



Legal Migration Fitness Check

Contextual analysis : Intervention logic External Coherence

Annex 1Cii



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1.1 Introduction to the external intervention logic analysis

1.1.1 Purpose and structure of the external intervention logic

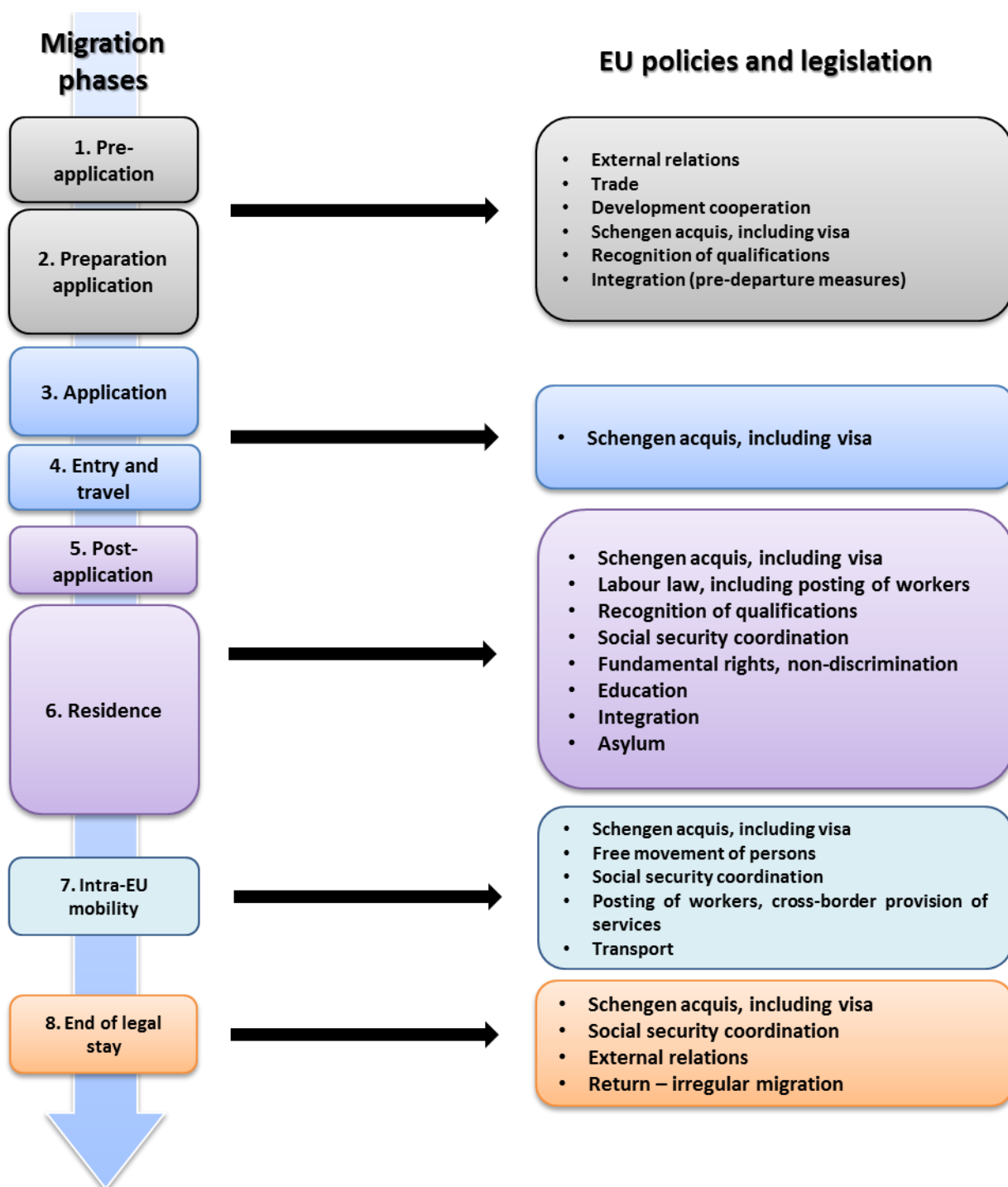
This document includes an analysis of external policy areas that were identified as relevant to the Fitness Check.

The purpose of the section is to analyse the interaction between the Legal migration Directives and these external policies and legislation.

This paper should be read in conjunction with other papers developed during the course of this study, notably the gap analysis papers that deal with specific categories of third country migrants, as well as papers on specific horizontal issues, in particular, exploitation of third country workers, attractiveness and transition into irregular stay.

1.1.2 Graphical representation of external legislation and other factors influencing the implementation of the legal migration Directives

Figure 1. Joint Intervention Logic for the legal migration Directive



1.2 External coherence with the Schengen acquis

In this section we analyse the coherence, possible inconsistencies or gaps between the Schengen acquis and the rules provided in certain legal migration Directives.

Geographical scope of the Schengen acquis

The Schengen¹ acquis is currently implemented by 26 States: 22 Member States² and 4 Associated Countries³, meaning that these States have abolished border control at their internal borders and have established common entry conditions and controls at their external borders. Third-country nationals (TCNs) wishing to enter the Schengen area should comply with a number of entry conditions such as having a valid travel document, a valid visa and documents justifying the purpose and the conditions of stay in the Schengen States to be visited. They shall not be subject to an alert in the SIS system and are not considered to be a threat to public policy and security. The Schengen Agreement requires maintaining a high level of trust between Member States. For this reason, recently, several key initiatives were taken to enhance external border management and internal security: (describe here Entry-Exit System and ETIAS)

A few Member States **opted-out** partially⁴ or entirely⁵ from the Schengen acquis and are not expected to join the Schengen Area in the future. Conversely, four Member States, Bulgaria, Croatia, Cyprus and Romania, are not yet part of the Schengen Area, but are likely to join it in the coming years. In practice, it means that these countries apply common rules on external border control but cannot issue Schengen visas: they only issue national short-stay visas the validity of which is limited to their own territory.⁶

EU policy on visas

As part of the Schengen acquis, the EU has harmonised the **conditions for application and procedures for issuing uniform short-term visas in the Community Code on Visas**.⁷ However, not all TCNs are subject to a visa obligation

¹ The Schengen acquis refers to a number of agreements signed before the entry into force of the Treaty of Amsterdam and later integrated into EU law: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997D%2FPRO%2F02%2FN>. Since then, a number of additional legal instruments were adopted to further shape in practice the Schengen area, such as the Schengen Borders Code and the Schengen Information System (SIS). See Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), Regulation (EC) 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), and Commission Recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons, C (2006) 5186 final.

² Namely Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden.

³ Iceland, Liechtenstein, Norway and Switzerland.

⁴ Although Denmark has signed the Schengen Agreement, it can choose whether or not to apply any new measures taken under Title IV of the EC Treaty within the EU framework, even those that constitute a development of the Schengen acquis. However, Denmark is bound by certain measures under the common visa policy.

⁵ This is the case of the UK and Ireland, who do not apply the Schengen acquis at all.

⁶ Bulgaria, Croatia, Cyprus and Romania. See Protocol to the Agreement on the Member States that do not fully apply the Schengen acquis available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22007A0517\(02\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22007A0517(02)). A Schengen Visa issued for one of the Schengen countries enables travel to these non-Schengen countries for up to 90 days in a 6 months period per country.

⁷ Regulation No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code); see also the Consolidated version 15.9.2011 of the Handbook for the processing of visa applications and the modification of issued visas, based on Commission decisions C(2010) 1620 final of 19.3.2010 and C (2011)5501 final of 4.8.2011. See also the Schengen Convention (Articles 3-18)

to enter into the territory of Member States for a short stay as the EU established and regularly updates a list of third countries whose nationals are exempt from this obligation.⁸ Additionally, a Member State may exempt from visa requirements some categories of TCNs such as civilian air and sea crew, flight crew and attendants on emergency or rescue flights and other helpers in the event of disaster or accident, and holders of diplomatic passports, official duty passports and other official passports.⁹

If TCNs exempted from any visa requirement on the basis of their nationality want to carry out a **paid activity during their short stay**, Member States may re-impose a visa requirement.¹⁰ No definition of 'paid activity' is provided in Regulation (EC) 539/2001 but EU visa-waiver agreements concluded with third countries specify that it does not include business persons (i.e. third-country nationals travelling for the purpose of business deliberations), sports persons or artists performing an activity on an ad-hoc basis, or journalists sent by the media of their country of residence and intra-corporate trainees.¹¹

As well as exemptions for some categories of TCNs, the EU has also concluded a number of **visa facilitation agreements** with third countries, as a result of which, third-country nationals from those countries benefit from facilitated procedures for the issuance of short-stay visas such as a faster processing of the visa applications, and an exemption or reduced visa fees.¹² EU citizens travelling to those countries may also benefit from reciprocal arrangements.

As a result of the above, **uniform short-term visas** issued by one of the Schengen States entitle their holders to stay and travel throughout the 26 Schengen States for **up to 90 days** in the previous 180 day period. In addition to this, because of the unilateral recognition of short term visas, Schengen short term visas also entitle their holders to enter and stay 90 days in any 180 day period in Bulgaria, Cyprus, Croatia, Romania, if the duration of the stay does not exceed the validity of the Schengen Visa. Generally, such visas do not provide for the possibility to undertake any paid activity in a Schengen Member State and they are issued for business trips, tourism, visits of family members or for attending sports or cultural events, etc.

Issuing visas and residence permits in accordance with the legal migration acquis

In practice, there is a strong interdependence between the Schengen acquis and the legal migration acquis. This comes from the overall purposes of the two policies as set out below:

- **Schengen policy** frames the entry and stay of TCNs in the **Schengen area** for up to 90 days in any 180 days period. In general, Schengen visas issued for the reasons mentioned in the above paragraphs.
- **Legal migration policy** regulates entry, residence and **work** in the **EU**. The geographical scope is thus not the same as that of the Schengen Area, but there is significant geographical overlap between the two: the EU28 minus UK, Ireland and Denmark. The main difference when compared with Schengen policy is regarding the purpose and the

for a definition and type of visas: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922\(02\):en:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):en:HTML).

⁸ See Annex II of Council Regulation 539/2001.

⁹ Article 4(1) and (2) Council Regulation 539/2001.

¹⁰ Article 4(3) Council Regulation 539/2001.

¹¹ As an example, see joint declarations to the Agreement between the EU and the Federated States of Micronesia on the short-stay visa waiver [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22016A1025\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22016A1025(01)).

¹² Full list to be found here: https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy_en.

duration of the stay. Legal migration policy covers **stays longer than 90 days**, except under the Seasonal Workers Directive. Generally, though not exclusively, legal migration policy covers work-related, remunerated activities.

The interaction between the two comes from the fact that the visa policy (possession of a visa or a visa application pending) is part of the admission conditions for legal migration permits. See for instance Article 5.f of the ICT Directive – admission criteria:

'...present a valid travel document of the third-country national, as determined by national law, and, if required, an application for a visa or a visa; Member States may require the period of validity of the travel document to cover at least the period of validity of the intra-corporate transferee permit'.

However, it should be noted that whilst the SWD refers in Article 6 to a valid travel document and enables MS to define what conditions this travel documents should comply with, valid travel documents are expressly defined in the Schengen Borders Code – Article 5.1 (a). This raises a question of the compatibility / coherence between the two.

Although a visa requirement is mentioned under admission conditions, the EU legal migration Directives do not impose on MS the type of visa (short term, long term, no visa) to issue to TCNs who are applying for EU residence permits on the basis of EU legal migration Directives.

- The Single Permit Directive (consideration 11) - *The provisions of this Directive on the single application procedure and on the single permit should not concern uniform or long-stay visas.*
- And Article 4.3 *The single application procedure shall be without prejudice to the visa procedure which may be required for initial entry.*
- The S&RD clearly specifies that the authorisation can mean a residence permit or a long stay visa (Article 3 definition 21).

