — IOM Seminar on Trade and Migration Geneva, Palais des Nations, 12-14 November 2003

⁹⁵ Ibid

BSs are "natural persons" moving for a short period (less than 90 days) into a Member State for the purpose of providing a service on behalf of their company with no commercial presence in the EU. BSs, like CCSs and IPs, are only engaged in the supply of that service, in the cases of BSs and CCSs receive remuneration from their non-EU employer and may not engage in other employment in the Member State where the service is provided other than the services contracted, or in the entire EU for that matter⁹⁶.

Specific categories of TCN professionals which may be considered as CCSs or IPs (as well as BSs for shorter periods) include⁹⁷:

- Personnel of foreign enterprises providing international land, air or water transport services under a foreign flag and foreign registration;
- Personnel of public or private enterprises from outside the EU with a State contract;
- Legal representatives: natural persons occupying a senior position, who have the power to undertake formally obligations in the name of the establishment;
- Installers and servicers: covers natural persons who are installers and servicers of machinery and/or equipment, where such installation and/or servicing by the supplying company is a condition of purchase of the machinery or equipment mentioned in commitment;
- Personalities of internationally recognized reputation: persons invited by higher educational institutions, scientific research institutes or public educational institutions; artists, sportsmen or sportswomen or other suppliers of services taking part in public performances; Fashion Models and Specialty Occupations.

The wide variety of professions included under these Mode 4 categories, as shown above, reveal the extent of the gap that exists in EU legislation governing the entry and stay of TCNs for business purposes. Pursuing a sectoral approach to regulating legal migration at EU-level would seemingly be impractical in this context. However, the outstanding challenge would be for Member States to accept that all Mode 4 categories ought to be regulated under EU legal migration legislation.

6.3 Scale of the problem/gap:

Measuring the scale of this gap is rather difficult as realistic estimates of Mode 4 transactions are first of all virtually non-existent. Statistical parameters that are used to approximate the volume of Mode 4 service supply include those of the Balance of Payment (BOP), foreign affiliates' statistics⁹⁸ (FATS) as well as migration and tourism statistical frameworks.

Difficulties arise when using these parameters, particularly as categories of service providers can easily overlap when it comes to service supply. The domestic sales of services of foreign affiliates is mostly covered in FATS, but with no clear distinction between Mode 3 (Commercial presence) and Mode 4 (TMNP). Whether or not Mode 4 transactions can be distinguished from Mode 3 transactions can also depend on the type of arrangements for the service or contract in question (e.g. whether a site office statistically qualifies as a corporate branch or whether it is considered that the operations are conducted from home territory).

For a more global analysis of services industries or market opportunities there exist a number of additional useful statistics that can be drawn from various statistical frameworks. With respect to Mode 4, the number of persons moving and present

⁹⁷ BACKGROUND NOTE ON GATS MODE 4 MEASUREMENT, World Trade Organization, February 2006

⁹⁸ The activities of foreign affiliates – would also include companies with commercial presence in the EU. https://www.wto.org/english/res_e/reser_e/ersd200805_e.pdf

abroad can be approximated through the use of tourism or migration statistics. Information on flows and stocks of natural persons could be derived from the definitions used in frameworks such as the International Recommendations on Tourism Statistics⁹⁹ and others¹⁰⁰.

Tourism statistics include international visitors travelling in a country other than in the one in which they usually reside and that they must not be employed by an enterprise of the country visited. The number of international visitors can be broken down according to the main purpose of the trip: personal (e.g. holidays, leisure, education, medical care) and business/professional purposes. Although very aggregated, collecting data on the latter is useful to conduct an analysis of flows of Mode 4 persons¹⁰¹.

While rough aggregated Mode 4 information may be drawn from these statistical systems, a more complete picture will require additional breakdowns in relevant categories. Although such statistics will not perfectly mirror the definitions of GATS, they would provide a reasonable indication of the number of mode 4 persons crossing borders and present abroad in the context of trade in services.

In 2015, around 14% of all international tourists reported travelling for business and professional purposes (approximately 167 million people)¹⁰². The table below presents three EU Member States with some of the highest numbers of international tourist arrivals for business and professional purposes in 2006¹⁰³.

Table 6. Arrivals for business and professional purposes, selected economies, 2006 (thousands)

Member State	Number of arrivals (in thousands)
United Kingdom	9 717
Spain	6 084
Poland	4 240

While very rough and aggregated Mode 4 statistics may be drawn from these statistical systems, the legal gap analysis would require a breakdown into relevant categories of business persons. Further distinguishing BS, CSS, and IP from the wider Mode 4 category would prove even more difficult as these groups are not consistently recognised as such among EU Member States and therefore no statistics are available to measure the migration inflows for these types of TCNs. In addition, statistics based on the issuing of C-type or D-type Visas tend to cover wider groups of TCNs, making it difficult to identify with accuracy the categories analysed by this study¹⁰⁴.

Given the policy relevance of improved service statistics, Eurostat launched a project to estimate services trade flows by modes of supply, using the UN simplified methodology and using the available BoP and FATS data. If data were missing in the Eurostat public database due to confidentiality or reliability matters, the national databases have been investigated. The Eurostat project however only concerns Mode

⁹⁹ IRTS 2008

¹⁰⁰ E.g.: Tourism Satellite Accounts: Recommended Methodological Framework – TSA-RMF 2008; Recommendations on Statistics on International Migration, Revision 1 – RSIM, Rev. 1

¹⁰¹ Measuring GATS Mode 4 Trade Flows, World Trade Organisation Economic Research and Statistics Division, October 2008

¹⁰² UN World Tourism Organisation (UNWTO), Tourism Highlights, 2016 Edition

¹⁰³ UNTWO 2008. Taken from: Measuring GATS Mode 4 Trade Flows, World Trade Organisation Economic Research and Statistics Division, October 2008

¹⁰⁴ Admitting third-country nationals for business purposes, European Migration Network, 2015

4 (presence of natural persons) exports from the EU to the rest of the world. The statistics generated by the Eurostat project however shows that Mode 4 represents around 5% of all GATS supply modes and that Mode 4 is more linked to construction activities and telecommunication, computer and information services (on average 10% of all supply modes). Again, no breakdown is available for BS, CCS and IP. However the sectors where Mode 4 supplies are higher than average compared to other modes and may provide a good indication of the sectors where these types of TCN professionals tend to operate¹⁰⁵.

An EU level scheme to regulate TCN professionals qualifying as BS, CCS and IP may therefore require a closer examination of the contractual or employment laws and practices in the construction and IT services in the Member States.

6.4 Consequences of the problem / gap

In the absence of EU-wide legislation, schemes covering the entry of TCNs falling under the BS, CSS or IP categories vary to some extent across the Member States. As mentioned under the problem definition, an important consequence of this fragmented approach is the reduced attractiveness of the EU as a destination for foreign companies to do business. These companies must choose between Member States, rather than having the whole EU market to tap into, and this may lead companies / independent professionals to choose non-EU destinations with larger markets..

Unilateral progress on liberalising¹⁰⁶ the entry and stay of Mode 4 persons at EU-level is politically fraught, particularly in terms of BS, CCS and IP, with concerns about the competitive challenge to local workers. This issue appears to be even more sensitive if the EU made extensive commitments for less skilled or unskilled professions, which currently is not the case. It would be especially sensitive in countries with comparatively high unemployment. There are also concerns that these types of TCN professionals, who are for the most part employees or independent workers, end up being at a disadvantage in terms of pay, health and safety standards and other basic rights¹⁰⁷.

Challenges were reported by most Member States (AT, BE, DE, ES, FR, HU, IE, LT, LU, LV, NL, PL, SE, SK, UK) in the design and implementation of policies to attract and admit TCNs for business purposes generally (i.e. investors/entrepreneurs and service providers). Some Member States raised concerns about the difficulty to counteract the establishment of bogus economic activities set-up by third-country nationals whose main aim is to simply enter and stay in the Member State (AT, CZ, HU, LT, PL) or engage in illicit activities (SE), thus misusing the schemes in place¹⁰⁸.

The sensitive issue of regulating BS, CCS and IP categories also raises the issue of how these categories of workers might best benefit the European Single Market. The existence of disparate national schemes regulating these types of TCN workers may negatively affect the demand for such professional services due to a lack of legal certainty, and issues linked to administrative hurdles and delays. Similarly, linked to this issue is the lack of a uniform system across the Member States for the recognition of TCN qualifications and certifications to perform certain services. This also adds to the legal uncertainty and administrative burden to this type of migration, and therefore inhibits the demand for such services where a TCN professional would be best placed to provide it¹⁰⁹.

¹⁰⁵ http://trade.ec.europa.eu/doclib/docs/2016/december/tradoc_155119.pdf

¹⁰⁶ Liberalising should also be understood here as a situation where Mode 4 persons would no longer be subjected to visa-type limitations in terms of e.g. quotas (if in place), length of stay, conditions of entry and re-entry, administrative costs and procedures

¹⁰⁷ http://www.migrationdrc.org/publications/briefing_papers/BP4.pdf

¹⁰⁸ Admitting third-country nationals for business purposes, European Migration Network, 2015

¹⁰⁹ Ibid

6.5 Responses to the problem

6.5.1 National level responses

National schemes regulating the migration of BS, CCS and IP remain very disparate. Most Member States do not have specific programmes for most categories of other business persons. For three of them (FR, NL, UK) these programmes can be based on multilateral and/or bilateral trade agreements with third countries. This is the case for CSSs in the Netherlands, and CSSs and IPs for both Spain and the United Kingdom. In Spain and the United Kingdom, CSSs, and IPs are included in the same national category¹¹⁰.

Simplified immigration procedures exist:

- In Poland for BS, CCS and IP
- In Hungary for CCS
- In the Netherlands for BS

A CSS qualify as standard seconded employees in Belgium and Poland. In Belgium, a CCS requires a work permit as highly skilled worker or specialised technician. Hungary has no definition but its civil law sets out the elements of certain agreements in which a party may be a CSS. Finally Sweden refers to CSSs as posted workers¹¹¹.

In Austria, Belgium, Germany, Hungary, Italy, Luxembourg and Sweden, IPs are considered as self-employed.¹¹² Slovakia differentiates between IPs providing investment aid and those on a business contract, while in Lithuania there is no definition (as for CSSs) and applications are assessed on a case-by-case basis. In Sweden, IPs may normally enter with a Schengen visa or, for stays longer than three months, a national type-D visa or a temporary residence permit for visits. Though not defined as such, Sweden allows the admission of BS, with Schengen visas or national type-D visas.

6.5.2 EU level responses

There is currently no EU-level response to manage the entry and stay in the EU of TCNs under the BS, CCS and IP categories. However, the Intra-Corporate Transfer Directive of 2014 regulated a large part of the categories of TCN covered by Mode 4 commitments: ICT (managers and specialists) and corporate trainees.

The EU and/or its Member States should seek to look at actions to separate out the temporary movement of the categories of natural persons under GATS not covered by the ICT Directive from other categories of TCN and take action to adopt provisions implementing the commitments of international trade commitments. An option could be the implementation of a universally applicable visa specific to GATS Mode 4.

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¹¹⁰ Admitting third-country nationals for business purposes, European Migration Network, 2015

¹¹¹ Ibid

¹¹² “Self-employed” and “independent” service suppliers are terms that are often used interchangeably. https://www.wto.org/english/res_e/reser_e/ersd200805_e.pdf

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7 Transport workers

7.1 Problem / gap definition

7.1.1 Introduction

As part of this Fitness Check, the coherence between the Legal migration Directives and other relevant legislation (such as transport specific, posted workers) and how adequate or relevant these are to address the admission, residence and working conditions for highly mobile third-country national transport workers is investigated. Stakeholders have drawn the Commission's attention to potential exploitation of third-country workers in the transport sector, and that certain practices involving third-country workers contribute to downward pressure on salaries and working conditions in the sector¹¹³ and that this is due to an absence of work and residence permit or other authorisation for third-country workers that are highly mobile between EU Member States.

This paper therefore sets out to analyse which legislation is applicable and to what extent it addresses all relevant aspects of the admission to and stay in, including the right to work, or if there are gaps or inconsistencies in the legislation at the EU level, that leads to on one hand deficiencies in the enforcement of legislation on equal treatment with nationals and on the other hand problems related to lack of clarity on the legal status of the stay in the EU, that can lead to the third-country worker overstaying and transition into irregular stay.

Following a preliminary assessment, the paper has been expanded to include several modes of transport that face similar problems.

This paper addresses the situation of third-country nationals in the international/intra-EU transport sector, working in different modes of international transport (in particular road transport, aviation, shipping, including inland waterway transport and intra-EU cruise ships) stemming from the inherent high levels of mobility between several Member States. The paper only concern those workers (whether crew, drivers or those carrying out other functions like catering, on board hotel services etc) that are highly mobile between Member States, and not those that work primarily in on Member State (baggage handlers at airports). Other categories of highly mobile third-country nationals may be in similar position, but this paper focusses on transport workers.

Whilst certain problems related to the transport sector applies also to EU nationals (exploitative business models, lack of enforcement of social rules, difficulties in establishing home base or MS competent for labour disputes), the situation of third country national transport workers may be more precarious, in particular those that never establish residence in any Member State.

Illustrative examples of practices by transport are:

- Road haulage: a truck driver may drive across several Member States and deliver goods to and from several destinations across the EU, without returning to a home base in a Member State for the required rest time. A third country driver may not have an EU home base to return to, and therefore spend all of the duration of the contract and stay in the EU by "living in the truck".
- Aviation : Whilst third-country crew members are often legitimately working on long-haul flights to and from the EU, with only brief stop-overs (for rest) in an EU Member State, third-country national crew members may in some cases also work on intra-EU flights for a certain period.

¹¹³ Trade unions in relation to aviation.

- Commercial shipping, including cruise ships on intra EU trips: a third-country crew member may be flown in to one Member State from a third-country to work on a contract with 8-10 months duration, thereafter cross several borders whilst living on the ship, occasionally leaving the ship to go ashore in different Member States, and subsequently leave the ship from another Member State.
- Inland water way transport: Crew members may work either as ship crew or in other hotel functions, on the main international waterways like the Danube or the Rhine, and as such third country nationals may spend all time on board the ship without establishing residence in a particular Member State.

All the cases above lead to problems in identifying if the person is "residing/staying", and of so in which Member State the person is "residing/staying" and thereby which Member State is responsible for issuing a work permits and enforcing equal treatment requirements. The objective of such equal treatment is to *"establish a minimum level playing field within the Union, to recognise that such third-country nationals contribute to the Union economy through their work and tax payments and to serve as a safeguard to reduce unfair competition between a Member State's own nationals and third-country nationals resulting from the possible exploitation of the latter."*¹¹⁴ A second related consequence of the absence of a permit suitable to highly mobile transport workers is that the risk overstaying and transitioning into irregular stay.

From the migration perspective, these workers neither fit into the frame of the currently existing legal migration Directives nor into the frame of the EU Visa and Border legislation, which is further explored below.

- A third-country national present on the EU territory needs to either be a holder of a residence permit or of a visa (unless he/she is from a visa exempt third country), otherwise the person is staying illegally in the EU.
- A third-country national working in a Member State may be covered by different legal frameworks: (i) have a work permit issued according to EU law; (ii) have a work permit according to national law, for instance work on the basis of a visa issued according to national law.
- In addition the third-country national may be covered by (a) EU legislation related to cross-border provision of services between EU Member States or (b) legislation on cross-border transports at EU or, in case of aviation, international level.
- The core coherence issue (gap) appears to be the lack of a work permit that adequately regulates the right to work in several Member States. The EU dimension is a central problem. On one hand the right of TCN to work and reside are governed at national level and through the implementation of EU Directives, on the other hand the intra-EU mobility provisions and visas covering more than one Member State, as regulated by the EU law, do not adequately address the needs of TCN transport workers in terms of the duration of stay.

To assess the coherence between the EU legal migration legislation and other relevant EU legislation related to visa, border, services provision, posting, employment policies and transport and to assess the relevance of this legislation to deal with the problems identified, including if there are legislative gaps and inconsistencies, the following aspects are further explored:

1 Right to residence and legal stay

¹¹⁴ Directive 2011/98/EU, recital 19.

- 2 Right to work and to carry out services, including posting
3. Exploitation and Equal treatment
4. Transport specific legislation

7.1.2 Right to residence and legal stay

The right to legal stay can either be considered in terms of shorter "stays" or in terms of establishment of "residence", which are two different concepts. Neither are explicitly defined per se in EU migration law¹¹⁵. The distinction between the two is not always clear. A third-country national requires a visa for entry and legal staying the Member States, unless she/he holds a valid residence permit, or is from a visa exempted country.

