



# **Legal Migration Fitness Check**

## **Contextual analysis : Intervention logic Directive specific analysis**

*Annex 1Ciii*



**EUROPEAN COMMISSION**

Directorate General for Migration and Home Affairs

Unit B.1 – Legal Migration and Integration

European Commission

B-1049 Brussels

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## 1.1 Introduction

This document is the final document for agreement under Task IC: Intervention Logics, 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, it provides a description of an intervention logic of the legal migration acquis which includes the rationale and objectives, policy context, internal and external factors, and includes both a joint intervention logic for the whole legal migration acquis plus intervention logics for each of the Directives.

The joint intervention is first described in the section below followed by individual sections for each of the individual Directives.

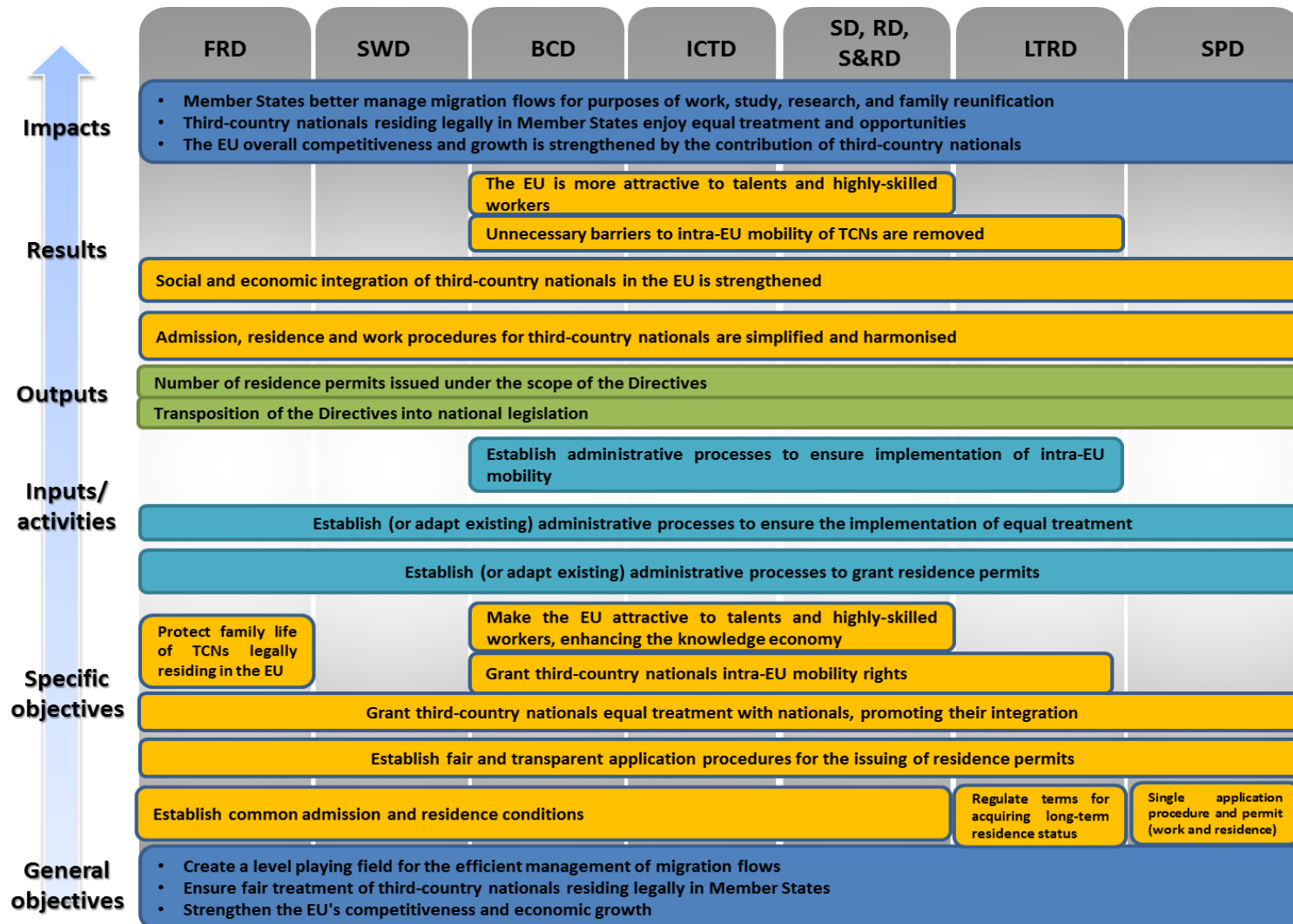
## 1.2 Joint intervention logic covering the Directives

The intervention logic covering all the Directives considered in this assignment is presented in the **Error! Reference source not found.** overleaf. The constituent blocs of the joint intervention logic are described in the subsequent sections.

The seven Directives increase the approximation of Member State approaches to the management of legal migration from third countries. They are underpinned by several important assumptions, principles and legal requirements, including:

- Underlying assumptions:
  - There will be continued migration of TCNs driven by the needs of the EU economy, demographic change and the ageing of the EU indigenous population, and the relative attractiveness of the EU as a place to work, live and study;
  - Migration pressures are very uneven between the different Member States reflecting the reality where some Member States are more attractive to third-country nationals due to language, economic ties, employment opportunities, variations in the quality of education systems etc).
- General principles and legal requirements in EU primary and secondary law:
  - The procedures for admission and right to stay of TCN should be similar between the Member States, non-burdensome and the outcomes of applications predictable (i.e. 'fair') in part because of the possibility and value of subsequent intra EU movements of TCN;
  - The rights of TCN admitted long term to the EU should be similar to those of EU citizens in order to limit the risk that TCN are the subject of exploitation and to enable their integration into the societies;
  - The rights of and safeguards related to TCN admitted to study in the EU or to undertake seasonal work should limit the possibility of exploitation; and,
  - Member States should maintain discretion over the volumes of admission for migrants coming for work purposes and over certain admission and residence conditions as well as over the access by migrants to certain benefits and public services.

Figure 1. Intervention logic



### 1.2.1 Rationale and objectives

The underlying rationale for the legal migration Directives is the need to approximate the regulation of migration from third countries for the purpose of work, living and studying in the EU. The migration from third countries is important in the context of continuing labour shortages and gaps in the EU which negatively affect the stock of EU's human capital and thus undermine the EU's competitiveness and the strategic ambition of the Europe 2020 strategy to deliver smart, sustainable and inclusive growth.

The Directives aim to further approximate the rules of third country migration amongst the EU Member States. Prior to the Directives, such rules varied between the Member States (and this remains the case as the Directives contain several 'may' clauses). Introducing more uniform migration rules through the implementation (the legal transposition and practical application) of the Directives is aimed to increase the EU's attractiveness to migrants from third countries as a destination, improve the efficiency of the application and control procedures, ensure fair treatment of third-country nationals (TCNs), prevent their exploitation, facilitate their integration and raise trust in appropriate and effective migration management amongst the different Member State authorities in order to facilitate the intra-EU migration of third country nationals.

Given such a rationale, the key general objectives for the Directives are articulated as follows:

- To attract and retain TCNs and their family members, in order to increase the economic contributions to enhance the EU's competitiveness and support economic growth by helping to reduce labour shortages and human capital gaps.
- To effectively respond to demands for labour at all skills levels, and to offset structural skill shortages.
- To counteract a distortion of the EU labour markets by ensuring equal treatment of third country nationals, notably as regards pay and working conditions, social security, tax benefits etc. and thereby avoid exploitation.
- To improve the effectiveness of the management of legal migration flows across the EU.
- To ensure fair treatment of third country nationals throughout the legal migration process.

Their specific objectives are therefore defined as follows:

- To develop a common immigration policy on TCNs across EU Member States;
- To simplify and harmonise conditions and procedures related to the admission, residency and work of TCNs across EU Member States;
- To promote the TCNs' social and economic integration and equal rights with EU nationals as well as to avoid their exploitation and prevent discrimination;
- To foster the intra-EU mobility of TCNs when it is needed.

### 1.2.2 The Directives' inputs

Table 1 below summarises the key rules of each of the individual Directives (which are then described in greater detail in the following sections). All the Directives covered have introduced a number of rules in the following areas:

- Groups of TCNs covered: here, a differentiation is made between the three horizontal Directives<sup>1</sup> covering broad categories of third country nationals (the

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<sup>1</sup> It is noted that the concept of a 'horizontal Directive' is often only applied to the Single Permit Directive, as it is the only one that focuses exclusively on procedural questions, with the other legal migration Directives referred to as sectoral (focusing on particular categories of TCN). , but your division is also valid. Please keep



single permit, family reunification and long term residents) and four specific Directives focussing on a specific segment of the labour market and specific groups of TCNs (students and researchers, highly skilled workers, intra-corporate transferees, seasonal workers). Noteworthy is also the possibility included in the two Directives for the Member States to include additional groups of TCNs in their transposition of the Directives (Family Reunification Directive allows Member States to include wider members of family and Students / Researchers Directive allows Member States to include pupils, volunteers other than those in the European Voluntary Service or au pairs).

- Admission conditions: while one Directive (the Single Permit) does not include rules on this; the rules on admission conditions contained in the other Directives vary, for example, with some Directives explicitly requiring proof of sufficient resources and sickness insurance and others not. .
- Admission procedures: these also vary between the seven Directives, with the more recent Directives adopting a more uniform deadline of 90 days for processing the TCN application;
- Form of permit: with most Directives providing for a residence permit, but certain Directives (Seasonal Workers and Students and Researchers Directives) foreseeing other types of authorisations;
- Equal treatment: while the areas of equal treatment are similar across the Directives, variations exist as a result of the may clauses which Member States can invoke in the different Directives, as well as in regard to the comparator for TCNs: most of the Directives refer to equality of treatment for TCNs with respect to nationals while the Directive on Intra-Corporate Transfers refers to equal treatment for TCNs with respect to posted workers.
- Access to work being regulated in all the Directives: this differs amongst the general access to work provided during the duration of a permit in the Single Permit and Long-term Resident Directives, the authorisation linked to a specific contract in the Seasonal Workers Directives and the time specific limitations of working contained in the Intra-Corporate Transfers and Students / Researchers Directives. Family members have similar access as the sponsor with some additional restrictions possible.
- Right to family reunification: this is treated as a subject in a separate Directive on family reunification as well as under specific rules on family reunification contained in the three other Directives (the Blue Card, Intra-corporate transfers and Students / Researchers Directives).
- Intra-EU mobility: this is regulated in four Directives (the Long-term residents; Blue Card, Intra-corporate transfers and Students / Researchers Directives).
- There are also a number of discretionary clauses where the Member States may adopt different measures from the rules laid down in the Directives (all Directives).

