



Legal Migration Fitness Check

Executive Summary of the supporting study

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Directorate-General for Migration and Home Affairs
Fitness check on legal migration

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1 Introduction and purpose of the study

The Commission's 2016 Communication¹ 'Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe', announced that the Commission was to launch a REFIT evaluation, with the overall objective of ensuring that legal migration policies are managed more effectively, by ensuring that the Union makes better use of all its existing instruments targeting different categories and skills of third-country nationals.

The Fitness Check Study's overall aim was to assess the current EU legal migration acquis and provide for future reflection on whether there was a need to rethink the EU model of managing legal migration and define a more coherent and effective model of legal migration management at EU level. The specific objective of the Study was to evaluate how the existing acquis on legal migration had contributed to the attainment of legal migration policy objectives and to identify overlaps, gaps, inconsistencies, synergies and the cumulative impacts of the legal instruments in this area. The Study should serve to consider possible ways of simplifying and streamlining the current EU framework in this area.

Included within the scope of the evaluation were the following EU legal migration Directives:

- Directive 2003/86/EC – Family reunification (FRD)
- Directive 2003/109/EC – Long Term Residents (LTR)
- Directive 2009/50/EC – EU Blue Card – highly skilled workers (BCD)
- Directive 2011/98/EU – Directive on a Single Application/Permit and third-country workers' equal treatment - the Single Permit (SPD)
- Directive 2014/36/EU on Seasonal workers (SWD)
- Directive 2014/66/EU on Intra-corporate transfers (ICT)
- Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil-exchange schemes or educational projects and au pairing (recast of Directives 2004/114/EC on students and 2005/71/EC on researchers) (SD, RD, S&RD).

The Fitness Check Study consisted of four distinct but interrelated tasks:

- Task I: Contextual analysis – providing a brief analysis of the EU migration policy context and developing intervention logics of the Directives
- Task II: Evidence gathering on practical implementation – providing and assessing evidence of how Member States implement the Directives
- Task III: Consultation of the public and targeted stakeholders – supporting the consultation of the public and targeted stakeholders
- Task IV: Fitness Check/REFIT Evaluation – carrying out a thorough analysis on each evaluation question providing all the necessary elements for the Commission to prepare the Fitness Check.

2 Methodology

The evidence base for the Fitness Check evaluation has been largely collected through the three previous Tasks. **Task I** included comprehensive desk research, a literature review and contextual analysis. Task I was primarily based on secondary literature review and analysis of qualitative and quantitative information.

¹ Communication from the Commission to the European Parliament and the Council: Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe (COM (2016) 197 Final)

The objective of **Task II** was to assess the legal and practical application in each Member State which applies the EU legal migration acquis (25 Member States). The assessment was informed by conformity assessments, as well a detailed set of descriptive and experiential questions answered by national researchers on the basis of desk research and interviews and exchanges with national stakeholders, interviews with migration agencies in and outside the EU and a set of specific responses to the Open Public Consultation (OPC), presented under Task III below. This resulted in national summaries for each Member State and a synthesis report providing an EU comparative overview.

Task III consisted of an OPC, which included the tailored sets of questions to different stakeholder groups; and targeted consultation with key stakeholders, including in-depth interviews, focus groups and targeted meetings. The OPC was open to all stakeholders with the aim to collect evidence, experiences, data and opinions to support the evaluation of the existing EU legal framework for the legal entry and stay of third-country nationals to the EU. The targeted consultations were carried out with different stakeholder groups, *inter alia*, social partners, NGOs, representatives of Ministries of Education, Interior and migration agencies, labour inspectorates and ecosystems for entrepreneurs.

Task IV included the REFIT evaluation and synthesised the findings resulting from the other tasks to answer the evaluation question.

3 Fitness Check/REFIT evaluation

The study considered the relevance, coherence and complementarity, effectiveness and EU added value of the Directives, summarised below.

3.1 Relevance

The evaluation looked at the relevance of the legal migration acquis through several points outlined below.