Generally Legal Migration Directives simply mention that:

- The Member State concerned shall grant third-country nationals whose application for admission has been accepted every facility to obtain the requisite visa. (Article 13.7 ICT Directive)
- The Member State concerned shall grant the third-country national every facility to obtain the requisite visas. (Article 7.1 Blue Card Directive)
- Same in -> Article 13 Family reunification

In practice, this leads to a variety of procedures which differ from Member State to Member State and from situation to situation. If a positive decision is taken in relation to the work/residence permit, a country may choose to ask the TCN to enter its territory in different ways to start performing his/her activity under the Legal Migration Directives:

- Without a visa (if visa waiver national). But even in this case, countries may ask for short term visa, because the TCN is coming for work purposes OR
- With a short stay visa OR
- With a long stay visa

This may lead to inconsistencies between the Legal Migration Directives and the Schengen acquis as Member States could enable entry on the basis of the visa waiver program for long-term stay under the Legal Migration Directives or issue a short term

Schengen visa to enter the country although the purpose is to stay long-term for work purposes.

Most legal migration Directives specify that an application for a residence permit by a TCN is only possible from outside of the territory of the Member States, or only from holders of a long-stay visa or a residence permit (for example in the Blue Card Directive). A few Directives derogate from this rule in order to allow for more flexibility and thus provide Member States with the possibility to allow applications from **TCNs already 'legally present'** on the territory of a Member State but who are not holders of a residence permit or a long-stay visa. This is a possibility for Member States in the S&R Directive and is foreseen in the proposal for a recast EU Blue Card Directive.¹³ This concept of "legally present" in a Member State comprises situations where TCNs are staying in a Member State under a short-stay visa or as visa exempt. This may create inconsistencies with the Schengen acquis: TCNs may enter the territory of a Member State with already a view to apply for such student or researcher permit and this may be incompatible with the Schengen acquis according to which the authorisation for a third-country national to enter the territory of a Member State is dependent on the purpose of stay.

In practice, a change of status from short term stays to other long term stays is possible, although not referred to in the legislation, for example, applications for family reunification. For legal certainty and more harmonisation, Directives should specify if/when this is allowed and have clear procedures both for visa nationals and for non-visa nationals on how a change of status from short term to long term is possible.

In addition, if a researcher is present with a short term visa (for which he/she had to prove the temporary nature of his/her stay) but intends to stay for a long term research, this presents an inconsistency.

Uniform format permits (Regulation (EC) No 1030/2002) and Schengen mobility

Permits issued under EU legal migration Directives use the uniform format laid down in the 2002 Regulation¹⁴: (see Article 13.3 ICT, Article 17 S&RD for example). This Regulation is part of the Schengen acquis (i.e. the development provisions).

The Schengen Borders Code (Article 6.1.b.), which enumerates the conditions of entry of TCNs, states that when a TCN is in possession of a valid residence permit or valid long stay visa from one of the states applying the Schengen acquis in full, he/she no longer needs a short term visa for entry and stays of up to 90 days in any 180-day period. In the Schengen Borders Code, the residence permit is defined as those residence permits issued by MS according to the uniform format laid down in the 2002 Regulation (See Article 2.16).

This means, in practice, that when a TCN is in possession of a residence permit issued under one of the legal migration Directives in one EU country, he/she can travel within the Schengen Area without a short term visa for up to 90 days in any 180 day period for the reasons described above.

The issues that occur in this context emerge from the different geographical scope of the two policies:

- Schengen Area: 22 EU countries + 4 associated non-EU countries
- Legal Migration Directives: EU28 – UK, Ireland and DK

¹³ Article 7(4) of the S&R Directive and Article 9 of the proposal for a recast Blue Card Directive.

¹⁴ Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals

Therefore, we may have:

- EU 'legal migration permits' issued by non-Schengen countries: Croatia, Cyprus, Romania, Bulgaria
- They are listed in Annex 22 of Schengen Border Guards Handbook (<https://www.sem.admin.ch/dam/data/sem/rechtsgrundlagen/weisungen/visa/vhb/vhb1-anh02-e.pdf>). However, these permits – although issued by these countries according to the uniform format – are not considered as being equivalent to short term visas.
- For example: A Blue Card permit issued by Romania does not allow the TCN to travel in the Schengen Area for 90 days in any 180-day period.
- It is the same as a short term visa. A short term visa issued by Romania does not allow travel in the Schengen Area, TCN must apply for a Schengen short term visa to travel to the Schengen Area in addition to the Romanian visa.

There is no problem of inconsistency, but variable geographic and complex rules make their application very difficult and it is very challenging for third country nationals and their employers to be fully compliant.

- EU 'legal migration permits' issued by Schengen countries allow TCNs to travel to these four non-Schengen countries because of unilateral recognition (Decision 565/2014/EU)
- Also, recognition between non-Schengen countries of their uniform format permits, results in the possibility of travel from a Bulgaria to Romania/Cyprus/Croatia with a Bulgarian Blue Card.¹⁵
- Schengen countries that do not issue permits under the legal migration Directives
- Norway, Switzerland, Iceland, Lichtenstein – however, as they are Schengen countries they are subject to 2002 Regulation and the permits they issue according to the uniform format also allow travelling inside the Schengen Area.

So Schengen mobility attached to uniform format permits is regulated in several pieces of legislation and in a rather fragmented way (Schengen Borders Code + annexes of the border guards' handbook + Decision of 565/2014/EU). Some EU legal migration Directives mention these rights partially in their considerations (SP – con 18, ICT- con 26, BC -con 14).

However, it would be preferable to have a consistent reference to the Schengen Acquis in all Legal Migration Directives and have the Schengen rights explicitly mentioned in the 'Rights Article' of the Directives.

For consistency and legal certainty, the legal migration Directives should specify this precisely. This would also enable a better distinction between the Schengen rights granted by these permits issued under the uniform format and the intra-EU mobility rights for work purposes (developed in the next chapter).

Interaction between short-term intra-EU mobility schemes in legal migration Directives and the Schengen acquis

Some EU legal migration Directives (ICT, S&RD) grant two types of short term mobility rights:

- **Schengen mobility rights** (uniform format permit) as explained above: 90 days in any 180 day period in the Schengen Area, mainly for

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these purposes: business trips, tourism, visits of family members or for attending sports or cultural events

No entry visa in the other countries required

- **Intra-EU short term mobility rights** for work purposes:

ICT 90 days in any 180 days per country (not restricted to the Schengen Area, but to the countries which apply the ICT Directive)

S&RD (short term mobility for researchers: up to 180 days in any 360-day period per Member State, again not restricted to the Schengen Area, but to the countries which apply the S&RD)

The main objective of this provision is that no work permit is required in the second MS

In practice, there is some confusion because of the similar formulation (90 days in any 180 days per country/per entire Schengen area), plus the different geographical scope. In addition, many EU legal migration Directives do not make the distinction between these types of mobility, and in practice, there are issues for non-Schengen countries. For instance a Romanian ICT permit holder does not benefit from Schengen mobility but does benefit from short term intra-EU mobility for work purposes. Therefore, s/he will not need a visa to go and work for a short period in another EU country, but will need a visa to go visit a relative in another EU country. This will also apply to students and researchers under the new Directive.

In addition, as for family members there are no short term mobility provisions in these Directives ICT and S&RD. Family members can only rely on the Schengen mobility provisions which are less generous than the intra-EU short term mobility rights for work purposes of the ICTs or Researchers. This means that in some cases family members cannot accompany the ICT or Researcher for the entire duration of his/her short term mobility.

The other legal migration Directives only grant Schengen short term mobility rights.

- Regarding **long term mobility rights** (ICT, Article 22: S&RD, Article 29) and / or moving to a second MS (Blue Card, Article 18) there is no mention of a visa; in the LTR, Article 15, there is again no mention of visa)

Thus the second MS cannot ask for a visa and there is consistency.

An intra-EU mobility scheme is one of the advantages and 'selling-points' of certain legal migration Directives. As analysed in other sections of this report¹⁶, a number of legal migration Directives do provide for short-term intra-EU mobility schemes, such as the ICT and S&RD Directives. These mobility schemes differ from the Schengen acquis which allows for short-term mobility of a 90-day period in *all* Member States. Indeed, holders of an ICT or researcher permit may move in all EU Member States (except those Member States not implementing that Directive) autonomously from the Schengen acquis. More specifically, the short-term mobility is allowed for up to 90 days in any 180 day period *per* Member State in the ICT Directive and of 180 days in any 360 days *per* Member State in the S&RD. Hence, short-term mobility schemes in the ICT and S&RD are more generous than the Schengen acquis in its geographical scope and duration. Another difference is that unlike the Schengen mobility, this type of mobility scheme enables travel for work purposes.

Additionally, TCN holders of an ICT or student or researcher permit of a **Member State not fully implementing the Schengen acquis** will not need a Schengen visa to move to another Member State and thus cross the external borders of the Schengen Member States. A number of safeguards were included in these Directives

¹⁶ See intra-EU mobility section (internal coherence).

to the effect that if TCN holders of such permits are considered to pose a threat to public security or public order, their entry may not be allowed by a Schengen Member State (in common with the Schengen Borders Code). Another safeguard is the notification procedure enabling the second Member State to be informed of the movement of a TCN to its territory.¹⁷

Scope SWD short-term visas and the Schengen acquis

The SWD Directive is the only directive to cover stays not exceeding 90 days. This particular set-up in the Directive raises questions on the clarity between the rules on admission of seasonal workers for stays less than 90 days and the interaction with the Schengen and visa rules. The relevant admission rules for each TCN will then depend on the length of stay (up to 90 days or longer) and on whether the prospective Member State of residence fully applies the Schengen acquis or not.

The Directive provides that for **stays not exceeding 90 days** in a Member State fully applying the Schengen acquis, the Directive has to be applied in conjunction with the Visa Code, the Schengen Borders Code and Regulation 539/2001.¹⁸ This means for example that TCNs who do not enjoy an exemption from the visa requirement have to comply with all relevant rules on the issuing of short-stay visas as set out in the Schengen acquis. In this case, some questions appear on the alignment of the application requirements under the SWD and the Visa Code, notably as regards the requirement for sickness insurance in the former and the travel medical insurance in the latter, and whether they are equivalent or interchangeable requirements.¹⁹ The European Commission²⁰ has interpreted Article 5(1)(b) as not requiring an additional insurance to that required under the Visa Code²¹ to avoid excessive burden for the seasonal worker.

For **Member States not fully applying the Schengen acquis**, only the Schengen Border Code applies. Therefore the SWD provides for these Member States to satisfy specific requirements (common also to the Schengen acquis).²² In addition to verifying the entry conditions, these Member States must ensure that TCNs applying for a SWD short-stay visa do not present a future risk to irregular migration and intend to leave the territory of the Member State at the latest on the date of expiry of the authorisation to stay. The Directive does not provide details on how this could be verified in practice and what documents should a TCN submit; however, this provision is set out in the Visa Code, and thus should be interpreted in the same way.

Another difficulty between the provisions of the SWD and the Visa Code is the **extension of short-term visas** above the 90 day period. The grounds for extension for a short-stay visa in the SWD appear to contradict the provisions of the Visa Code. Indeed, while the SWD provides that the extension of such a visa is regulated by the Visa Code, the latter does not appear to address the particular situation of seasonal workers, notably regarding the compulsory grounds of extension and the optional grounds.²³ The European Commission²⁴ considered the work contract of a seasonal

¹⁷ See Articles 32 of the S&R Directive and 23 of the ICT Directive.

¹⁸ Article 2(1) of the SWD.

¹⁹ Article 5 of the SWD and Article 15 of the Visa Code.

²⁰ See Migrapol, Mig Dir 64, Mig Dir 69, Mig Dir 71, Mig Dir 77, Mig Dir 87, Mig Dir 94, available at: <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2904&NewSearch=1&NewSearch=1>.

²¹ In accordance with Article 15 of the Visa Code, the sickness insurance must cover "expenses which might arise in connection with repatriation for medical reasons, urgent medical attention and/or emergency hospital treatment or death" (Article 15(1)). This would cover most of the expenses that may be faced by the seasonal worker in the few days between his/her arrival on the territory of the Member State and the start of his/her job, when he/she will be covered by the equal treatment provisions as regards notably social security.

²² Article 5(5) of the SWD.