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this in mind and check with the IA/Explanatory memorandums which may specify the initial intention, keeping in mind that 2003/86 and 2003/109 were adopted before

Table 1. Key rules of the Directives

Directive	Family Reunification (2003/86/EC)	Long Term Residents (2003/109/EC)	Students Directive (2004/114/EC)	Researchers Directive (2005/71/EC)	EU Blue Card (2009/50/EC)	Single Permit (2011/98/EU)	Seasonal Workers (2014/36/EU)	Intra-Corporate Transfers (2014/66/EU)	Students and Researchers (2016/801/EU)
Date of Adoption	22/09/2003	25/11/2003	13/12/2004	12/10/2005	25/05/2009	13/12/2011	26/02/2014	15/05/2014	11/05/2016
Transposition deadline	03/10/2005	23/01/2006	12/01/2007	12/10/2007	19/06/2011	25/12/2013	30/09/2016	29/11/2016	23/05/2018
EU28 countries that opted out	IE, DK, UK	IE, DK, UK	IE, DK, UK	DK, UK	IE, DK, UK	IE, DK, UK	IE, DK, UK	IE, DK, UK	IE, DK, UK
Main groups covered (personal scope)	Nuclear family members (spouse and minor children) of legally residing TCN (including refugees)	TCN legally and continuously residing in the MS for five years	TCNs admitted for the purpose of studies	TCN carrying out research in higher education institutions	Highly qualified TCN	TCN applying to and those residing for work purpose or for other purposes, having the right to work	TCNs admitted for the purpose of seasonal work	Managers, specialists and trainee employees admitted within an intra-corporate transfer	TCNs for the purposes of research, studies, training or voluntary service in the European Voluntary Service
Options as regards personal scope <sup>2</sup>	Dependent first-degree relatives, dependent adult children, <sup>3</sup> unmarried partner	no	TCNs admitted for the purpose of pupil exchange, unremunerated training or voluntary service	No	no	no	no	no	TCNs for the purposes of pupil exchange scheme or educational project, voluntary service other than the European Voluntary Service or au pairing
Excluded groups									
Protection	Asylum seekers (sponsors) TCN under temporary or subsidiary protection (sponsors)	Asylum seekers TCN under a form of protection other than international protection	Asylum seekers TCN under subsidiary or temporary protection Unremovables, <sup>4</sup>	Asylum seekers TCN under temporary or international protection	Asylum seekers TCN under temporary or subsidiary protection Refugees Unremovables, <sup>5</sup>	Asylum seekers TCN under temporary or subsidiary protection Refugees Unremovables, <sup>6</sup>			TCN under temporary or international protection
Family	Family members of EU citizens <sup>7</sup>		Family members of mobile EU citizens		Family members of mobile EU citizens	Family members of mobile EU citizens	Family members of mobile EU citizens		Family members of mobile EU citizens
Temporary status	Sponsor with short-term permit (<1 year) or sponsor without reasonable	Seasonal workers Posted workers Service providers			Seasonal workers, Posted workers while posted and in the Member State	Seasonal workers, Posted workers Intra-corporate	Service providers Posted workers	Posted workers TCN residing for study purposes or performing a	Intra-corporate transferees Highly qualified workers

<sup>2</sup> Groups of TCN that Member States may choose to include in the scope in the transposition of the Directive (may-clauses).

<sup>3</sup> Adult children unable to provide for themselves due to their state of health.

<sup>4</sup> Whose expulsion has been suspended.

<sup>5</sup> Whose expulsion has been suspended.

<sup>6</sup> Whose expulsion has been suspended.

<sup>7</sup> Mobile EU citizens and their family members are covered by the Free Movement Directive 2004/38/EC; non-mobile EU citizens are excluded.

	prospect of obtaining the permanent residence	Au pairs <sup>8</sup> TCN residing for study or vocational training reasons		where posted Service-providers Researchers (under Directive 2005/71/EC) while applying to reside in a Member States to carry out a research project	transferees Au pairs		traineeship as part of their studies		
Free movement				TCN enjoying free movement equivalent to EU citizens (EEA and CH)	TCN enjoying free movement as EU citizens (for instance CH, NO)	TCN enjoying free movement as EU citizens	TCN enjoying free movement as EU citizens	TCN enjoying free movement as EU citizens	
LTR		LTR		LTR exercising their right to reside in another MS to carry out an economic activity	LTR			LTR	
Others	Polygamous spouses, if one spouse already resides in MS		TCN considered under national legislation workers or self-employed	TCN applying to do a PhD in the EU Seconded TCN researchers TCN whose expulsion has been suspended for reasons of fact or law		TCN admitted as self-employed, seafarers	TCN admitted as self-employed, TCN assigned by undertakings engaged in making labour available Researchers		
Admission conditions (for LTR conditions for being granted the status, not initial admission to the territory)	<u>Mandatory for MS:</u> Family relationship proven  <u>Optional for MS:</u> Accommodation meeting certain standards, <sup>9</sup>  Stable and regular resources, <sup>10</sup>	5 years of legal and continuous <sup>14</sup> residence;  Stable and regular resources for the applicant and her/his family,  Sickness insurance  not be regarded as a threat to public policy, public health	Valid travel document;  Sickness insurance  not be regarded as a threat to public policy, public security or public health  Proof of fees paid (if MS requests)  Conditions of Article	Valid travel document  A hosting agreement with approved research organisation in the EU  Statement of financial responsibility from the hosting institution	Valid travel document  At least one-year work contract  Higher professional qualifications,  Gross annual salary equivalent to 1.5 the average gross annual salary in the MS,	not be regarded as a threat to public policy, public security or public health <sup>15</sup>	Work contract complying with collective agreements and/or practice  Evidence of sufficient resources  Evidence of adequate accommodation  Sickness insurance	Evidence that the host entities belong to the same (group of) undertaking(s) in the TC  Previous employment of in the same (group of) undertaking(s) <sup>16</sup>  Work contract complying with posted workers	Valid travel document  Sickness insurance  Evidence of sufficient resources  Address in the MS may be required  For researchers: a hosting agreement with an research organisation in the

<sup>8</sup> The list may not be exhaustive as the relevant Article reads: TCN residing "solely on temporary grounds such as au pair or seasonal worker, or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services or in cases where their residence permit has been formally limited", Article 3(2)(e), Directive 2003/109/EC.

<sup>9</sup>

<sup>10</sup>

<sup>14</sup> Periods of absence shorter than 6 consecutive months or in total 10 months over the 5 year period do not interrupt the continuous residence.

<sup>15</sup> The Directive does not provide for admission conditions; admission is regulated by national law (including when implementing the other directives).

<sup>16</sup> From at least 3 up to 12 uninterrupted months immediately preceding the transfer for managers and specialists, and up to 6 months for trainees.

	Compliance with integration measures, <sup>11</sup> Previous residence of the sponsor (max 2 years can be required); <sup>12</sup> Sickness insurance <sup>13</sup>  Refugees benefit from more favourable conditions.	security or public health	7 are missing.	not be regarded as a threat to public policy, public security or public health	Legal requirements to practice, if the profession is regulated profession  not be regarded as a threat to public policy, public security or public health  Sickness insurance  not be regarded as a threat to public policy, public security or public health	for periods not covered by the work contract  not be regarded as a threat to public policy, public security or public health	legislation Remuneration comparable to nationals Evidence of professional qualifications and needed experience Evidence of sufficient resources Address in the MS may be required Sickness insurance for periods not covered by the work contract  not be regarded as a threat to public policy, public security or public health	MS  For students: acceptance on the course of study  Special conditions for pupils, trainees and volunteers, au pairs  not be regarded as a threat to public policy, public security or public health	
Admission procedures deadline	No later than 9 months from the date the application was lodged	No later than 6 months from the date the application was lodged	within a period that does not hamper the pursuit of the relevant studies, whilst leaving the competent authorities sufficient time to process the application	A decision on the complete application as soon as possible and, where appropriate, provide for accelerated procedures	As soon as possible and at the latest within 90 days of the application being lodged.	No later than 4 months from the date the application was lodged	as soon as possible but not later than 90 days from the date on which the complete application was submitted, 60 days if the TCN applies to be hosted by a recognised host entity.	as soon as possible but not later than 90 days from the date on which the complete application was submitted, 60 days if the TCN applies to be hosted by a recognised host entity.	as soon as possible but not later than 90 days from the date on which the complete application was submitted, 60 days if the TCN applies to be hosted by a recognised host entity.
Form of permit	Residence permit of at least 1-year duration and renewable; <i>under the Single Permit Directive, it is also a work permit under certain conditions</i>	Permanent residence permit, valid for at least 5 years and automatically renewable on expiry.	Residence permit for at least 1 year and renewable	residence permit for a period of at least one year and renewable  TCN researcher can teach	Residence permit valid for a period between 1 and 4 years; <i>under the Single Permit Directive, it is also a work permit</i>	Single permit (residence and work permit)	If < 90 days: visa (if needed) and/or work permit;  If > 90 days: residence permit (single application procedure) and/or long-stay visa,  Duration of stay up to between 5 and 9 months in any 12-month period (MS to set the duration)	residence permit (single application procedure), valid one year at least	Long-stay visa or residence permit valid for at least 1 year (for students and researchers) , valid at least 2 years if the student or the researcher participates in an EU or multilateral programme.
Equal	Access as the	Equal treatment	No provisions	Equal treatment	Equal treatment	Equal treatment	Equal treatment	Equal treatment	For researchers,

11  
12  
13

treatment	sponsor to: education, employment and self-employment, vocational guidance, initial and further training	with nationals: employment and self-employment, education and vocational training, recognition of qualifications, social security, social assistance and social protection, tax benefits, access to goods and services made available to the public, freedom of association and affiliation, free access to the entire territory of the MS	with nationals: recognition of diplomas, certificates and other professional qualifications working conditions, including pay and dismissal branches of social security tax benefits; access to goods and services and the supply of goods and services made available to the public	with nationals: recognition of diplomas, certificates and other professional qualifications working conditions, including pay and dismissal branches of social security tax benefits; access to goods and services and the supply of goods and services made available to the public	with nationals: working conditions, education and vocational training, recognition of qualifications, branches of social security, <sup>17</sup> income-related pension, access to goods and services made available to the public, freedom of association and affiliation,	with nationals: working conditions, education and vocational training, recognition of qualifications, branches of social security, <sup>18</sup> tax benefits, access to goods and services made available to the public, freedom of association and affiliation, free access to the entire territory of the MS	with nationals: terms of employment and working conditions, education and vocational training, recognition of qualifications, branches of social security, <sup>19</sup> tax benefits, access to goods and services made available to the public, freedom of association and affiliation, back payments on any outstanding remuneration	with posted workers as regards to terms and conditions of employment; with nationals as regards to: recognition of qualifications, branches of social security, <sup>20</sup> access to goods and services made available to the public, freedom of association and affiliation, payment of pensions	equal treatment with nationals of the Member State concerned as provided for in Article 12(1) and (4) of Directive 2011/98/EU (Single permit)  For trainees and volunteers considered to be in an employment relationship and students, equal treatment with nationals of the Member State concerned as provided for in Article 12(1), (2) and (4) of Directive 2011/98/EU (Single permit)  For trainees and volunteers not considered in employment, equal treatment with nationals as regards Access to goods and services Recognition of qualifications
Access to work	As the sponsor (MS may decide to delay the access for up to 12 months)	As nationals	Students authorised to work at least 10 hours per week; Access to work may be restricted during the first year Self-employment is possible	Yes, maximum teaching hours may be limited by MS	For the first two years, access to employment limited to positions fulfilling these requirements; afterwards, limited to highly qualified employment	TCN may exercise the employment activity authorised under the single permit	The TCN may exercise the employment activity for which the authorisation was issued	Employment within the intracorporate transfer up to 3 years for managers and specialists and 1 for trainee	Researchers: research and teaching Students authorised to work at least 15 hours per week; self-employed activities possible
Family	(third-country	No provisions	No provisions	Family members can	Yes, more	No provisions	No provisions	Yes, more	For family members

<sup>17</sup> As defined in Regulation (EEC) No 1408/71.<sup>18</sup> As defined in Regulation EC No 883/2004.<sup>19</sup> As defined in Article 3 of Regulation EC No 883/2004.<sup>20</sup> As defined in Article 3 of Regulation EC No 883/2004.