Visas can be either issued under the Visa Code (Regulation (EC) No 810/2009) or under national law:

- **"A" category** stands for the Airport Transit Visa which allows its holder to travel through the international zone of the Schengen Country Airport without entering the Schengen Country Area. Special rules apply to certain transport workers.
- **"C" category stands for a Short-term visa** which allows its holder to reside in a Schengen Country (Schengen Area) for a certain period of time depending on the visa validity. This particular category, according to the holder's purpose of the travel can be obtained in a form of:
 - **Single-entry** visa allows its holder to enter a Schengen country (Schengen Area) only once for the certain period of time. Once you leave the certain Schengen Area you entered the visa validity expires, even if the time period allowed to stay in the Schengen Area is not over yet.
 - **Double-entry** visa applies for the same policy as above mentioned, however you are allowed to enter the Schengen Area twice, meaning that for the certain period of time permitted by your visa you can enter the Schengen Zone, leave and enter again without any problems. Once you are out of the country for the second time the visa expires.
 - **Multiple-entry** visa allows its holder to go in and out of the Schengen Area as pleased. However, this visa allows its holder to stay in a Schengen Zone for maximum 90 days within half the year, starting from the day one crosses the border between a Schengen member country and the non-Schengen member country.
- **Limited territorial validity visas (LTV)**. This type of visa obtained allows the holder to travel only in the Schengen State that has issued the visa or in some other cases, in the certain Schengen States specifically mentioned when applying for the visa. The holder of this type of visa cannot enter or transit through any other Schengen country that is not the first and final destination target. This type of visa is issued in very peculiar cases such as a humanitarian reason or under international obligation as an exception to the common USV system. This type of visa may apply for individuals who don't possess a valid travel document yet have to travel to a Schengen area on an emergency of any kind.
- The national visa of **"D" category** can be granted as a "long-stay visa" which according to the Convention implementing the Schengen Agreement as amended can be issued for a maximum of 12 months, can be granted to third-country nationals for studying or working or permanently residing in one of the Schengen countries. The national visa can be of a single entry, *or multi-entry*,

¹¹⁵ The concept of residence is defined in other legislation, for instance in relation to social security and to taxation.

allowing its holder to travel in and out of *this Schengen country* as he/she pleases and also travel throughout the whole Schengen Area without additional visa requirements. A third-country national holding a valid long-stay visa issued by a Schengen state may travel and stay in the territory of other Schengen states no more than 90 days in any 180-day period.

The limitation of the different visa options are:

- Neither for these options allow travel and stay in the territory of other Member States than the issuing Member State for a period exceeding 90 days in any 180 days. Certain transport workers need an authorisation to stay for a longer period.
- Whilst the "C-visa" can allow certain business activities (attending conferences etc), it is not equivalent to an authorisation to work (see next section).
- The national "D-visa" on the other hand can be issued allowing both residence and work in the Member State that issues this long-stay visa, for a period not exceeding 12 months, where after it must be replaced by a residence permit¹¹⁶ (see below).
- Whilst both the Visa Code and the Schengen Borders Code (Regulation (EU) 2016/399) provides specific rules for border crossings certain transport workers, these rules are limited to the border crossing and transit to, from and between the vessels (shipping) or hotels for rest periods (aviation) and do not concern long-stay or short stay rights as above.
- Whilst nationals from some third-countries are exempt from holding a visa, this applies only to for a period of the 90 days within a period of 180 days, and in this period it does not entitle the person to work (see below).

As a consequence, the third country worker working in transport and staying on the territory of one or more Member States for a longer period, risks to at the end of the duration of the 90 days within a period of 180 days, to overstay and enter into irregular stay in the EU. The newly adopted Entry/exit system is furthermore design to easier detect overstay.

Alternatively the transport worker would need to apply for several D visas that allow work in each of the Member States in which territory they intend to work.

7.1.3 Right to work and to carry out services

The right of TCN to carry out work in the EU is based either on legal migration legislation (according the EU or national law), or on rules related to provision of services, the latter either specific for the transport mode or general posting of workers. Giving a third-country national the authorisation to work is however exclusively limited to the Member State issuing the permit. There are EU-level legal provisions on cross-border work in the transport sector and general rules on intra-EU posting of workers, neither of which fully correspond the needs of highly mobile transport workers.

- The EU legal migration Directives, regulate the issuance of permits that allow both residence, and in most cases also work.¹¹⁷ This concerns the EU Directives that allow for shorter periods of duration of work like the Seasonal workers (SWD) and the Single Permit Directive (SPD). EU legislation also allows Member States to issue national D-visas for the purpose of work (see above on restrictions in terms of duration and intra-EU mobility). The SPD also covers the permits issued in accordance with national law, as regards equal treatment covering all workers (see definition) and for procedures (those applying for a

¹¹⁶ Art 21 Convention implementing the Schengen agreement as amended by regulation (EU) No 265/2010.

¹¹⁷ See chapter on self-employment

permit). Some Member States have in this context specific national work authorisation rules for certain transport workers, but these rules are not harmonised at the EU level nor do their rights extend beyond the MS in question.

- Whilst the EU Directives like the EU Blue Card, the LTR directive, the ICT Directive and the Student & Researchers, include specific rules on intra-EU mobility of TCN workers, those rules tend to concern the change of residence from one member state to another, and not shorter movements for the purpose of work (the ICT Directive includes some more flexible short-term mobility for certain senior or management categories only of third-country nationals, including for pilots, but the personal scope is not applicable to all relevant transport workers)..

Permits issued under these Directives, including the national permits issued in accordance with the SPD, therefore only give the authorisation to work for that specific Member State. This does not cover the need for transport workers to carry out work on the territory of different Member States, most often during short time periods in each Member States, but can also be for a total duration of the say in the EU territory exceeding 90 out of 180 days. This highly mobile nature of the work leads to two different problems in terms of application of the legislation in relation

- It is difficult to establish which Member State is responsible for issuing a work/residence permit (or long-stay D visa) if the transport worker is not establishing residence (see below on other criteria than habitual residence that may play a role) in any of the Member State, and thereby, it is difficult to determine which Member State is responsible for enforcement of rights linked to the permit, including equal treatment in terms of working conditions and pay.
- If the third-country national wishes to work with a legally issued authorisation to work in each of the Member States in whose territory she/he works, he/she needs to request a D visa or a work/residence permit in each of the Member States concerned.

In conclusion, there is currently no EU or national legislation that provides the possibility for highly-mobile third-country nationals to carry out work in more than one Member State, other than certain business activities that are allowed under the Schengen mobility rules (90 days in a period of 180 days).

Although one may argue that the first Member State into which the third-country national arrives, should issue the work authorisation (permit/visa), this may not then be the Member State where the person spends most time during the stay in the EU, or there may be stronger links to other Member States (see below).

Other legislation relevant legislation concerns the provision of services, either directly from third-countries (trade in services) or through posting of workers from one Member State to another.

- Whilst the Posted Workers directive (PWD) (96/71/EC) currently applies to the provisions of transport services in between Member States other than maritime transport, covering a third-country national who have already established residence in a Member State and therefore holds a work and residence permit in an EU Member State, the Directive is limited in the workers' rights that are covered by the equal treatment provisions and has been considered as not sufficient to avoid situations of uncompetitive practices. The Directives does not apply to postings from outside the EU, other than that the conditions for such transport operators should also not be given more favourable conditions, in this case meaning that minimum wages of host MS should apply to them as well. (see *paper on Posted workers*).

- The ICT Directive covers specifically those TCN that are posted from the headquarters of the company in a third-country to a company's branch in the EU; however its scope of application in what regards the workers covered has a limited interest to the transport sector, since it covers only the highly qualified workers. (*For coherence and relevance issues related to the trade in provisions of other services, see paper on Trade in service provisions¹¹⁸*).
- Some Directives, such as the PWD and the SPD explicitly exclude merchant navy personnel on seagoing ships (PWD) or sea farers or other personnel working on EU flagged ships (SPD).

These Directives however assume that there is a headquarter or branch of a company in a Member State that sends out an employee to provide services in another Member State, or that the third-country national is employed by a company established in a third country. Not all transport workers are in an employment relationship (*can also be as self-employed, see separate note*) and not all transport workers are sent out from companies established in a way that ensures these rules can be applied.

In addition:

- Admission of self-employed non-EU nationals that are based either in an EU Member State (other than the EU Long term residence status) or outside of the EU are not covered by EU migration Laws. Self-employment (including bogus self-employment practices) has been found to be used in "new models" of employment in some transport sectors;
- Transport mode specific sectoral legislation or indeed general primary or secondary EU laws that to various extents regulate the right to provide transport services between Member States(*further detail below in section x.3 EU level response*) or related to the Treaty based right to provide services(see *below*). These laws do not contain the full range of equal treatment guarantees as set out in Legal Migration Directives.

A consequence of the absence of appropriate and valid work-permits or valid work visas for more than one Member States, for the above mentioned reasons, results in less effective enforcement of rights such as equal treatment with nationals as regards working conditions, pay, social security, tax benefits etc, a situation that leaves the third-country worker more vulnerable to exploitation than EU nationals.

7.1.4 Exploitation and Equal treatment

Whilst all persons may be at risk from exploitation in relation to work, whether nationals working in their own MS or if they are EU citizens from another Member State or indeed third country nationals, the latter group is potentially more vulnerable abuse and exploitation due to the legal status related to temporal restrictions and conditions related to the issuance and work and renewal of permits (*See paper on exploitation*).

In the transport sector itself are faced certain specific challenges in this context:

- the existence of exploitative practices (letter box companies, complex subcontracting chains, bogus self-employment¹¹⁹) designed specifically to present obstacles to the effective enforcement of social security rules and legal certainty, practices driven by high competitiveness on the sector and downwards pressure on salaries.

¹¹⁸ The specific situation of service providers falling under Mode 4 (contractual service suppliers (CSS), independent professionals (IP)) of GATS are explored in the paper on "Trade in service provisions".

¹¹⁹ There are not necessarily evidence of such practices in all transport modes studied here, notably aviation.

- deliberate setting up of multiple home bases for the operation of transport services, with a vessel/vehicle registered in one country, the employment contracts are issued in a 2nd Member State, the company is established in a 3rd MS, and the worker, if resident, may pay social security and taxes in a 4th MS and the worker may spend most of his/her time in a 5th MS. Different transport related pieces of legislation refers to the 'home base' of the individuals concerned, notably which Member State is responsible¹²⁰ for social security and working conditions related or for safety related reasons.
- 'Home base'¹²¹ can be defined as the place where the employee normally starts or ends the duty periods and where the employer is registered. Whilst there is CJEU case law determining which Member States jurisdiction applies to employment contracts in such cases, based on a hierarchy of criteria such as the 'habitual place of work', the place "where the worker receive s instructions" or "keeps tools/equipment", and "where the recruitment took place", these concepts may not necessarily apply to third-country workers who are "based and/or recruited in a third country" but nevertheless may work for an extensive period in the territory of the EU.

Therefore, although other grounds than (habitual) residence have been used for the determination of which court is responsible for labour disputes in other EU legislation (see Brussels and Rome Regulations) and though this case law (see *below section 1.3.1*) may not necessarily be directly applicable to determine which Member State would be responsible for issuing the work authorisation(permit/visa) under the legal migration Directives, the determination of which Member State would responsible is a core. Such practices (deliberately or not) makes it even more difficult to determine which Member States would be responsible for enforcing equal treatment rules, hence leaving a gap that can lead to unfair practices among transport companies, by recruitment of third-country workers for transport.

In conclusion, the range of specific challenges faced by highly-mobile transport workers are not adequately addressed by any current EU or national legislation. This does not entail that all third-country national working in transport are exploited or are used for social dumping, but the legal framework protecting these workers is unclear and thus the situation of certain third country workers is more precarious.

7.2 Scale of the problem / gap

EU-wide statistics on the scale of the problem of mobile transport workers are not available. The number of third-country nationals working in the respective transport sector and who could possibly be at risk of exposure to the problems analysed in this paper, can be considered:

- **Road transport:** Altogether 3 million workers are in the road transport. Of these 2.9 million (97.5 %) are EU nationals and 75,000 (2.5%) non-EU nationals. One of the consequences of driver shortage is that more and more drivers from non-EU countries are being employed in the EU. As each driver from a non-EU country active on the international road haulage market needs to be equipped with a driver attestation, the Commission has a fairly good overview of their overall numbers. At the end of 2016, around 76,000 driver attestations were in circulation, 46% more than at the end of 2015. It means that some 2.5% of all people employed in the road haulage sector are from a non-EU country. Most drivers from outside the EU are employed in the four countries Poland, Lithuania, Slovenia and Spain: 77% of all driver attestations

¹²⁰ See also pages 20 and following on the practice guide below (Court jurisprudence about "habitual place of work" e.g. Case C-29/10, Koelzsch v. Grossherzogtum Luxembourg for the transport sector) http://ec.europa.eu/justice/civil/files/employment_guide_en.pdf

¹²¹ Ruling of 14.9.2017 on cases C-168/16 and C-169/16.

valid at the end of 2016 were issued in these four countries.¹²² The countries which conduct the highest amount of cross-trade are Poland, Lithuania, Slovakia, Hungary, and the Czech Republic, with Poland alone responsible for 26.7 % of flows in 2013.¹²³

- **Maritime shipping** : Statistics of certain crew is published by EMSA (masters, officers, engineers,) but not all crew, especially less skilled crew.¹²⁴;
- **Inland navigation/Inland Waterways Transport** : The share of non-EU workers is increasing but according to official statistics still rather low. The reason for hiring third-country workers is 'friction' on the labour market¹²⁵. Examples are :
 - Germany reported a total share of 22.9% of foreign workers²¹ in 2010, of which: 20,6% EU non-nationals (mostly from Poland, Czech Republic and Romania) and 2.3% non-EU foreign (mobile) workers (mostly from Turkey, Ukraine and Philippines). In 2011, this share of foreign workers covered by social security increased to 23.4%.
 - In Belgium, the share of foreign IWT workers in 2007 covered by social security was 9,1% EU-foreigners and 1,5% non-EU foreigners;
 - In the Netherlands the register of service for non-nationals recorded in 2008 a figure of about 6.8% of non-EU (mobile) workers (from a total of 13,6% non-national (mobile) worker). These (mobile) workers came mainly from the Philippines. The percentage of non-EU (mobile) workers in the Netherlands is much lower now. In 2012, the Employee Insurance Agency (UWV) announced that it will become more difficult to obtain working permits for workers from outside the European Economic Area (EEA). The requirement for employers of looking first for employees from the Netherlands or other EU countries will be applied more strictly. The employment organisations in the Netherlands reported a share of 1% of non-EU (mobile) workers compared to 26% of (mobile) workers from other EU countries.

Aviation: No quantitative information is available to the Commission on how many third country nationals work on EU based aircraft or EU based airlines.¹²⁶ A conference on social dumping in the civil aviation sector, organised by the European Employment and Social Committee, it was estimated that:

- Over 1 in 6 pilots is atypically employed;
- The problem is concentrated among young pilots (between 20-30 year olds); 40% of these are estimated to be not directly employed (but most are living in an EU Member State);

¹²² <https://ec.europa.eu/transport/sites/transport/files/mobility-package-overview-of-the-eu-road-transport-market-in-2015.pdf>

¹²³ European Parliament 2015 Report on employment conditions in the international road haulage sector: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542205/IPOL_STU\(2015\)542205_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542205/IPOL_STU(2015)542205_EN.pdf)

¹²⁴ <http://www.emsa.europa.eu/emsa-documents/latest/item/2779-seafarer-statistics-in-the-eu-statistical-review-2014-data-stcw-is.html>

¹²⁵ Panteia Research , Contribution to the problem definition in the context of the preparation of the Impact Assessment Regarding the recognition of professional qualifications and training standards in inland navigation, April 2014. Page 14-15. Study.

<https://ec.europa.eu/transport/sites/transport/files/modes/inland/studies/doc/2014-04-problem-def-recogn-prof-qual-train-stds-inland-nav-prep-ia.pdf>

¹²⁶ For the share of non EU carriers see: <https://ec.europa.eu/transport/sites/transport/files/modes/air/studies/doc/2015-10-employment-and-working-conditions-in-air-transport-and-airports.pdf>

- Half of the pilots who work for Low Cost Airlines are not directly employed; and,
- 4 out of 5 'self-employed' pilots work for Low Cost Airlines.

However, the figures quoted were based on anecdotal sources of information and therefore the real scale of the problem cannot be indicated.¹²⁷

7.3 Responses to the problem

The different modes of transport present specific challenges and are governed by different sectorial pieces of EU legislation.

The issues raised in this paper are not primarily concerning third-country national transport worker who is already legally residing in the EU with a residence permit, for instance an EU long-term resident in a Member State, and who is employed by a transport operator based in that EU Member State. Such a worker shall be employed on the same conditions as nationals of that country, and the legal situation is clear as to which legislation applies, both in terms of immigration law and social security, taxation and working conditions. Likewise, when a third-country worker is recruited for a specific post in a Member State or for a company registered in that country, and he or she changes residence to that specific Member State as the home base (for instance under the Blue Card or possibly the ICT Directives), then the legal situation as far as the migration status is also clear.¹²⁸ It is furthermore not considered as problematic when non-EU based and non-EU citizens work on long-haul flights to and from the EU and their country of origin/base of establishment in a third country, and only make rest-related stop overs in an EU Member State. This is common practice and related to safety in terms of language knowledge of passengers and for the purpose of occupational health and safety.

7.3.1 Responses at EU level: Transport legislation

The EU has developed a plethora of employment law instruments to strengthen the protection of transport workers, particularly those whose work involves cross-border operations. This section reviews the main instruments adopted so far in the road haulage, civil aviation, shipping and inland navigation sectors, highlighting their limitations particularly in the case of third-country nationals transport workers. It then considers the extent to which the EU legal migration Directives can provide answers to the problems.

Responses in the road transport sector

In the case of **road transport workers**, difficulties determining the home base are connected to the amount of time the workers spend away from the 'home base' of the employer. Under Regulation 1072/2009,¹²⁹ international traffic by EU hauliers in the EU has been completely liberalised and some restrictions remain only on cabotage, i.e. national operations by a foreign haulier in a host Member State. This means that road transport workers often spend several months per year away from home base and sometimes only rarely return to home base and they operate in several different Member States. However, the time actually spent on the road in each Member State is hard to monitor and enforce and it is difficult to determine the law applicable to their labour contracts or the applicability of the rules on the posting of workers. They are only obliged to have a driver attestation issued by the Member State where the haulier is established. As regards foreign hauliers, international traffic between the EU and third countries is regulated by agreements and traffic rights are in general subject to

¹²⁷ See for example A conference on social dumping in the civil aviation sector, available here: <http://www.eesc.europa.eu/?i=portal.en.events-and-activities-aviation-social-dumping-presentations.35402>

¹²⁸ Specific problems related to the specific sectors which would affect EU citizens and legally residing non-EU nationals alike, may still occur. Some are set out below.