²³ See Article 15(10) of the SWD and Article 33 of the Visa Code.

worker with the same employer or a different one to be a 'serious personal reason' in the meaning of Article 33 of the Visa Code and therefore a ground for an extension of his/her stay not exceeding 90 days.²⁵

Specific categories of third-country nationals and gaps in the legal migration Directives

Certain categories of third country nationals enter the EU for work purposes without being covered by the legal migration Directives or the Schengen rules. A very good example are TCNs who stay and work fewer than 90 days in any 180 day period in one Member State, but have a total stay in the Schengen Area of more than 90 days in any 180 day period, for instance, artists, transport workers, etc.

These categories are problematic because:

- They cannot ensure long term stay for work purposes in the EU
- They are subject to national immigration schemes as to whether they can legally work and what authorisation is required in this respect.

However, if a solution is found for these people to be able to stay more than 90 days in any 180 day period in the Schengen Area, they will still be confronted with the issue of having to apply for work permits in all the countries where they will work, be it for a few days/weeks.

The European Commission published a proposal for a Regulation for a **touring visa** in order to fill a gap between the Schengen acquis and the legal migration Directives.²⁶ The context of the proposal was based on the conclusion that many third-country nationals – tourists, live performance artists - want to travel within the Schengen area for more than the 90 days in a given 180 days period without wanting to reside in a particular Member State for longer than 90 days and without having to leave the Schengen area for 90 days in between their stays. The proposal was submitted by the Commission in 2014 but was subsequently withdrawn. There will be a new proposal to review the EU Visa Code in 2018.

The Regulation establishing an "**Entry/Exit System**" was adopted on 30 November 2017²⁷ to identify overstays of TCNs remaining in the Schengen Area after the end of their authorised stay.²⁸ This system applies to entries and exits of TCNs coming for less than 90 days, be they visa-required or visa-exempt TCNs, and the competent authorities would be alerted automatically when the system identifies someone as an over-stayer. As a result, this Regulation does not apply to holders of long-stay visas and residence permits, as well as to TCNs under the mobility schemes of ICT and S&R

²⁴ See Migrapol, Mig Dir 64, Mig Dir 69, Mig Dir 71, Mig Dir 77, Mig Dir 87, Mig Dir 94, available at: <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2904&NewSearch=1&NewSearch=1>.

²⁵ This is also in line with the Visa Handbook (Part V, point 1.2) which gives as an example the situation of a businessperson coming to the EU to negotiate a contract, and where negotiations take longer than expected. The obligation to extend the visa would in that case not come from the Visa Code (where it is a "may" clause) but from the Directive, if all conditions are fulfilled.

²⁶ Proposal for a Regulation establishing a touring visa and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 562/2006 and (EC) No 767/2008 COM(2014) 163 final, Brussels, 1.4.2014.

²⁷ Regulation (EU) 2017/2226 of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011.

²⁸ COM(2016) 196 final, Brussels, 6.4.2016. This proposal aims to amend Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code),

Directives (Art. 2.3), and therefore poses no friction with the Directives in the legal migration acquis.

Conclusions

There are a number of specific issues to note when analysing the coherence of the EU legal migration Directives with the Schengen acquis:

There is a difference in geographical scope between the legal migration Directives and Schengen policy – this variable geography makes it difficult to be fully compliant, and a number of gaps are apparent.

In relation to a change of status of TCNs from short term visa to long term stay, not all the legal migration Directives are clear on this and in practice MS have diverse processes.

There is no clear distinction between Schengen short term mobility with EU permits and short term mobility for work purposes (different duration, issue of family members. There are also some coherence issues regarding permits issued by non-Schengen countries.

There are coherence issues for those who are not covered by legal migration Directives or Schengen, e.g. those who stay in the Schengen Area for more than 90 days in any 180 day period (but only a few days/weeks in one country). The solutions which must be found must allow them to enter, stay and work without having to apply for work permits in all the countries.

1.3 Interaction with the asylum acquis: Family Reunification and other issues

1.3.1 Interaction with the asylum acquis: Family Reunification

The Family Reunification Directive²⁹ governs family reunification of third-country nationals legally staying in the EU, including refugees. In respect of the EU asylum *acquis*, specifically the recast Qualification Directive³⁰ as well as the proposal for a Qualification Regulation³¹, also contain provisions related to family unity. The Dublin III Regulation³² and the proposal for a Dublin IV Regulation³³ also refer to family unity at the asylum seeking stage.

Differing objectives: The Family Reunification Directive has as its objective the family reunification (and formation) of legally staying third-country nationals with their third country family members who may still be residing in third countries. Contrary to this, the rules on family unity in the Qualification Directive are limited to family members already present in the same Member State (MS). The Dublin Regulation is not designed as providing an individual right to family reunification. It primarily establishes which MS is responsible to assess an asylum application and it refers to family links as one of the criteria to be taken into account for establishing responsibility of a Member States. Due to these differing objectives of the legal instruments the definitions of family members as well as the scope of application of the right to family life is not fully coherent.

One main gap in the **Family Reunification Directive** is that it offers facilitated family reunification to **refugees** as sponsors but not to **beneficiaries of subsidiary protection** (BSPs). BSPs are subject of the normal regime applicable to any third country national. One historic reason for this distinction is that at the time of adoption of the Family Reunification Directive, there was no common European definition of subsidiary protection and all protection categories apart from refugees were excluded from the scope.

1.3.1.1 Legal definitions and term

The **following terms and legal definitions** are relevant for the topic of this section

Family members: Family members are defined differently in different legal instruments as shown below:

Family Reunification Directive: according to Articles 4 and 10, the Directive applies at least to the sponsor's spouse and minor children of the sponsor and of his/her spouse, and to parents (and optionally other guardians) of unaccompanied minor refugees. Minor children include (a) children adopted in accordance with a decision

²⁹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

³⁰ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

³¹ Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

³² Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

³³ Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final.

taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations; (b) adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement; (c) adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement.³⁴

The Dublin III Regulation³⁵ contains a series of provisions on protection of applicants, and guarantees for minors (including a detailed description of the factors that should lay at the basis of assessing a child's best interests). As indicated in the preamble³⁶, the Dublin III Regulation should be applied in line with the best interests of the child and with respect for family life, in accordance with international instruments.

Dublin IV Regulation proposal: The Commission is now proposing to revise and replace the current asylum instruments to better manage migration flows and offer more adequate protection where necessary, including stronger guarantees for unaccompanied minors and a balanced extension of the definition of family members. In addition to the spouse and the children, the proposal's definition of family members includes also the father, mother or another adult responsible for the applicant when the applicant is a minor and unmarried, and, which is an amendment to the Dublin III Regulation, siblings of the applicant (Article 2 (g)). The proposal also includes family relationships which were formed after leaving the country of origin.

Qualification Regulation proposal: Article 2 (9) includes in the definition of family members the family that already existed before the applicant arrived on the territory of the Member States (including families formed in transit countries) and which includes the spouse of the beneficiary of international protection, or his or her unmarried partner in a stable relationship, the minor children and the father and mother or another adult responsible for the beneficiary of international protection, when that beneficiary is a minor and unmarried. Like the QD, the proposed provisions of the family unity in QR aim at ensuring a right to reside to those family members who are already present together with the asylum applicant in the given MS in relation to the asylum application once the applicant is granted protection.

Refugee: A third-country national who has been granted a refugee status under the Qualification Directive. According to Article 2(d), a refugee is defined as a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country.

Beneficiary of subsidiary protection (BSP): A third-country national who has been granted a subsidiary protection status under the Qualification Directive. According to Article 2(f), a person eligible for subsidiary protection is a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial

³⁴ Article 4 also indicates that the minor children must be below the age of majority set by the law of the Member State concerned and must not be married. By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.

³⁵ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

³⁶ paragraphs 13-16

grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country. It should be highlighted that there is a difference in the current *acquis* of the foreseen residence permit validity of refugees and BSPs reflecting the presumably more temporary need of protection, so BSPs might only have one year residence permits. Hence there might be a link/justification for having different family reunification rights of both categories.

1.3.1.2 Scale of the problem / gap

Out of all the persons who were granted protection status in 2016 in the **EU**, 389 670 persons were granted refugee status (55% of all positive decisions), 263 755 subsidiary protection (37%) and 56 970 authorisation to stay for humanitarian reasons (8%). It should be noted that, while both refugee and subsidiary protection status are defined by EU law, humanitarian status is granted on the basis of national legislation. The absence of facilitated family reunification rules in the EU therefore affect ca **45% of all third country nationals benefitting from protection in the EU**.

Regarding the rules in place for BSPs, according to the EMN Focussed Study on Family Reunification of Third- Country Nationals in the EU (plus Norway), the majority of Member States grant family reunification also to BSPs (AT, BE, BG, DE, EE, ES, FI, FR, HR, HU, IE, LT, LU, LV, NL, NO, SE, SK, UK). In many Member States BSPs can apply for family reunification under the same conditions as refugees (BE, BG, EE, ES, FR, HR, HU, IE, LT, LU, NL, NO, SI, SK, UK). It should be noted, however, that some Member States (in particular DE, SE, FI, AT) have recently made their policies for BSPs more stringent, thus underlining the effects of the lack of EU harmonisation in this area.³⁷ In such cases, the gap has been exacerbated by the fact that the statuses of refugees and BSPs have otherwise been more closely aligned in the EU asylum *acquis*.

According to a study on the application of the recast Qualification Directive, 10 Member States already apply a broader definition of family members when implementing the Qualification Directive, including siblings.³⁸

1.3.1.3 EU Level responses to the problem

Regarding the extended definition of family members in the Dublin IV proposal, the Commission states in recital 19 that reuniting siblings is of particular importance for improving the chances of integration of applicants and hence reducing secondary movements. The scope of the definition of family member should also reflect the reality of current migratory trends, according to which applicants often arrive to the territory of the Member States after a prolonged period of time in transit. The fact that siblings are not covered under the definition of family members in the Family Reunification Directive or the Qualification Directive (or Qualification Regulation proposal) does not imply that there is a gap at EU level due to the different objectives followed by these legal instruments. Moreover, it must be noted that the Dublin IV Regulation is still at proposal stage and might still be amended in this regard.

In 2014, the Commission issued a Communication providing guidelines for the application of the Family Reunification Directive.³⁹ There it is stressed that the

³⁷ For instance, due to the massive influx of asylum-seekers in Germany and Sweden, these Member States introduced temporary orders in 2016 which limit the right to family reunification of beneficiaries of subsidiary protection.

³⁸ Behrens, J.; Labayle, M.; Duro Mansilla, M.; Lekka, L.; van Nierop, P.; Deodato, M.; Hayward, L.; Nicoletti, R.; Valenti, A., Evaluation of the application of the recast Qualification Directive (2011/95/EU), study commissioned by DG Migration and Home Affairs of the European Commission, p. 182, publication forthcoming.

Directive should not be interpreted as obliging Member States to deny beneficiaries of temporary or subsidiary protection the right to family reunification and that the Commission considers that the protection needs of persons benefiting from subsidiary protection do not substantially differ from those of refugees. The Commission therefore encourages Member States to adopt rules that grant similar rights to refugees and BSPs, including by taking into account international instruments such as the UN Convention on the rights of the child or the ECHR. The Commission has, however, not formally proposed yet to assimilate the family reunification rights of refugees and BSPs.

1.3.1.4 National level responses

Member States' approaches differ significantly regarding the right to family reunification of BSPs. Generally, there seems to be a recent trend of Member States to change their policies and/ or practices on family reunification (CY, DE, FI, HU, IE, NO, SE, SI, SK have recently introduced new family reunification rules).⁴⁰ The types of changes vary from one State to another. Some Member States appear to have introduced overall more stringent requirements for family reunification (AT, BE, DE, FI, IE, NL, SE).⁴¹ Other Member States seem to have reduced the conditions (EE) and/ or introduced measures supporting family reunification (LU, NL). In Slovenia the possibility for BSPs to reunite with family members has existed since 2014; on the other hand, since 2014, the right to family reunification in Cyprus applies only to refugees (and not to BSPs). Germany and Sweden, for example, introduced temporary orders in 2016 which limit the right to family reunification of BSPs. Other Member States recently reduced the grace period during which the material requirements for exercising the right to family reunification do not yet apply to refugees and/ or BSPs, which makes it more difficult for the migrant to meet the deadline. On the contrary, other Member States ceased to apply a grace period giving indefinite access to the more favourable conditions (HU). Some Member States limited (IE) or expanded (SI, SK) the definition of the family.