reunification	nationals admitted as family members may themselves become sponsors subsequently)			reside with the researcher	favourable conditions than Directive 2003/86/EC: integration measures applicable only after granting family reunification, no waiting period			favourable conditions than Directive 2003/86/EC: integration measures applicable only after granting family reunification, no waiting period, decision within 90 days, access to the labour market	of researchers: more favourable conditions than Directive 2003/86/EC: integration measures applicable only after granting family reunification, no waiting period, decision within 90 days, access to the labour market except in exceptional circumstances
Intra-EU mobility	No provisions	LTR (and family members) entitled to reside in another MS for more than 3 months for work, <sup>21</sup> study or vocational training, other purposes; MS may require that the LTR has: stable and regular resources, sickness insurance, compliance with integration measures.	Yes (within a period that does not hamper the pursuit of the relevant studies)	Yes, short-term mobility on the same hosting agreement; for longer mobility a new hosting agreement may be required	The BC holder can make use of facilitated conditions to move to a second MS after 18 months of residence in the first MS and apply for the BC.	No provisions	No provisions	Short-term mobility (up to 90 days in any 180-day period per MS), long-term mobility for more than 90 days	Allowed for students and researchers under specific conditions
Other rights	Right to an autonomous permit at least after 5 years of residence	The expulsion from the territory should not be based on economic considerations	Special conditions for volunteers; school pupils and unremunerated trainees	No provisions	More favourable access to LTR: longer periods of absence, periods of absence that can be accumulated in the EU, if last 2 years spent in one MS	No provisions	One extension and change of employer must be granted if conditions are fulfilled  facilitation of re-entry	No provisions	Students and researchers can stay up to 9 months to search for work after completion of studies / research
Key aspects of discretion left to Member States	May extend the group of family members outside the nuclear family  May adopt more favourable provisions  May decide to delay the labour market access for up to 12 months	May adopt more favourable provisions  May require that the LTR has: compliance with integration measures.	May adopt more favourable provisions  may require the period of validity of the travel document to cover at least the duration of the planned stay  May ask for fees of applicants	May introduce additional conditions for hosting organisations and hosting agreements	May adopt more favourable provisions  May require the applicant to provide his/her address in the territory  the salary threshold may be at least 1,2 times the average gross annual salary in the Member State	May adopt more favourable provisions  May decide it does not apply to third-country nationals either authorised to work not exceeding six months or who have been admitted to a Member State for the purpose of	May adopt more favourable provisions  May determine the volumes of admission  May require additional conditions for travel document  May apply a labour market test	May adopt more favourable provisions  May determine the volumes of admission  May ask for documentary evidence in the official MS language  May require to	May adopt more favourable provisions  May ask for documentary evidence in the official MS language  May determine volumes of admission for some categories (not for students and not for those not in an

<sup>21</sup> Employed or self-employed.

<p>may, in appropriate circumstances, accept an application submitted when the family members are already in its territory</p> <p>May require to provide evidence of sufficient funds and accommodation</p> <p>May require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her</p> <p>May reject applications on several grounds</p>	<p>Students may be entitled to self-employment and asked to report their employment activities</p> <p>Access the employment may be restricted for the first year</p>	<p>concerned</p> <p>May apply a labour market test</p> <p>May reject an application to ensure ethical recruitment or employer has been sanctioned for undeclared work and illegal employment</p> <p>After the first two years, Member States may grant the persons concerned equal treatment with nationals as regards access to highly qualified employment</p>	<p>study</p> <p>may determine volumes of admission</p> <p>May ask for fees of applicants</p> <p>May restrict equal treatment</p>	<p>May reject applications on several grounds</p> <p>May determine a maximum period of time within any 12-month period, during which an employer is allowed to hire seasonal workers</p> <p>May allow more than one extension / change of employer</p> <p>May ask for fees of applicants</p> <p>May restrict equal treatment</p> <p>May require recruitment solely via public employment services</p>	<p>provide an address in the MS</p> <p>may require that the intra- corporate transferee will have sufficient resources</p> <p>May reject applications on several grounds</p> <p>may require the payment of fees</p> <p>May introduce a six month break after the period of first transfer expired for a re-application</p> <p>May restrict equal treatment</p>	<p>employment relationship)-</p> <p>May require to provide an address in the MS and set the reference amount to define sufficient resources</p> <p>May require written undertaking from a research organisation</p> <p>May decide the approval process of research organisations acting as hosts</p> <p>May reject applications on several grounds</p> <p>May restrict the equal treatment</p> <p>May set a maximum number of teaching hours for researchers</p> <p>May set the number of hours a student can work above the minimum of 15 hours per week</p> <p>May restrict the job search activities after the period of study / research</p>
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### 1.2.3 Outputs, results and impacts

The main outputs from the Directives are the national rules and practices set up in response to the implementation of the Directives.

A structured overview of the legal implementation of the Directives as well as a detailed mapping of their practical implementation will be undertaken in the context of Task II of the Fitness Check. This will show the main types and instances of differences in the national transposition of each Directive between the Member States:

- Member States which have transposed Directives without any change;
- Member States which have used more beneficial provisions (gold-plating);
- Member States which have made use of the 'may' clauses contained in the Directives;
- Member States where the Directives' rules are not transposed correctly.

The overview of the legal implementation will identify the main provisions where Member States gold-plated the Directives, as well as the main may clauses where Member States applied discretion in the transposition of the Directives. It will therefore show the patterns of implementation and their coherence across the Member States.

The key anticipated results from the Directives can be defined as follows:

- A more coherent approach to attracting and regulating the migration of different groups of third-country nationals emerges across the EU Member States;
- Admission, residency and work procedures for TCNs are simplified and harmonised; they become more efficient for TCNs, employers and receiving organisations in the EU whereas the migration authorities are in a better control of migration procedures (which in turn increases the trust between the different Member States and facilitates the intra-EU mobility);
- Removal of unnecessary barriers to the intra-EU mobility of TCNs;
- Social, labour market and economic integration of third-country nationals in the EU is strengthened through the family reunification rights, rights to access work and equal treatment rights.

In turn, the outputs and results of the Directives are expected to contribute to the following impacts:

- Labour shortages are addressed in the sectors and occupations across the EU through more efficient admission procedures of TCNs;
- EU's competitiveness and knowledge-based economy position is strengthened through the influx of human capital from the third countries.
- Management of legal migration flows is more effective
- The treatment of third country nationals is fairer.
- The following sections consider the intervention logics of the individual Directives in turn.



## 1.3 Directive 2011/98/EU Single Permit

### 1.3.1 Rationale and objectives

In October 2007, in parallel with the proposal for the “Blue Card” Directive, the Commission adopted a proposal for a Directive establishing a single application procedure for a single permit for third-country national workers, and ensuring equal treatment for third-country nationals allowed to work in the EU.<sup>22</sup> The proposal was based on the idea of reducing the “**rights gap**” between third-country national workers and nationals of Member States. The argument was that granting migrant workers comparable rights to Member States’ own nationals would recognise their economic contribution to the economy of a Member State and would also reduce possibilities of unfair competition between third-country nationals and EU citizens, safeguarding EU citizens from cheap labour and migrant workers from exploitation.<sup>23</sup>

### 1.3.2 EU policy context and external factors

The approval of the Single Permit Directive 2011/98/EU was particularly difficult: it required four years of lengthy negotiations, a Treaty change, and a compromise between the LIBE and EMPL committees in the Parliament.<sup>24</sup> Moreover, most of the Member States were late in transposing the Directive.<sup>25</sup> Finally adopted in 2011, Directive 2011/98/EU had to be transposed in December 2013.<sup>26</sup>

The Directive is implemented in a complex policy environment where there is a global competition for labour across all skills levels. However, within the EU, the economic and political crisis is resulting in an unfavourable environment for migrants.

### 1.3.3 The Directive’s inputs

The Directive 2011/98/EU applies to three main categories of third-country nationals (Article 3):

- Third-country nationals who apply to reside in a Member State to work,
- Third-country nationals who have already been admitted to a Member State for the purpose of work,
- Third-country nationals who have already been admitted to a Member State for purposes other than work and who are allowed to work (for e.g. family members of migrant workers, students and researchers).

However, the Directive 2011/98/EU provides for a long list of categories of third-country nationals that are excluded from its scope. Beneficiaries of international protection, family members of EU citizens and EU long-term residents are excluded from the scope due to the special and enhanced status that they already enjoy based on other EU instruments. Posted workers and intra-corporate transferees (ICTs) are excluded, as they are not considered to be part of the labour market to which they have been posted. For similar reasons, seasonal workers are excluded due to the

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<sup>22</sup> European Commission, Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638 final, Brussels, 23.10.2007. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007PC0638&from=EN>.

<sup>23</sup> COM(2007) 638 final, p. 3.

<sup>24</sup> Pascouau, Y. and McLoughlin, S., 2012. EU Single Permit Directive: a small step forward in EU migration policy. Available at [http://www.epc.eu/documents/uploads/pub\\_1398\\_eu\\_single\\_permit\\_directive.pdf](http://www.epc.eu/documents/uploads/pub_1398_eu_single_permit_directive.pdf)

<sup>25</sup> European Commission, Annual Report 2014 and 2015 monitoring the application of Union law, COM(2016) 463 and COM(2015) 329, available at: [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index\\_en.htm](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm);

<sup>26</sup> Arts. 15-16 of Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343, 23.12.2011.

temporary nature of their status. These categories are now also covered by other specific Directives, but the Single Permit refers to the generic category. Third-country nationals seeking entry and residence on the basis of self-employment are also excluded.

The main added-value of the Single Permit Directive is twofold: introducing a single application procedure and a single permit, and extending equal treatment rights also to those third-country national admitted on the basis of national rules and some TCNs covered by other Directives.

Chapter II of the Directive 2011/98/EU introduces the general obligation for Member States to examine the application to work and reside in the territory of a Member State in a single application procedure. If the application is granted, Member States must issue a single permit covering both residence and work permits (Article 4). Thus, the Directive 2011/98/EU aims at establishing in Member States a **“one-stop-shop” system** and ensuring compliance with certain procedural safeguards and standards when handling an application. Initially, this system was conceived not only to simplify administrative procedures for third-country nationals but also to make the control of the legality and residence of migrant workers easier for national authorities.<sup>27</sup>

In the conduct of the **application procedure** however, Member States have a wide margin of interpretation and implementation, thus questioning the harmonisation effect of the Directive 2011/98/EU on this point. For example, national authorities may decide who, between third-country nationals or employers or both, have to initiate the procedure in order to obtain a single permit. Furthermore, the **time limit for examining the application** is set at maximum four months and, if no decision is taken, the consequences are determined by the Member States. The application procedure for a single permit is without prejudice to the visa procedure (including long-term visas) which may be required for initial entry in a Member State, thus extending the application procedure for a single permit in practice.

Once a single permit is issued, the Directive bars Member States from issuing additional permits as proof of authorisation to access the labour market. However, it may indicate additional information related to the employment relationship (Article 6). A holder of a single permit has the right to enter and reside in the territory of the Member State and exercise an employment activity.

Finally, the Directive introduces a series of procedural guarantees regarding inter alia the obligation to provide, in writing, reasons for rejecting an application or renewing a permit, in order to provide for the possibility for legally challenging the decision or to provide upon request information regarding the documents required for an application. Fees, if charged, should be proportionate and based on services actually provided to process applications and issue permits.

In addition to a single procedure establishing a unique permit for work and residence, the Directive also defines a common set of rights for all non-EU migrants working in a Member State. As mentioned above, these rights apply whether third-country nationals have just arrived or whether they are already resident in a Member State.

Chapter III of the Directive 2011/98/EU introduces the second aspect of the added value of the Directive. As with other instruments adopted in the area of legal migration before 2011, the Directive 2011/98/EU determines the fields where **equal treatment** with the nationals of the Member States should be provided. Consequently, the right to equal treatment includes working conditions, recognition of diplomas, freedom of association and trade union membership, education and vocational training, recognition of qualifications, social security, tax benefits, access to goods and services and support services provided by employment offices (Article 12).

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<sup>27</sup> COM(2007) 638 final, p.6.