¹²⁹ Regulation (EC) 1072/2009 on common rules for access to the international road haulage market (recast)

bilateral and/or multilateral quotas (except in the case of Switzerland and EEA Countries). This means that foreign drivers working for EU hauliers will in some cases spend most of their working time away from home base. Foreign drivers working for third country hauliers, on the other hand, will often drive in the EU for a shorter time, since they are mostly involved in international traffic from the EU to the third country and vice-versa.

Road transport workers fall under the Directive 96/71/EC on the Posting of Workers (PWD) to the extent that the undertaking takes one of the transnational measures referred to in Article 1(3) of this Directive in the framework of the provision of services, which sets out mandatory rules regarding the terms and conditions of employment for workers who are posted from one Member State to another in order to avoid "social dumping". However, the application of the Posting of Workers Directive to international drivers has raised difficulties due to the complex contractual relationships within the sector. According to a European Parliament report on employment conditions in the international road haulage sector, increased competitive pressure in the international haulage market, as a result of liberalisation, is giving rise to new business models based on subcontracting. Due to the complex contractual relationships involved in subcontracting, it is difficult for local enforcement authorities to determine a carrier's country of establishment and a driver's main country of operation, and therefore to identify the social and labour legislation which applies in individual cases.¹³⁰

The Commission's proposal to amend Directive 96/71/EC on the Posting of Workers includes specific provisions to address situations with complex subcontracting chains. It allows to apply the same rules on remuneration to posted workers that are binding on the main contractor, and this also if these rules result from collective agreements that are not universally applicable. This would only be possible on a proportionate and non-discriminatory basis and would thus in particular require that the same obligations be imposed on all national sub-contractors.¹³¹

In addition the Commission is also addressing the issues through its Mobility Package¹³², adopted on 31 May 2017, which proposes a clarification of the conditions under which the rules on posting should apply to international road transport. It further establishes appropriate enforcement measures which do not impose disproportionate administrative burden on the industry. The proposal represents a balance between social protection of workers and the smooth functioning of the internal market.

Responses in the aviation sector

In the case of **aviation workers**, the difficulties determining the home base are more often connected with the development of new employment models following the full liberalisation of the EU aviation sector, including airports and ground-handling services, but the determination of the home base is more complex for the more mobile air crews.

The EU has adopted a number of Regulations, implementing Regulations and Directives aimed at securing the safety of the civil aviation industry, among others by providing common rules for the protection of the employment conditions of pilots and other types of air crew. Regulation (EU) No 2018/1139¹³³, for example, lays down

¹³⁰ European Parliament 2015 Report on employment conditions in the international road haulage sector, p. 35.

¹³¹ Proposal for a Directive amending Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Strasbourg 8.3.2016, COM(2016) 128 final.

¹³² COM(2017) 278 final. https://ec.europa.eu/transport/modes/road/news/2017-05-31-europe-on-the-move_en

¹³³ OJ L212, 22.8.2018,p.1.

common rules in the field of aviation and establishes the European Aviation Safety Agency. This Regulation was followed by a myriad of implementing regulations, each of them accompanied by (admittedly non-binding) EASA guidance for employers in the industry. Directive 2000/79/EC is another example of a European Union instrument, which stipulates the working time rules for mobile staff in the civil industry.

However the liberalisation of the civil aviation market, combined with increased competition from low-cost airlines, have given rise to point-to point air carriers which operate only for a specific destination and do not necessarily set up hubs or networks. This means transfers can be organised more easily and increase mobility creating more forms of transnational employment. This has led to a further outsourcing of recruiting and HR services, meaning higher use of temporary agencies to employ air cabin crew members and pilots, increased use of temporary contracts, casual work contracts, seasonal work contracts and self-employment. It has also led to highly complex chains of employment relations.¹³⁴ These new employment models allow businesses to minimise or avoid their tax liabilities, with negative effects for the social protection of the transport workers.

For example, an air carrier established in Member State A may hire a worker from a Member State B to send the person to work in Member State C, the person is working for the air carrier as a self-employed being hired via an intermediary through a "contract of services". Because this is a delivery of a service, there is a link to posting rules. However the posting rules only apply to employed workers, which means the worker is not covered by the minimum rates of pay and employment conditions stipulated in the Posting of Workers Directive.

A key issue to determine if a third-country national require a work and residence permit in an EU Member State, is to determine where the crew member has his/her home base. The difficulties in determining which EU Member State is competent for social security and working conditions has been long debated also at the intra-EU level for civil aviation. A CJEU Ruling of 14.9.2017 on joint cases C-168/16 and C-169/16 established that the "home base" shall primarily be the place where the crew begins and ends their journey, and the concept of a "home base" being the country where the aircraft or company is registered (as for security related legislation) would not automatically apply also to determine which Member State's court would be competent for issues related to social security and working conditions.

Although the CJEU ruled that the determination of which MS' jurisdiction responsible for matters relating to the worker can not be as defined on the basis of another piece of EU legislation, the ruling may give an indication of which MS would also be considered responsible for issuing the work/residence permit for a third-country worker. Once the MS responsible for the third-country worker for instance for social security, it may be possible to further determine if EU legislation, including EU migration law applies and if so which laws. If the person shall be considered residing in a third-country, then posting rules could apply or provision so services. If the person would be considered to have an EU Member State as its home base, as specified by the Court, then that Member States migration law would apply, and depending on into which category the worker would fall, which EU Directives would apply.

Responses in the shipping sector

The legal regime for seafarers stems to a large extent from international law, namely the MLC -maritime labour convention- (working conditions) and STCW - International Convention on Standards of Training, Certification and Watchkeeping for Seafarers- (training). Maritime shipping is a global business where shipping companies can

¹³⁴ See for example: DG Move (2015), Study on employment and working conditions in air transport and airports <https://ec.europa.eu/transport/sites/transport/files/modes/air/studies/doc/2015-10-employment-and-working-conditions-in-air-transport-and-airports.pdf>

outflag in search for lower tax conditions and hire seafarers from low cost labour supplying countries (such as Philippines) for time limited contracts. Under the MLC, a seafarer from a third country who is not covered under the social security scheme of his country has to be covered by the flag's country.

The exemptions to the legal migration rules were introduced because the legal regime of the vessel (flag State rules) as well as the rules applicable to the crew vary over time.

Regulation (EEC) No 4055/86 applying the principle of freedom to provide services to maritime transport between EU countries and with non-EU countries regulates, the right to transport service providers. The regulation Applies equal treatment with nationals according to Art 8:whereby *"person providing a maritime transport service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals"*.

Council Regulation 3577/92 applying the principle of freedom to provide services to maritime sector in national waters, so called "cabotage".

Responses in the field of International inland waterway navigation

The access to the market is regulated by Regulation (EC) 1356/96 and Regulation (EC) 3921/91 which establish freedom to provide inland waterway services respectively between and within a Member State. These regulations apply equal treatment with nationals. With respect to third countries operators, legal persons must have their registered place of business in a Member State and the majority of holding in which or majority of which belongs to Member State national.

The EU legislation however stipulates that it does not affect the rights of third-country operators under the Revised Convention for the Navigation of the Rhine (Mannheim Convention), the Convention on Navigation on the Danube (Belgrade Convention). With respect to personnel, the principle of territoriality applies, meaning that third countries nationals are subject to the same requirements regarding for instance resting/working time and qualifications. Directive (EU) 2017/2397 on the recognition of professional qualifications adopted in December 2017¹³⁵ clearly stipulates that all crew members need to hold a Union certificate of qualification (or a certificate recognised as equivalent).

Whilst these transport specific rules addresses the right to provide services, to some extent equal treatment, health and safety provisions, and to some extent provisions to avoid exploitative practices, they do not address the issues related the right to stay and reside in the EU for third-country workers, nor the authorisation to work, beyond the right to provide certain transport services.

7.3.2 Responses at EU level: Legal migration

The work-related legal migration Directives contain equal treatment provisions aimed at ensuring the fair-treatment of third-country nationals, including as regards pay and working conditions, social security and other areas.

- The Blue Card Directive includes provisions on equal treatment in respect of employment conditions and remuneration which can benefit highly skilled third-country transport workers (e.g. pilots).
- The Single Permit Directive extends equal treatment provisions also to low and medium-skilled third-country workers, which can benefit in particular in the road transport industry but also among cabin crew. The Directive however

¹³⁵ OJ L 345, 27.12.2017, p. 53

explicitly excludes one specific group of transport workers, namely those "who have applied for admission or have been admitted as seafarers for employment or work in any capacity on board of a ship registered in or sailing under the flag of a Member State" (Article 3.2.l) Also posted workers (Article 3.2.c), seasonal workers (Article 3.2.e) and self-employed workers (Article 3.2.k) are excluded from its scope. The Directive furthermore allows the exclusion of those who are authorised to work in a Member States for a period not exceeding 6 months from the procedural rules (in chapter II), however, it shall be noted that such an exemption does not apply to the right to equal treatment (Chapter III, although some more limited exemptions may be applied in that respect).

- The ICT Directive may be relevant for specific skilled crew who are transferred by an international airline to an EU Member State for their home base.
- Whilst employment on for instance cruise ships on intra-EU routes is often seasonal in character, the Seasonal Workers Directive is does not allow for intra-EU mobility, so this Directive could not be applied to this category of workers mobile between different Member States.

Several relevant categories of third-country nationals are excluded from the scope of the Directives, leaving them more vulnerable to unfair employment practices on the part of international transport companies. These include third-country national workers who are posted by an international airline or a temporary work agency based outside of the EU. It also includes self-employed workers and workers whose home base is difficult to determine due to the inherent high levels of mobility of their work.

Whilst the accumulation of consecutive shorter working and stay times in several Member State may exclude highly-mobile workers from the procedural safeguards (ie SPD), the rules on equal treatment should apply whilst the worker is in employment also for a shorter time.

7.3.3 Response at EU level: visa and border policy

Touring artist visa proposal

With the proposal of the Touring artist Visa adopted in 2013 (add ref) , the Commission tried to address the situation that in many ways is similar to that of the highly-mobile transport workers, that is touring artists (and support crew?) that move between Member State and stay days, weeks or months in each Member State and then move on to the next Member State with an overall stay exceeding the 90 days/180days allowed by the Schengen acquis. This proposal will however be withdrawn in 2018, as it was not supported by Member States. The generic problems encountered by other types of highly-mobile workers are however remain.

The **Schengen Borders Code (Regulation (EU) 2016/399)**, which contains specific rules for aircrew transiting or resting in a Schengen country (Annex VII). The Schengen Borders Code stipulates that in these cases, include specific rules for third-country national aircrew in relation in Article 6 of the Code, whereby holders of a pilot's licence or of a crew member certificate, may in derogation of article 6 embark or disembark at the airport. Some Schengen countries wrongly interpret this provision of the Schengen Borders Code as hindering the issuing of a specific work permit to employees of national airline carriers. This is however incorrect in the sense that the Schengen Border Code does not regulate the issue of work, so Schengen visas do not include the right to carry out employment. It therefore does also not hinder the issuance of work permits.

The **Visa Code (Regulation (EC) No 810/2009)** foresees specific entry and exit visa status for certain transport workers:

- the Visa code does not apply to flight crew members who re nationals of contracting Party to the Chicago Convention on International Civil Aviation.

- Specific, but strict, rules apply for visas at the border to seafarers in transit subject to visa requirements (Annex IX) issuing seafarers, covering transit into a Member state to sign onto a vessel, to transfer between vessels and to leave a ship after completed service can be issued on the basis of Article 36 of the Visa code.

Neither the Visa Code, nor the Schengen Border code in any way regulate work or residence permits, which would either be set out in national law or in other EU legislation.

7.3.4 National level responses

As pointed out above, national level response does not necessarily solve the problems linked to the European dimension related to high level of mobility between the Member States. Some Member States exempt transport workers from the need to hold a work permit or work visa, under strict conditions whilst they operate on their territory.

The employment of workers in road transport as well as in aviation is mainly regulated via general employment permits on Member State level. For example in Germany the general Law on Residence and the Employment Regulation regulate the entry of TCN to the labour market. This includes aviation: as long as crew of German airlines fulfil the necessary preconditions outlined in the Law on Residence, they can be granted a residence permit for employment purposes without a labour market test.¹³⁶

The main variation at national level concerns social policies, and in particular the different levels of employment protection available to workers in different countries. This creates the conditions for 'social dumping' in the road transport and aviation industry as operators can take advantage of market liberalisation of the road haulage and aviation markets to register themselves in the country with the lowest tax liabilities. This contributes to a 'race to the bottom' in terms of the employment rights of transport workers.

Some countries have developed measures to try to stem this tendency. In France, for example, the main employment law stipulates that a collective agreement that is binding on an employer automatically and immediately binds all relevant employment contracts in a subcontracting chain, unless more favourable conditions apply (*Code du Travail*, article L 135-2). In contrast, in the UK, a collective agreement is binding in honour only between the parties, although its normative terms (such as hours of work and pay) may be given legal effect by incorporation into the contract of employment. Contractual incorporation is tested in the courts by reference to the parties' 'intentions' and the 'aptness' of a collective norm forming part of the individual's contract of employment.¹³⁷

7.4 Consequences of the problem

As already mentioned, the rise of new business models in the transport industries that can be based on sub-contracting, outsourcing and self-employment contracts, has resulted in lower transport costs for consumers but is having negative effects for levels of pay and employment conditions in both transport sectors. For transport workers, it is often difficult to establish the home base and therefore to determine the social and employment legislation that applies in individual cases. In the aviation sector, the internationalisation of airlines and increasing use of subcontracting and temporary work agencies, often based in non-EU countries, means that many workers

¹³⁶ This is outlined in the Law of Residence (Section 18, AufenthaltG) and the Employment regulation (Section 24, BeschV).

¹³⁷ ETF, Evolution of the Labour Market in the Airline Industry due to the Development of the Low Fares Airlines (LFAs), 2013 <http://www.etf-europe.org/files/extranet/-75/44106/LFA%20final%20report%20221014.pdf>

do not have access to the protections contained in EU employment and migration laws.

Although there is limited data on the scale of the problem, surveys of transport workers conducted by trade unions and academics identify widespread concerns about job security, pay levels and benefits within both the road transport and aviation sectors. In one study focusing on the aviation sector, a minority of respondents regarded their pay and benefits to be sufficient for their current lifestyle and even fewer (typically less than 20 per cent) regarded their pay and benefits as sufficient for their future life plans. The declining quality of employment is in turn raising concerns about the safety of transport carriers, particular in the civil aviation industry.¹³⁸

7.5 Conclusions

Addressing the problems of third-country national transport workers is highly relevant to the EU legal migration acquis, since there are shortcomings in how the objectives can be reached for this group as regards ensuring equal treatment of third-country nationals, notably as regards pay and working conditions, social security and other areas, thus avoiding their exploitation and preventing discrimination in the EU.

Whilst new employment models are proliferating in the transport sector can create exploitative working conditions for all workers, regardless of nationality, but some third-country workers may be more vulnerable due to the lack of clarity on the legality of the stay/residence, including authorisation to work. Although available statistics are showing relatively low proportion of third-country workers, their share is increasing, presenting a downward pressure on salaries and working conditions. Further knowledge gathering is needed as regards the extent of the problem and the impact thereof.

The existing EU legal migration Directives, also in interaction with visa and border policies, are not well equipped to address the problems related to highly-mobile work. There are:

- gaps as regards work permit, or long-stay visa, that allows work in more than one Member States, and thereby;
- gaps as regards legally enforceable equal treatment with nationals rules for such highly-mobile third-country transport workers, compared to non-mobile third-country workers (ie those with a permit/visa in one Member State); as well as
- gaps in relation to procedural safeguards.
- gaps as regards the need for visas authorising work and stay for multiple Member States that covers the whole intended duration of work (could be 8-10 months for instance) when the time is shared between Member States.
- administrative burdens as regards the needs to apply for permits/visas in multiple Member States to ensure full legality of the entire intended stay
- inconsistencies between the need to transport workers needs in terms of duration of the stay and need for multiple entries, with the rules on visa and borders (Schengen stay of 90 days in any 180 days) also in view of the stricter controls introduced by the new entry/exit system;
- inconsistencies between the legislation and the case law determining the Member State that is responsible for enforcing contractual rules and the absence of such case law and rule concerning the determination of which Member State is responsible for authorising work to a third-country national.

In addition, while the potentially relevant Single Permit, Blue Card, Seasonal Workers and ICT Directives contain equal treatment provisions aimed at providing third-

¹³⁸ ETF, Evolution of the Labour Market in the Airline Industry due to the Development of the Low Fares Airlines (LFAs), 2013 <http://www.etf-europe.org/files/extranet/-75/44106/LFA%20final%20report%20221014.pdf>

country national workers with the same pay and employment conditions as workers (and, in the case of the ICT Directives, posted workers), these Directives include exemptions from their scope categories of third-country nationals that are particularly relevant to the transport sector and who are vulnerable to unfair employment practices, namely, self-employed workers, seafarers and other employees on seagoing ships registered on an EU MS flag, posted workers and workers for whom it is difficult to determine the home base and in the case of Seasonal Workers intra-EU mobility would mean certain transport workers in for instance intra-EU cruise ships would be excluded from the legislation.