Overall the legislative instruments were relevant at the time they were set and they remain relevant today, albeit impacted by various internal and external drivers and including several gaps in scope. Nevertheless, **the evaluation confirmed the continuing relevance of the objectives of the legal migration Directives.**

The relevance criterion first looked at whether the objectives of the legal migration Directives were relevant at the time they were set and whether they remain relevant today. The results show the following:

- The objectives **were relevant at the time they were set**, as they responded to a need across the EU to establish a series of minimum standards and guarantees in a number of areas, ranging from security (to control the European Community's external border), admission conditions and procedures, to the rights of third-country nationals following admission, corresponding to the overarching objective of creating an equal level playing field. The Directives were also relevant to address the 'needs', in relation to the management of legal migration i.e. to tackle demographic changes, and labour market shortages.
- The Directives **remain relevant today** to the extent that they respond to current needs of Member States. The Directives acknowledge the continuing need for migration to tackle labour market and demographic challenges.
- Legal **migration continues to be influenced by external and internal drivers** and needs influencing migration patterns towards the EU. There are different needs depending on the type of TCN: family migrants, labour migrants, students/researchers and include a combination of socio-economic (primarily), demographic, environmental and political (security) factors in the origin and destination country or region.

Additionally, the relevance criterion looked at the extent to which the scope of the Directives in terms of categories match the current needs in terms of categories to be covered by the Directives. The results show that:

- Overall, the **scope of the Directives matches the current needs in terms of the categories** initially intended to be covered by the legislation. However, There is a gap for certain categories of third-country nationals such as low- and medium skilled (except for SWD), and self-employed, including (innovative) entrepreneurs.
- Furthermore, some of the **Directives may co-exist with parallel national schemes**, as allowed by the LTR and the BCD (but not in respect to the FRD, SWD, ICT and S&RD).
- In addition, Member States may (and de facto have) national rules that are relevant for migration management, but cover situations which are outside the personal and material scope of the Directives.

The relevance criterion further looked at the extent to which the scope of the Directives and the way these are implemented meet the current needs in all steps of the migration process. The results show that, **overall the provisions of the Directives are fit for purpose across the phases**. Practical implementation issues have been identified, which may hamper the extent to which the Directives fully meet the demands of third-country nationals and other relevant stakeholders (e.g. Member State authorities) in the different migration phases (e.g. with regard to equal treatment provisions, or differences in the duration of permits).

Relevance additionally looked at the extent to which the way Member States implement the Directives is relevant to the initial objectives and current needs. The results confirm that overall the **implementation in Member States does not particularly impact the relevance of the Directives**. Member States have implemented several more restrictive optional provisions ('may clauses') and partly because the mandatory provisions ('shall clauses') leave ample room for interpretation across the migration phases, which might impact on the ability of the Directives to meet some of their objectives.

Finally, the relevance criterion looked at the extent to which the provisions of the Directives and the way these are implemented are relevant in view of future challenges. The results show that:

- The flow of migration to the EU in the short to medium term (2015-2030) is likely to be affected by a number of drivers: **socio-economic, demographic, security and environmental**. Socio-economic and demographic factors are expected to have the greatest impact to the provisions currently outlined across the EU legal migration Directives and the methods in which they are implemented across Member States. These include the EU's aging population, skills shortage across sectors and the sectoral transition to a service-based workforce, but also the 'youth-bulge' phenomena and expansion of middle class populations in migrant sending regions. In addition, significant environmental drivers are likely to affect the flow of migrants towards the EU.
- In light of future global trends likely to affect legal migration to the EU, the legal migration Directives are to some extent "undermined" by issues related to complex application processes. This accessibility is hampered by both high application costs in some Member States and complex application procedures, which could deter the high and low skilled migrants the EU needs from applying to work in the EU.
- Furthermore, at present, some national parallel schemes offer more favourable conditions and procedures than their EU legal migration Directive equivalents.

- Additionally, the intra-EU mobility under the BCD, ICTD, S&RD and RD could be strengthened.