The Directive 2011/98/EU allows Member States to **limit the right to equal treatment** in certain situations, namely they are allowed to deny grants and loans for education and vocational training; family benefits may not be granted to third-country nationals authorised to work for a period of six months or less, or to students or third-country nationals entitled to work on the basis of a visa. Access to housing and tax benefits may be restricted as well. During the negotiations, the issue of the portability of pension rights was much debated. On this issue, the final text indicates that third-country workers moving to a third country shall receive statutory pensions based on previous employment, under the same conditions and at the same rate enjoyed by nationals of that Member State when they move to a third country.

#### **1.3.4 Outputs, results and impacts**

The main **outputs** from the Directive 2011/98/EU and generating EU added value are the national rules and practices set up in direct response to the Directives. A structured overview of the relevant aspects of the legal transposition and detailed mapping of the practical implementation of the Directives will be undertaken as part of Task II. This will reveal the main differences in the national approaches to implementing the Directives, including:

- Member States which have transposed the Directives without any change;
- Member States which have used more beneficial provisions (gold-plating);
- Member States which have made use of the may clauses contained in the Directive (such as the use of discretion in the application procedure, or allowing Member States to limit the right to equal treatment in certain situations, e.g. restriction of access to tax benefits);
- Member States where the Directive's rules are not transposed correctly.

This analysis will identify the main provisions where Member States gold-plated the Directive, as well as the main may clauses resulting in variations in the rules and practices at national level (such as the use of discretion in the application procedures, or allowing Member States to limit the right to equal treatment in certain situations). Thus, the overview of the legal implementation and detailed mapping of practical implementation will show the patterns of implementation and will permit an analysis of their coherence with the objectives of the Directives.

These outputs are supposed to lead to a number of **results** stemming from the Directive 2011/98/EU, generating EU added value and leading to a more coherent approach to attracting third-country nationals in the EU. They are also expected to lead to more simplified, harmonised and effective admission procedures for TCNs, more efficient control procedures and TCNs making use of the same rights as MS nationals in the labour market.

By creating a (more) level playing field in terms of wages and working conditions for all workers (in the relevant categories covered by the Directive), regardless of nationality, the equal treatment provisions are supposed to have positive results for both TCNs that obtain a single permit and for EU citizens. The equality provisions should make TCN workers feel more valued and reduce the possibilities for their exploitation, while it should reduce the incidence of unfair competition between EU citizens and third-country workers. The approximation of the rights enjoyed by TCNs and EU citizens would also help to promote economic and social cohesion in the MS.

#### **1.4 Directive 2003/86/EC Family reunification**

This section outlines the intervention logic of Directive 2003/86/EC – Family reunification, including an outline of the rationale for the Directive, its EU policy and external context, as well as the objectives, expected results and impacts.

### 1.4.1 Rationale and objectives

Directive 2003/86/EC on family reunification has the overall **objective** to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States. The Directive specifically aims:

- To adopt measures concerning family reunification in conformity with the obligation to protect the family and respect family life;
- To ensure fair treatment of TCN residing lawfully in EU MS;
- To create sociocultural stability facilitating the integration of TCNs in EU MS, in order to promote economic and social cohesion.

The main **rationale** for the Directive is the obligation to respect family life as a fundamental right. Through enabling family reunification of third-country nationals, the Directive is supposed to facilitate the integration of third-country nationals and their families in the EU. This in turn aims at promoting the fundamental objectives of economic and social cohesion in the EU.

### 1.4.2 EU policy context and external factors

The Family Reunification Directive was the first legal migration directive to be adopted in the emerging European policy context on migration. It is part of the strategic **EU policy context**, including the Treaty of Amsterdam that conferred the European Community with the competence to adopt measures on the conditions of entry and residence of third-country nationals and on procedures for the issuance of residence permits, explicitly mentioning “those for the purpose of family reunion” (Article 63(3)(a) TEC). The Presidency Conclusions of the Tampere Council stated that the EU must ensure fair treatment of legally residing third-country nationals, and should “aim at granting them rights and obligations comparable to those enjoyed by EU citizens”, including in the right of family unit.<sup>28</sup>

Responding to the European Council’s call, the Commission proposed a Council Directive on the right to family reunification in December 1999. After the first opinion of the European Parliament, the Commission first amended its proposal in September 2000. Two years of negotiations in the Council followed, after which the Council asked the Commission to present an amended proposal. The amended proposal was issued in May 2002, and was finally adopted in September 2003.

Member States had to transpose the Directive by 3 October 2005. However, 19 Member states failed to do so and the Commission started infringement procedures against them. To date, all Member States bound by the Directive have notified its transposition. The Directive contains many discretionary provisions and leaves considerable leeway for Member States to determine their national policy on family reunification. Thus, national policy preferences are also affecting the flows of migrants and their family members since the implementation of the Directive to date.

Recent EU policy developments in the migration area calling for common and efficient migration admission and control procedures can potentially influence the conditions for family reunification in Member States within the scope of the Directive. The Directive is part of the EU’s comprehensive migration policy outlined in the Global Approach to Migration and Mobility (GAMM) first developed in 2005, and evaluated in 2011. Family reunification forms a part of the GAMM’s first pillar on organising and facilitating legal migration and mobility. The European Agenda on Migration stated that a common system on legal migration should aim at making the EU an attractive destination for third-country nationals. Labour immigration continues to be seen as playing a key role in driving economic development in the long-term and in addressing current and future demographic challenges in the EU. Moreover, a well-functioning legal migration

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<sup>28</sup> European Council, 1999. Tampere European Council 15 and 16 October 1999. Presidency Conclusions, [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)

system was seen as a potential alternative to the spontaneous arrival of persons at the EU borders, and, as a consequence, Member States were urged to make full use of the legal venues available, including, for instance, family reunification.

EU and Member State policies on family reunification are driven by other EU legal migration Directives, national legal migration policies, and by several external factors. Demographic changes across the EU, linked with skills shortages in some Member States and high unemployment rates in others are decisive for the implementation of the Family Reunification Directive across the EU. Member States that face skills shortages aim to attract skilled third-country nationals and provide them with incentives to enter the Member State. The conditions regarding family reunification implemented by Member States (within the flexible terms of the Family Reunification Directive) are influenced by Member States' sectoral policies, e.g. educational, social and employment policies as well as Member States' policies on legal migration. For example, in order to attract highly skilled workers, investors and entrepreneurs, Member States use more favourable conditions for family reunification and employment of family members as incentives (amongst others such as tax incentives). Nevertheless, the political climate across the EU seems to be driving family reunification policies in a more restrictive direction. The European Migration Network 'Annual Report on Immigration and Asylum' (2015) identified several trends across Member States related to family reunification, including the restriction of family reunification and implementation of tighter requirements for family members who want to join TCNs already in the EU (e.g. AT, BE, DE, FI, NL, SE were among the MS that introduced tighter requirements regarding the knowledge of host country language and culture in order to be granted family reunification).

### 1.4.3 The Directive's inputs

The scope of the Directive covers the members of the 'nuclear family', i.e. the spouse and the minor, unmarried children of the sponsor or of the spouse. Member States may however extend it to first-degree dependent relatives, adult unmarried children unable to provide for themselves due to their state of health, unmarried partners and registered partners. The Directive does not specify the treatment of same-sex couples, which means that they enjoy rights under the Directive according to their status under the national law of each Member State. However, recital (5) in the preamble affirms the principle of non-discrimination on the basis of sexual orientation.

The Directive includes three **requirements** for family reunification that Member States may ask the sponsor to meet: suitable accommodation for the size of the family complying with health and safety standards, sickness insurance for the sponsor and his/ her family members, and stable and regular resources sufficient to maintain the family without recourse to social assistance (Article 7(1)). Moreover, Member States may require third-country nationals to comply with some pre-departure or post-departure **integration measures**, according to national provisions (Article 7(2)). The sponsor may also be required to have resided in the Member State for a maximum period of two years, or exceptionally three years, before reuniting with the family (Article 8). Once in the EU, eligible family members shall receive a residence permit entitling them to **equal treatment with the sponsor** in multiple areas, such as access to education, vocational training and guidance, employment and self-employment, which may be however restricted for one year after carrying out labour market analysis (Article 14).

Family reunification of **refugees** is subject to **specific, more favourable rules** under Directive 2003/86/EC (Article 9). For example, refugees shall not be asked to meet the requirements set out in Article 7(1) of the Directive for a period of three months after the granting of the refugee status when seeking to be reunited with pre-existing family members. Moreover, the integration measures set out in 7(2) of the Directive shall not be applied as a pre-condition to grant family reunification to refugees. In addition, pre-existing family members shall be exempt from the waiting period provided in Article 8.

**Beneficiaries of subsidiary protection** are excluded from the scope of the Directive, thereby falling under national law in this regard. However, some Member States may have similar favourable conditions in national law for beneficiaries of subsidiaries protection as they have for refugees.<sup>29</sup> Moreover, there are specific conditions for the family reunification for **highly skilled workers, researchers and intra-corporate transferees** laid down in other directives. These conditions are more favourable than the general policy defined under the Family Reunification Directive. For instance, family reunification is not dependent on the sponsor's perspective to obtain a permanent residence permit, or on the fulfilment of specific integration measures (referred to in Art. 7(2) of the FRD). Moreover, the time to process applications is faster, and family members of researchers and highly skilled workers have the right to immediately access the labour market.

#### 1.4.4 Outputs, results and impacts

The main **outputs** from the Directive 2003/86/EC are the national rules and practices set up in response to the implementation of the Directive. These include rules on:

- Admission conditions of family members of third country nationals,
- Monitoring activities, specific checks and inspections to combat fraud and marriages/partnerships/adoptions of convenience,
- Implementing penalties and redress mechanisms,
- Equal treatment for family members of third country nationals, including as regards access to education, vocational and further training, employment and self-employment in accordance with the Directive, and,
- Specific, more favourable rules for family reunification of refugees (beneficiaries of subsidiary protection are excluded).

A structured overview of the relevant aspects of the legal transposition and detailed mapping of the practical implementation of the Directives will be undertaken as part of Task II. This will reveal the main differences in the national approaches to implementing the Directives, including:

- Member States which have transposed the Directive without any change;
- Member States which have used more beneficial provisions (gold-plating), regarding e.g. the treatment of same-sex couples;
- Member States which have made use of the may clauses contained in the Directive (such as the requiring that the family members comply with pre- or post-departure integration measures or restricting the right to employment/self-employment of family members for 1 year);
- Member States where the Directive's rules are not transposed correctly.

**Results** within the sphere of control of the Directive 2003/86/EC are supposed to generate EU added value and lead to simplified and common admission procedures for TCN families, strengthened social and economic integration of third-country nationals and their family members in the EU. As **impacts**, the Directive is expected to generate EU added value and support the EU in mitigating the risks of population decline as well as strengthen the sustainability of the EU welfare system and growth of the EU economy through a growing number of integrated third-country nationals and their families.

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<sup>29</sup> The recast Qualification Directive (2011/95/EU) adopted in 2011 approximated the rights of refugees and beneficiaries of subsidiary protection in a number of areas, including the right to family unity. However, Article 23 on family unity covers different situations than those primarily envisaged in Directive 2003/86/EC.

However, in 2014 the Commission issued the First Implementation Report of the Directive and highlighted several issues of incorrect transposition or misapplication. Further, the level of harmonisation achieved by the Directive had been limited, due to the high number of discretionary clauses.<sup>30</sup> To ensure the full implementation of the existing rules and to guide the application of the Directive, the Commission published in 2014 a Communication providing detailed guidance on the implementation of the articles of Directive 2003/86/EC.<sup>31</sup> The communication is not legally binding and its impact has not been assessed yet.

## 1.5 Directive 2003/109/EC Long-term residents

This section outlines the intervention logic of Directive 2003/109/EC – Long-term residents (LTR), including an outline of the rationale for the Directive, its EU policy and external context, as well as the objectives, expected results and impacts. **Error! eference source not found.** below provides a summary of the intervention logic.