The way Member States are attempting to address the issues related to exploitative practices is not sufficient. Whilst efforts are underway at the EU level to make sure for instance rules on posting of workers address issues related to exploitative practices, there is a gap related to posting does not cover posting from third-countries, whereby not all rights from the workers perspective are covered compared to third-country nationals that work and reside legally in one Member State.:

- While some Member States are attempting to address the problem through national provisions (e.g. requiring collective agreements that are binding on an employer to extend to all the agreements in a sub-contracting chain), the internationalisation of transport markets makes it difficult for Member States to address the problems on their own.
- **Other EU legislation addresses only certain aspects of the problem.** A host of EU employment legislation attempts to address the problems, including the Posting of Workers Directive and the Temporary Work Agency Directive, by establishing minimum rules concerning the pay and employment conditions of workers in cross-border situations. Whilst these provisions of these instruments cover workers regardless of nationality, certain third-country nationals, in particular posted workers and the self-employed, excluded from the scope of the EU legal migration Directives, are more vulnerable. They are also not able to assist in situations where posting of third-country nationals takes place by operators or temporary work agencies situated in third countries.

The transnational nature of the problems mean there would be added value in developing further actions at EU level, both addressing the legality of stay and work in a highly mobile context, as well as in relation to the enforcement of rights n, including procedural rights and right to equal treatment.

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8 Non-removable irregular migrants who are granted a toleration status

8.1 Problem / gap definition

This fact sheet deals with a gap stemming from the Return Directive, namely the legal situation of third-country nationals who are staying illegally on the territory of a Member State but who cannot be removed.¹³⁹

The aim of the Return Directive is to reduce “grey areas” and improve legal certainty of third-country nationals who no longer enjoy a legal stay by imposing an obligation on Member States to issue a return decision to any third country national illegally staying on their territory.¹⁴⁰ Therefore Member States should either issue a third country national a permit to legally stay on their territory or issue a return decision to any third country illegally staying on their territory.

The Return Directive however does not address the situation of **third country nationals who are issued a return decision or a removal order which cannot be enforced due to legal or practical reasons**. Member States should or may postpone removal of a third-country national in a number of cases foreseen by the Return Directive.¹⁴¹

While the Return Directive foresees basic rights and procedural safeguards for third-country nationals pending their removal,¹⁴² Member States enjoy a wide discretion to provide this category of migrants with additional rights, ‘tolerate’ them on their territory or even grant (temporary) residence permits. The way Member States apply this discretion differs significantly varying from no recognition, de facto toleration, formal toleration to temporary residence permits.¹⁴³

8.2 (Legal) definition(s) of the problem/gap

While a definition of an irregular migrant¹⁴⁴ and of return¹⁴⁵ can be found in EU legislation, there is a lack of commonly agreed terminology or EU-wide definition of a non-removable third-country national.

The Return Directive refers to minimum basic rights and procedural guarantees for third-country nationals subject to a return decision and who cannot be returned for legal or practical reasons. In practice, the legal status of this category of migrants varies greatly in Member States. Attempts at establishing a classification of the statuses granted by Member States to irregular migrants pending return have been

¹³⁹ Recital 12 of the Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter the Return Directive).

¹⁴⁰ Return Handbook, p. 21.

¹⁴¹ According to Article 9 of the Return Directive, Member States *should* postpone removal where it would infringe the respect of the principle of non-refoulement or where the return decision is reviewed by a competent national authority. Member States *may* postpone return by taking into account the specific individual circumstances of the third-country national or for practical reasons impeding removal (lack of identification of the third-country nationals or transport capacity).

¹⁴² Article 14 of the Return Directive.

¹⁴³ EMN, Study on The different national practices concerning granting of non-EU harmonised protection statuses, 2010 (hereafter EMN 2010 Study); FRA, Fundamental rights of migrants in an irregular situation in the European Union, 2011 (hereafter FRA 2011), p. 34. European Commission, Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries, 2013 (hereafter 2013 Study on the situation of third-country nationals pending return/removal), p. 22.

¹⁴⁴ Definition of an irregular migrant can be derived from the definition of illegal stay provided in Article 3(2) of the Return Directive, namely a third-country national who does not fulfil, or no longer fulfils the conditions of entry in a country, as set out in Article 5 of the Schengen Borders Code or in national law.

¹⁴⁵ Definition of return can be deducted from Article 3(3) of the Return Directive, namely the process of a third-country national going back (voluntarily or enforced) to his or her country of origin, a country of transit or another third country.

made in several studies.¹⁴⁶ These studies have shown that non-removable irregular migrants can face broadly four different situations in Member States, knowing that several of these situations may be encountered in the same Member State:

- **Irregular migrant status:** third-country nationals pending return or removal do not have additional rights or distinct status from the one referred to in the Return Directive.¹⁴⁷ This category of third-country nationals are thus outside the scope of this fact sheet.
- **De facto toleration:** third-country nationals may sometimes have their return date extended and usually do not receive a written confirmation of the suspension of their removal. Their presence is tolerated in practice until their return or removal can be executed.¹⁴⁸
- **Formal toleration status** or 'Duldung' practice: third-country nationals receive a judicial or administrative decision which gives them the permission to stay in the territory of the Member State until their return or removal is executed. Such a document normally protects the individual from arrest and detention for the purpose of removal but normally entitles the holder to fewer rights than provided to the holder of a residence permit.¹⁴⁹ The toleration status only suspends the return decision as long as its execution is impossible in fact or in law.¹⁵⁰
- **Temporary residence permit:** third-country nationals pending return may receive a judicial or administrative decision granting temporary residence to persons who are not removed for humanitarian, practical or policy considerations.¹⁵¹ These residence permits are granted as a replacement of a postponement of removal and, in specific situations, can lead to a legalisation of the stay of a third-country national. Once an individual is issued a residence permit, even of a temporary nature, his/her situation can be considered as no longer irregular. Therefore, holders of a residence permit fall outside of the scope of this fact sheet.

8.3 Scale of the problem / gap

While the presence of irregular migrants pending removal is an EU-wide phenomenon, there are however no reliable estimates on the scale of the phenomenon at EU or national level.

A number of indirect indicators may nevertheless provide a first step in understanding the scale of the gap. As illustrated in Figure 1 below, Eurostat currently collects figures on the total return decisions issued (in grey) and the number of effective returns (light blue line). The difference between these figures (dark blue) indicates the potential number of third-country nationals who are subject to a return decision but which was not executed (approximately between 360 000 and 240 000 per year between 2008 and 2016). This is a first indication as no comprehensive data is collected about those

¹⁴⁶ EMN 2010 Study, FRA 2011 and 2013 Study on the situation of third-country nationals pending return/removal.

¹⁴⁷ According to the 2013 Study on the situation of third-country nationals pending return/removal, this is the case of CY, DK, EE, FR, IT and LV which do not provide for any any suspension of removal order, toleration status or residence permit for this category of irregular migrants in their national legislation, p. 24.

¹⁴⁸ According to the 2013 Study on the situation of third-country nationals pending return/removal, this is the case in BE, BG, CY, DK, EE, ES, FR, HU, IE, IT, LT, LV, NO, PT, and UK, p. 28.

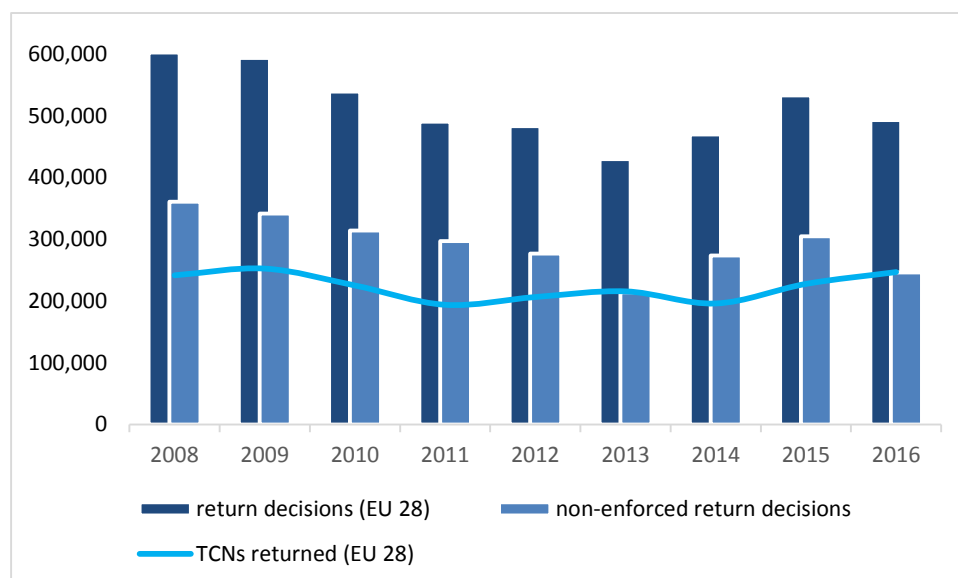
¹⁴⁹ FRA 2011, p. 36.

¹⁵⁰ According to FRA 2011, p. 36, this was the case in AT, BG, DE, EL, LT and RO. According to the 2013 Study on the situation of third-country nationals pending return/removal, this is the case in AT, CH, CZ, DE, EL, LI, LU, NL, PL, RO, SI and SK, p 27.

¹⁵¹ According to the 2013 Study on the situation of third-country nationals pending return/removal, this is the case in FI, MT, SE and Iceland (p. 26).

third-country nationals who have been issued a return decision, but have returned voluntarily for example.¹⁵²

Figure 1. Number of return decisions, effective returns and non-enforced return decisions in the EU (2008-2016)



Source: Eurostat (data extracted on 6th June 2017)

8.4 Responses to the problem

8.4.1 EU level responses

EU level responses can be classified in two streams: foreseeing a number of minimum basic rights for non-removable third country nationals and pathways leading to the regularisation of their stay.

Access to rights for irregular migrants pending return

The **Return Directive** provides that where the removal of an illegally staying third-country national cannot be executed, they must be granted a **minimum set of basic rights** such as family unity, emergency health care, basic education for minors and that the needs of vulnerable persons is taken into account.¹⁵³ The CJEU also specified that Member States have to cover **other basic needs**, in order to ensure that emergency health care and essential treatment of illness are in fact made available during the period in which that Member State is required to postpone removal.¹⁵⁴ Member States should also provide a third-country national with a written document confirming the postponement of their removal, in order for the third-country national to be able to prove his or her situation in the event of administrative controls or checks.¹⁵⁵ In addition, the Return Directive prohibits detention where prospects for removal no longer exist.¹⁵⁶

¹⁵² Eurostat partially collects data on the type of returns – voluntary and forced return for certain Member States (as not all Member States provide this information or collect this information) only as of 2014.

¹⁵³ Article 14 of the Return Directive.

¹⁵⁴ CJEU, *Abdida*, case C-562/13 of 18 December 2014, ECLI:EU:C:2014:2453. While there is no general legal obligation under EU law to provide for the basic needs of all third-country nationals pending return, the Commission encourages Member States to do so to ensure humane and dignified conditions of life for returnees (Return Handbook, p. 75).

¹⁵⁵ Article 14(2) of the Return Directive.

¹⁵⁶ Article 15(4) of the Return Directive.

Other EU instruments may have an impact on the situation of irregular migrants, regardless of their pending removal or not:

- The **Directive on Safety and Health at Work**¹⁵⁷, which promotes workers' rights to make proposals relating to health and safety, does not exclude irregular migrants by defining 'worker' as 'any person employed by an employer' without restricting it to regular workers.
- The **Employers Sanctions Directive**¹⁵⁸ gives migrant workers in an irregular situation the right to claim outstanding remuneration resulting from illegal employment or to lodge complaints against employers.
- The non-discrimination guarantees of the **Racial Equality Directive**¹⁵⁹ also apply to migrants in an irregular situation prohibiting discrimination based on race or ethnic origin. It applies to discrimination in public and private sectors. The directive, however, does not apply to differences of treatment based on nationality or the legal status of third-country nationals.

Pathways to legalisation

Regarding paths to legalisation, non-removable migrants may obtain a right to stay following a **marriage with a mobile EU citizen**,¹⁶⁰ having a **child with EU citizenship**¹⁶¹ or obtain a national **residence permit based on Article 8 ECHR**.¹⁶²

Member States may also consider granting a temporary residence permit to migrants in an irregular situation who cooperate with the justice system, either as **victims of trafficking in human beings** or as witnesses for specific cases.¹⁶³

While there is no obligation on Member States to grant a residence permit to non-removable returnees, the Return Directive also foresees the possibility for Member States to **grant a residence permit for compassionate, humanitarian or any other reasons to third-country nationals staying illegally on their territory**.¹⁶⁴ The Return Handbook provides a number of criteria that Member States may take into account for granting permits related to the individual and policy situation.¹⁶⁵

The issue of **regularisation measures** and the harmonisation of this practice at EU level were discussed at informal expert level with Member States.¹⁶⁶ At that occasion, a frame for the legalisation or not of non-removable third-country nationals was discussed. It was based on a number of criteria such as length of stay on the territory of a Member State, cooperation during the return procedure, social integration. Such

¹⁵⁷ Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC).

¹⁵⁸ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

¹⁵⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

¹⁶⁰ Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

¹⁶¹ Following for example the case-law of the CJEU in *Zambrano* (C-34/09) or, more recently, in *Chavez-Vilchez* (C-133/15).

¹⁶² For example ECtHR ruling in *Jeunesse v. the Netherlands* of 3 October 2014, Application no. 12738/10.

¹⁶³ Under Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

¹⁶⁴ Article 6(4) of the Return Directive and CJEU ruling in the *Mahdi* case, C-146/14.

¹⁶⁵ These criteria can take into account the cooperative/non-cooperative attitude of the returnee, the length of factual stay of the returnee in the Member State, the integration efforts made by the returnee, the personal conduct of the returnee, its family links, etc. (Return Handbook, p. 77).

¹⁶⁶ CC return 50 of 21 March 2014, available at: http://www.emn.lv/wp-content/uploads/1.Lutz_non-removables-EMN-seminar-handout.pdf.

cooperating returnees would also have access to work and material reception facilities. However, no agreement on a EU harmonised solution in this area was reached with Member States. The political consensus seems to put the focus on increasing the return rates at EU level while the status and rights granted (or not) to non-removable returnees are dealt with at national level.¹⁶⁷

8.4.2 National level responses

As mentioned earlier, national policies dealing with situations of non-removability vary considerably across the EU ranging from regularisation programmes¹⁶⁸, de facto toleration of a non-removable returnee on State territory to the possibility of formal toleration or the granting of residence permits.¹⁶⁹

Differences exist regarding the conditions under which a status is granted as well as the length and the rights attached to the respective status in relation to family unity, health, education, labour market access and reception conditions. Based on existing studies, it appears that non-removable third-country nationals with an official toleration status are granted additional rights in comparison to other third-country nationals pending return/removal.¹⁷⁰ Such additional rights for example relate to the right to freely choose a residence or the right to not live in accommodation centres, access to the labour market, additional access to medical assistance and access to adult education.¹⁷¹

Cooperation of the third-country national during his or her return procedure may also lead to additional rights such as financial help or a work permit. Such cooperation is often a pre-requisite in a number of Member States for obtaining a formal toleration status or a right to legal stay.¹⁷²

8.5 Consequences of the problem / gap

The lack of common EU approach towards third-country nationals who cannot be removed despite being subject to a return decision raises several consequences and challenges:¹⁷³

- **Uncertainty of the legal status and access to rights** of the individuals concerned: while the status and access to certain rights is more certain in Member States that grant a form of formal toleration status, in most Member States, third-country nationals pending return face a de facto toleration with unclear access or information on their basic rights. In many cases access to basic rights, such as rights to family unity, healthcare, employment, education and accommodation is burdensome. This is also related to the fact that, even their presence is known to the authorities,

¹⁶⁷ Presentation by F. Lutz, *Non-removable Returnees under European Union Law - Status Quo and Possible Developments* at EMN expert seminar, Riga, on 22-23 March 2017, available at: http://www.emn.lv/wp-content/uploads/1.Lutz_non-removables-EMN-seminar-handout.pdf.

¹⁶⁸ According to the FRA 2011 report, p. 36, regularisation programmes are in place in BE, FR, DE, EL, IT, NL, PT, ES and UK. According to the 2013 Study on the situation of third-country nationals pending return/removal, access to legalisation *specifically* for third-country nationals whose return/removal order has been postponed is possible in AT, CH, CZ, DE, DK, FI, IS, LI, LT, LU, NL, NO, PL, SI and UK.

¹⁶⁹ FRA 2011, p. 36, and Chapter 3 of the 2013 Study on the situation of third-country nationals pending return/removal, p. 33.

¹⁷⁰ According to the 2013 Study on the situation of third-country nationals pending return/removal, p. 43, this is the case in AT, CH, EL, FI, LI, LU, NL, PL, RO, SI, and SK.

¹⁷¹ 2013 Study on the situation of third-country nationals pending return/removal, p. 34.

¹⁷² According to the 2013 Study on the situation of third-country nationals pending return/removal, pp. 52-55, this is the case in AT, BE, CH, CY, DE, EE, EL, ES, FI, FR, HU, IS, IT, LI, LT, LU, LV, NL, NO, PL, RO, SE and SK.

¹⁷³ Based on findings of the 2013 Study on the situation of third-country nationals pending return/removal, p. 77 and presentation by F. Lutz, "Non-removable Returnees under European Union Law - Status Quo and Possible Developments".

irregular migrants might be afraid of detention or removal if they access basic services.