Finally, nearly all Member States who refer to the Commission Guidelines (i.e. BE, BG, EE, ES, FI, NO, SE) mention that this has not brought any significant change to the way they interpret and apply the Family Reunification Directive. This is partly due to the fact that national legislation is already more favourable, especially towards family members of refugees.⁴²

1.3.1.5 Consequences of the problem / gap

The consequences of the problem / gap are set out below:

- **Less favourable family reunification rules for beneficiaries of subsidiary protection:** In some Member States, BSPs either have no right to family reunification or are subject to more restrictive conditions than refugees, such as waiting periods and income requirements. Several conditions and procedural requirements are very difficult for BSPs to fulfil, creating a disparity in their treatment if compared to the refugees when it comes to enjoying family life. On the one hand the question need to be asked whether this different treatment has any rationale as their overall situation and needs for family reunification are

³⁹ Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification COM(2014) 210 final.

⁴⁰ EMN Synthesis Report for the EMN Focussed Study 2016 Family Reunification of Third- Country Nationals in the EU plus Norway: National Practices (publication forthcoming in 2017)

⁴¹ For example, in Belgium, material requirements such as the income requirement for exercising the right to family reunification were introduced in 2011. Also more recently the rules were tightened on some aspects, a retribution for the application was introduced, the fight against marriages of convenience and other abuses was prioritised and the processing time for family reunification requests has lengthened from 6 to 9 months.

⁴² EMN Synthesis Report for the EMN Focussed Study 2016 Family Reunification of Third- Country Nationals in the EU plus Norway: National Practices (publication forthcoming in 2017)

similar to those of refugees. On the other hand it should be highlighted that there is a difference in the current *acquis* of the foreseen residence permit validity of refugees and BSPs reflecting the presumably more temporary need of protection, so BSPs might only have one year residence permits. Hence there might be a link/justification for having different family reunification rights of both categories.

- **Secondary movements:** The fact that BSPs are excluded from the Family Reunification Directive means that they cannot benefit from the more favourable family reunification rules applicable to refugees. This might potentially lead to asylum seekers aiming at choosing the Member State with more favourable provisions. Due to the existence of the Dublin rules which determine the MS in charge of conducting the asylum procedure and don't leave a free choice to asylum applicants, this seems rather a theoretical than a practical issue. Statistical evidence for this phenomenon is not available.
- **Protection gaps for unaccompanied minors:** In certain Member States, the law provides for family reunification with beneficiaries of subsidiary protection at the earliest three years (AT) or two years (LV) from the date of obtaining subsidiary status. This means in practice that children, who are like the majority of unaccompanied minors 16 or 17 years old at the time of their arrival, have reached the age of majority by the end of the waiting period and can therefore not benefit from the facilitated possibilities available to minor refugees to unite with their parents.
- **Integration challenges:** Precarious conditions for family members remaining in the country of origin and a prolonged separation from them may lead to hardship for the sponsor and make integration more challenging.

1.3.1.6 Conclusions

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

Family reunification facilitates the integration of third-country nationals residing in EU Member States and helps to create socio-cultural stability, thus it can promote economic and social cohesion - which is a fundamental EU objective. On the other hand, it is also evident that family migrants, who make up about 50% of all migrants in the EU and are thus the biggest group of migrants, have been facing considerable integration challenges, and outcomes of children of two-non EU born parents on average have worse outcomes than children of couples where one parent was native.

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

The Family Reunification Directive only refers to refugees as sponsors and not beneficiaries of subsidiary protection. Beneficiaries of subsidiary protection may, however, apply for family reunification under the normal regime of the Family Reunification Directive. The previous parts of this factsheet have highlighted the main issues in relation to the non-coverage of beneficiary of subsidiary protection.

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

There is no other instrument in EU law which would cover the right to family reunification of beneficiaries of international protection.

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

Based on desk research, it seems that the majority of Member States grant family reunification also to BSPs: while in many Member States BSPs can apply for family reunification under the same conditions as refugees, some other Member States have however made their policies on BSPs more stringent, thus underlining the effects of the lack of EU harmonisation in this area. This gap has been exacerbated by the fact

that the status of refugee and BSPs have been brought closer to each other in the EU asylum acquis.

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

As mentioned above, there is indeed a difference in the Member States' policies on BSPs, thus underlining the effects of the lack of EU harmonisation in this area. The question arises whether this situation and the resulting difference in the Member States' policies justifies further intervention at EU level. The case can be made that there would be added value in addressing the issue at EU level. As described above, the scope of application of the right to family life does not always seem coherent and logically consistent, given the approximation of refugee status and subsidiary protection status done within the asylum acquis in the last years. However, as also set out above, the current asylum acquis still contains certain differences reflecting the presumably more temporary need of protection of BSPs as opposed to refugees. Hence there might be a link/justification for having different family reunification rights of both categories.

1.3.2 Other coherence issues related to the interaction between the legal migration and asylum acquis

Next to the family reunification issues highlighted above, there are some other problems and gaps at the interface between the legal migration acquis and the asylum acquis, worth highlighting:

1.3.2.1 Access of beneficiaries of international protection to legal migration statuses (LTR status, Blue Card status, other purely national statuses)

Most legal migration directives exclude beneficiaries of international protection (IP) from their scope of application. The only possibility for switching from IP status to a legal migration status would therefore be for the beneficiary of IP to give up his/her protection status. Since this implies a significant personal risk and the benefits of acquiring a legal migration status as opposed to IP status are limited, such switch is not happening frequently in practice.

The only legal migration directive which – so far – contains an express opening to beneficiaries of IP is the LTR Directive: **Directive 2011/51/EU amending the LTR Directive 2003/109** opens the possibility for beneficiaries of IP to acquire cumulatively – in addition to IP status - LTR status.

The 2016 **proposal for an amended Blue Card** Directive also proposes that beneficiaries of IP will be able to apply for an EU Blue Card like any other third-country national, while retaining all the rights they enjoy as beneficiaries of protection. Also third-country nationals to be resettled in Member States under future EU schemes, who will be granted similar rights as those laid down in Qualification Directive, are to be given access to the EU Blue Card. The aim of this proposal is to make highly skilled beneficiaries of international protection more accessible to employers and be able to take up employment in a more targeted way in accordance with their skills and education, filling shortages in sectors and occupations in any Member State.

Allowing for the acquisition of such double status requires laying down exactly which rights are applicable under which directive at which moment (an issue of legal certainty). The most important legal challenge – of key relevance when it comes to intra EU-mobility – is to fix rules which prevent expulsion from a second Member States to a third country in situations in which a mobile beneficiary of IP in a first MS loses his residence right in a second MS. Such rules already exist in the amended LTR Directive and in the proposed new Blue card Directive.

A **true gap exists**, however, in situations in which a beneficiary of international protection in MS A acquires a purely national residence permit in MS B. In such situations, MS B is not necessarily informed about the protection status in MS A and

may carry out – if the national permit in MS B is revoked or withdrawn – return to a third country. Such scenario should not be the rule, since Article 6(2) of the Return Directive prescribes that sending back to MS A should be preferred over return to a third country, but in the absence of a central EU register of residence permits issued by Member States, there is no guarantee that MS B will be aware of an IP permit issued by MS A.

1.3.2.2 The situation of beneficiaries of purely national protection statuses

Holders of purely national protection statuses (8% of those granted protection in the EU in 2016) are currently only covered by national law, when it comes to determining their rights. The provisions of the Single Permit Directive, which was meant to be a catch-all measure providing a common set of rights for all third country nationals permitted to work, expressly excludes them from its scope of application in its Article 3(h). None of the asylum directives provides rights to this category of persons either. There is therefore a true gap. This gap could be closed by extending the scope of the Single Permit Directive to beneficiaries of purely national protection statuses.

1.3.2.3 Legal admission to EU for protection purposes

Neither the asylum acquis, nor the visa acquis nor the legal migration acquis contain rules on entry or admission of third country nationals for the purpose of seeking protection in the EU. This finding was recently confirmed by the ECJ in its judgement in case C 638-16 PPU. Already before this widely discussed and debated judgement was issued, the European Commission decided to make an attempt to close this gap by proposing a European frame for admission for protection purposes in its July 2016 proposal for a Regulation establishing a Union Resettlement Framework to ensure orderly and safe pathways to Europe for persons in need of international protection (COM(2016)468).

It results that there is a gap as regards legal admission to the EU for protection purposes, but that the Commission already made a proposal to close it.

1.3.2.4 Rights under the Qualification Directive and Reception Conditions Directive (including labour market access) - technical consistency with legal migration directives

The Qualification Directive as well as other asylum instruments contain provisions on the rights of third country nationals, including on access to the labour market and right to equal treatment. Many of these provisions are similar to parallel provisions in the legal migration directives. However, not always exactly the same wording as in the legal migration directives is used. There is therefore arguably a case for aiming at more technical consistency of the wordings used. This **need for achieving more consistency on technical wording** may be addressed as a possible follow-up of the legal migration REFIT exercise, side by side with technical asylum acquis specialists.

Sources

- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
- Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of

25 November 2003 concerning the status of third-country nationals who are long-term residents

- Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)
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- European Legal Network on Migration: Information Note on Family Reunification for Beneficiaries of International Protection in Europe (2016)
- EMN Synthesis Report for the EMN Focussed Study 2016 Family Reunification of Third- Country Nationals in the EU plus Norway: National Practices (publication forthcoming in 2017)
- EMN Integration of beneficiaries of international/humanitarian protection into the labour market: policies and good practices. Synthesis Report for the EMN Focussed Study 2015

1.4 External coherence with the Return Directive

The Return Directive, which entered into force in 2010, is the main legal instrument of the EU's return acquis.⁴³ The purpose of the Return Directive is to regulate the return of illegally staying third-country nationals to third countries of origin or transit.⁴⁴ The Return Directive was adopted to limit situations where third-country nationals are left in legal limbo and to provide them with a higher degree of legal certainty: either they have a right of stay on the territory of a Member State or they do not, in which case they fall under the scope of application of the Return Directive. There is no "third option".⁴⁵ The Return Directive also provides for a number of procedural safeguards and guarantees to third country nationals throughout the return procedure.

There are numerous categories of third-country nationals considered to be illegally staying in a Member State:⁴⁶

- Holders of an expired residence permit or visa;
- Holders of a withdrawn permit or visa;
- Rejected asylum seekers;
- Asylum applicants who have received a decision ending their right of stay as asylum seeker;
- Persons subject to a refusal of entry at the border;
- Persons intercepted in connection with irregular border crossing;
- Irregular migrants apprehended in Member State territory;
- Persons enjoying no right to stay in the Member State of apprehension (even though they are holding a right to stay in another Member State);
- Persons present on Member State territory during a period of voluntary departure;
- Persons subject to postponed removal.

The following categories of third-country nationals are not considered as illegally staying since they enjoy a legal right to stay – even if the latter is of a temporary nature, in a Member State:

- Asylum applicants staying in the Member State in which they enjoy a right to stay pending their asylum procedure;
- Persons staying in a Member State where they enjoy a formal toleration status (provided such status is considered under national law as "legal stay");
- Holders of a fraudulently acquired permit for as long as the permit has not been revoked or withdrawn and continues to be considered as valid permit.

The Return Directive and the EU legal migration acquis are complementary in that the Return Directive establishes the rules for returning third-country nationals who no longer have authorisation to stay in the EU under one of the legal migration Directives. If a third-country national does not have a lawful residence on the territory of a Member States, he/she is subject to a return decision and a removal procedure.⁴⁷ The

⁴³ Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter the Return Directive). Other instruments relevant to EU return policy are instruments focusing on return cooperation (Directives 2001/40 on the mutual recognition of decisions on the expulsion of non-EU nationals and Decision 2003/110 on assistance in cases of transit for the purposes of removal by air, Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders), parts of the recast Frontex Regulation (Regulation 2016/1624), financial instruments (AMIF Fund) and EU readmission agreements (a number of 17 EU agreements have been concluded, full list available here: https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en).