### 1.5.1 Rationale and objectives

Directive 2003/109/EC on long-term residents has the **objective** to determine the terms and rights for long-term residence of TCNs who have legally and continuously resided for a period of 5 years within the territory of an EU Member State, and to determine the terms for residence in a second Member State. The Directive specifically aims:

- To establish the conditions for acquiring the long-term residence status
- To grant TCNs rights comparable to those of citizens of the EU

To establish the conditions for residence in a second Member State other than the one which conferred the long-term residence status The rationale for the adoption of the Directive was to promote the integration of third-country nationals who are long-term residents by ensuring a recognised status and a set of rights which are as near as possible to those enjoyed by EU citizens.

### 1.5.2 EU policy context and external factors

The Conclusions of the European Council in Tampere held in 1999 included a specific paragraph that set out the principles on the treatment of long-term resident determining the need that "a person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State".<sup>32</sup>

Based on these conclusions, a proposal for a Directive on the status of third-country nationals who are long term residents was proposed by the European Commission in March 2001 (LTR Directive).<sup>33</sup> The Directive 2003/109/EC was approved in November 2003 with a transposition deadline set for January 2006. In 2007, the European Commission initiated infringement proceedings against 20 Member States for failure to

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<sup>30</sup> European Commission, Report on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610 final. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0610&from=EN>

<sup>31</sup> European Commission, 2014. Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, (COM(2014) 210 final), [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/com/com\\_com\(2014\)0210\\_/com\\_com\(2014\)0210\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014)0210_/com_com(2014)0210_en.pdf)

<sup>32</sup> Point 21 of the Tampere European Council Conclusions.

<sup>33</sup> European Commission, Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM(2001) 127 final, 13.03.2001.

fully transpose the Directive, as a result of which 3 Member States were condemned by the European Court of Justice (Luxembourg, Portugal and Spain).<sup>34</sup>

Further strategic policy developments (Treaty of Lisbon, Stockholm Programme) and developments in the migration area calling for common and efficient migration admission and control procedures (GAMM, European Agenda on Migration; Action Plan on Migration) can potentially influence the conditions on LTR imposed by Member States within the scope of the Directive, e.g. in terms of equal treatment of TCNs, and the recognition of qualifications.

Several **external factors** within the EU, such as demographic challenges across the Member States, different economic conditions in the Member States, skills shortages in some and high unemployment in other Member States drive policies on legal migration and their implementation across EU Member States, including the LTR Directive. Furthermore, the negative perception of migration is growing in some European countries, impacting not only the attractiveness of EU Member States for TCNs, but also the policies of MS with regard to short – and long-term migration. Globally, factors such as the global competition for talent (not only between Europe and 'typical' migration destinations such as the US or Canada, but also between Europe and 'players' such as China<sup>35</sup>) can also impact on Member States' approaches to implementing the LTR. Further, the economic, political and social situation in the origin countries influence migration movements in the short- and long-term. The possible brain drain of qualified human capital in home countries due to migratory movements to Europe may also influence the modalities of transposing the LTR Directive chosen by Member States, as options for long term residency might influence the decision to migrate, but also the decision to remain in the host country, which might pose a brain drain for the home country.<sup>36</sup> Finally, Member States' sectoral policies on education, employment and social security also influence the conditions under which TCNs enjoy long term residence in EU Member States.

### 1.5.3 The Directive's inputs

The Directive harmonises the conditions for conferring long-term residence status and lays down the terms of residence in EU Member States. Under certain conditions, long-term residents enjoy equal treatment with EU citizens in certain areas (i.e. employment, education, social security, etc.).

Although the Directive is supposed to apply to all third-country nationals, several groups are excluded from its scope. These are students or persons pursuing vocational training, seasonal workers, diplomats, applicants for refugee status, and persons who reside on temporary grounds or hold a residence permit that has been formally limited. This is due to their precarious situation or because they are residing in a Member State only for a short time.

The Directive was amended in 2011, and the amendments included extension of the scope to **beneficiaries of international protection**.

Third-country nationals are entitled to acquiring the LTR status in a Member State after residing legally and continuously for a period of 5 years within the territory of an EU Member State. The calculation of **5 years of continuous residence** allows for absences of up to 6 months at a time (not exceeding 10 months during the 5 year period however). In the case of refugees, at least half of the period for the decision on

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<sup>34</sup> European Commission, Report on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2011) 585 final, Brussels, 28.9.2011. Available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/1\\_en\\_act\\_part1\\_v62\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/1_en_act_part1_v62_en.pdf)

<sup>35</sup> See also Muenz, R. (2014), The global race for talent: Europe's migration challenges, Bruegel Policy Brief, 2, 2014.

<sup>36</sup> However, it should be noted that the discussion of brain drain must be seen in connection with 'circular migration', as well as with economic benefits for the home countries of TCNs due to e.g. remittances sent by TCNs to their home countries.



an asylum application is taken into account for the calculation of the five years, or the whole period if the asylum procedure exceeded 18 months.

Applicants must prove that they have sufficient resources to live without social assistance and sickness insurance. Furthermore, Member States may require compliance with **integration conditions**, which are only broadly outlined in the Directive. The CJEU ruled that the obligation for third country nationals possessing a long-term residence permit to pass a civic integration examination was an acceptable integration condition within the meaning of the Directive.

The Directive allows Member States to limit certain important aspects of the rights given to TCNs. For example, access to education and training may be subject to demonstrating sufficient knowledge of the language; social security benefits may be limited to "core benefits".

The Directive provides freedom to move and reside for a period exceeding three months in another Member State. This may take place based on economic, educational reasons or any other reasons. However, Member States may restrict access to their labour market and give preference to EU citizens, or limit the number of residence permits if quotas for admission of third-country nationals are already set out in national law at the moment of the adoption of the Directive. The family members of LTR have the right to accompany him/her in the second Member State, while enjoying the same rights as in the first Member State.

#### **1.5.4 Outputs, results and impacts**

The main **outputs** from the Directive 2003/109/EC are the national rules and practices set up in order to implement the Directive. These include rules and practices concerning the conditions to issue the LTR permit and its validity, rights for TCNs and their family members set out in the Directive, including rights on access to education, on vocational and further training, and on access to employment and self-employment, enabling of intra-EU movement to TCNs and their family members, while ensuring the possibility to limit certain rights or to refuse long-term residence on grounds of public policy or security, but also rules on integration requirements for TCNs and their family members in EU Member States.

A structured overview of the relevant aspects of the legal transposition and detailed mapping of the practical implementation of the Directives will be undertaken as part of Task II. This will reveal the main differences in the national approaches to implementing the Directives, including:

- Member States which have transposed Directive without any change
- Member States which have used more beneficial provisions (gold-plating)
- Member States which have made use of the may clauses contained in the Directive (such as requiring compliance with certain integration conditions, or limiting access to social security benefits to "core benefits")
- Member States where the Directive's rules are not transposed correctly.

**Results** within the sphere of control of the Directive 2003/109/EC generating EU added value and the emergence of simplified and common procedures for long-term residence of TNCs, as well as strengthened social and economic integration of third-country nationals and their family members in the EU. Moreover, the Directive shall support equality of treatment with citizens of the MS in a wide range of economic and social matters, and remove unnecessary barriers to intra-EU mobility of TCNs who are LTR.

The Directive is expected to generate EU added value and support the EU in mitigating the risks of population decline as well as strengthen the sustainability of the EU welfare system and growth of the EU economy through a growing number of integrated third-country nationals with a long-term residence in the EU.

However, in 2011 the Commission issued the First Implementation Report of the Directive and highlighted several shortcomings and transposition gaps. The Report suggests possible amendments to the Directive in order to take better account of temporary stays in the calculation of the 5-year period, facilitating access to the labour market of the second Member State; and further simplifying the acquisition of LTR status in the second Member State.<sup>37</sup>

## **1.6 Directive (EU) 2016/801 (students, researchers, trainees, volunteers, au pairs), Directive 2004/114/EC and Directive 2005/71/EC**

This section summarises the intervention logic for Directive (EU) 2016/801 (on students and researchers) which will replace the previous Directives on students (Directive 2004/114/EC) and researchers (Directive 2005/71/EC). The intervention logics of the three Directives are considered here together as they have similar rationale, objectives, outputs, results and impacts as well as key policy and contextual factors.

### **1.6.1 Rationale and objectives**

The main rationale for Directive (EU) 2016/801 was to ensure increased transparency and legal certainty and to offer a coherent legal framework for those third-country nationals who come to the EU for the purpose of research, studies, training, voluntary service in the European Voluntary Service and au pairs. Member States may also decide to apply the provisions of this Directive to third-country nationals who apply to be admitted for the purpose of a pupil exchange scheme or educational project, voluntary service other than the European Voluntary Service (EVS) or au pairing. The Directive (EU) 2016/801 also aimed to:

- Address the shortcomings identified in the implementation of the two previous Directives 2004/114/EC and 2005/71/EC. These mainly related to the admission conditions, rights, procedural safeguards, students' access to the labour market during their studies, intra-EU mobility provisions, the optional categories of third-country nationals, the need for better job-seeking possibilities for researchers and students and better protection of au pairs who are not covered by Directives 2004/114/EC and 2005/71/EC.
- to increase the attractiveness of the EU as a destination for these third country nationals, considering that they represent a source of highly skilled human capital in the global competition for talent. They can be utilised in ensuring smart, sustainable and inclusive growth, and therefore contribute to the achievement of the objectives of the Europe 2020 Strategy.

The Directive (EU) 2016/801 also aims to facilitate their mobility between the EU Member States and their access to the national labour markets.

### **1.6.2 EU policy context and external factors**

Directive (EU) 2016/801 is implemented in a complex policy environment covering several policy fields. At the strategic level, the Directive is relevant in the context of the Europe 2020 Strategy calling for smart, sustainable and inclusive growth and Education and Training 2020 Strategy aiming at better, more modern and internationalised systems of education. The latter aims are also supported by the EU initiatives in the European Higher Education Area and European Research Area which aim to modernise and internationalise the higher education sector in the EU. In

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<sup>37</sup> Commission, 2011. Report on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2011) 585 final. Available at [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/1\\_en\\_act\\_part1\\_v62\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/1_en_act_part1_v62_en.pdf)

parallel, the Innovation Union and EU2020 Entrepreneurship Action Plan called for more highly-skilled labour in the economy to support the knowledge and innovation based economic development. In addition, the policy developments in the migration area called for common and efficient migration admission and control procedures (European Agenda on Migration; European Commission priorities: 8th Priority Migration). Equally important for the Directive's implementation are the external factors of global competition for talent in research and development as well as the general unfavourable climate towards migration inside the EU. National policies in the area of higher education and migration were also affecting the migration flows of the students, researchers, trainees, volunteers and au pairs in this period.

### 1.6.3 The Directive's inputs

Directive (EU) 2016/801 contained a number of rules.

The scope of the Directive (EU) 2016/801 is broader than the previous Directives 2004/114/EC and 2005/71/EC, as the Directive (EU) 2016/801 will apply to third-country national students, researchers, trainees and volunteers engaged in the EVS. Member States may opt to extend the Directive's provisions to pupils, volunteers outside the EVS and au-pairs. Third-country nationals who are EU long-term residents, refugees or residing in the EU on a strictly temporary basis are excluded from its scope (Article 2).

Member States are obliged to foresee national rules for trainees as well as for volunteers under the EVS. This concerns unremunerated trainees, as it was the case under Directive 2004/114/EC, but also those who are remunerated. However, the notion of trainee has also been restricted to third-country nationals who hold a degree of higher education (or are pursuing a course of study that leads to a higher education degree). This restriction, reflecting the interest of the European Union in favouring highly skilled migration, was not present in Directive 2004/114/EC.