- This situation also reveals **a gap in the EU's asylum policy** as this lack of common approach on non-removable third country nationals also impacts the situation of individuals who have not obtained a protection status but who can nevertheless not be removed for *non-refoulement* or other humanitarian reasons.¹⁷⁴
- **Impact on the protection of fundamental rights:** the status of a person has an impact on their level of fundamental rights protection, such as on protection from arbitrary detention.¹⁷⁵
- **Secondary movement and pull-factors:** differences in national safeguards regarding irregular migrants might lead to push and pull effects between Member States, incentivising irregular migrants to move to that Member State allegedly guaranteeing the highest protection of rights, conditions of stay or regularisation mechanisms. The latter may be perceived as a 'reward for irregularity' and may potentially lead to increasing irregular migration to the EU Member States.
- Impact on **public acceptance of EU migration policies:** large numbers of non-removable third-country nationals with limited access to employment may contribute to increasing a negative public opinion on migration and may undermine public support towards an EU migration policy. Common standards which would allow certain categories of non-removable third-country nationals (for e.g. those cooperating for their return and with a certain duration of stay) to access the labour market or a more certain legal status may be beneficial in this context.

8.6 Conclusions

- **The problem/gap is indirectly relevant to the overall objectives of the EU legal migration acquis:**

Return of illegally staying third-country nationals is not *per se* one of the general objectives of the EU legal migration acquis. However, the general objectives of the acquis focus on improving the effectiveness of the management of legal migration flows across the EU, avoiding exploitation of third-country nationals and promoting their social and economic integration. The legal situation of third-country nationals who are subject to a return decision which cannot be executed for legal or practical reasons for an amount of time and are thus 'tolerated' on the territory of the Member States in an official or unofficial way creates grey zones for these categories of migrants. The latter are thus out of scope of both the Return Directive and the EU legal migration Directives.

Non-removable migrants who are granted a toleration status may, under some conditions defined in national laws, fall under the scope of the EU legal migration Directives if such toleration status may lead to a form of regularisation or legalisation of their stay on the territory of a Member State (for e.g. family reunification, LTR, student and researchers Directive, etc.). In the meantime, their access to basic rights and safeguard of procedural rights as long as return is not possible or access to the labour market is mainly governed by national rules.

- **The existing EU legal migration Directives do not respond to the problem/gap identified:**

¹⁷⁴ On this point see also recent EMN Focussed Study on *The Return of Rejected Asylum Seekers: Challenges and Good Practices*, 2016.

¹⁷⁵ FRA 2011, p. 35.

None of the EU legal migration Directives address the situation of non-removable third country nationals who are granted a toleration status under national laws. Unless non-removable third-country nationals may change status following a regularisation or legalisation of their status, none of the legal migration Directives apply.

- **The way Member States implement the legal migration Directives does not affect the problem**

Albeit the results of the practical implementation study (Task II) may provide for additional information to answer this question fully, preliminary findings of desk research show that, due to the nature of the gap, the legal migration Directives do not suffice to resolve the gap.

- **Few other EU legislation may partially address the problem:**

The situation of non-removable irregular migrants stems from a legislative gap. The provisions of the Return Directive only partially deal with the issue and do not provide for harmonised or common approaches at EU level, for example on regularisation of this category of migrants. Other EU legislation, such as instruments pertaining to the EU asylum acquis (the Reception Conditions Directive), or other sectoral legislation may impact the legal situation of irregular migrants by providing for (victims of trafficking, employers' sanction Directive, racial equality Directive).

- **There are consequently gaps in the response at EU level:**

There is a gap at EU level and the issue is mainly dealt with at national level in a very diverse manner regarding the regularisation mechanisms and various 'degrees' of toleration statuses.

- **There may be added value in addressing the issue at EU level, but there are important pitfalls:**

There would be an added value in defining common approaches regarding certain categories of non-removable third-country nationals (for example those in a protracted situation of irregularity, who cooperate to their return or who have a certain degree of integration in Member States), notably in relation to their access to the labour market of Member States. Such a common approach would decrease secondary movements and would increase fundamental rights of the third country nationals concerned by granting them a frame of a more certain legal status. However, providing a clearer pathway for legalisation, easing legalisation may also create pull-factors for further irregular migration to Member States. In addition, this remains a politically sensitive issue to regulate at EU level as Member States prefer keeping a focus on increasing return rates at EU level and dealing with the status of non-removable third-country nationals at national level only.

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EU Policy Documents

- European Commission, Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks Return Handbook, C(2015) 6250 final, Brussels, 1.10.2015.

Legislation

- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third- country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.
- Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89 / 391 /EEC).
- Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

9 Issues related to overstaying and transition into irregular stay

9.1 Problem / Gap definition

Overstaying refers to the phase migrants find themselves in when remaining in a country **beyond the approved duration of their stay**. Regular migrants may transition into overstay/ irregular stay if they are unable to renew their residence permit for some reason, often not of their own making (for example, due to bureaucratic delays beyond their control).

Most overstayers **enter legally on visitor, tourist or student visas** (rather than through an irregular channel of entry). Therefore, the challenge of them overstaying may be a question of weak internal controls rather than one of efficient entry controls.¹⁷⁶

9.2 (Legal) definition(s) of the problem / gap

In the EU context, the EMN refers to an '**overstayer**' as a person who has legally entered but then stayed in a Member State beyond the allowed duration of their permitted stay without the appropriate visa (typically 90 days or six months), or of their visa and/ or residence permit.

Three types of irregular migrants related to travel, residence and work can be distinguished: i) those who cross borders without the required documentation ('clandestine entry', e.g. because they make use of forged documents or do not have the required visa; **ii) overstayers, i.e. those who remain in a country beyond the approved duration of their stay**; and iii) those who work in a country without the necessary authorisation (e.g. a work permit) or perform a type of work which is deemed irregular (e.g. informal economy).¹⁷⁷ *This fiche focuses on the second type of irregular migrants, i.e. overstayers (to be distinguished from the other two).*

9.3 Scale of the problem / gap

Given the hidden nature of irregular migration, any estimates of its scale are approximate. Globally, the IOM estimated in 2010 that **10-15% of migrants have an irregular status**. Within the EU, **the share of irregular migrants is thought to be particularly high in southern Member States, such as Spain, Portugal, Italy and Greece** not only because of the ease of overstaying, but also due to these countries' history of clandestine entry, as well as the approach of the authorities characterised as 'hands-off' for most of the time. At the same time, since the 1980s, southern Europe has seen a large number of regularisations, resulting in some 5 million migrants having their status regularised.¹⁷⁸

Another document from the Parliamentary Assembly of the Council of Europe, from 2007, estimates that **over 5.5 million irregular migrants live in the EU**.¹⁷⁹

9.4 Consequences of the problem / gap

The following consequences of overstaying and transition into irregular stay can be highlighted:

- Loss of legal status may lead to destitution and social problems (irregular migrants don't have **access to healthcare, education, or language support**)

¹⁷⁶ Ibid.

¹⁷⁷ Research on Migration: Facing Realities and Maximising Opportunities. A Policy Review, https://ec.europa.eu/research/social-sciences/pdf/policy_reviews/ki-04-15-841_en_n.pdf

¹⁷⁸ Ibid.

¹⁷⁹ Regularisation programmes for irregular migrants, <http://www.unhcr.org/4b9fac519.pdf>

- Presence of irregular migrants may also lead to **exploitation in the grey/black labour market**.
- Overstayers who transition into irregular stay are subject to return and **expulsion** measures, possibly including detention measures. This causes expenditure for Member States and human costs for migrants.

9.5 Responses to the problem

9.5.1 EU level responses

Article 79(1) TFEU obliges the EU institutions to adopt 'enhanced measures to combat illegal immigration'. Corresponding actions can include both legislation and operative instruments of an executive or financial nature. The wording leaves no doubt that these measures can include both the prevention of illegal entry and the termination of unauthorised residence, thereby supporting the overall objective of ensuring efficient migration management at all stages. While Article 79(2)(a) TFEU covers the termination of legal residence status, 79(2)(c) TFEU applies to those entering or residing without authorisation, either because their residence permit expired or was revoked or because they never had one. Article 79(2)(c) TFEU embraces domestic measures to counter illegal residence that are not related to border control activities, such as the contents of the Employer Sanctions Directive 2009/52/EC. The express reference to 'removal and repatriation' clarifies, in contrast to earlier formulations, that rules on deportation, as well as operative or financial support for national removal operations, are covered by Article 79(2)(c) TFEU, which served as the central legal basis for the Return Directive 2008/115/EC and the provisions concerning removal in the Asylum, Migration and Integration Fund.¹⁸⁰

More recently, the **European Agenda on Migration** has given the issue of irregular migration new prominence, proposing to tackle it by, reducing the incentives for irregular migration (including irregular overstay) and focusing on:

- addressing the root causes of irregular migration;
- fighting against smugglers and traffickers and
- enhanced return and readmission.

In its 6.4.2016 Communication on a reform of the CEAS and enhancing legal avenues to Europe (COM(2016)197) the Commission made the point that smart management of migration – including avoidance of irregular overstay - requires not only a firm policy in addressing irregular flows, but also a proactive policy of sustainable, transparent and accessible legal pathways. The Commission made it clear that more legal channels are needed to enable migrants to arrive in the EU in an orderly, managed, safe and dignified manner. The EU notably needs a more proactive labour migration policy to attract the skills and talents it needs to address demographic challenges and skills shortages, thereby contributing to economic growth and the sustainability of our welfare system.

There is, however, no easy trade-off between legal and irregular migration: more legal admissions do not lead automatically to a reduction of irregular migration flows (including overstay).

The EU level response on the issue of overstay therefore focused – in essence – on promoting more efficient return and, at the same time, setting up a legal frame (rules on legal migration, visa and borders) which makes sure that those who are admitted will comply with migration rules and return upon expiry of their right to stay.

¹⁸⁰ Thym in Hailbronner/Thym (ed.), *EU Immigration and Asylum Law – A Commentary*, 2nd edition (C.H. Beck, Hart, Nomos 2015), Part C 1, MN 19.

The Directives covering legally residing TCNs include indeed some clauses in relation to overstaying/ transition into irregular stay (without explicitly referring to the issue in most cases). The Seasonal Workers Directive¹⁸¹ is particularly relevant in this respect, as it contains provisions to prevent overstaying and temporary stay from becoming permanent (see Table 7 below):

Table 7. *Overstaying and transition into irregular stay in the EU legal migration acquis*

Primary purpose	Relevant EU instruments	Main provisions in relation to overstaying and transition into irregular stay in EU Directives concerning work
General	EU Long Term Residence Directive ¹⁸²	<p>Many provisions regarding residence in the EU, but in particular Article 22 on withdrawal of residence permit and obligation to readmit which stipulates the following:</p> <p><i>1. Until the third-country national has obtained long-term resident status, the second Member State may decide to refuse to renew or to withdraw the resident permit and to oblige the person concerned and his/her family members, in accordance with the procedures provided for by national law, including removal procedures, to leave its territory in the following cases: (a) on grounds of public policy or public security as defined in Article 17; (b) where the conditions provided for in Articles 14, 15 and 16 are no longer met; (c) where the third-country national is not lawfully residing in the Member State concerned.</i></p>
	Single Permit Directive ¹⁸³	<p>Preamble 3 of the Directive stipulates the following: <i>Provisions for a single application procedure leading to a combined title encompassing both residence and work permits within a single administrative act will contribute to simplifying and harmonising the rules currently applicable in Member States. Such procedural simplification has already been introduced by several Member States and has made for a more efficient procedure both for the migrants and for their employers, and has allowed easier controls of the legality of their residence and employment.</i></p> <p>Preamble 16 of the Directive further stipulates the following: <i>The provisions of this Directive on the single permit and on the residence permit issued for purposes other than work should not prevent Member States from issuing an additional paper document in order to be able to give more precise information on the employment relationship for which the format of the residence permit leaves insufficient space. Such a document can serve to prevent the exploitation of third-country nationals and combat illegal employment but should be optional for Member States and should not serve as a substitute for a work permit thereby compromising the concept of the single permit. Technical possibilities offered by Article 4 of Regulation (EC) No 1030/2002 and point (a)16 of</i></p>

¹⁸¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0036&from=EN>

¹⁸² IE, DK and the UK do not participate in this Directive.

¹⁸³ IE, DK and the UK do not participate in this Directive. The Single Permit is under the 'General' category because it does not only apply to TCNs who are in the EU for the purpose of work, but also to those who are there for other purposes and are allowed to work.

		<p><i>the Annex thereto can also be used to store such information in an electronic format.</i></p> <p><i>Finally, Preamble 17 of the Directive stipulates that: The conditions and criteria on the basis of which an application to issue, amend or renew a single permit can be rejected, or on the basis of which the single permit can be withdrawn, should be objective and should be laid down in national law including the obligation to respect the principle of Union preference as expressed in particular in the relevant provisions of the 2003 and 2005 Acts of Accession. Rejection and withdrawal decisions should be duly reasoned. Articles 4 and 8 of the Directive contain further provisions in this regard.</i></p>
Work/ Study	Blue Card Directive ¹⁸⁴	<p>Article 7 on withdrawal or non-renewal of the EU Blue Card which stipulates the following:</p> <ol style="list-style-type: none"> <i>1. Member States shall withdraw or refuse to renew an EU Blue Card where: (a) the EU Blue Card or the documents presented have been fraudulently acquired, or have been falsified or tampered with; (b) the third-country national no longer holds a valid work contract for highly skilled employment or the qualifications required by points (b) and (c) of Article 5(1) or his or her salary no longer meets the salary threshold as set in accordance with Article 5(2), (4) or (5), as applicable, without prejudice to Article 14.</i> <i>2. Member States may withdraw or refuse to renew an EU Blue Card issued on the basis of this Directive in any of the following cases: (a) for reasons of public policy, public security or public health; (b) where appropriate, where the employer has failed to meet its legal obligations regarding social security, taxation, labour rights or working conditions; (c) where the conditions in the applicable laws, collective agreements or practices in the relevant occupational branches for highly skilled employment are no longer met; (d) where the third-country national has not communicated the changes referred to in Article 13(1), where applicable, and in Article 14(3); (e) where the third-country national no longer holds a valid travel document; (f) where the third-country national fails to comply with the conditions of mobility under this Chapter or repetitively makes use of the mobility provisions of this Chapter in an abusive manner. Where an EU Blue Card is withdrawn or not renewed on the basis of point (e) of paragraph 2, Member States shall, prior to withdrawing or not renewing the EU Blue Card, set a reasonable deadline for the third-country national concerned to obtain and present a valid travel document.</i> <i>3. The lack of communication pursuant to Article 13(1) or 14(3) shall not be considered to be a sufficient reason for withdrawing or not renewing the EU Blue Card if the holder proves that the communication did not reach the competent authorities for a reason independent of the holder's will.</i> <i>4. Without prejudice to paragraph 1, any decision to withdraw or refuse to renew an EU Blue Card shall take account of the specific circumstances of the case and respect</i>

¹⁸⁴ IE, DK and the UK do not participate in this Directive.

	<p><i>the principle of proportionality.</i></p> <p>Article 14 on temporary unemployment further stipulates:</p> <ol style="list-style-type: none"> <i>1. Unemployment in itself shall not constitute a reason for withdrawing an EU Blue Card, unless the period of unemployment exceeds three consecutive months, or where the unemployment occurs more than once during the period of validity of an EU Blue Card.</i> <i>2. During the period referred to in paragraph 1, the EU Blue Card holder shall be allowed to seek and take up employment in accordance with the conditions set out in Article 13.</i> <i>3. The EU Blue Card holder shall communicate the beginning and, where appropriate, the end of the period of unemployment to the competent authorities of the Member State of residence, in accordance with the relevant national procedures.</i>
Seasonal Workers Directive ¹⁸⁵	<p>The majority of provisions within this Directive are relevant, see Preamble 7 of the Directive which explicitly refers to the issue of overstaying in the following terms: <i>This Directive should contribute to the effective management of migration flows for the specific category of seasonal temporary migration and to ensuring decent working and living conditions for seasonal workers, by setting out fair and transparent rules for admission and stay and by defining the rights of seasonal workers while at the same time providing for incentives and safeguards to prevent overstaying or temporary stay from becoming permanent. In addition, the rules laid down in Directive 2009/52/EC of the European Parliament and of the Council (4) will contribute to avoiding such temporary stay turning into unauthorised stay.</i></p>
Intra-Corporate Transferees Directive ¹⁸⁶	<p>Some relevant provisions, for example, Article 8 on withdrawal or non-renewal of the intra-corporate transferee permit, e.g.:</p> <p><i>3. Member States shall refuse to renew an intra-corporate transferee permit in any of the following cases: (a) where it was fraudulently acquired, or falsified, or tampered with; (b) where the intra-corporate transferee is residing in the Member State concerned for purposes other than those for which he or she was authorised to reside; (c) where the host entity was established for the main purpose of facilitating the entry of intra-corporate transferees; (d) where the maximum duration of stay as defined in Article 12(1) has been reached.</i></p>
Students and Researchers Directive ¹⁸⁷	<p>Some relevant provisions, for example those in Chapters III and IV of the Directive in relation to authorisations and duration of residence and grounds for rejection, withdrawal or non-renewal of authorisations.</p>
Students Directive ¹⁸⁸	<p><i>Please see above.</i></p>

¹⁸⁵ IE, DK and the UK do not participate in this Directive.

¹⁸⁶ IE, DK and the UK do not participate in this Directive.

¹⁸⁷ IE, DK and the UK do not participate in this Directive. IE does not participate in the Student Directive (Council Directive 2004/114/EC). IE does participate in the Researchers Directive (Council Directive 2005/71/EC).

	Researchers Directive ¹⁸⁹	Please see above.
Family	Family Reunification Directive ¹⁹⁰	Several provisions with regard to the issuance of a residence permit, as well as the possibility for a renewal as stipulated in Articles 6, 13, 16 and 18.