⁴⁴ Article 3(3) of the Return Directive.

⁴⁵ Return Handbook, p .7.

⁴⁶ Return Handbook, pp. 7-8.

⁴⁷ Article 6 of the Return Directive.

scope of the EU return *acquis* therefore starts where the scope of the legal migration (or asylum) *acquis* ends.

The Return Directive does not address readmission procedures to third countries – which are covered by specific bilateral or EU readmission agreements between Member States or the EU and third countries.⁴⁸ Additionally, the Return Directive concerns only return to third countries of origin or transit and no procedures of ‘taking back’ between Member States. More importantly, the Return Directive does not **harmonise the reasons for ending legal stay** which are regulated by the relevant provisions in legal migration Directives (and the asylum *acquis*).

Notwithstanding these complementarities, there are a number of gaps in the interaction between the Return Directive and the EU legal migration Directives which can create legal uncertainty for the third-country nationals involved.

1.4.1 Regularisations

The first gap concerns the conditions and criteria for regularising third-country nationals who are staying illegally in a Member State. According to the Return Directive, Member States can decide to grant a residence permit or an equivalent right to stay to an irregular migrant, at any moment, for compassionate, humanitarian or other reasons.⁴⁹ The legal migration Directives contain rules on granting residence permits to specific categories of third-country nationals; they do not harmonise the issuance of humanitarian permits or regularisation.

The only horizontal piece of *soft law* existing in this field is the European Pact on Immigration and Asylum adopted in 2008 which asked MS to use only case-by-case regularisation, rather than generalised regularisation, under national law, for humanitarian or economic reasons.⁵⁰

1.4.2 Non-removable returnees

Another gap concerns the situation of non-removable returnees. The Return Directive does not address the situation of third country nationals who are issued a return decision or a removal order but which cannot be enforced due to legal or practical reasons. Member States should or may postpone removal of a third-country national in a number of cases foreseen by the Return Directive.⁵¹ The Return Directive refers to minimum basic rights and procedural guarantees for third-country nationals subject to a return decision and who cannot be returned for legal or practical reasons. In practice, the legal status of this category of migrants varies greatly in Member States, ranging from irregular migrant status, *de facto* toleration, granting of a formal toleration status to specific temporary residence permits.⁵²

⁴⁸ A readmission agreement is “an agreement between the EU and / or a Member State with a third country, on the basis of reciprocity, establishing rapid and effective procedures for the identification and safe and orderly return of persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence in the territories of the third country or one of the Member States of the European Union, and to facilitate the transit of such persons in a spirit of cooperation”. EMN Asylum and Migration Glossary, October 2014, p. 225, available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/docs/emn-glossary-en-version.pdf.

⁴⁹ Article 6(4) of the Return Directive.

⁵⁰ Council, European Pact on Immigration and Asylum, document number 13440/08, Brussels, 24 September 2008, p. 7, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2013440%202008%20INIT>.

⁵¹ According to Article 9 of the Return Directive, Member States *should* postpone removal where it would infringe the respect of the principle of non-refoulement or where the return decision is reviewed by a competent national authority. Member States *may* postpone return by taking into account the specific individual circumstances of the third-country national or for practical reasons impeding removal (lack of identification of the third-country nationals or transport capacity).

⁵² See EMN, Study on The different national practices concerning granting of non-EU harmonised protection statuses, 2010; FRA, Fundamental rights of migrants in an irregular situation in the European Union, 2011; European Commission, Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries, 2013.

In its Return Handbook, the Commission recommended to Member States that although Member States are not obliged to grant a permit to returnees once it becomes clear that there is no more reasonable prospect of removal, they are free to do so at any moment and can take into account certain individual (case related) as well as horizontal (policy related) assessment criteria when considering the regularisation of non-removable returnees, namely:

- the cooperative/non-cooperative attitude of the migrant;
- the length of factual stay of the migrant in the Member State;
- integration efforts made by the returnee;
- the personal conduct of the returnee;
- family links;
- humanitarian considerations;
- the likelihood of return in the foreseeable future;
- the need to avoid rewarding irregularity;
- the impact of regularisation measures on migration pattern of prospective (irregular) migrants; and
- the likelihood of secondary movements within the Schengen area.⁵³

However, these remain recommendations and are not binding on Member States.

1.4.3 Expulsion or removal for reasons of national and public security

A third gap concerns the absence of common rules for expelling a third-country national for reasons of national and public security. Member States have called on the Commission to propose horizontal legislation making the expulsion of suspected terrorists or hatred preachers mandatory, notably during the discussions in the 2000s on a proposal for the Return Directive.⁵⁴ Such a provision was excluded by the Commission from the proposal for a Return Directive in 2005 for three main reasons:⁵⁵

- Legal migration Directives as well as instruments on asylum acquis contain provisions on "public order/security" which allow Member States to withdraw or not renew residence permits of third country nationals and thus expel third-country nationals who constitute a threat to public policy or public security. The Commission, in its "post-September 11" working document, concluded that "a scrupulous application of these clauses is a more appropriate way of enhancing security than to substantially change the different Proposals at stake."⁵⁶
- Expelling a suspected third-country national terrorist may not always be in the interest of a Member State, as it may sometimes be preferable to bring criminal charges against such person or to keep him/her under surveillance in a Member State rather than to expel him to a third country.
- The issue of expulsion for reasons of public order/security should not be dealt within the Return Directive but within the context of legal migration Directives as they regulate the conditions of entry and stay as well as end of legal residence or stay in a Member State.

Additionally, although a Council Directive on the mutual recognition of decisions on the expulsion of third country nationals was adopted in 2001, the understanding of expulsion differs between Member States. For some Member States, expulsion is an act which declares entry, stay or residence to be illegal; for other Member States,

⁵³ Return Handbook, p. 77.

⁵⁴ See also definition of "expulsion" in the Article 3 of Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals.

⁵⁵ Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals SEC(2005) 1057, COM/2005/0391 final of 1 September 2005.

⁵⁶ COM(2001) 743 of 5 December 2001.

expulsion is an act which terminates the legality of a previous lawful residence e.g. in cases of criminal offences.⁵⁷

Action at EU level on this issue may be requested by Member States due to the current context of increased terrorist threats.

1.4.4 Other situations

Gaps and inconsistencies between the Return Directive and the legal migration acquis may appear in the event where the residence permit granted by a (first) Member State is withdrawn or not renewed. This is a particularly salient issue in legal migration Directives that contain provisions on intra-EU mobility of third-country nationals and/or readmission between Member States.⁵⁸

More specifically, the Return Directive does not apply to 'returns' of a third country national from one Member State to another as bilateral readmission agreements between Member States are outside of the scope of this Directive. Readmission of a third-country to another Member State is not considered as 'return' as it is defined in the Return Directive but rather a 'taking back' procedure or 'going back to a Member State'.⁵⁹ Indeed, Article 6(2) of the Return Directive provides that third country nationals that have a right of residence in another Member State cannot be the subject of a return decision.⁶⁰ The Return Handbook specifies that provisions in the legal migration Directives on readmission between Member States are the first ones to be considered and provisions on return contained in the Return Directive should be a second step.⁶¹

As an example, Article 23 of the ICT Directive provides that in cases where the conditions of regular stay in a second Member State are no longer met, the third country national should go back to the first Member State and that the latter should allow this re-entry. Similar provisions can be found in Article 18 of the Blue Card Directive and Article 32 of the Recast Students and Researchers Directive.

Therefore in principle a return decision should be adopted only if the third country national does not comply with this request or in cases of risk for public policy or national security. However, this appears to be a grey-zone in practice as there are no harmonised procedures, forms nor templates for the second Member State to 'force' the first Member State to accept re-entry of a third-country national.

Third-country nationals who are in a situation of a **pending application for a residence permit** may be either legally or illegally staying, depending on whether they hold a valid visa or another right to stay or not.

Following Article 6(5) of the Return Directive, in cases where illegally staying third-country nationals are subject of a **pending procedure to renew a residence permit**, Member States *may* not issue a return decision until the pending procedure is finished.⁶² According to the Return Handbook,⁶³ this provision is intended to protect third-country nationals who were legally staying in a Member State for a certain time and who, because of delays in the procedure leading to a renewal of their permit, temporarily become illegally staying. Member States are encouraged to make use of

⁵⁷ Commission staff working document - Detailed comments on Proposal for a European Parliament and Council Directive on common standards on procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final), SEC/2005/1175.

⁵⁸ Articles 12 and 22 of the LTR Directive, Article 23 of the ICT Directive, and Article 18 of the Blue Card Directive.

⁵⁹ Article 6 of the Return Directive

⁶⁰ Article 6(2) of the Return Directive.

⁶¹ Commission Recommendation, Return Handbook, C(2015) 6250, p.33.

⁶² Article 6(5) of the Return Directive.

⁶³ Return Handbook, Section 5.7., p. 33.

this provision in all cases in which it is likely that the application for renewal will be successful and to provide the persons concerned at least with the same treatment as the one offered to returnees during a period of voluntary departure or during postponed return.

In this situation, Article 18(5) of the Blue Card Directive specifies that a Member State may issue a residence permit or an authorisation to stay for the duration of the renewal procedure and a decision on the application has been made.

Third-country nationals who apply for **renewal of an already expired permit** are illegally staying, unless provided otherwise by the national laws of the Member State concerned.

1.4.5 Conclusions

The Return Directive complements the legal migration Directives by establishing the rules for returning third-country nationals who no longer have authorisation to stay in the EU under one of the legal migration Directives. This has helped to limit situations where third-country national are left in a situation of legal uncertainty about his/her status on the territory of a Member State: either a third country national has a right to stay (based on the legal migration Directives or on national provisions) or not, in which case he/she should be issued a return decision.

However, a number of gaps and inconsistencies remain. The Return Directive does not cover the issue of regularisation of illegally staying third-country nationals nor the situation of non-removable third-country nationals. The situation of third-country nationals in a protracted situation of irregularity is then decided at national level through toleration statuses or ad-hoc regularisations, which eventually creates in practice a 'third option' that the adoption of the Return Directive sought to eliminate.

Furthermore, intra-EU mobility of legally residing third-country nationals may also lead to uncertain legal situations where the residence permit issued by the first Member State of residence expires or is not renewed in time. The 'return' of a third-country national to the first Member State in this context is outside the scope of the Return Directive. Legal migration Directives containing such provisions provide for an obligation for the first Member State to allow re-entry of the third-country national concerned yet in practice, it appears to be a grey area as concrete forms or procedures seem to be lacking.

1.5 Victims of trafficking

The EU has two main pieces of legislation which aim at providing support and protection to persons who have been victims of trafficking:

- **Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking.** This Directive falls within the scope of EU policy on irregular migration as it introduces a temporary residence permit intended for third-country national victims of trafficking in human beings or, if a Member State decides to extend the scope of the Directive, to third-country nationals who have been the subject of an action to facilitate illegal immigration (smuggling).
- The aim is to provide protection to the victims of trafficking and to enable them to take part in legal proceedings against traffickers. The Directive includes provisions on the treatment that holders of the residence permit should receive - that is, once the victims of trafficking have been (temporarily) regularised through the issuing of a residence permit. This treatment includes the right to have access to the labour market for the duration of the residence permit under conditions to be determined under national legislation (Article 11). Transition into other legal statuses is also permitted once the permit expires, then each country's "ordinary alien law shall apply" (Recital 18 and Article 13).
- **Directive 2011/36/EU⁶⁴ on preventing and combating trafficking in human beings and protecting its victims** (replacing Council Framework Decision 2002/629/JHA), hereafter called the anti-trafficking Directive. This Directive provides for minimum rules regarding the definition of criminal offences and sanctions on legal persons in the area of trafficking of human beings. It also requires that Member States provide appropriate assistance, support and protection to victims of trafficking.
- The aim of this protection is to "safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators" (Recital 14). The scope of the protection excludes the issuing of residence permits to victims of trafficking as this is provided for in Directive 2004/81/EC. Directive 2011/36/EU requires Member States to implement a wide range of protective measures for victims of trafficking, to be made available before, during and for an appropriate time after criminal proceedings. These include measures that are necessary to enable the victim to recover and escape from their traffickers, and to participate in criminal proceedings where relevant e.g. medical treatment to help address severe physical or psychological consequences of the crime, or protection if the victim's safety is at risk due to the victim's statements in those criminal proceedings.