Third-country nationals falling into the categories provided for by the Directive (EU) 2016/801 benefit from a right to admission when the general and specific conditions are fulfilled. This derives from the case *Ben Alaya*<sup>38</sup> clarifying that Member States are obliged to admit a third-country national who wishes to reside for more than three months in that territory for study purposes, where that national meets the conditions for admission exhaustively listed in Articles 6 and 7 of Directive 2004/114/EC and provided that that Member State does not invoke against that person one of the grounds expressly listed by the Directive (EU) 2016/801 as justification for refusing a residence permit.

However, Member States still have some discretionary power when they examine applications under Directive (EU) 2016/801. For instance, these relate to the general conditions related to sufficient resources under Article 7(1)(b), the condition that the traineeship does not replace a job under the specific conditions for trainees (Article 13(3)), or the possibility for Member States to reject an application where there is evidence or serious and objective grounds to establish that the applicant would reside for purposes other than those for which he or she applies under Article 20(2)(f). The issue of discretion (as regards appreciation of a threat to public security) is subject to a request for a preliminary ruling in the case *Fahimian* currently pending before the Court.<sup>39</sup>

Important changes were introduced by the Directive (EU) 2016/801 concerning access to the labour market for the TCNs concerned. First, the Directive (EU) 2016/801 extends the right for students to access the labour market of a Member State while studying or undergoing a research project e.g. the amount of time a student may work has increased to minimum 15h/week compared to minimum 10h/week before

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<sup>38</sup> C-491/13 of 10 September 2014.

<sup>39</sup> C-544/15.

(Article 24). Second, the Directive (EU) 2016/801 also provides for the right to access the labour market of researchers' family members (Article 26). It grants them more favourable conditions by waiving restrictions set in the family reunification Directive (e.g.: minimum waiting period). The new rules provide family members immediate access to the labour market. The EU Member States may set limitations in cases of exceptional circumstances such as particularly high levels of unemployment (Article 26(6)).

The Directive (EU) 2016/801 grants to non-EU national students and researchers the right to remain in their host Member State for at least nine months after they complete their studies or research project in order to seek employment or set up a business (Article 25(1)). While some Member States already guarantee this right,<sup>40</sup> this right is not automatically granted, as students and researchers must apply for this 9-month residence permit and the Member States may check the genuine nature of employment search after a period of three months.

The right to family reunification for researchers has been strengthened by Article 26 of Directive (EU) 2016/801 in comparison to the very limited provisions of Directive 2005/71/EC.

Another important amendment is the strengthening of intra-EU mobility rights for both students and researchers (Chapter IV) which brings the new legal framework in line with other EU programmes such as Erasmus Mundus and Marie Curie. Directive (EU) 2016/801 to some extent confirms the concept of intra-EU mobility which first appeared in EU law as part of Directive 2003/109/EC on long term residents,<sup>41</sup> allowing third-country nationals to move between Member States, while freedom of movement is the rule for EU citizens. This concept has been further developed with the Directive 2014/66/EU on intra-corporate transferees and the Directive 2009/50/EC (Blue Card).<sup>42</sup> In the case of Directive (EU) 2016/801, when studies entail a period of European mobility under a European or multilateral programme or an agreement between higher education institutions, students have the right to study in another Member State for a period of 360 days per Member State on the basis of a simple notification to the second Member State. Students outside such schemes cannot benefit from mobility, contrary to what was foreseen by Article 8 of Directive 2004/114/EC for students admitted in a Member State for no less than two years. For researchers, a short-term mobility of 180 days is possible following a simple logic of mutual recognition of the authorisation delivered by the first Member State and possibly a notification to the second Member State. While for long-term mobility it is up to the Member State to decide whether to ask the researcher to submit the application, a notification or even no additional procedure, however, without prejudice to his/her right to carry out the research in the second Member State until a decision has been taken.

Procedural guarantees have been reinforced for all categories. Directive (EU) 2016/801 requires MS to provide the applicant with a decision within 90 days of the submission of their application (and even 60 days for those to be hosted in approved host entities) while the previous directives did not set any specific timeframe (Article 34). New procedural guarantees also include the right to receive reasons for an inadmissible or unsuccessful application or withdrawal of authorisation as well as the possibility to lodge an appeal against a negative decision (Articles 34(4) and (5)).

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<sup>40</sup> For e.g. Germany guarantees a right to stay after completion of studies of 18 months, Netherlands up to 12 months, European Commission, Staff Working Document, Impact Assessment accompanying the document Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of research and studies, COM(2013) 151 final, p. 20.

<sup>41</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

<sup>42</sup> Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

#### 1.6.4 Outputs, results and impacts

The main outputs anticipated from Directive (EU) 2016/801 and generating EU added value are the national rules and practices which will be set up to implement the Directive. Following the Directive's transposition, the main outputs will consist of different national approaches including:

- Member States which have transposed Directive without any change
- Member States which have used more beneficial provisions (gold-plating)
- Member States which have made use of the may clauses contained in the Directive (such as opting to extend the Directive's provisions to pupils, volunteers outside the EVS and au-pairs, discretion in the examination of applications, right to limit the labour market access of researcher family members in certain circumstances, discretion in the intra-EU mobility dimension)
- Member States where the Directive's rules are not transposed correctly.

These outputs should contribute to a number of direct results stemming from the implementation of the Directive (EU) 2016/801 and generating EU added value, such as simplified and common admission procedures for *bona fide* students, researchers trainees and au pairs: strengthened social and economic integration of these categories of TCN in the EU and removal of the unnecessary barriers to intra-EU mobility of students and researchers.

Other factors will affect the desired impacts from Directive (EU) 2016/801, however, the Directive can be expected to generate EU added value and make a contribution to strengthening the EU's competitiveness and knowledge-based economy due to students and researchers contributing to close some skills gaps in the labour markets. The Directive's rules should also contribute to an efficient distribution of students and researchers across Member States according to the needs in the specific research institutions and ensuring that the EU higher education systems remain excellent, modern and international.

### 1.7 Directive 2009/50/EC 'EU Blue Card' Directive<sup>43</sup>

This section outlines the intervention logic of Directive 2009/50/EC – 'EU Blue Card Directive', including an outline of the rationale for the Directive, its EU policy and external context, as well as the objectives, expected outcomes and impacts.

#### 1.7.1 Rationale and objectives

Council Directive 2009/50/EC, known as the EU Blue Card Directive, was adopted on the 25<sup>th</sup> of May 2009. It aims to determine the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

The Directive aims to respond to a need for attracting highly qualified workers from third countries in order to foster the knowledge economy and address labour and skills shortages in the labour market.

The Directive applies to third-country nationals who enter the territory of a Member State to take up highly qualified employment, which is defined as being an employee, being paid, and requiring higher professional qualifications (Article 2). The latter are defined as:

- Higher educational qualifications lasting at least three years (levels 5a and 6 of the International Standard Classification of Education (ISCED 1997<sup>44</sup>));

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<sup>43</sup> Please note that the scope of the study does not cover the 'Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment 2016/0176'.

- Optional provision for Member States: at least five years of professional experience at a comparable level to higher education and in a field relevant to the profession in which the worker is employed.
- Some categories of third-country nationals are excluded from the scope of the Directive (Art. 3), such as beneficiaries of temporary protection, international protection or humanitarian protection, researchers (under Directive 2005/71/EC) while applying to carry out a research project,<sup>45</sup> long-term residents (under Directive 2003/109/EC), persons who entered under an international agreement facilitating certain categories of trade and investment-related natural persons, seasonal workers, posted workers while posted and in the Member State where posted, and persons whose expulsion order has been suspended.

### 1.7.2 EU policy context and external factors

The EU Blue Card Directive was proposed by the Commission in 2007 and aims to contribute to the objectives set by the **Lisbon European Council** in 2002, which included an aim of making the EU “the most competitive and dynamic knowledge-based economy in the world”. Attracting highly qualified third-country nationals became an objective in itself to address labour shortages by fostering the admission and mobility of highly skilled workers that could boost the economy and make it more competitive.

The EU Blue Card Directive was the last legal migration Directive to be approved under the **consultation procedure**. The negotiation process was relatively quick, not least because the Council wanted to adopt the Directive before the entry into force of the Lisbon Treaty and the co-legislative procedure.<sup>46</sup> As a result, the Directive comprised many discretionary clauses whereby Member States could exert their margin of appreciation.<sup>47</sup>

The Directive has been the object of political debate and criticisms<sup>48</sup> for its alleged underachievement. In this context, in his 2014 **Political Guidelines**,<sup>49</sup> the President of the European Commission Jean Claude Juncker stated that one of his key initiatives would be to review the Blue Card; this was also one of the main elements of the 2015 **European Agenda on Migration**.<sup>50</sup> Given the political mandate and notwithstanding the fact that the Directive was only three years old (and even younger considering the

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<sup>44</sup> The Proposal 2016/0176 refers to ISCED 2011 with different levels, namely: levels 6, 7 or 8 of ISCED 2011, or levels 6, 7 or 8 of EQF, according to the choice of the Member State concerned (Article 2)

<sup>45</sup> Please note that researchers are only excluded when applying for the purposes of carrying out a research project. They are not excluded in cases when they apply for a job outside the scope of a research project or when already on territory as a researcher but changing to a job outside the scope of a research project.

<sup>46</sup> The implementation report COM/2014/0872 final states the following: "The Blue Card Directive was negotiated and adopted before the entry into force of Treaty of Lisbon. Under the former system unanimity was required in the Council, instead of the current qualified majority, and the European Parliament was not co-legislator. This led to long and difficult negotiations on the Commission's proposal. The resulting Directive only set minimum standards and left much leeway to MS through many "may-clauses" and references to national legislation."

<sup>47</sup> Roos, C. 2013. *The EU and Immigration Policies: Cracks in the Walls of Fortress Europe?* Basingstoke: Palgrave Macmillan

<sup>48</sup> Carrera, S., Guild, E., & Eisele, K. 2014. Rethinking the Attractiveness of EU Labour Immigration Policies CEPS; Eisele, K. 2013. Why Come Here If I Can Go There? Assessing the 'Attractiveness' of the EU's Blue Card Directive for 'Highly Qualified Immigrants'. *Liberty and Security in Europe Papers*, (60); Gümüs, Y. K. (2010). EU blue card scheme: the right step in the right direction?. *European Journal of Migration and Law*, 12(4), 435-453; Belmonte, M. (2015) The EU Blue Card - is there a need for a more comprehensive approach?, IES Policy Brief.

<sup>49</sup> Juncker, J. 2014. Political Guidelines., [https://ec.europa.eu/priorities/publications/president-junckers-political-guidelines\\_en](https://ec.europa.eu/priorities/publications/president-junckers-political-guidelines_en)

<sup>50</sup> European Commission, 2015. European Agenda on Migration, COM(2015) 240 final [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf)

delays in the transposition), the Commission started a review process, consisting in the evaluation of the current Blue Card Directive and in an impact assessment for its revision.<sup>51</sup> In June 2016 the Commission adopted a proposal for a **new EU Blue Card Directive**.<sup>52</sup> This proposal includes the following:

- A lower salary threshold, to be set by the Member State concerned between the 1 and 1.4 times the average gross annual salary at the national level;
- The duration of the job contract, shortened to 6 months;
- The equivalence between professional experience and education in recognising qualifications;
- A more facilitated scheme for intra-EU mobility and for accessing the long-term residence;
- The incompatibility of the EU Blue Card with national schemes for highly skilled workers, which will be no longer permitted.

The negotiations on the Commission's proposal are ongoing.

### 1.7.3 The Directive's inputs

The Directive sets out conditions for admission, procedural rules and a set of rights for the EU Blue Card holders and their family members. As per Art. 79(5) of the Lisbon Treaty, Member States remain fully competent on the volumes of admission of third-country nationals coming from third countries to their territory and can set specific quotas for Blue Cards. Moreover, they may decide to run national parallel schemes for highly skilled workers.