3.2 Coherence

This evaluation criterion examines the coherence of the legal migration Directives, specifically looking at the following main aspects:

- Internal coherence, examining the extent to which the objectives of the legal migration Directives produce complementarities and synergies or on the contrary – result in overlaps, inconsistencies or gaps.
- External coherence, capturing how the legal migration Directives are complementary/overlapping with national level migration legislative frameworks (national policy coherence) and other EU policies (EU policy coherence).

3.2.1 Internal coherence

Within internal coherence the evaluation analysed the extent to which the objectives of the Directives are coherent and consistent, as well as whether there are any gaps and inconsistencies and scope for simplification.

Overall, **gaps and overlaps in the personal scope of the legal migration Directives**, alongside **different categories of inconsistencies have been identified**, as well as different options to address these.

Two different types of gaps have been identified in the EU legal migration acquis, namely a) certain migrant categories covered by the Directives do not benefit from the same rights and b) certain categories are not covered at all or only partially. The lack of common minimum standards, safeguards and rights may lead to substantial differences in the treatment of these third-country nationals and legal uncertainty, especially for those categories which do not fall under the SPD. This in turn can make the EU less attractive as a migration destination overall (thus indirectly impacting on trade and other economic development), or make some Member States much less attractive than others with more 'interesting' schemes in place.

The comparative legal analysis of the eight Directives has identified different types of inconsistencies, including a) inconsistencies in terminology, and b) Inconsistencies in provisions which cannot be (fully) justified by the nature of the Directive.

While there are historical and contextual developments which explain the inconsistencies between the Directives, there is scope and stakeholder consensus to address those listed under a) as well as room to explore possible improvements to those listed under point b), through a combination of e.g. harmonisation of terminology; clarifying / further specifying certain concepts; providing indications how certain provisions are to be applied in practice and streamlining rules and standards which are different for no substantive reasons.

3.2.2 External coherence

The evaluation assessed the external coherence of the legal migration Directives and in particular how they were complementary or overlapping with national level migration legislative frameworks (**national policy coherence**) and other EU policies (**EU policy coherence**).

With regard to the implementation at **national level**, the existence of different national policy choices has caused inconsistencies throughout the EU, by making use of the high level of discretion often left to the Member States, and the existence of national parallel schemes.

With regard to **EU policy coherence**, the evaluation has identified several external coherence issues as well as synergies and complementarities between the EU legal migration acquis and other EU policies and legislation. Taking these all into account, overall the EU legal migration Directives are well embedded in wider EU policies and

legislation and well linked to key policy priorities around jobs and growth, justice and fundamental rights

With regard to **the coherence with national implementation**, in particular, *the adoption of more restrictive or more permissive may clauses*, although in accordance with the Directives, has created de facto substantial differences in Member States' practices and frameworks, which in turn could lead to inconsistencies in the implementation of the EU acquis throughout the EU.

Moreover, *the way in which Member States have 'operationalised' the legal migration acquis* has also caused several divergences in practice, further exacerbated by a series of conformity and practical application issues identified in several migration steps, leading to an overall inconsistent approach.

In addition, *the existence of diverse national parallel schemes* in the Member States has further contributed to incoherence between EU Member States with regard to admission, entry and stay of third-country nationals. The vast majority of Member States have one or more parallel national statuses in place which are considered as an equivalent to the EU Directive(s), mostly for the BCD and the LTR.

National schemes significantly overlap with the provisions of the legal migration Directives, some offering more favourable conditions and rights than their EU equivalents, others a mix of favourable and less favourable treatment. When offering more favourable provisions and simplified procedures, these schemes have been preferred by some Member States.

With regard to **EU policy coherence**, in particular, some of the *most significant coherence issues (gaps)* have been identified in the areas of the recognition of qualifications, asylum acquis, free movement and employer sanctions, and have been mostly found in the application, residency and intra-EU mobility phases, with regard to inter alia the issues of equal treatment in the context of family reunification.