9.5.2 National level responses

Member States have resorted to three main policy options to address the issue of irregular migration:

- **Temporary toleration (or tolerated stay)** – implemented, for example, because the return is temporarily not possible (due to problems with readmission or other circumstances making fundamental rights compliant return impossible)
- **Regularisation** – this accepts the social reality of the presence of irregular migrants and confers a legal status upon them,. Regularisations may have unwanted effects, such as a 'bus stop queue' whereby irregular migrants continue to enter a Member State in anticipation of a further regularisation. Moreover, large scale regularisation measures may be a pull factor for further irregular migration. Regularisation are also contrary to the logic of fair migration management, since they "reward" irregularity.
- **Return** – which is an expensive and time-consuming measure on the one hand and the most consistent with the logic of border controls and 'migration management' on the other hand.¹⁹¹
- Lately, Member States increasingly use **voluntary departure** incentives (reintegration packages) as an incentive to encourage irregular migrants (including overstayers) to voluntarily comply with the obligation to return.

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¹⁸⁸ DK, UK and IE do not participate in the Students Directive.

¹⁸⁹ IE participates in the Researchers Directive, but DK and the UK do not.

¹⁹⁰ IE, DK and the UK do not participate in this Directive.

¹⁹¹ Research on Migration: Facing Realities and Maximising Opportunities. A Policy Review, https://ec.europa.eu/research/social-sciences/pdf/policy_reviews/ki-04-15-841_en_n.pdf

trafficking/sites/antitrafficking/files/the_stockholm_programme_-_an_open_and_secure_europe_en_1.pdf

10 Exploitation of legally residing third-country workers

The vulnerability of third country nationals to certain forms of labour exploitation has been an issue that has drawn attention of civil society and EU institutions alike. A number of reports of the Fundamental Rights Agency over the past year have drawn attention to the plight of third country nationals.

This paper examines the extent to which the current labour migration acquis is coherent with other EU legislation in particular social exploitation of third-country workers in the EU is regulated in the EU legal migration Directives and in other EU instruments, such as employment and criminal law linked legislation.

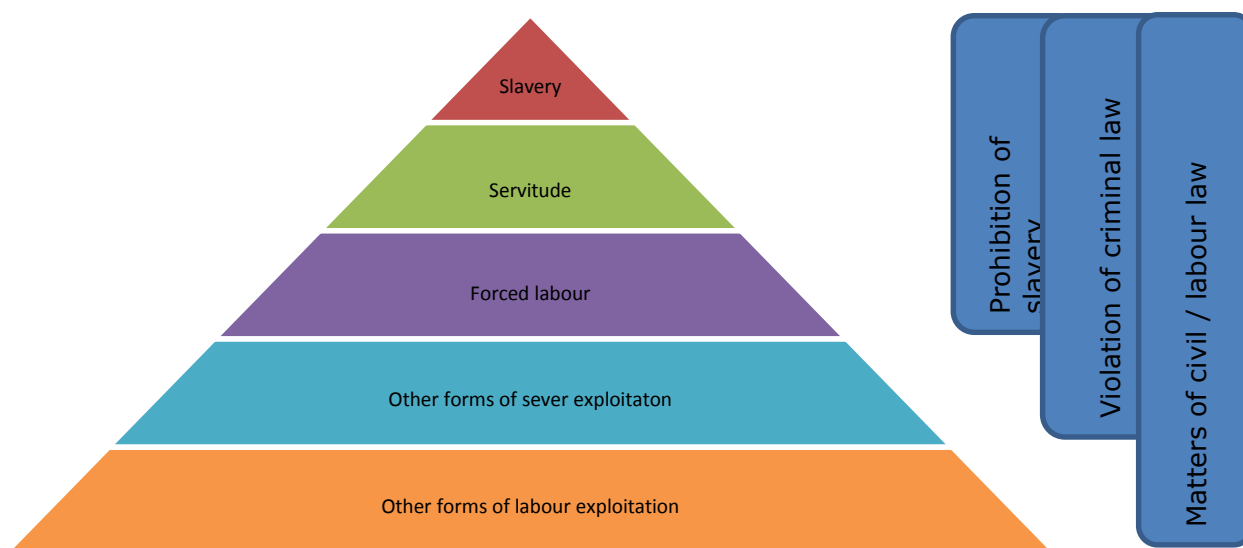
This paper should be read in conjunction with the external intervention logic chapters on employer sanctions, victims of trafficking, posted workers and temporary agency work.

10.1 Scoping of the problem

10.1.1 Definitions and forms of exploitation

There is no universally agreed definition of labour exploitation, as a phenomenon it is a continuum, where it ranges from with slavery and forced labour on one end and sub-standard employment conditions or terms on the other end. (Figure 2). Whereas exploitative labour is usually regulated by employment laws, the difference between 'mild' and 'severe' forms of labour exploitation are not always easily distinguishable: particular incidents of exploitative labour may also be addressed by criminal law where they amount to crimes.¹⁹²

Figure 2. Forms and severity of labour exploitation



Source: FRA (2015, p. 34)¹⁹³

Definitions of labour exploitation in EU legislation is only partial. The Employer Sanctions Directive (Directive 2009/52/EC) defines 'particularly exploitative working conditions' as working conditions, including those resulting from gender based or other discrimination, where there is a striking disproportion compared with the terms of employment of legally employed workers which, for example, affects workers' health

¹⁹² Exploitation and abuse of international migrants, particularly those in an irregular situation: a human rights approach, <http://www.globalmigrationgroup.org/system/files/uploads/news/GMG-Thematic-Paper-20131224-updated.pdf>, p.8

¹⁹³ Fundamental Rights Agency (2015) *Severe Labour Exploitation, Workers Moving within or into the European Union*, available at: <http://fra.europa.eu/en/publication/2016/severe-labour-exploitation-workers-moving-within-or-european-union-summary>

and safety, and which offends against human dignity, legal migrants can more easily fall under those conditions.

The FRA has slightly expanded this definition defining labour exploitation as “work situations that deviate significantly from standard working conditions as defined by legislation or other binding legal regulations, concerning in particular remuneration, working hours, leave entitlements, health and safety standards and decent treatment”.¹⁹⁴

Whilst undeclared work is not necessarily the same as exploitation, the definition of undeclared work as referred to in Decision 2016/344/EU¹⁹⁵, should be noted, as it was defined in the Commission Communication of 24 October 2007 entitled “Stepping up the fight against undeclared work ” as any paid activities that are lawful as regards their nature but not declared to public authorities, taking into account differences in the regulatory systems of the Member States”. That definition excluded all illegal activities.

In the EU’s Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims (henceforth the Anti-Trafficking Directive), the “purpose of exploitation” is one of the constitutive elements of the offence of trafficking in human beings. In the context of defining the offence, the Directive provides an indicative list of forms of exploitation associated with trafficking: “Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.”

One important element of the definition is the issue of coercion and consent of the victim. This is highlighted in the Trafficking Directive 2011/36/EU, which states that, in the context of trafficking, the “intended or actual” consent of the victim is considered irrelevant when the means set forth in Article 2 (paragraph 1) of the Directive have been used.¹⁹⁶

Labour exploitation may take a number of specific forms¹⁹⁷:

- no salary paid or salary considerably below legal minimum wage;
- parts of remuneration flowing back to employer on various grounds;
- lack of social security payments;
- extremely long working hours for six or seven days a week;
- very few or no days of leave;
- working conditions differ significantly from what was agreed;
- worker lives at the workplace;
- hardly any contact with nationals or persons from outside the company (or the family, in the case of domestic workers);
- passport / id retained, limited freedom of movement.

¹⁹⁴ FRA, 2015. Severe labour exploitation: workers moving within or into the European Union - States’ obligations and victims’ rights. Available at <http://fra.europa.eu/en/publication/2015/severe-labour-exploitation-workers-moving-within-or-european-union>

¹⁹⁵ Recital 5, Decision 2016/344/EU of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work

¹⁹⁶ The means referred to in Article 2, paragraph 1 are “[the] recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”

¹⁹⁷ FRA (2015), p. 36

10.1.2 Third country nationals and the labour exploitation

Any worker in the EU, regardless of their nationality, can fall victim to the above described forms of labour exploitation. It is a phenomenon, motivated by employers' incentives to circumvent the costs of employing workers and to minimise costs through non-payment of social contributions, lower salaries, and hiring workers for more flexible hours or with sub-standard working conditions.

Third country nationals as well as EU citizens may engage in a range of labour relations, where they may fall victim to labour exploitation:

EU citizens and TCNs with valid work permits may engage in regular employment, where the work conditions are substandard or working hours excessive. Both of these categories of workers may engage in a legitimate work in construction or agricultural sector, but their pay may not be declared by the employer (i.e. they are paid in 'cash'). Therefore this would be classified as 'undeclared work'¹⁹⁸, or 'shadow economy'. Illegally staying TCNs or TCNs with residence status but without the right to work may also engage in legitimate but undeclared work, and also be part of the 'shadow economy'.

Legally residing third country nationals without authorisation to work, or with expired work authorisation, or with authorisation with limit on the number of hours they may work (e.g. students) may engage in legitimate work without the right to do so. This work could be declared by the employer (who may even be unaware of the irregularity) or may be undeclared. Most vulnerable are the illegally staying TCNs who may only engage in undeclared work activities, or in illicit sale of prohibited goods or services.

Under any of the above scenarios, the afore-mentioned labour exploitation practices may take place. The more irregular or even criminal the nature of the labour relation between employer and the employee is, the less likely it is for the employee to report an exploitative situation. Therefore, in industries with high prevalence of undeclared work / shadow economy, such as construction, agriculture, or accommodation and food services activities, risks of labour exploitation are higher¹⁹⁹. In addition, "victims to of all forms of labour exploitation may also be victims of trafficking whenever the elements of the trafficking definition in Article 2 of the Anti-Trafficking Directive, as covered by Member State law, are met"²⁰⁰. The link between trafficking and migration is discussed in more detail in the paper on the external coherence chapter to this report on *Victims of Trafficking*.

	EU Citizen	TCN (with work permit)	TCN (no work permit)	Illegally staying TCN
Regular employment	X	X		
Regular but undeclared work	X	X		
Irregular employment			X	
Irregular work and undeclared work			X	

¹⁹⁸ COM defines undeclared work as "any paid activities that are lawful as regards their nature, but not declared to public authorities, taking into account differences in the regulatory systems of the Member States". Decision 2016/344/EU: "Undeclared work was defined in the Commission Communication of 24 October 2007 entitled "Stepping up the fight against undeclared work".

¹⁹⁹ FRA (2015), p. 48

²⁰⁰ FRA (2015), p. 36

Illegal employment and undeclared work				X
Illegal / black economy work	X	X	X	X

Specific issues related to third country nationals are:

- By migration status: the third-country national is entitled to work in general, or s/he is entitled to work for the specific employment only; s/he is on a temporary permit for remunerated activities reasons, in particular as employee or self-employed, and the permit is dependent upon her/his work, or s/he is on a permit for other reasons, therefore the permit is not dependent upon her/his work (e.g. study, family, humanitarian reasons, victims of trafficking), or s/he is a permanent resident; the third-country national may be entitled to reside but not to work..
- By place of work: the third-country national may be working in the MS from which s/he received the permit, or in another MS (*for instance, as posted worker – see external dimension chapter on the Posting workers Directive*)
- Add point on additional vulnerability of reporting exploiting employers if your own residence depends on that employer. High risk of not getting permit renewed etc.

The causes of labour exploitation of legally residing third-country nationals are complex. The scale of the informal economy affects the opportunities for illegal employment and exploitation (for nationals and non-nationals). Lack of protection for workers, poor enforcement of control mechanisms and low presence/visibility of trades' unions also increase the opportunity for exploitation. It is widely held that high levels of taxation and social security contributions are the main causes of the increase of the informal economy; however, not much evidence has been collected on the causal relationship between the regulatory framework on migration and illegal employment.

10.2 Scale of the problem / gap

Estimating the size of the problem of labour exploitation is challenging for a number of reasons, partly as explained above, there is no definition of 'labour exploitation'.

As labour exploitation is a hidden and complex phenomenon, making reliable estimates of its magnitude is challenging. Qualitative evidence supports the claim that third-country nationals are more likely than nationals to be involved in exploitative employment. Relevant proxy data include data on the share of third-country nationals in the sectors which are more prone to exploitation and data on the size of these sectors in Member States.²⁰¹ Few studies have been found which attempt to estimate the scale of labour exploitation in all of its forms. One way of measuring the scale of this phenomenon is to **use proxy indicators**

While **undeclared work** is not the same as exploitation, it can serve as a proxy. For example, the failure to declare all or part of an employee's income can, depending on the social security system of a Member State, leave workers without social protection. Overall (including EU nationals), the Special Eurobarometer 402 'Undeclared work in the European Union'²⁰² reports that in 2013, 4% of respondents carried out undeclared activities apart from their regular employment in the previous 12 months.

²⁰¹ See 2015 FRA report which contains the top 3 sectors where migrants are severely exploited, p. 48. Available at <http://fra.europa.eu/en/publication/2015/severe-labour-exploitation-workers-moving-within-or-european-union>

²⁰² Special Eurobarometer 402, 2014. Undeclared work in the European Union. Available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_402_en.pdf

Different methods have also been used to estimate the magnitude of illegal employment, ranging from indirect methods using proxy indicators, and/or statistical discrepancies, to direct survey methods. In the majority of cases, the available data do not distinguish between illegal employment of EU nationals and third-country nationals, or between legally residing third-country nationals and illegally staying third-country nationals.

This proxy data can be gathered in the context of the **Employers' Sanctions Directive**. The Directive covers only illegally residing third-country nationals. However, by imposing the obligation on Member States to provide data on the number of inspections carried out by sector (and as a percentage of the total number of employers in the sector), the Directive can help to identify the sectors that are most prone to exploitation in general.

Another partial indicator of the scale may be found when examining data available on **trafficking victims of labour exploitation**. According to a Eurostat study, while a majority of victims of trafficking in EU Member States had encountered trafficking for sexual exploitation, an average of 19% of victims of trafficking encountered forced labour.²⁰³ This low percentage of labour trafficking cases can be explained by the challenges to identify and investigate such cases.

It is, however, very important to point out that victims of trafficking may have different residence statuses. They can be undocumented (irregular) migrants, but EU citizens or third-country nationals with valid residence permits can also end up in situations of trafficking and exploitation. Indeed, according to Eurostat,²⁰⁴ at the European level as many as 65% of registered victims of trafficking are EU citizens. On the other hand, for example in Finland, most trafficking victims are third-country nationals with valid work permits. In addition, as a special form of protection, permits can be issued to TCN that are victims of trafficking as an incentive to cooperate in the legal procedure to prosecute the traffickers (see *section Directive 2004/81/EC*) however this measures only those who are issued a permit due to cooperation in the procedures, and not necessarily the extent of the problem.

One study provides some data on the scale of forced labour in nine Member States by providing figures on forced labour cases prosecuted or investigated by national authorities; however, the data provided does not distinguish between forced labour of legally residing migrants and that of irregular migrants.²⁰⁵

Available national research on the exploitation of legally residing third-country workers, such as seasonal workers, is available in certain Member States and only examining certain sectors of the labour market.²⁰⁶

²⁰³ Eurostat, Report on Trafficking in human beings (2015 edition); labour exploitation of victims of trafficking covers the following sectors: agriculture, construction, textile industry, horeca (hotel/restaurant/catering), care, fisheries, and others; report available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eurostat_report_on_trafficking_in_human_beings_-_2015_edition.pdf

²⁰⁴ Ibid

²⁰⁵ Clark N., *Detecting and tackling forced labour in Europe*, conducted by the Working Lives Research Institute, London Metropolitan University, Joseph Rowntree Foundation, 2013, available at: <https://www.jrf.org.uk/report/detecting-and-tackling-forced-labour-europe>. This study looks at forced labour in Germany, Italy, Ireland, Latvia, the Netherlands, Poland, Spain and Sweden.

²⁰⁶ See for example research in Axelsson, L., Hedberg, C., Malmberg, B., & Zhang, Q. *Chinese restaurant workers in Sweden: policies, patterns and social consequences*, 2014, IOM, available at: https://www.researchgate.net/profile/Bo_Malmberg/publication/281776022_Chinese_restaurant_workers_in_Sweden_policies_patterns_and_social_consequences/links/55f7edf608ae07629dcd74b7.pdf and Ollus, N., & Jokinen, A. *Exploitation of migrant workers in Finland, Sweden, Estonia and Lithuania: Uncovering the links between recruitment, irregular employment practices and labour trafficking*. M. Joutsen (Ed.). European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), 2013, available at: <http://www.cbss.org/wp-content/uploads/2012/11/HEUNI-report-75-15102013.pdf>.

Therefore, comparing and aggregating data on the range of practices linked to labour exploitation across the EU would require availability of comparable data. Examples are : (1) criminal justice data on a range of *reported* crimes (from severe forms of labour exploitation, to forced labour, to THB for the purposes of labour exploitation); (2) data from institutions issuing sanctions on administrative violations linked to labour laws and standards. However as other categories of crimes, the levels of unreported crime is significant.

For instance, the 2015 Eurostat report *Trafficking in Human beings*, shows that in 2011, there were 1736 registered victims of trafficking for the purpose of labour exploitation in the EU.²⁰⁷ For the same year, using the methodology of 'capture recapture method', the International Labour Organisation study on forced labour shows that in 2012, in the EU, 616 000 victims of labour exploitation, or 70% of all victims of labour exploitation.²⁰⁸ The ILO study concludes, that the reporting rate is 3.6% or only 1 in 27 cases of forced labour reported.²⁰⁹ Consequently the use of official statistics will be of little use with such high rate of unreported cases. The 2017 update used a different methodology (a global household survey by Gallup) but reached a lower estimate of 684 000 victims of 'modern slavery' in the EU in 2016²¹⁰. These though do not differentiate between different types of exploitation (e.g. sex exploitation vs. forced labour exploitation).