The prospective EU Blue Card holder is required to have a valid contract or a binding job offer of at least one year, as well as health insurance. The main requirements for the EU Blue Card holders are the **professional qualification** (educational qualification or, by way of derogation, professional experience) and the **salary offered** for the position to take up. The gross annual salary of the prospective EU Blue Card holder must be at least 1.5 times the average gross annual salary in the Member State concerned. By way of derogation, Member States have the option to define the gross annual salary as at least 1.2 times the average gross annual salary in the Member State concerned for employment in professions that suffer from workforce shortages, for which purpose the Member State communicates a list to the Commission, and belong to major groups 1 and 2 of the International Standard Classification of Occupation (ISCO-08), namely legislators, senior officials, and managers (major group 1) and professionals (major group 2) (Article 5). Before issuing the permit, Member States may decide to carry out a labour market test (Article 8), whereby the possibility to fill a vacancy with a person already on the EU labour market is tested.

Access to the **labour market** for EU Blue Card holders is limited during the first two years to the employment activities that meet the requirements to issue an EU Blue Card. After two years, Member States *may* decide to grant an EU Blue Card holder equal treatment to nationals on access to highly qualified employment (Article 12(1)). Moreover, changing employment during the first two years requires a written authorisation by the competent authorities (Article 12(2)). According to the Directive, the permit could not be automatically withdrawn if the third-country national finds herself or himself unemployed. **Unemployment** is allowed once for a maximum of

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<sup>51</sup> The executive summary of the Impact Assessment is available at the following link: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016SC0194> and the full impact assessment under this link: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016SC0193>.

<sup>52</sup> European Commission, 2016. Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0378:FIN>

three months, during which the Blue Card holder is allowed to seek employment (Article 13).

The EU Blue Card holder enjoys **equal treatment** to nationals in a number of areas, including working conditions, freedom of associations, education and vocational training, recognition of qualifications, access to goods and services available to the public. Member States may restrict equal treatment under certain conditions, for instance with regard to study and maintenance loans and procedures for obtaining housing.

**Family members** of EU Blue Card holders enjoy specific rights (Article 15): for instance, the decision to grant family reunification shall not depend on the perspective of the sponsor to obtain a long-term residence permit, or on the family member's compliance with integration measures. Moreover, the deadline to process applications of family members and therefore to issue a residence permit is six months after the application, and family members may apply simultaneously with the sponsor. They shall also have immediate access to the labour market, once in the Member State.

An advantage of the EU Blue Card compared to other permits is the possibility to accumulate periods of residence in other Member States to count towards the five years required to obtain **the right to long-term residence in the EU**. The EU Blue Card offers this possibility, as long as the last two years have been spent in the Member State where the long-term residency application is lodged.

However, the Directive's provisions do not offer significant facilitation when it comes to **intra-EU mobility**. It allows the EU Blue Card holder to move to another Member State and apply for the EU Blue Card there, and only after 18 months spent in the first Member States does limited facilitation apply, and the applicant gains some advantage when applying for the EU Blue Card in a second Member State. In these circumstances, the EU Blue Card holder can apply for a new EU Blue Card on the territory of the second Member State within a month (as opposed to having to apply outside the territory of the second Member State). The Member States have the option to allow the applicant to already start working before the decision is taken on the application. Family reunification is possible immediately, the family does not have to await the decision outside the Member State's territory. Periods of consecutive residence as an EU Blue Card holder in other Member States are taken into account for 5 years when the applicant makes use of the facilitation rights set out in Article 20.

#### **1.7.4 Outputs, results and impacts**

The main **outputs** of the Directive are the national rules and practices set up to implement the Directive. These rules and practices relate to:

- The criteria for admission of highly-skilled TCNs and their family members to the EU;
- The issuing of EU Blue Cards as a form of residence and work permit;
- Monitoring activities (through Member States' provision of statistics on the EU Blue Card, e.g. number of EU Blue Cards issued, renewed and withdrawn);
- Communication and exchange of information among Member States (through the appointment of contact points in Member States).

All of the national rules and practices have been mapped under Task II and more information is available there which reveals the following variations in national approaches:

- Member States which have transposed Directive without any change;
- Member States which have used more beneficial provisions (gold-plating);
- Member States which have made use of the may causes contained in the Directive (such as the use of discretion in the application procedures, or



allowing Member States to limit the right to equal treatment in certain situations);

- Member States where the Directive's rules are not transposed correctly.

The implementation of the EU Blue Card Directive was supposed to **result** in a more coherent approach for the EU to attract highly-skilled third-country nationals, simplified and harmonised admission procedures for highly skilled TCNs, and strengthening of the EU Blue Card 'brand'. However, the 2014 implementation report as well as the 2016 impact assessment of the EU Blue Card Directive show the extent of variation in national rules which have emerged as a result of the existence of may clauses and options for derogation. For example, many EU Member States continue to run parallel national schemes to attract highly-skilled third-country nationals that compete with the EU Blue Card and with each other. In many EU Member States the number of national permits issued exceeds that of EU Blue Cards. Some parallel national schemes cover other categories of workers not included in the EU Blue Card, such as investors, entrepreneurs and job-seekers. Such schemes may provide specific facilitation for e.g. workers in shortage occupations and recent graduates. In some schemes there are requirements for third-country nationals to have specific work experience prior to application, for either the national permits or the EU Blue Card (as an alternative to achieving a specified education level).

As regards **impacts**, the EU Blue Card scheme was intended to make the EU more attractive for highly-skilled third-country nationals, to help address labour and skills shortages and to help remedy the relative decline in working age population. Ultimately the EU Blue Card was supposed to boost EU competitiveness and the knowledge-based economy in the face of the global competition for talent as well as to decrease labour shortages in high-skilled occupations across the EU. Several indicators can measure these results and impacts: including the number of EU Blue Cards granted, the average period of residence of EU Blue Card holders, mobility rate of EU Blue Card holders, degree of coherence and harmonisation of Member States rules for highly skilled TCNs or average processing times for applications to be admitted as EU Blue Card holder or as a family member of the EU Blue Card holder.

The implementation report of the EU Blue Card Directive issued in 2014, identified several issues, such as the low level of harmonisation across EU Member States, which hampers the attractiveness of the EU for highly-skilled third-country nationals. The new EU Blue Card proposal (2016/0176)<sup>53</sup> is supposed to address the shortcomings of the current EU Blue Card Directive. It aims to improve the attraction and retention of highly-skilled third-country nationals. Amongst other changes, the new EU Blue Card proposal would simplify and harmonise the admission conditions procedures and rights under the EU Blue Card, as well as reduce complexity and increase the facilitation for recent graduates and workers in shortage occupations.

## **1.8 Directive 2014/36/EU Seasonal workers**

### **1.8.1 Rationale and objectives**

Directive 2014/36/EU, known as the Seasonal Workers Directive, was adopted on the 26<sup>th</sup> of February 2014. It aims to determine the conditions of entry and stay of third-country nationals for the purpose of seasonal work. It also establishes a set of rights

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<sup>53</sup> Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (2016/0176). The new EU Blue Card proposal is currently under negotiation. Further information are available at: <http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM%3A2016%3A378%3AFIN>

to which seasonal workers are entitled during their stay in the EU. The **objectives** of the Directive are threefold:<sup>54</sup>

- Providing the Member States with an entry scheme that enables them to face shortages in the seasonal employment sectors;
- Preventing exploitation of migrant workers, by providing them with a set of rights; and
- Contributing to the development of third countries, with measures that facilitate circular migration.
- The Directive, which represents the first piece of EU legislation on low-skilled labour migration,<sup>55</sup> is a complex legal instrument covering stays under and above 90 days.

### 1.8.2 EU policy context and external factors

As discussed above (see Section 2.3.2.3) the vertical approach adopted by the Commission in the field of legal migration represented a strategy to overcome the profound divergences among the Member States. The original 2001 proposal for a Directive covering all economic migrants<sup>56</sup> included the highly skilled as well as low skilled workers ('**horizontal approach**'). The horizontal approach met with resistance from Member States and was rejected. However, the Commission did not give up on the aim to provide an entry scheme for low-skilled workers, a far more controversial group than highly skilled workers. Even though the Directive was adopted in 2014, evidence of political will to regulate the migration of low-skilled workers can be found in several earlier initiatives. In 2006 the **Policy Plan on Legal Migration**<sup>57</sup> mentioned that the Commission would put forward a proposal on seasonal workers, with the aim of supplying the needed manpower to the EU labour market and of creating a secure legal status for seasonal workers. Later, the **Stockholm Programme**<sup>58</sup> stressed the link between migration and development and urged to maximise the positive effects of one over the other. Moreover, it stressed the need to open up legal migration channels to respond to labour market needs; and finally it highlighted the need to ensure fair treatment of third-country nationals. In this policy context, in July 2010 the Commission put forward the proposal for the Seasonal Workers Directive.

The Directive was negotiated under the **co-decision** procedure, introduced by the entry into force of the Lisbon Treaty, and some scholars deemed that this change in the applicable procedure was favourable to the adoption of the Directive.<sup>59</sup> The discussions lasted three years and three months and, for the first time, the Commission faced significant direct opposition from the national parliaments, which threatened to use the newly introduced 'yellow card' procedure<sup>60</sup>. In the discussions,

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<sup>54</sup> European Commission 2010. Summary of the Impact Assessment, SEC(2010) 888, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:0888:FIN:EN:PDF>.

<sup>55</sup> Fudge, J. and Herzfeld Olsson, P. The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights, available at <https://kar.kent.ac.uk/44227/1/FudgeandHerzfeldOlssonSeasonalWorkersDirectiveFinal%2028%20Sept.pdf>

<sup>56</sup> COM (2001/C 332 E/08) 127 final

<sup>57</sup> European Commission, 2005. Policy Plan on Legal Migration, COM(2005) 669 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0669&from=EN>.

<sup>58</sup> European Council, 2010. The Stockholm Programme. An open and secure Europe serving and protecting citizens, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF>.

<sup>59</sup> Fudge, J. and Herzfeld Olsson, P. The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights, available at <https://kar.kent.ac.uk/44227/1/FudgeandHerzfeldOlssonSeasonalWorkersDirectiveFinal%2028%20Sept.pdf>

<sup>60</sup> Lazarowicz, A. 2014. A success story for the EU and seasonal workers' rights without reinventing the wheel, EPC Policy Brief [http://aei.pitt.edu/56468/1/pub\\_4309\\_eu\\_and\\_seasonal\\_workers\\_\\_rights.pdf](http://aei.pitt.edu/56468/1/pub_4309_eu_and_seasonal_workers__rights.pdf)

Member States opposed the proposal on the ground of subsidiarity and proportionality.<sup>61</sup> Eventually, only the Netherlands, Czech Republic and Poland voted against the Directive.<sup>62</sup>

### 1.8.3 The Directive's inputs

The Directive 2014/36/EU sets out the conditions for admission, some procedural rules and a set of rights for seasonal workers, for stays both within and above 90 days. As per Article 79(5) of the Lisbon Treaty, Member States remain fully competent on the volume of admission and can set specific quota for seasonal workers.

The Directive 2014/36/EU does not provide a definition of '**seasonal work occupations**', but only an indication of what could be considered seasonal work (activities dependant on the passing of the seasons).<sup>63</sup> It is left for Member States, possibly in consultation with social partners, to compile a list of occupations which "are dependent on the passing of the seasons" (Article 1). The **requirements** (Articles 5 and 6) for admission include:

- A valid work contract or, when foreseen by national law, a binding job offer, which shall include details on the positions in compliance with collective agreements and/or practice (e.g. working hours, paid leave, and duration of employment);
- Health insurance for periods not covered by the work contract (or, when foreseen by national law, an application); and
- Evidence of adequate accommodation.
- Sufficient resources for the seasonal worker not to recur to the social assistance system.
- Evidence that the third-country national does not present any risk of illegal employment and intends to leave the territory once the employment is over;

The Directive includes a number of may clauses. While Member States must set the **maximum duration of the stay**, which shall however not exceed a period of nine months in a 12 month period (nor be below five months), Member States may decide to prolong the duration of the permit for three-month period after the initial seasonal contract is ended. Member States are allowed to perform a **labour market test** (Article 8) to verify the presence of suitable candidates, who are already on the EU labour market.