1.5.1 Access to employment and vocational training – interaction SPD

The key interaction of Directive 2004/81/EC with the EU's legal migration Directives is in relation to the right of third-country nationals who have been issued a temporary residence permit under Directive 2004/81/EC to access the labour market, vocational training and education as provided for under Article 11 of this Directive.

Article 11.2 stipulates that "the conditions and the procedures for authorising access to the labour market, to vocational training and education shall be determined, under the national legislation, by the competent authorities". However, following the adoption of the Single Permit Directive (SPD) in 2011, the residence permits issued under Directive 2004/81/EC (and the corresponding rights afforded to the holders of these permits) fall under Article 7 of the SPD, which covers residence permits issued

⁶⁴ Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

for purposes other than work, and Article 12 of the SPD affording the holder of the permits equal treatment with respect to nationals in a wide range of areas, including:

- a) Working conditions (including pay and dismissal), but not including access to the labour market which is not specifically regulated by the SPD;
- b) Freedom of association and affiliation and membership of an organisation representing workers;
- c) Education and vocational training;
- d) Recognition of qualification;
- e) Social security, as defined in Regulation (EC) No 883/2004;
- f) Tax benefits;
- g) Access to goods and services; and
- h) Advice services afforded by employment offices.

There is one overlap between the VOT and the SPD in relation to access to education and vocational training: the VOT Directive (Article 11) provides that Member States should determine the conditions and procedures for authorising such access to vocational training and education, without requiring equal treatment with nationals; whereby the SPD provides, as a general rule, equal treatment with nationals, though allowing Member States to grant equal treatment only to certain residence permit holders, including third-country workers who are in employment or who have been employed and who are registered as unemployed.

The SPD also allows Member States to limit the right to equal treatment as regards social security to all third-country nationals who fall under the scope of the Directive, therefore including residence permit holders under Directive 2004/81/EC, if they are unemployed or if they have been employed for less than six months. Member States are also allowed to restrict access to family benefits for third-country nationals who have been authorised to work in the territory of a Member State for a period not exceeding six months. Given the temporary nature of the residence permits issued under Directive 2004/81/EC (and therefore the corresponding right of the permit holders to work), these restrictions are likely to apply to victims of trafficking who have been granted a permit of a short duration in conformity with this Directive.

There is therefore an important synergy between Directive 2004/81/EC and the Single Permit Directive, in that the former allows a particularly vulnerable category of third-country nationals – third-country nationals who have been victims of trafficking and have received a permit under Directive 2004/81/EC – to receive the complementary protection afforded by the SPD. The above-outlined restrictions, which the SPD allows Member States to apply in respect of certain equal treatment provisions, are not in themselves inconsistent with Directive 2004/81/EC. However, the fact that Directive 2004/81/EC stipulates that *Member States should determine* the conditions and procedures for authorising access to vocational training and education (Article 11) may be inconsistent with Articles 7 and 12 of the Single Permit, which only allow Member States to provide some limitations to such access. The ambiguity created by the wording of Article 11 of Directive 2004/81/EC (“Member States shall define the rules”) may create some legal uncertainty for the third-country nationals concerned, who should be afforded the equal treatment rights under the Single Permit Directive.

1.5.2 Interaction with the LTR Directive

Finally, there is a potentially important gap in the interaction between the VOT Directive and the LTR Directive, namely, the fact that it is not clear whether the periods which a third-country national has resided in a Member State on the basis of a residence permit issued under Directive 2004/81/EC can be counted towards the minimum of five years required for a third-country national to be eligible for long-term

residence status under the LTR, in view of the temporary nature of the permit(see article 3.2.e, LTR).

1.5.3 Role of the Directive in relation to exploitation of third country workers

The general actions to combat trafficking in Directive 2011/36/EU on preventing and combatting trafficking in human beings may also benefit third-country victims who are holders of a residence permit covered by one of the EU legal migration Directives. The definition of 'trafficking' in Directive 2011/36/EU covers a wide range of offences, including 'severe' forms of labour exploitation ("sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery and servitude"), which can be considered supportive of the wider objective of the EU legal migration Directives to ensure equal treatment of third-country nationals (workers mainly), notably as regards pay and working conditions, social security and other areas, thus avoiding their exploitation and preventing discrimination. The measures foreseen in Directive 2011/36/EU include common rules on the sanctions to apply on legal persons in the area of trafficking of human beings as well as awareness-raising to reduce the risk of people becoming victims of trafficking, and regular training for officials who are likely to come into contact with victims of trafficking and those who investigate or prosecute cases of trafficking.

While no particular inconsistencies have been identified between Directive 2011/36/EU and the EU legal migration Directives, there is a potentially important gap in the support which Directive 2011/36/EU is able to provide to the EU and Member States in their efforts to address cases of labour exploitation among legally resident third-country nationals. Directive 2011/36/EU covers cases of labour exploitation which take place in the context of trafficking; however, labour exploitation may also take other forms which do not amount to a trafficking offence, including breaches of labour law (e.g. employers not complying with minimum salary, maximum working hours, etc.) or breaches of migration law (e.g. employer not in reality providing the salary and working conditions set out in the application). These forms of labour exploitation may be particularly relevant to some categories of legally residing third-country nationals. The only EU legal migration instrument that addresses the issue of labour exploitation is the Seasonal workers Directive, which provides for sanctions against employers who have breached their obligations (for instance with regard to payment, working conditions and the accommodation) and for labour inspections.

Finally, while other EU instruments, including the EU Facilitation Package and the Employer Sanctions Directive include measures which address other forms of labour exploitation, they only cover third-country nationals in an irregular situation.

1.5.4 Scale

Relatively few permits have been issued in conformity with Directive 2004/81/EC each year, those which have been issued are reported under the "other" section of Eurostat statistics for the Single Permit Directive.

Table 1. First permits issued to victims of trafficking under Directive 2004/81/EC

	2009	2010	2011	2012	2013	2014	2015	2016
EU-28	55	985	1,196	1,127	881	893	690	963
Belgium	0	92	49	81	56	40	67	48
Germany	0	2	7	10	20	7	4	9
Greece	0	22	9	13	38	2	3	1
Spain	0	0	16	67	81	91	78	141
France	55	65	32	38	40	63	46	75
Croatia	:	:	:	:	1	0	0	0
Italy	0	462	713	563	388	346	288	351
Cyprus	0	0	0	22	0	12	32	9
Netherlands	0	304	338	318	212	181	137	119
Austria	0	0	0	0	0	0	0	0
Poland	0	9	2	0	4	9	17	171
Portugal	0	14	15	8	11	2	1	29
Slovenia	0	0	0	0	0	1	0	0
Slovakia	0	0	1	1	0	0	0	0
Finland	0	0	0	0	10	114	9	8
Sweden	0	15	14	6	19	25	6	2

Source: Eurostat

1.5.5 Conclusion

There are synergies but also some inconsistencies and gaps between the two EU Directives which contain provisions for assisting the victims of trafficking and the EU legal migration Directives.

The synergies include:

The possibility which Directive 2004/81/EC provides for Member States to grant a temporary residence permit including the right to work to third-country national victims of trafficking. This allows this particular category of third-country nationals to enjoy the complementary protection in terms of equal treatment afforded by the Single Permit Directive to third-country nationals who have the right to work.

The common measures for combatting trafficking in human beings foreseen in Directive 2011/36/EC support the objective, explicitly included in the Seasonal Workers Directive and the Single Permit Directive, to combat and prevent the exploitation of legally residing third country nationals.

The inconsistencies and gaps include:

It is also not clear whether third-country nationals who have obtained a residence permit under Directive 2004/81/EC can include their period of residence within the minimum time required to be eligible for long-term residence status.

The focus of Directive 2011/36/EU on cases of exploitation which take place in the context of but there is no obligation derived from EU legislation on Member States to develop common measures to combat other forms of labour exploitation, including breaches of migration or employment law which may disproportionately affect certain

categories of legally residing third-country nationals, such as students or family members in employment situations.

1.6 Fundamental rights and non-discrimination

This section explores the coherence of the legal migration Directives with fundamental rights, in particular with the provisions of the EU Charter of Fundamental rights which, as of 2009, has the same legal value as the EU Treaties.⁶⁵ According to Article 6 TEU, sources of fundamental rights in the EU are the EU Charter of Fundamental Rights (hereafter the Charter), the European Convention on Human Rights (hereafter the ECHR) and the general principles of EU law which were developed by the CJEU and derive from national constitutional traditions, as well as other international treaties signed by the Member States. The CJEU ruled however that the Charter is the main basis on which the EU institutions and EU Courts will ensure that fundamental rights are respected throughout the EU.⁶⁶

1.6.1 Scope of application of the Charter of Fundamental Rights

The Charter applies to EU institutions, agencies, bodies, offices and to Member States when they are implementing EU law, which means that it does not apply to national law which is not implementing EU law or in cases where its application has the effect of extending the competences that the EU treaties confer on the Union.⁶⁷ Given the EU competence in migration policies,⁶⁸ national migration legislation implementing EU law in this area or any national measure negatively affecting any of the rights guaranteed in EU law will also have to respect the rights enshrined by the Charter.⁶⁹

Regarding the personal scope of the Charter, the latter applies irrespective of the nationality of individuals concerned. Albeit the Charter contains a specific chapter on EU citizens' rights (making reference for example to the free movement and residence rights) and a few other provisions which limit the personal scope of their application – which will be analysed in the subsections below,⁷⁰ all the other articles of the Charter are applicable to all individuals without distinction of their nationality.⁷¹

It is also necessary to mention in this section the relationship between the **Charter and the ECHR** as referred to in Article 52(3) of the Charter. It provides that the level of protection by a Charter right cannot be lower to that guaranteed by the ECHR, while at the same time not preventing the Charter from offering more extensive protection. The Explanations relating to the Charter indicate a number of correspondences between the Charter and ECHR Articles.⁷² For example, Article 7 (Respect for private and family life) of the Charter to a large extent reproduces the wording of Article 8(1) ECHR. In contrast, other Charter Articles are broader in scope than their ECHR parallels and thus offer wider protection.⁷³

A more general observation is the scope of application of the ECHR which, unlike the Charter, is not bound by the application of EU law and, according to Article 1 ECHR, is

⁶⁵ Article 6 TEU.

⁶⁶ CJEU judgment in cases C-399/11 *Melloni* EU:C:2013:107 and C-617/10 *Akerberg Fransson*, EU:C:2013:105, as well as in *Opinion 2/13 on EU accession to the ECHR* EU:C:2014:2454 (para 188).

⁶⁷ Articles 51(1) and 52(1) of the Charter.

⁶⁸ Chapter 2 of Title V TFEU.

⁶⁹ European Parliament, Study on *The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures*, 2016, PE 556.930, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU\(2016\)556930_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU(2016)556930_EN.pdf).

⁷⁰ Chapter V, and Articles 12(2), 15(2) and (3), 21(2) and 34(2) of the Charter.

⁷¹ S. Peers, *Immigration, Asylum and the European Union Charter of Fundamental Rights*, European Journal of Migration and Law [2001], p. 146.

⁷² Explanation provided for Article 52 of the Charter.

⁷³ For example, the right to a fair trial under Article 47(2) of the Charter is not limited, as under Article 6(1) ECHR, to disputes concerning civil rights and obligations or criminal charges. Thus the Charter does not follow the approach of the ECtHR in excluding migrants from the scope of application of Article 6 ECHR, therefore the rights derived from the case law of Article 6 ECHR can also apply to (legal) migration cases. See S. Peers, *Immigration, Asylum and the European Union Charter of Fundamental Rights*, p. 165.

applicable to any person falling under the jurisdiction of the Contracting States, irrespective of their nationality. This difference in the scope of application of the Convention has an impact on the application of certain rights as referred to in the subsections below.