Available national research on the exploitation of legally residing third-country workers, such as seasonal workers, is available in certain Member States and only examining certain sectors of the labour market.²¹¹

More recent studies by the ILO provide global and regional estimates of the scale of severe labour exploitation and forced labour.²¹² The ILO's 2017 estimate that on any day in 2016, 24.9 million people are in forced to work under threat or coercion, and in Europe (as well as in Central Asia) 3.6 per 1000 persons were victims. 9% of all victims of modern slavery are in Europe. The ILO studies show that, world-wide, the sectors most affected by forced labour are domestic work, construction, manufacturing, agriculture and fishing. They also show that migrant workers are particularly vulnerable to labour exploitation, but the studies do not distinguish between migrant workers in regular and irregular situations.²¹³

²⁰⁷ Eurostat, Report on Trafficking in human beings (2015 edition); labour exploitation of victims of trafficking covers the following sectors: agriculture, construction, textile industry, horeca (hotel/restaurant/catering), care, fisheries, and others; report available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eurostat_report_on_trafficking_in_human_beings_-_2015_edition.pdf, p.91

²⁰⁸ ILO (2012) *Forced Labour: an EU Problem*, available at: http://www.ilo.org/brussels/press/press-releases/WCMS_184972/lang--en/index.htm.

²⁰⁹ Ibid. p.39

²¹⁰ ILO (2017), *Global Estimates of Modern Slavery* (available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf); Global Slavery Index Report (available at: <https://www.globallslaveryindex.org/download/>), pp.58-66. The data does not include Malta.

²¹¹ See for example research in Axelsson, L., Hedberg, C., Malmberg, B., & Zhang, Q. *Chinese restaurant workers in Sweden: policies, patterns and social consequences*, 2014, IOM, available at: https://www.researchgate.net/profile/Bo_Malmberg/publication/281776022_Chinese_restaurant_workers_in_Sweden_policies_patterns_and_social_consequences/links/55f7edf608ae07629dcd74b7.pdf and Ollus, N., & Jokinen, A. *Exploitation of migrant workers in Finland, Sweden, Estonia and Lithuania: Uncovering the links between recruitment, irregular employment practices and labour trafficking*. M. Joutsen (Ed.). European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), 2013, available at: <http://www.cbss.org/wp-content/uploads/2012/11/HEUNI-report-75-15102013.pdf>.

²¹² ILO (2017) : *Global estimate of forced labour*, available at: <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>

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²¹³ Ibid

10.3 Responses to the problem

EU level responses to the issue of exploitation of legally residing third-country workers can be distinguished into three main categories: EU responses in the field of criminal law, EU responses in the field of employment, and EU responses in the context of the legal migration Directives.

10.3.1 EU responses containing criminal law provisions (and/or related to trafficking)

There are three EU instruments that are relevant in the fight against labour exploitation of legally resident third-country nationals, which have criminal law provisions:

- **The employers' sanctions Directive**²¹⁴ includes measures to prevent, detect and sanction as an administrative offence (and under certain circumstances as a criminal offence, including when the work involves 'particularly exploitative working conditions') the hiring of illegally staying third-country nationals (See *external coherence chapter on Employers sanctions for more details*).
- **The Anti-Trafficking Directive**²¹⁵ provides for minimum rules regarding the definition of criminal offences and sanctions on individuals and legal persons in the area of trafficking of human beings. (See *external coherence chapter on Victims of trafficking for more details*).
- **Directive on the residence permit issued to third-country nationals who are victims of trafficking** (2004/81/EC). This Directive does not contain criminal law provisions but is included in this section as it contains measures aimed at addressing problems faced by third-country national victims of trafficking. (See *external coherence chapter on Victims of trafficking for more details*).
- **The Facilitation package** is composed of two instruments, Directive 2002/90/EC and Framework Decision 2002/946/JHA that aim at supplementing the other instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children. The latest EU Action Plan against migrant smuggling announced that, together with Member States, the Commission would identify targets as regards the number of inspections to be carried out every year in the economic sectors most exposed to illegal employment.²¹⁶

10.3.2 EU responses in the field of employment law

A number of EU employment instruments aimed at achieving decent working conditions are applicable to all workers, including third country national workers in the EU. This is essential for the fight against exploitation, which can also be countered based on that acquis, which comprises:

- **Safety and Health at Work Framework Directive** contains basic obligations for employers and workers – third-country nationals or EU citizens, which, however, does not cover all aspects of decent working conditions and excludes 'domestic servants from its scope.'²¹⁷

²¹⁴ Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

²¹⁵ Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, hereafter the anti-trafficking Directive.

²¹⁶ European Commission, Communication on an EU Action Plan against migrant smuggling (2015 - 2020), COM(2015) 285 final, p.8.

²¹⁷ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989

- Directive and the Framework Agreement on **fixed-term work**,²¹⁸ provides for the principle of non-discrimination' according to which fixed-term workers shall not be treated in a less favourable manner in respect of their employment conditions than comparable permanent workers solely because they have a fixed-term contract.
- **Working Time Directive** entitles workers to minimum working conditions such as periods of daily rest, weekly rest and annual leave, breaks and maximum weekly working time.²¹⁹
- **Temporary Agency Work Directive** establishes the principle of equal treatment for temporary agency workers with regard to their basic employment and working conditions compared with directly employed workers.²²⁰ According to a recent study, agency workers may be exposed to a heightened risk of exploitative working conditions.²²¹
- **Posted Workers Directive** establishes rules for transnational provision of services from undertakings in one Member State to another, and regulates however the purpose is not to prevent exploitation (see *External coherence chapter on posted workers*).

10.3.3 Actions to tackle undeclared work

Undeclared work is not necessarily the same as exploitation; however the work is partly relevant. To tackle **undeclared work**, in which both legally residing third-country nationals and EU nationals may be involved, the European Commission launched the **European Platform on undeclared work** in 2016²²² with the aim of enhancing cooperation between authorities and other actors at national and transnational level, to ultimately improve Member States' capacity to tackle undeclared work and improve cross-border cooperation.²²³

Its main activities are exchanging best practices and information; developing expertise and analysis; encouraging and facilitating innovative approaches to effective and efficient cross-border cooperation and evaluating experiences; and contributing to a horizontal understanding of matters relating to undeclared work. The Platform mentions migrant workers as being particularly vulnerable to the effects of undeclared work. Therefore, indirectly, supports strengthening the capacity of Member States to ensure equal treatment of third-country national workers, notably as regards pay and working conditions, social security, and tax benefits, and thereby help to avoid exploitation.

The concept of **undeclared work** is explicitly referred to in four legal migration Directives:

²¹⁸ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999

²¹⁹ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Official Journal L 299, 18/11/2003

²²⁰ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008

²²¹ Ollus, N., & Jokinen, A. Exploitation of migrant workers in Finland, Sweden, Estonia and Lithuania: Uncovering the links between recruitment, irregular employment practices and labour trafficking. M. Joutsen (Ed.). European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), 2013, available at: <http://www.cbss.org/wp-content/uploads/2012/11/HEUNI-report-75-15102013.pdf>.

²²² Established by Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work (Text with EEA relevance)

²²³ European Parliament and Council, 2016. Decision on establishing a European Platform to enhance cooperation in tackling undeclared work, Decision (EU) 2016/344. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D0344&from=EN>

- In relation to the application phase, the Blue Card Directive (Art. 8.5), the Seasonal Workers Directive (Art. 8.2), the ICT Directive (Art. 7.2), and the Students and Researchers Directive (Art. 20.2,) specify that the Member States can reject the applications if the employers or host entities have been “sanctioned in accordance with national law for undeclared work and /or illegal employment”.
- In relation to the residence phase, the Seasonal Workers Directive (Art.9.2), the ICT Directive (Art.8.2) and the Students and Researchers Directive (Art. 21.2c) specify that the authorisations for third-country nationals can be withdrawn if the employer has been sanctioned “in accordance with national law for undeclared work and/or illegal employment” (this provision is absent in the Blue Card Directive). The Seasonal Workers Directive, the ICT Directive and the Students and Researchers Directive (in the latter, in the form of a ‘may clause’) also stipulate that their respective authorisations should, where appropriate, not be renewed where the employer or the host entity has been sanctioned in accordance with national law for undeclared work and/or illegal employment.

The aim of these provisions – to prevent third-country nationals from working for employers who have been sanctioned for undeclared or illegal work – is consistent with the EU’s efforts to support Member States in tackling undeclared work. One coherence issue concern the fact, third-country nationals may be reluctant to report undeclared work if they know that their permit or authorisation may be withdrawn or not renewed if the employers are sanctioned for undeclared work²²⁴. The SWD (Art.9.5), ICT (Art.8.6), and S&RD (Art.21.7) contain provisions that any decision to withdraw the authorisation shall take account of the specific circumstances of the case, including the interests of the third country national, and respect the principle of proportionality. Nevertheless, this formulation leaves sufficient discretion of the Member State, and does not guarantee third country nationals the right to continue their employment in a legitimate manner with another employer should they report such cases.

10.3.4 EU responses in EU legal migration Directives

Several Legal Migration Directives include provisions on equal treatment with nationals for third-country nationals who have been admitted to a Member State for the purposes of work (or who have a right to work). The Single Permit Directive is particularly relevant in this respect as it defines a common set of rights for most non-EU migrants working in a Member State. The equal treatment provisions in the EU legal migration acquis cover a number of work-related areas, including (among others):

- ,access to social security, social assistance and social protection,
- working conditions, including health and safety at the workplace, working hours, leave and holiday.

However, not all equal treatment provisions are available to all categories of third-country workers. For example, self-employed workers are explicitly excluded from the Single Permit Directive and are not covered by the EU acquis. Also, the provisions on equal treatment in the EU legal migration Directives are subject to limitations and are sometimes presented as options for Member States (for details see the internal coherence section on equal treatment in the Intervention Logic). Moreover, on their own, equal treatment provisions cannot prevent exploitation. They are a necessary

²²⁴ On the importance of protecting persons who complain against their employers, see ETUC, PICUM and Solidar, “Joint Comments on Expected Commission Proposals to Fight ‘Illegal’ Employment and Exploitative Working Conditions,” Brussels, 26 April 2007, available online at: www.picum.org. See also, the Report of the European Parliament Committee on Employment and Social Affairs on ‘Effective labour inspections as a strategy to improve working conditions in Europe’ (2013/2112(INI), 12 December 2013.

starting point in order for third-country nationals to secure employment and fair working conditions, but the legal migration Directives – except the Seasonal Workers one – do not provide mechanisms to secure their enforcement (i.e. there are no provisions relating to inspections, monitoring nor sanctions against employers). (see also *fiche on Employers Sanctions directive*).

10.3.5 National level responses

This section identifies national level responses to the problem. Four types of actions at national level are deemed to have positive effects on combatting labour exploitation: inspections, employers' sanctions, facilitating legal immigration, and reforming the labour market to increase the employment participation rate and enforce the labour standards.²²⁵

According to the preliminary findings of an on-going EMN study on illegal employment, seven Member States (BE, DE, EL, FI, FR, LT, and PL) reported to have good practices in the area of employers' sanctions and the fight against severe forms of exploitation. These Member States have set up mechanisms to permit close collaboration between different administrative bodies and authorities (such as government employment agencies and immigration authorities). They also have a comprehensive legal framework imposing both administrative and criminal sanctions and effective complaints mechanisms.²²⁶

Available studies suggest that the actions taken by Member States either focus on combating severe labour exploitation among irregular migrants, or take actions which do not distinguish the status of third country nationals.²²⁷

In Sweden, an IOM study on the work conditions of Chinese workers in recommended several policy actions to improve the fight against labour exploitation, ranging from establishing an authority responsible for conducting post-arrival verifications of working conditions and thus increase inspections in the workplace, to shortening the periods of time before a third-country national can apply for a permanent residence permit and extending the timeframe as set in national law within which workers may change their employer.²²⁸

10.4 Consequences of the problem / gap related to third-country nationals

The following consequences of the labour exploitation of legally residing third-country nationals can be highlighted:

- Challenges to fundamental rights: first and foremost, exploited third-country nationals constitute a group of people whose rights are violated. In the case of persons who are trafficked and subjected to forced labour or other forms of severe exploitation, the third-country nationals are victims of gross violations of fundamental rights.²²⁹

²²⁵ Sumption, M., 2011. Policies to Curb Unauthorized Employment. Migration Policy Institute

²²⁶ EMN Study on Illegal Employment of Third Country Nationals in the European Union. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_illegal_employment_synthesis_report_final_en_0.pdf

²²⁷ Clark N., Detecting and tackling forced labour in Europe, conducted by the Working Lives Research Institute, London Metropolitan University, Joseph Rowntree Foundation, 2013, available at: <https://www.jrf.org.uk/report/detecting-and-tackling-forced-labour-europe>.

²²⁸ Axelsson, L., Hedberg, C., Malmberg, B., & Zhang, Q. Chinese restaurant workers in Sweden: policies, patterns and social consequences, 2014, IOM, available at: https://www.researchgate.net/profile/Bo_Malmberg/publication/281776022_Chinese_restaurant_workers_in_Sweden_policies_patterns_and_social_consequences/links/55f7edf608ae07629dcd74b7.pdf.

²²⁹ Article 5(3) of the Charter of Fundamental Rights of the EU.

- **Social challenges:** As a result of the distorted competition nationals face from exploited third-country nationals, social tensions between nationals and third-country nationals or between third-country nationals themselves may also arise. Additionally, criminal networks often benefit from exploitative labour (for instance, in Italy in the agriculture and construction sectors)²³⁰ and failing to tackle labour exploitation empowers these criminal networks.
- **Micro-economic challenges:** exploitation distorts competition among economic actors and creates social dumping.
- **Macro-economic challenges:** when third-country nationals are exploited, tax revenues decrease as exploitation often takes place in the context of undeclared work;
- **Political challenges:** governments need to help employers to meet their labour demands, without imposing excessive regulatory burden on hiring third-country nationals, and at the same time guaranteeing social fairness and the respect of rights for third-country nationals.

10.5 Preliminary conclusions

- **The prevention of exploitation of legally residing third-country nationals is highly relevant in relation to the overall objectives of the EU legal migration acquis,** which aims to attract and retain third-country nationals, effectively responding to demands for labour at certain key skills levels, while counteracting a distortion of the EU labour markets by ensuring equal treatment of third-country nationals (workers mainly), notably as regards pay and working conditions, social security and other areas, thus avoiding their exploitation and preventing discrimination in the EU.
- **The existing legal migration Directives only partially respond to the problem.** The equal treatment provisions that have been included in the legal migration Directives are necessary to begin the process of preventing and addressing situations where the working conditions of third-country nationals deviate significantly from the standard working conditions as defined by legislation. However, the legal migration Directives do not cover all third-country nationals who work in the EU (e.g. self-employed workers are excluded), and in some cases the provisions are subject to limitations. Moreover, the legal migration Directives – except the Seasonal Workers Directive – do not require Member States to establish monitoring mechanisms, nor sanctions against employers who do not comply with the provisions on equal treatment.
- **Other EU legislation addresses certain aspects of the problem but there are still gaps.** The implementation of the EU employment acquis complements the equal treatment provisions in the legal migration Directives by harmonising basic obligations for Member States in respect of certain aspects of working conditions (safety and health but also working time). The implementation of the temporary agency work Directive is particularly relevant in this regard. The personal scope of the EU Anti-Trafficking Directive includes legally residing third-country nationals. However, the Directive only covers those situations of labour exploitation which amount to the criminal offence of trafficking in human beings, while it does not cover other forms of labour exploitation, which are addressed by criminal and labour legislation at Member State level. Other EU instruments, including the Facilitation Package and the Employer Sanctions Directive address other forms of labour exploitation, but only cover third-country nationals in an irregular situation.

²³⁰ Amnesty International, 2012. Exploited Labour

- **There are consequently gaps in the response at EU level.** While the inspections and sanctions against employers who hire third-country nationals illegally (required by the Employer Sanctions Directive) can indirectly help legally residing third-country nationals who are victims of exploitation in the hands of the same employers, there is only one EU instrument (the Seasonal Workers Directive) which specifically addresses their situation.
- **There would be added value in developing a requirement at EU level for Member States to enforce compliance by employers with the equal treatment provisions in all the EU labour migration Directives.** The efforts of Member States currently focus on cases of severe labour exploitation, or on employers who hire irregular migrants. While some countries have begun to expand the scope of the Employer Sanctions Directive by applying it also to third-country nationals who are legally-staying, this is not the case in all Member States.
- **The work of the European Platform** to enhance cooperation in tackling undeclared work is complementary with, and supportive of, the objectives of the EU's legal migration Directives, as the measures supported by the work of the Platform aim to improve working conditions, promote integration in the labour market and social inclusion, including better enforcement of law within those fields, also for legally residing third-country nationals, thus helping to avoid their exploitation.
- There may be contradictions between policies that aim at encouraging those exploited (including TCN) **to report situations** of exploitation and the EU legal and irregular migration Directives that focus on withdrawing, or not renewing, permits of third-country nationals if the employer has been guilty of exploitative practices, creating a disincentive for third country workers in vulnerable situations to report.

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See 2015 FRA report which contains the top 3 sectors where migrants are severely exploited, p. 48. Available at <http://fra.europa.eu/en/publication/2015/severe-labour-exploitation-workers-moving-within-or-european-union>

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11 Attractiveness of the EU as a destination

11.1 Problem / gap definition

Usually when talking about attractiveness of the EU to third-country nationals, the target group concerned relates to highly skilled workers students and researchers, as well as innovative entrepreneurs,

The attractiveness of a certain destination for migrants does depend on many different factors; the easiness – or inversely the difficulty – of the migration/admission rules is surely one of them. It also varies from a Member State to the other, based for example on the region third-country nationals are coming from and the historic ties to certain Member States. For example, non-European third-country nationals migrate to the United Kingdom, Spain or France. European third-country nationals mainly from South-Eastern Europe, Russia or Turkey migrate to countries such as Austria and Germany. According to a recent OECD report, third-country nationals from Africa are more likely to migrate to the EU than other OECD countries, and in general third-country nationals migrating to the EU are younger and less well educated compared to those migrating to other OECD countries²³¹.