The authorisation issued to the seasonal worker can be renewed, within the maximum period, at least once with the same or another employer (Article 14). With a view of promoting circular migration, the Directive 2014/36/EU provides **facilitation for re-entry** of third-country nationals who already worked once as seasonal workers in the EU during the previous five years. Ways to facilitate their re-entry include an exemption from submitting some documents and accelerating or prioritising the application (Article 16).

The Directive 2014/36/EU (Article 17) requires Member States to introduce measures to prevent possible **abuses and to sanction** them. In addition, they are required to put in place mechanisms to deal with complaints against employers (Article 25) and to monitor, assess and carry out inspections to ascertain the compliance with the law. In

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<sup>61</sup> European Commission 2010. Report from the Commission on subsidiarity and proportionality (18th report on Better Lawmaking covering the year 2010), COM(2011) 344 final, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011DC0344>

<sup>62</sup> Council of European Union, 2014. Voting result of the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and stay of third-country nationals for the purposes of employment as seasonal workers, <http://data.consilium.europa.eu/doc/document/ST-6599-2014-INIT/en/pdf>

<sup>63</sup> The agriculture, horticulture and tourism sectors are mentioned in the preamble as typical cases.

particular, the Directive's provisions on **enforcement** are stronger than the ones foreseen by other EU legislation on migration and will probably be implemented in a variety of ways.

Article 23 defines the **rights** granted under the Directive 2014/36/EU. Member States shall ensure equal treatment with respect to nationals in a number of areas, for instance the terms of employment; right to strike, take industrial action and affiliate to unions; access to public goods and services (with the exception of housing); recognition of qualifications.

Seasonal workers must also enjoy equal treatment in the following areas:

- Some branches of social security (defined in Article 3 of Regulation 883/2004), although Member States may exclude family and unemployment benefits;
- Education and vocational training, although Member States may limit this only to activities linked to the employment activity and by excluding seasonal workers from benefiting from grants and loans; and
- Tax benefits, even if Member States may limit this based on the place of residence of the family member for which the seasonal worker claim benefits.

Member States had to transpose the Directive by the 30<sup>th</sup> of September 2016.

#### **1.8.4 Outputs, results and impacts**

The main outputs anticipated from the Directive 2014/36/EU and generating EU added value are the national rules and practices set up to implement the Directive.

A structured overview of the relevant aspects of the legal transposition has been undertaken as part of Task II. This will reveal the main differences in the national approaches to implementing the Directives, including:

- Member States which have transposed Directive without any change
- Member States which have used more beneficial provisions (gold-plating)
- Member States which have made use of the may causes contained in the Directive (such as compiling a list of seasonal occupations, or limiting the right to equal treatment e.g. in relation to tax benefits)
- Member States where the Directive's rules are not transposed correctly.

These outputs are expected to lead to a number of direct **results** stemming from the implementation of Directive 2014/36/EU and generating EU added value, such as a more coherent approach to providing sufficient seasonal labour in the EU, simplified, harmonised and more effective admission and re-admission procedures for seasonal workers, and seasonal workers benefitting from the same rights as MS nationals in the labour market.

The main **impacts** expected from the Directive 2014/36/EU relate to addressing seasonal labour shortages across the EU, reducing the exploitation of the seasonal workers and facilitating the re-entry of bona fide seasonal workers.

### **1.9 Directive 2014/66/EU Intra-corporate transfers**

This section outlines the intervention logic of Directive 2014/66/EU on Intra-corporate transfers, including an outline of the rationale for the Directive, its EU policy and external context, as well as the objectives, expected outcomes and impacts. **Error! eference source not found.** below summarises the intervention logic.

#### **1.9.1 Rationale and objectives**

Directive 2014/66/EU on intra corporate transfers, known as the Intra-Corporate Transferees Directive ('ICT Directive'), has the **objective** to establish common rules on the conditions of entry and residence of third-country nationals in the framework of

an intra-corporate transfer.<sup>64</sup> The ICT Directive covers intra-corporate transfers of highly skilled employees (in particular managers, specialists and trainee employees) to the EU.

The main **rationale** for the Directive are the labour market needs of an increasingly globalised business sector, including increasing trade and growth and spread of multinational companies that operate in the EU. The Directive is supposed to enable multinational companies to utilise their staff according to their business needs, and at the same time to allow the EU to benefit from the transfer of skills, knowledge, technology and know-how.

### 1.9.2 EU policy context and external factors

The ICT Directive is not the first attempt to regulate intra-corporate transfers. In the services sector, the World Trade Organisation already regulated the transfers through the General Agreement on Trade in Services (GATS), in force since 1995. The ICT Directive serves to complement and facilitate the application of the commitments taken by the EU under the GATS. It has a broader scope than the GATS agreement, as it does not cover only the service sector and it applies to companies in any country, including those that have not signed the GATS.

The ICT Directive is placed in the wider **policy framework** of the competition for talent and of the Europe 2020 Strategy for “smart, sustainable and inclusive growth”. The Stockholm programme highlighted that migration could have positive effects on competitiveness. One of the initiatives of Europe 2020 is the ‘agenda for new skills and jobs’ with the aim to modernise labour markets and empower people by developing their skills throughout the lifecycle with a view to increase labour participation and the better match of labour supply and demand, including through labour mobility. It underlined the need for focussed efforts to attract highly skilled TCNs in the global competition for talent and paving the way for new economic migration in sectors in which labour and skills shortages are emerging.<sup>65</sup> In this policy framework the temporary transfer of personnel within multinational companies who share their know-how was seen as beneficial to enhance productivity and stimulate innovation. In parallel, the policy developments in the migration area called for common and efficient migration admission and control procedures with a focus on attracting highly-skilled third country nationals to the EU (European Agenda on Migration; Action Plan on Migration).

Several **external factors** may affect the Directive’s implementation. These include, among others, the globalisation of business, increasing trade and the growth and spread of multinational groups, the global competition for talent and the demographic challenges that the EU is facing. In addition, national policies for attracting highly-skilled third-country nationals might also affect the migration flows of managers, specialists and trainees across company subsidiaries.

The ICT Directive was proposed by the Commission in 2010, and was negotiated in parallel to the Seasonal Workers Directive. The Directive, which was initially perceived as an uncontroversial piece of legislation, took nevertheless four years to be adopted and the difficulties in the negotiations especially concerned equal treatment and

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<sup>64</sup> Article 3 (b) defines ‘Intra-corporate transfer’ as “the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third-country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States”.

<sup>65</sup> European Commission’s Communication COM (2010) 2020, Europe 2020: A strategy for smart, sustainable and inclusive growth <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>

mobility.<sup>66</sup> The Directive entered into force on the 28th of May 2014 and the 25 participating Member States were supposed to implement it by 29 November 2016. As of January 2017, Bulgaria, France, Hungary, Italy, The Netherlands and Spain have transposed the Directive. The other Member States have not met the transposition deadline.<sup>67</sup>

### 1.9.3 The Directive's inputs

The **scope** of the Directive concerns temporary assignments of highly skilled third-country nationals to subsidiaries in the EU, thus allowing multinational companies to efficiently utilise their human capital. Furthermore, it aims at facilitating transfers by setting up harmonised conditions for admission, residence and work, including fast application procedures (maximum 90 days) and by creating a unique intra-EU mobility scheme for workers in the same undertaking or group of undertakings. Additionally, it lays down a common set of rights for intra-corporate transferees in the EU, in order to ensure worker protection and avoid distortions of competition (Article 18).

The Directive provides for **equal treatment** with the persons covered by the Posted Workers Directive as regards terms and conditions of employment. In other areas such as freedom of association, recognition of qualifications, some branches of social security, and access to goods and services made available to the public, intra-corporate transferees are entitled to equal treatment with nationals of the Member State concerned (Article 18).

Managers and specialists, to be eligible for an intra-corporate transfer, must have worked for the multinational company for at least three up to twelve uninterrupted months (to be decided by Member States) immediately prior to their transfer; whilst for trainee employees this period is shorter, from at least three to six uninterrupted months (Article 5(1)(b)), again to be decided by Member States. The application must include a work contract, which should comply with the administrative provisions and/or universally applicable collective agreements relevant for posted workers in similar situations and the salary should not be less favourable than the one of nationals in comparable positions (Article 5(4)). The permit is valid for a maximum of three years in the case of managers and specialists and for one year in the case of trainee employees (Article 12).

The ICT Directive sets **more favourable conditions for family members** (Article 19) than those provided under the Family Reunification Directive, whereby the decision to grant family reunification shall not depend on the perspective of the sponsor to obtain long-term residence or on the family member's compliance with integration measures. The residence permit of family members must be issued at the same time as that of the ICT, or within 90 days after the application is submitted and family members have immediate access to the labour market, once in the Member State.

The ICT Directive offers extensive **intra-EU mobility rights**. For short terms, i.e. for up to 90 days in a 180-day period per Member State, intra-corporate transferees are entitled to move and work in their company's subsidiary in another Member State. For longer terms, Member States may decide either to apply the same procedure as for short terms or to require a specific application procedure from the third-country national, which is a simplification of the procedure the applicant underwent in the first Member State (Article 22).

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<sup>66</sup> Lazarowicz, A. The Intra-Corporate Transferees Directive: time to break the deadlock, EPC Policy Brief [http://www.epc.eu/documents/uploads/pub\\_3445\\_intra-corporate\\_transferees\\_directive.pdf](http://www.epc.eu/documents/uploads/pub_3445_intra-corporate_transferees_directive.pdf)

<sup>67</sup> EUR-Lex website, National Implementing Measures (NIM) communicated by the Member States concerning Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer <http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32014L0066>

The Directive does not apply to researchers, posted workers, self-employed workers, students and persons assigned by any undertaking specialised in providing labour (e.g. employment agencies) (Article 2). Moreover, Member States remain fully competent on the volume of admission and can set specific quota for ICTs.

#### 1.9.4 Outputs, results and impacts

The main **outputs** anticipated from Directive 2014/66/EU relate to the national rules and practices that will be adopted to implement the Directive. These will relate to:

- Facilitating intra-corporate transfers through setting up harmonised conditions for admission, residence and work, including fast application procedures
- Monitoring activities (through Member States' appropriate checks and effective inspections)
- Making use of the European Qualifications Framework (EQF) for lifelong learning
- Applying the principle of equal treatment with persons covered by the Posted Workers Directive in areas such as freedom of association, recognition of qualifications, some branches of social security, and access to goods and services made available to the public
- Setting up more favourable conditions for family members.

A structured overview of the relevant aspects of the legal transposition has been undertaken as part of Task II. This will reveal the main differences in the national approaches to implementing the Directives, including:

- Member States which have transposed Directive without any change;
- Member States which have used more beneficial provisions (gold-plating);
- Member States which have made use of the may clauses contained in the Directive (such as the minimum period that managers and specialists must have worked for a multinational company to benefit from the provisions of the Directive);
- Member States where the Directive's rules are not transposed correctly.

The expected **results** of the Directive are facilitated intra-corporate transfers through minimising the administrative burden for companies and simplifying the procedures. Moreover, the Directive would lead to a removal of unnecessary barriers to intra-EU mobility of intra-corporate transferees and create a common approach to intra-corporate transfer in the EU.

The **impacts** expected from the Directive include enabling companies to better match their labour supply and demand and lead to enhanced productivity and stimulating innovation, by sharing experience. This would generate EU added value and put the EU in a stronger position in its relationship with international partners.

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