1.6.2 Free-movement rights: “constitutional cleavage” between EU citizens and third-country nationals

There is a ‘constitutional cleavage’ (in the words of Daniel Thym) between rights granted to EU citizens and third-country nationals which was introduced for the first time in the Maastricht Treaty and the ‘constitutionalisation’ of EU citizenship.⁷⁴ In the EU legal framework, EU citizens’ rights, including equal treatment, stem from the free-movement rights granted to EU nationals and inscribed at Treaty level. As a consequence, as third-country nationals cannot invoke the same mobility rights, they have access to a more “conditional” form of equal treatment guarantees, in particular those third-country nationals with a more temporary or precarious residence status.

Third-country nationals who reside legally in the EU may invoke fundamental and human rights guarantees in various domains, as discussed later in this paper. However, in comparison with EU citizens, the rights are affected by a number of limitations.⁷⁵ Firstly, CJEU and ECtHR case law makes it clear that equal treatment guarantees do not apply to immigration law. For example, there is no right to enter the EU territory for third-country nationals.⁷⁶ This logic is reaffirmed by the Charter in its **Article 15(3)** which provides that “nationals *who are authorised to work* in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union”, and thus excluding from its scope any general right of access to the EU territory to third-country nationals for economic purposes. Secondly, regarding intra-EU mobility rights for legally residing third-country nationals, the Charter provides in its **Article 45(2)** that similar intra-mobility rights as to EU citizens *may* be granted to third-country nationals. Therefore, the EU legislators maintain a broad margin of discretion over circumstances granting access to third-country nationals to the territory of Member States, access to the labour market and intra-EU mobility rights.

1.6.3 Non-discrimination on grounds of nationality

The principle of non-discrimination based on nationality is a key principle in EU law enshrined both at primary and secondary level, and underlying the dynamic of CJEU case law on the EU single market and EU citizenship.⁷⁷

Article 18 TFEU, the first Article on the Chapter on non-discrimination in the TFEU, provides that “*within the scope of application of the Treaties [...] any discrimination on grounds of nationality should be prohibited*”. On the one hand, it is not clear from the wording of this Article that it is applicable only to EU citizens. Former Article 12 TEC, on which Article 18 TFEU is based, triggered discussion on whether differential treatment between nationals of Member States and third-country nationals who fall under the scope of application of EU law is possible if it results from the application of the Treaties and from EU secondary legislation.⁷⁸ Some academics argued that such

⁷⁴ D. Thym, *Legal framework for EU Immigration Policy*, in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law. Commentary*, 2nd edition, Nomos 2016, pp. 285-287.

⁷⁵ D. Thym, *EU migration policy and its constitutional rationale: A cosmopolitan outlook*, *Common Market Law Review*, 2013, Vol. 50 Issue 3, p. 719.

⁷⁶ Member States must grant access to their territory only to refugees in order to have their asylum claims examined, as ruled by ECtHR in *Hirsi Jamaa et al. v. Italy*, Application No. 27765/09, judgement of 23 Feb. 2012. See also CJEU, case C-540/03, *Parliament v. Council*, [2006] ECR I-5769, para 59.

⁷⁷ D. Thym, *Legal framework for EU Immigration Policy*, in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law. Commentary*, 2nd edition, Nomos 2016, p. 289.

⁷⁸ See for example S. Iglesias Sánchez, *Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles for Enhancing Coherence*, *European Journal of Migration and Law*, 2013, pp. 137-153.

interpretation would lead to a potential tension with the non-discrimination based on nationality provided in Article 14 ECHR.⁷⁹

More recent case law of the CJEU clarified this point: although the wording of Article 18 TFEU does not specifically state that it is only applicable to EU citizens, third-country nationals cannot invoke it as this Article “*is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries*”.⁸⁰

The Charter, in its Articles 20 and 21, also provides for the respect of the principle of non-discrimination in the application of EU law as well as in national measures implementing Union law. Article 21(2) of the Charter provides that “*within the scope of application of the [EU Treaties], and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited*”. The Explanations to the Charter provide that this paragraph corresponds to the first paragraph of Article 18 TFEU and therefore cannot be invoked by third-country nationals nor applicable to EU migration law.

Article 20 of the Charter enshrines the principle of equality before the law which precludes comparable situations from being treated differently, and different situations from being treated in the same way unless the treatment is objectively justified.⁸¹ Unlike Article 14 ECHR, it does not depend upon the parallel applicability of another human right listed in the ECHR. As an example of the CJEU’s exclusion of third-country nationals from the scope of this Article, in a case on integration measures to be followed by long-term residents and not imposed on EU nationals, the CJEU stated that the situation of third-country nationals is not comparable to that of EU citizens.⁸² Thus, since third-country nationals are sole recipients of the provisions contained in EU migration Directives, there may be cases where there is no violation of the principle of equal treatment due to the ‘non-comparability’ of the situation of third-country nationals and EU nationals.⁸³

The non-discrimination on grounds of nationality is an illustration of the difference in the scope of application between the EU Charter and the ECHR. While the ECtHR encompasses a set of rights regardless of whether a person is a national or a non-national of a Contracting State to the Convention, the Charter excludes the prohibition of discrimination on ground of nationality within the scope of application of the Treaties when it concerns third-country nationals.

⁷⁹ EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights, June 2006, p. 194, available at: http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf. While the ECtHR accepted that the preferential treatment conceded to citizens of EU Member States in EU law is based on ‘objective and reasonable grounds’ as Member States belong to a ‘specific legal order’ in *Moustaquim v. Belgium* (Application n° 12313/86, judgment of 18 February 1991, para. 49), it also ruled however that such preferential treatment should remain proportionate in *Gaygusuz v. Austria* (Application n°17371/90, judgment of 16 September 1996). In this case, the ECtHR ruled that the refusal of Austrian authorities to grant the applicant, a TCN, emergency assistance on the grounds that he did not have Austrian nationality was ‘not based on any objective and reasonable justification’.

⁸⁰ D. Thym, *Legal framework for EU Immigration Policy*, in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law. Commentary*, 2nd edition, Nomos 2016, p. 289; see also CJEU judgment in *Vatsouras and Koupatantze*, C-22/08 & C-23/08, EU:C:2009:344, para 52; see also CJEU judgment in *Khalil*, C-95/99 98/99 and C-180/99, EU:C:2001:532, para 40. And CJEU judgment in *S.P.C.M. and Others*, C-558/07, EU:C:2009:430, paragraph 74.

⁸¹ Based on the Explanations to the Charter, this Article corresponds to a principle which is included in all constitutions of EU Member States and has been recognised by the CJEU as a basic principle of Community law: see CJEU judgment of 13 November 1984, Case 283/83 *Racke* [1984] ECR 3791, judgment of 17 April 1997, Case C-15/95 *EARL* [1997] ECR I-1961, and judgment of 13 April 2000, Case C-292/97 *Karlsson* [2000] ECR 2737.

⁸² CJEU, judgement in case C-579/13, *P & S*, EU:C:2015:369, paras 39-43

⁸³ CJEU, judgement in *P & S*, C 579/13, EU:C:2015:369, paras 39-43 ; and D. Thym, *Legal framework for EU Immigration Policy*, p. 289.

Third-country nationals then rely on the scope of non-discrimination rules described in the secondary legislation. For example, equal treatment in EU migration law for third country nationals can be found in most legal migration directives.⁸⁴ The CJEU, in the *Kamberaj* case, ruled that it stands ready to scrutinise potential exceptions laid down in these provisions in light of fundamental rights, in particular in light of the provisions of the Charter.⁸⁵ Indeed, a number of provisions of the Charter do not have a specific mention of the nationality of their recipients and are equally applicable to EU citizens and third-country nationals. In particular, Articles in **Titles I to VI of the Charter** refer to social and economic rights and play a supportive role in the management of legal migration as the CJEU has been able to use the Charter to interpret the legitimate scope of the restrictions. As an example, the CJEU extended the core benefits contained in the long-term residents Directive to include housing benefits by referring directly to Article 34 of the Charter which recognises the right to social and housing assistance.⁸⁶

The ECtHR has been hesitant to challenge EU immigration law in light of Article 14 ECHR. The Strasbourg Court has accepted the 'special legal order' character of the EU as a legitimate justification for discrimination based on citizenship.⁸⁷ The ECtHR also ruled that '*immigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice*' and therefore weighs less heavily than other forms of unequal treatment.⁸⁸

The ECtHR has therefore adopted a case-by-case approach in evaluating whether there was a breach to the principle of non-discrimination on grounds of nationality. In a few cases, the Court has stated that 'very weighty reasons' are required for different treatment to be applied on the basis of nationality, even if the difference results from EU law.⁸⁹ The tighter the link of a third-country national with a Member State (for e.g. in terms of length of residence, degree of integration and family ties), the less inclined the ECtHR appears to be to allow a differentiated treatment for EU and non-EU national.⁹⁰ An important factor weighing in favour of treating foreigners on a par with nationals, in ECtHR case-law, are the conditions of long-term lawful residence, statelessness or being granted international protection. As an example, ECtHR case law accepted that differential treatment of third-country nationals with different migration statuses, notably long-term residents versus temporary or 'precarious' residents, is possible as long as it relies on a proportionate justification.⁹¹ However, the room for differentiation appears to depend on the nature of the right at stake.⁹²

⁸⁴ For e.g. Article 12 in the Single Permit Directive, Article 14 of the Blue Card Directive, and Article 11 of the Long Term Residents Directive;

⁸⁵ CJEU, case C-571/10, *Servet Kamberaj*, judgment of 24 April 2012.

⁸⁶ CJEU, case C-571/10, *Servet Kamberaj*, judgment of 24 April 2012, para. 91-93. In this case, the Court found that national regional law treating third country nationals differently from EU citizens with regard to housing benefits violated Article 11 (1) (d) of the Long-Term Residents Directive. It ruled that while Member States can limit social assistance and protection, noting though that the list of minimum core benefits contained in Recital 13 is not exhaustive. The CJEU extended the core benefits to include housing benefits. In doing so, the Court recalled Article 34 of the EU Charter of Fundamental Rights.

⁸⁷ ECtHR, *Moustaquim v. Belgium*, pp.no. 12313/83, ECtHR 18 February 1991; see also *C. v. Belgium*, app. no. 21794/93, ECtHR 7 August 1996.

⁸⁸ ECtHR, judgment of 27 November 2011, No. 56328/07, *Bah v. the United Kingdom*, para 47.

⁸⁹ See ECtHR judgments in cases related to access to social benefits by third-country nationals in ECtHR, *Gaygusuz v. Austria*, Appl.no. 17371/90, ECHR 16 September 1996; ECtHR, *Koua Poirrez v. France*, appl. no. 40892/98, 30 September 2003; ECtHR, *Fawsie v. Greece*, Appl.no. 40080/07, 28 October 2010; ECtHR, *Dhabhi v. Italy*, app.no. 17120/09, 8 April 2014.

⁹⁰ See Chapter 4.7 of the FRA Handbook on European non-discrimination law (2010), available at <http://fra.europa.eu/en/publication/2011/handbook-european-non-discrimination-law>.

⁹¹ See ECtHR, judgment of 30 September 2003, No. 40892/98, *Koua Poirrez v. France*, paras 46-49; and ECtHR, judgment of 21 June 2011, No. 5335/05, *Ponomaryovi et al. v. Bulgaria*.

⁹² See also Brouwer, E.R. & Vries, K.M. de (2015), '*Third-country nationals and discrimination on the ground of nationality: article 18 TFEU in the context of article 14 ECHR and EU migration law: time for a new approach.*' In M. Van den Brink, S. Burri & J. Goldschmidt (Eds.), *Equality and human rights: nothing but trouble?* (pp. 123-146). Utrecht: SIM.