The attractiveness to talent and highly skilled workers can contribute to address a number of challenges affecting Europe's future labour market, including an ageing society²³²; rapid technological changes and development; increasing demand for certain categories of labour; and uncertainty about future growth in European economies in a number of sectors and occupations.²³³ As highlighted in the Commission's Communication of 6th April 2016, the EU needs a more proactive labour migration policy to attract the skills and talents to address demographic challenges and skills shortages.²³⁴

The 2015 EMN study on labour shortages and the need for labour migration from third countries²³⁵ concluded that the scale of unfilled vacancies in the EU during the 2011-2014 reference period was significant. Labour shortages were experienced in medium-skilled and low-skilled occupations, such as agriculture and fisheries and personal care but also in highly skilled occupations, such as healthcare and ICT. The table below provides the scale of the shortages. As it can be seen, for some countries these shortages are quite significant, both nominally but also as a share of the total workforce needed in these industries.

Table 8. Labour shortages in selected sectors (12 Member States)

Year	Health	Personal Care	Personal Service	Agricult. Forestry and Fishery	ICT	Teaching	
AT	2013	233	409	3,563	138	384	188

²³¹ OECD (2016), "How attractive is the European Union to skilled migrants?", in Recruiting Immigrant Workers: Europe 2016, OECD Publishing, Paris.

²³² Without any further net migration into the EU from now on the working-age population would decline by almost 40 million people over the next 20 years (-13 %) and by more than 80 million people by 2060 (-28 %). That is, the decline would be around twice as fast as assumed in Eurostat's 2015 baseline projections. ESDE (Employment and Social Development in Europe) report 2017, p. 61

<http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8030&furtherPubs=yes>

²³³ "Mapping and analysing the bottleneck vacancies in EU labour markets" (September 2014) commissioned by the European Commission, Available at: ec.europa.eu/social/BlobServlet?docId=12625&langId=en

²³⁴ Communication from the European Commission, Brussels, "Towards a Reform of the Common European Asylum System and Enhancing Legal avenues to Europe" 6.4.2016 COM(2016) 197 final

²³⁵ EMN Synthesis Report 2015, 'Determining labour shortages and the need for labour migration from third countries in the EU', available at: https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/reports/studies_en

BE	2013	7,339	3,949	7,418	N/a	7,511	15,014
CZ	2011	754	53	2,091	175	882	538
EE	2014	523	608	3,907	473	143	702
FR	2012	2,301	18,997	34,125	2,108	3,957	5,054
HU	2014	104	609	4,365	3,185	310	357
LV	2014	251	434	1,457	463	194	380
LT	2014	28	18	194	0	10	29
PL	2014	1,716	7	679	54	1,452	536
PT	2014	431	1,097	5,725	2,343	368	698
SK	2014	112	67	588	28	42	79
UK	2014	17,844	76,972	43,145	6,252	23,300	20,566

Source: National reports EMN study 2015 on labour shortages (Please note that MS apply different methodologies in estimating the labour shortages). See Synthesis and National Reports for more information

Furthermore, as outlined in the European Commission’s proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment²³⁶, policy measures such as activation, training and up-skilling of existing labour force will not be sufficient to meet the needs of the EU labour market and labour migration will play a key role in satisfying the demand for these skills.

11.2 Scale of the problem / gap

Below, the attractiveness of the EU for the different groups of third-country nationals is shown in more detail.

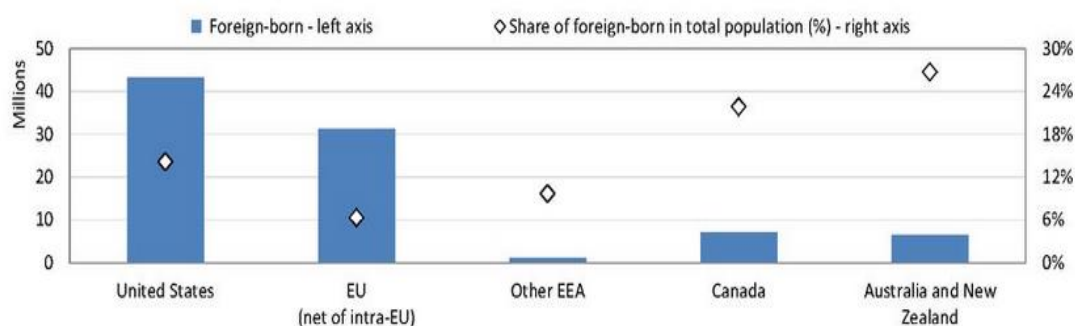
Labour migrants

In the face of increasing demand of labour from third countries, in view of the labour shortages in key occupations, there is evidence that highly skilled workers find other countries, such as the United States, Canada, Australia and New Zealand more attractive. According to OECD statistics and as shown in Figure 3 below, the number and the share of foreign-born residents was higher for non-EU OECD countries, such as United States, Canada, Australia and New Zealand than in the EU. In the European Union, for the period 2010-2011, the share of non-EU born migrants was just 6% of the total population. Even when only EU-15 is considered (pre-2004 EU Member States), the share of migrants born outside the EU is 8%, while in EU-12 (post-2004 EU Member States), this amounts to 2%. These rates are well below countries such as New Zealand (30%), Australia (26%), Canada (22%) and US (14%).²³⁷

²³⁶ Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378 final

²³⁷ OECD (2016), ‘Recruiting Immigrant Workers’, OECD publication

Figure 3. Number of foreign-born (all ages) and share of foreign-born in total populations in 2010-2011, excluding intra-EU mobility



Source: OECD (2016), 'Recruiting Immigrant Workers', OECD publication

Furthermore, the *World Economic Forum's Executive Opinion Survey* showed that EU Member States are seen as less attractive for the global talent than non-EU countries.²³⁸ The *IMD World Competitiveness Yearbook*, which takes into account income and tax, business culture, language, job opportunities and working conditions, also showed similar results – i.e. while a number of major business destinations in the EU are internationally competitive, the EU is less attractive than the major competing non-EU destinations on average. Moreover, the survey shows that, while a number of countries' attractiveness improved in the decade leading to 2014, many EU Member States appear to be perceived as less attractive than before.²³⁹

The Global Talent Competitiveness Index 2015-16 - which uses a complex ranking to score countries' ability to attract and retain international talent - is led by Switzerland and Singapore. It has scored 5 European Countries (LU, DK, SE, UK and FI) in top 10 alongside United States, Canada and Norway.²⁴⁰

The Gallup World Survey on migration intentions (2007-2013) found that there are comparable numbers of respondents interested in migrating to the United States and to the European Union. However, the European Union is substantially less attractive to migrants from Asia, with only 13.6% of those intending to migrate citing an EU Member State as their preferred destination, compared to the 42% who would choose the United States. Similar results show for the Latin America and the Caribbean. Among those wishing to go to the European Union, sub-Saharan Africans comprise 44.9%, Middle Eastern and North-African nationals 19.6%, would-be migrants from Latin America and the Caribbean 13.8%, and Asians 9.3%.²⁴¹

According to OECD research²⁴², although there are differences across Member States, overall, European Union attracts a different migrant profiles compared to other OECD destinations, especially when defined by educational attainment and labour status. Spain and France appeal largely to non-EU migrants from northern and sub-Saharan Africa, while Austria and Germany have high shares of migrants from European countries, including Russia, Southeast Europe and Turkey.

The European Union is more attractive to single, inactive and less well educated potential migrants. A much larger share of the migrants to EU Member States than to OECD countries outside Europe have low levels of educational attainment – the

²³⁸ *World Economic Forum(2014), Global Competitiveness Report 2014-2015* cited in OECD (2016), 'Recruiting Immigrant Workers', OECD publication

²³⁹ *IMD World Competitiveness Yearbook* cited in OECD (2016), 'Recruiting Immigrant Workers', OECD publication

²⁴⁰ The Global Talent Competitiveness Index Talent Attraction and International Mobility 2015-16

²⁴¹ *Gallup World Survey* cited in OECD (2016), 'Recruiting Immigrant Workers', OECD publication

²⁴² OECD (2016), 'Recruiting Immigrant Workers', OECD publication

proportions are 40% and 27%, respectively. As the share of medium-educated (37%) migrants is similar in both destination regions, the share of highly educated immigrants is much higher in non-Europe OECD (36%) than in the European Union (25%).²⁴³

Box 1. Higher education percentage of foreign-born aged 15 and over by destination²⁴⁴

Destination	High-education foreign-born (%)
Canada	47
Australia	35
New Zealand	33
US	30
EU-27	22

Students

The EU is an attractive destination for international students with over 0.5 million residence permits issued for the purpose of education activities in 2015. According to a recent study issued by the OECD, in the period of 2000-2012 the international student population in the EU more than doubled. It has overtaken the United States in the number of students. However, in Australia and New Zealand the number of international students tripled in the same period²⁴⁵.

For students the EU offers a wide range of destination countries with distinct features – such as the language, culture and economic situation – influencing the decision of international students regarding the host country for their studies. Data from the European Migration Network Study on Immigration of international students to the EU (2012) shows that students are mainly concentrated in the largest countries with the highest capita per income and the largest tertiary educational sectors. The UK attracted the largest number of students (426,875), followed by France (256,261) and Germany (191,735). Other popular, but smaller countries are Denmark, the Netherlands, Italy, Austria and Spain attracting between 55,000 – 77,000 students in 2012. In Central and Eastern Europe (CEE) the Czech Republic attracted the most students (around 39,000 in 2012). Students' preference for a specific country is also influenced by language similarities, historical ties and geographical closeness. The EU seems to become more attractive for students from Asia and Latin America, who chose to come to the EU much more frequently than 10 years ago²⁴⁶.

Still, most of the international students do not stay in the EU after they graduate. According to the OECD between 16% and 30% of graduates (depending on the method of data calculation) stay in the EU, which is lower than in other OECD countries where more than a third of graduates usually stay²⁴⁷. The reasons are obviously diverse: the stay of graduates depends on their country of origin, whereby students from Northern and Western Africa, some South-East Asian countries and the Commonwealth of Independent States have a high probability to stay in the EU after

²⁴³ Ibid

²⁴⁴ A. Damas de Matos, Immigrant skills, their measurement, use and return: A review of literature, in Matching Economic Migration with Labour Market Needs, OECD, 2014

²⁴⁵ European Migration Network (2012). Immigration of international students to the EU

²⁴⁶ OECD (2016), "How attractive is the European Union to skilled migrants?", in Recruiting Immigrant Workers: Europe 2016, OECD Publishing, Paris.

²⁴⁷ OECD (2016), "How attractive is the European Union to skilled migrants?", in Recruiting Immigrant Workers: Europe 2016, OECD Publishing, Paris.

graduation. This can be explained through historic relations to a particular EU country as well as socio-economic development in the home country making it more likely for graduates to remain in the host country where they might perceive their chances of finding a job higher compared to their home country. However, if the integration into the host country labour market is difficult, the likelihood of graduates to stay in the host country afterwards is smaller. Hence, the labour market policies, but also the institutional stability of the EU Member States influence the decision of students to stay in the EU after graduation. Also innovative regions have higher stay rates, which mirrors the growing importance of the innovative sectors, such as ICT and biomedicine to attract and retain students and graduates in the EU²⁴⁸.

Entrepreneurs and investors

In terms of attractiveness for entrepreneurs or investors, the EU still lags behind other destinations, notably the US, but also emerging popular destinations such as Chile or Singapore. Although several EU Member States have developed schemes to attract entrepreneurs, most of these have been introduced only recently and their success in attracting entrepreneurs and investors is yet to be evaluated.

(See also the chapters on investors and self-employment and entrepreneurs)

11.3 Overview/summary of the problem/gap

As presented in the previous sections above it is recognised that the European Union needs to attract third-country nationals with labour skills to satisfy labour shortages and decline in population (demand side). However, evidence shows that Member States of the European Union are lagging behind other countries, such as the United States, Canada and Singapore, not only in terms of the volumes of TCNs attracted but also in terms of composition of skill and education level (supply side).

In order to attract talent, key factors at play include:

- culture, language and historic ties
- job and career development opportunities, management practices, ease of recognition of qualifications and level of pay
- immigration system, right to reside, including family members and receive residence/work permits
- social security and healthcare
- lifestyle and well-being, including family-friendly environments
- absence of discrimination and xenophobia
- Other factors: climate, political system, religion, etc.

The EU legal migration acquis responds to some of the factors identified – notably on immigration system manifested in the admission conditions, procedures and rights as well as access to social security and healthcare. However, as seen with the EU Blue Card, some of the legal migration instruments have not been sufficiently attractive due to rigid admission conditions and different implementation across Member States. The remaining factors, such as those related to the labour market, can be enhanced through initiatives and policies at EU and national level.

11.4 Responses to the problem

11.4.1 EU response

The EU's key instrument for attracting highly skilled workers – the EU Blue Card – has proved ineffective due to the varying level of its application in the EU Member States and existing national schemes in competition with the instrument. However, the

²⁴⁸ Weisser, R. (2016), Internationally mobile students and their post-graduation migratory: An analysis of determinants of student mobility and retention rates in the EU, OECD Social, Employment and Migration Working Papers, No. 186, OECD Publishing, Paris.

numbers of issued permits have gradually risen every year²⁴⁹. The proposal for a new EU Blue Card Directive aims to tackle the main shortcomings associated with the current system. The proposal establishes a single EU-wide scheme, replacing parallel national schemes, while enhancing some of the rights, such as intra-EU mobility, access to long-term residence and family reunification and relaxing some of the conditions, such as on the salary threshold.

In addition to the EU legislative response, other measures could include focusing on better branding and advertising of the EU as a destination for global talent as well as taking this into account horizontally in EU external action schemes and initiatives with third countries. Tools like EURES can facilitate jobmatching, although that all aspects of that instrument does not include third-country nationals applying from abroad, such third-country nationals can consult it for available vacancies. (see also section on *Education , skills and jobmatching*).

11.4.2 National level responses

The policy developments in EU Member States related to legal migration focus mainly on attracting talents, including students, highly-skilled workers and fill shortages in national labour markets²⁵⁰. While Member States continue to develop policies to attract skilled and highly-skilled migrants, policies in other migration routes such as family reunification are being tightened, and an emphasis on preventing and combatting misuse of the legal migration routes is visible.

EU Member States generally follow a 'managed migration' approach, as shown in the box below²⁵¹.

Box 2. The 'managed migration' approach

EU Member States have adopted the 'managed migration' approach developing policies for labour migration, and at the same time restricting other types of migration. In a comprehensive overview of the migration policy in the EU, Menz (2010) argues that through the managed migration Member States predominantly privilege the migration of highly-skilled workers in their policies above family migrants and asylum seekers²⁵². The managed migration approach is much more comprehensive compared to earlier approaches of attracting migrants to fill economic needs (such as the 'guest worker' schemes in the 1960s and 1970s in Germany or Austria)²⁵³. The approach does not only include entry and residence regulations (in forms of work permits), but also integration measures (such as access to language courses). The approach can further be divided into two sub-approaches:

- The supply-centred 'human capital' approach, whereby policies aim to attract migrants that will have a favourable position at the labour market (e.g. students); and
- A demand-centred approach, whereby policies grant accelerated admission to migrants that can fill demands in shortage occupation.

²⁴⁹ See also statistical analysis 3.3 million first permits were issued in EU-28, and in EU-25 2.45 million in 2016. [Eurostat, [migres_first]

²⁵⁰ OECD (2016), "The context for labour migration in Europe", in *Recruiting Immigrant Workers: Europe 2016*, OECD Publishing, Paris.

²⁵¹ For an overview see: Careja, R. and Andreß, H.-J. (2013), Needed but Not Liked – The Impact of Labor Market Policies on Natives' Opinions about Immigrants, *International Migration Review* 47 (2): 374-413

²⁵² For further information see: Menz, G. (2010), *The Political Economy of Managed Migration: The Role of Unions, Employers, and non-Governmental Organizations in a Europeanized Policy Domain*. Oxford: Oxford University Press.

²⁵³ European Migration Network (2011), *Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States*.

Both sub-approaches are incorporated in EU Member States' policies regarding migration.

In light of the managed migration approach, Member States' policies vary from encouraging migration as a means of investment without referring to particular shortage occupation (such as in NL), to facilitated access in light of labour market shortages. According to data collected by the EMN in 2015 these include²⁵⁴:

- Exemptions from labour market tests (AT, BE, CY, DE, EE, ES, FI, FR, HR, IE, PL);
- Exemptions from quotas (HR, IT);
- Access to a points-based system (AT);
- Reduced minimum income requirements (EE, EL, IE, LV, NL, UK);
- Facilitating access to certain groups already present in the Member State, including students or researchers (DE, LT, FR) and asylum seekers (SE);
- More favourable conditions for family reunification (e.g. IE).

All Member States grant permits to highly-skilled workers, students and recent graduates. Some Member States have permits in place specifically for entrepreneurs. Family reunification is possible in all Member States, under certain conditions. Some Member States do not allow the entry of lower skilled labour while others admit lower skilled labour for seasonal activities. The different policies reflect the diverse approaches by Member States in terms of managing labour migration. The policies aim to fit the perceived economic needs and at the same time to address the concerns of the native population related to migration²⁵⁵.

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