The analysis also found *several synergies and complementarities* between the EU legal migration acquis and other EU policies, including the EU skills agenda and external education policy, recognition of professional qualifications and free movement.

3.3 Effectiveness

Overall, the objectives of the EU legal migration acquis (including three overarching objectives applicable to all EU legal migration acquis and eleven specific objectives, applicable only to some Directives) have been partially achieved and the degree of achievement differs across the objectives.

The overarching objectives include (i) *creating an **equal level playing field** to manage migration flows in the EU through the approximation and harmonisation of Member States' national legislation*; (ii) *ensure **transparency**, simplification and legal certainty* and (iii) *ensure **fair treatment***. The evaluation has shown that the achievement of these objectives is underway. However, the attainment of objectives has been hindered by the uneven practical application which is partly due to many 'may clauses' and partly because the mandatory 'shall clauses' that leave ample room for interpretation. The complexity and fragmentation of the current system where parallel statuses exist for some Directives have also deterred the achievement of the overarching objectives of equal level playing field and simplification. Furthermore, a multitude of external factors has impacted on the achievement of objectives. For example, the attractiveness of the EU Member States as destination countries may be impacted by available job opportunities, economic climate and social-cultural links.

Specific objectives of the Directives related to certain categories of **economic migration** (BCD, SPD, SWD and ICT) include *attracting and retaining third-country nationals; managing economic migration flows; addressing labour shortages and boosting economic competitiveness and enhancing knowledge economy*. As these Directives were adopted and transposed recently they have to yet reveal their

potential, but some shortcomings have been identified. Statistics on the number of residence permits issued, such as the EU Blue Card and the LTR, show that the take up of residence permits based on EU instruments has been less than those of residence permits of parallel national instruments. Furthermore, the sectoral approach and different admission and residence conditions for high compared to certain medium and low skilled workers can be potentially discriminatory and hamper equal treatment. With regard to labour shortages, the EU Directives have not contributed to a significant extent (yet) to address labour shortages but that they do have the potential to make a contribution.

With regard to **equal treatment**, the Directives brought uniformity across Member States in ensuring the right to equal treatment (with some degree of variance between the Directives). However, the FRD does not grant equal treatment although those allowed to work (or in employment) will benefit from the SPD.

The objectives **prevention of exploitation** and **reducing irregular stay** have partially been achieved. The Directives have included explicit provisions, most notably in the SWD. The temporary nature of the stay may in part contribute to the vulnerable situation of seasonal workers, due to the absence of social networks and lack of knowledge of the national systems.

The Directives have also contributed to the achievement of the objectives of **mutual enrichment** and promoting better familiarity among cultures, protection of **family life** and unity and promoting **integration** and socio-economic cohesion.

Finally, although **intra-EU mobility** is mentioned as an explicit objective in a number of Directives, in practice obstacles to intra-EU mobility remain. Challenges for TCNs to exercise intra-EU mobility include a lack of information, requirements for documentation being the same or very similar to first applicants.

When comparing with the **legal baseline** and the situation prior to the adoption of the Directives, although similar statuses already existed in most Member States for which data was available, the Directives contributed to a higher degree of legal certainty and approximation by introducing common provisions and uniformity. Most changes were brought by the FRD, LTR and SPD. The FRD has been adopted in the broad framework of protecting family life and family unity and has brought uniform set of entry and residence conditions. Similarly, LTR streamlined the entry and residence conditions across Member States and created uniform status that was not in place in some Member States. The SD and RD did not bring forward significant changes as such statuses existed in the Member States prior to the adoption of the Directives. However, the recast SRD is expected to bring more harmonisation with regard to entry and residence conditions, including rights to work and equal treatment. The EU Blue Card also brought forward a standard framework for admission of TCNs in the EU. However, due to many may clauses and existence of parallel national schemes, the Directive did not achieve the expected progress in attracting highly qualified TCNs.

With regard to the extent to which the **observed effects of the implementation** of the Directives correspond to their objectives, across the eight phases of the migration process, practical implementation differs across Member States. In general, the practical implementation of EU legal migration acquis have contributed to the achievement of the objectives. However, certain issues have been identified in each phase to a varying degree depending on the Member State, which may impact negatively on the over-arching objective of legal certainty, transparency, user-friendliness and simplification of the application procedures.

3.4 Efficiency

Legal migration generates **positive economic benefits** in terms of competitiveness and productivity. Migration also has positive impacts on the demographic situation of Member States and pension systems. However, the analysis of steps of the **migration process shows that Member States sometimes make implementation choices that hinder efficiency.**

The Directives contribute, by offering a simplified approach and common admission procedures, to making the legal migration process more efficient. A qualitative assessment shows that some of the greatest benefits of the legal migration acquis are linked to the equal treatment provisions, which facilitate integration and social cohesion of migrants, and reduce the risks of exploitation.

The main factors that impact the costs and benefits of the legal migration acquis are linked to the national implementation choices (including admission procedures and conditions, deadlines, availability of information) and institutional setups (the number of agencies involved in the migration management process). A quantitative case study assessment of costs and benefits related to the handling of applications for permits show a small net benefit related to administrative costs for national administrations. Most administrative costs are carried by the applicants, but the wider benefits of residence and work in the EU are expected to be large for the applicant, but these are difficult to quantify. Broader social and economic facts also influence the levels of migration, and indirectly the economic and fiscal costs and benefits linked to the legal migration process.

The legal migration Directives provide a range of implementation options that can increase costs to third-country nationals and the administration in the implementation of the acquis. At each step, there is scope for increasing efficiency, in terms of optimisation of application condition, fees, duration of permits, or various deadlines that administrations need to adhere to, during the migration process. The analysis of implementation choices in regards to intra-EU mobility, for example, shows that most of the time most Member States choose implementation options that increase their processing costs and the costs to third-country nationals. Ultimately, the choices made by most Member States hinder the achievement of the overall objective of intra-EU mobility, as one of the key advantages of having an EU migration acquis.

There is **potential for streamlining EU legal migration legislation** for the purpose of increased efficiency and reduced costs and administrative burden in all phases of the migration process. There are opportunities to streamline legal directives in the direction of adopting clearer rules on various deadline and fees, as well as reducing the range of obsolete admission conditions.

3.5 EU Added Value

Overall, the legal migration Directives have brought positive effects that would have not been possible without EU intervention. There are still issues possibly requiring further EU level action, such as a better management of intra-EU mobility or improving equal treatment as well as gaps related to certain categories of third-country nationals. In sum, the withdrawal of the EU Directives might lead to a lower attractiveness of the EU and competition between Member States.

First the evaluation criterion analysed the positive effects and results brought in by the EU legislation. The results show that the legal migration Directives have **added value at the EU level** that would not have been realised without them, in key areas such as the recognition of the rights of third-country nationals across the EU; harmonisation of minimum rights and conditions; legal certainty and predictability; or opportunities for intra-EU mobility and simplified administrative procedures for some Member States and third-country nationals.

Furthermore, the criterion analysed to what extent the issues addressed by the legal migration Directives continue to require action at the EU level and what the consequences of withdrawing the legal migration acquis would be. The results show:

- In particular, there is evidence of a need for a better management of intra-EU mobility; an increased coverage of minimum standards (harmonisation) and gaps in coverage; improving equal treatment and improving matching systems with demand. Additional issues currently not covered by the acquis include: gaps in the coverage of certain TCN categories; access to information and recognition of non-EU academic and professional qualifications and differences in fees charged across the Directives.
- Consequences of withdrawing the acquis include: return to national schemes, adoption of legal migration policies at Member States level likely to be more divergent, limited intra-EU mobility, competition amongst Member States and overall a reduced attractiveness of the EU as a destination from a third-country national perspective.

The study concluded in June 2018 and the final report will be available at:
https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/fitness-check_en.

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