1.6.4 Scope of non-discrimination rules described in the secondary legislation

It was already highlighted above that EU Member States *can* legitimately differentiate rights accorded to persons on the basis of their citizenship and that this is recognised by the TFEU and the Charter: Article 18 TFEU (interdiction of any discrimination on grounds of nationality) has been interpreted by ECJ as allowing for different treatment of EU citizens and third-country nationals. Article 21 of the Charter (non-discrimination based on sex, race, colour, ethnic or social origin, ...) does not mention discrimination based on nationality and the **EU anti-discrimination directives (2000/78/EC and 2000/43/EC)** both contain a provision according to which the directives do not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

At the same time, third-country nationals benefit from general rights guaranteed by Charter to *any person*: A number of the rights listed in the legal migration directives are therefore - in substance - declaratory confirmation of rights already available to all people present on EU territory. This applies in particular to the provisions in the legal migration directives dealing with freedom of association (Article 12 Charter) and equal working conditions (Article 31 Charter). Article 20 of the Charter (equality before the law) also applies to *all persons*; unequal treatment is only allowed in so far as it can be justified by legitimate considerations and provided it is done in a proportionate manner. Article 20 is therefore an important benchmark for the human rights scrutiny of EU migration directives.

Migration law can be characterised as a "**fine-tuning of legitimate discrimination**": The legal migration directives set out to what extent foreigners enjoy - or don't enjoy - rights similar to rights enjoyed by own nationals.

The equal treatment provisions of the legal migration Directives are characterised by numerous limitations which give discretion to Member States as to the equal treatment to be afforded to third-country nationals enjoying a certain status under EU law with respect to other third country nationals or nationals of the Member States in a number of areas. While it is not possible to describe these differences *per se* as illegitimate discrimination, the extent of the limitations to equal treatment provided for in the legal migration directives may raise issues of consistency with fundamental rights, including Article 20 of the Charter (which allows for unequal treatment only in so far as it can be justified by legitimate considerations and provided it is done in a proportionate manner). The CJEU has already had the occasion to rule that the equality clauses provided for in the legal migration instruments, and their limitations, must be interpreted in a way consistent with fundamental rights as enshrined in the Charter, such as the right to social and housing assistance.⁹³

The legal migration Directives and the two Equality Directives (which are used as a maximalist benchmark here for comparison reasons) appear to be broadly consistent in their approach to **employment and working conditions** (including pay and dismissal), as they contain similar provisions. However, there are three areas in which the approach to equal treatment in the legal migration Directives differ, due to the specific scope and purpose of legal migration law, and of the equal treatment it aims at achieving:⁹⁴

In the Long-Term Residents Directive, equal treatment in access to employment is limited insofar as employment does not entail even occasional involvement in the

⁹³ See *Kamberaj*, para. 92

⁹⁴ The Directive 2004/114/EC "Students" does not have any equal treatment provisions. However, a new Directive 2016/801/EC covering both students and researchers (among others) includes equal treatment of groups covered in the Directive.

exercise of public authority and Member States may limit equal access to employment in occupations where in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or EEA citizens;

In the Blue Card Directive, equal treatment in access to employment is limited in the first two years to the exercise of paid employment activities under the conditions for admission and Member States may limit equal access to employment in occupations where in accordance with existing national or EU legislation, these activities are reserved to nationals, EU or EEA citizens

In the Family Reunification Directive, equal treatment in access to employment is limited insofar the Member States may decide according to national law the conditions under which family members exercise an employed or self-employed activity.

There is also overall consistency in the approach of the Equality Directives and the EU legal migration Directives to equal treatment in relation to **membership of worker or employer organisations**. All of the legal migration Directives, except for the Family Reunification Directive and the Researcher Directive, include this area. Moreover, the Single Permit Directive covers persons issued with permits under the Researcher and the Family Reunification Directives when they have the right to work.

Access to and supply of goods and services which are available to the public, including housing is included in the equal treatment provisions of all of the legal migration Directives, except for the Family Reunification Directive. While family members who have the right to work are covered in this respect by the Single Permit Directive, the exclusion of non-working family members appears problematic as equal access to goods and services, such as housing, would be especially important for third-country national minors and family members during the first year of their residence when access to the labour market is restricted.

Equal treatment in access to **tax benefits** (as covered in the Racial Equality Directive only) is not included in the Blue Card, the Family Reunification and Intra-Corporate Transfers Directives. Whilst it is included in the Single Permit, Researcher and Seasonal Workers Directives and the Students and Researchers Directive, its scope in the Single Permit Directive, Seasonal Workers Directive and Students and Researchers Directive is narrower in allowing Member States to limit its application to cases where the registered or usual place of residence of the family members of the third-country worker for whom he/she claims benefits, lies in the territory of the Member State concerned.

Equal treatment in relation to access to vocational training and education is not included in the Researcher and the Intra-Corporate Transfers Directives. It is included in the Long Term Residents, Single Permit (covering also persons issued with permits under Researcher Directive, when they have the right to work), Blue Card, Family Reunification and Seasonal Workers Directive and in the recast Students and Researchers Directive. However, in four Directives (Long Term Residents, Single Permit, Blue Card and Seasonal Workers) the equal access to education is narrower in scope as it can be restricted by the Member States to those employed (Single Permit Directive and Long-term residents Directive), by excluding loans and grants (Blue Card Directive, Seasonal Workers Directive) and by requiring language proficiency (Long-term residents Directive).

The only Directive that covers **equal treatment in access to social protection and social assistance**, in the sense of a guaranteed minimum income, as opposed to social security is the Long Term Residents Directive. It allows Member states to limit it to equal treatment to 'core benefits'. The other Directives (except for the Family Reunification Directive) cover only equal treatment as regards access to social security. This includes equal treatment as regards the portability of statutory pensions if and when the third-country national moves to a third-country after a period working in one of the Member States. However, the legal migration Directives' equal treatment provisions as regards access to social security are themselves subject to numerous

restrictions (for details, see external coherence section on Regulation of Social Security).

1.6.5 Right to family life and family reunification Directive

The scope and interpretation of the right to family life, as defined in the Charter⁹⁵ and the ECHR and corresponding case law, and framed in secondary law by the family reunification Directive, plays an important role in the definition of the scope of the rights of third-country nationals on the territory of EU Member States.

In cases concerning both family life and immigration, the ECtHR ruled that Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory, as this will depend on the particular circumstances of the persons involved as well as the general public interest, and the country concerned is allowed to put conditions on the entry and residence of third-country nationals on its territory.⁹⁶ The ECtHR considers and weighs different factors such as links with the country in question, considerations of public order and compliance with national immigration laws.⁹⁷ Article 8 ECHR therefore does not establish a right to family reunification and leaves a high level of discretion to the Member States.

However, with the adoption of the family reunification Directive, the EU has established **a right to family reunification for third-country nationals** that fall within the Directive's scope of application and comply with its conditions. In its first judgment on the Family Reunification Directive, the CJEU recognised, in line with ECtHR case law, that although the Charter recognises the importance of family life, neither the Charter nor the ECHR create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification.⁹⁸ However, it also ruled that the right to family reunification as framed in the family reunification Directive goes beyond the right to family life as mentioned in Article 8 ECHR, as the Directive imposes precise positive obligations on the Member States to authorise family reunification when the criteria set in the Directive are met, without a margin of appreciation.⁹⁹ In the same judgment, the CJEU ruled that the right to respect for private or family life as recognised in Article 7 of the Charter, should be read in conjunction with the obligation to have regard to the child's best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents.¹⁰⁰ In a later landmark case, the CJEU further limited the margin of appreciation of Member States as to the interpretation of the conditions set in the family reunification Directive by ruling that the possibilities left in the Directive for Member States to impose conditions for family reunification must be interpreted strictly and should not undermine the objective of the Directive to promote family reunification.¹⁰¹

Third-country nationals who are excluded from the scope of the family reunification Directive can still rely on and invoke Article 8 ECHR and the corresponding case law. Indeed, Article 8 is examined by the Strasbourg Court in cases of expulsion, where the

⁹⁵ The Charter mentions the right to respect for family life (Article 7), as well as the right to marry and to form a family (Article 9) and also protects the rights of the child (Article 24).

⁹⁶ See for e.g., ECtHR, *Gül v. Switzerland*, Application no. 23218/94, 19 February 1996; ECtHR, *Hode and Abdi v. the United Kingdom*, Application No. 22341/09, 6 February 2013 and ECtHR, *Tuquabo-tekle v. the Netherlands*, Application no. no. 60665/00, 1 March 2006.

⁹⁷ See for e.g. case law cited in A. Wiesbrok, *Legal Migration to the EU*, 2010, pp. 210-224.

⁹⁸ CJEU, Case C-540/03, *European Parliament v Council*, 27 June 2006, para. 59.

⁹⁹ CJEU, Case C-540/03, *European Parliament v Council*, 27 June 2006, para. 60.

¹⁰⁰ CJEU, Case C-540/03, *European Parliament v Council*, 27 June 2006, para. 58.

¹⁰¹ CJEU, Case C-578/08, *Chakroun*, 4 March 2010, para 44.

margin of appreciation of Member States is tighter.¹⁰² In such cases, applicants' ties with his/her country of residence and possible ties with the country of origin must generally be balanced against the severity of the offence justifying the expulsion.¹⁰³

1.6.6 Conclusion

The fundamental rights provisions contained in the EU Charter of Fundamental Rights help to support the management of legal migration by informing the application of the EU legal migration Directives and the scope of the rights contained therein for third-country nationals on issues such as family reunification and social rights. Given the primary law nature of the fundamental rights included in the EU Charter of Fundamental Rights, national authorities need to respect them when implementing legal migration Directives or adopting national measures which may negatively affect any of the rights contained in these Directives.

Third-country nationals benefit from general rights guaranteed by the Charter and the ECHR to *any* person: A number of the rights listed in the legal migration directives are - in substance - declaratory confirmation of such rights. This applies in particular to the provisions in the legal migration directives dealing with freedom of association (Article 12 Charter) and equal working conditions (Article 31 Charter). Article 20 of the Charter (equality before the law) also applies to *all persons*; These provisions are important benchmarks for the human rights scrutiny of EU migration directives.

However, for a large number of economic and social rights, the Treaties and the Charter establish a distinction between EU citizens and third-country nationals according to which the former have stronger equal treatment guarantees which stem from constitutionally-protected free-movement rights. Fundamental rights guarantees recognised to third-country nationals in the Charter and case law confirm that EU legislators maintain a broad margin of discretion over circumstances granting access to third-country nationals to the territory of EU Member States for economic reasons and granting intra-EU mobility. Accordingly, in this field the principle of non-discrimination on grounds of nationality as referred to in the Treaties and the Charter cannot be invoked by third-country nationals. The latter can only rely on the scope of non-discrimination rules as referred to in EU secondary legislation. Case law of the CJEU and ECtHR interpreting provisions of the Charter and of EU law expand the scope of fundamental rights guarantees of third country nationals on certain issues, such as social benefits and family reunification.

Against that background, migration law can be characterised, to a large extent, as a "fine-tuning of legitimate discrimination": The legal migration directives set out in how far foreigners enjoy - or don't enjoy - rights similar to rights enjoyed by own nationals. The equal treatment provisions of the legal migration Directives are characterised by numerous limitations which give discretion to Member States as to the equal treatment to be afforded to third-country nationals. While it is not possible to describe these differences *per se* as illegitimate discrimination, the extent of the limitations to equal treatment provided for in the legal migration directives may raise issues of consistency with fundamental rights, including Article 20 of the Charter which allows for unequal treatment only in so far as it can be justified by legitimate considerations and provided it is done in a proportionate manner.

With regard to the cope of non-discrimination rules described in the secondary legislation, the adoption of the Single Permit Directive has helped to widen the scope of the equal treatment provisions also in respect of certain categories of third-country nationals - in particular family members who have the right to work. The main

¹⁰² See for e.g. case law cited in A. Wiesbrok, *Legal Migration to the EU*, 2010, pp. 210-224, and European Parliament, Study on the influence of ECJ and ECtHR case law on asylum and immigration, PE 462.438, 2012.

¹⁰³ See for e.g. recent ECtHR cases *Jeunesse v. the Netherlands*, Application No. 12738/10, 3 October 2014, and *Nuñez v. Norway*, Application No. 55597/09, 28 June 2011

categories of third-country nationals who are therefore excluded from the equal treatment provisions of the legal migration Directives are non-working families and the self-employed.

1.7 Free movement

Freedom of movement and residence for persons in the EU is the cornerstone of Union citizenship, established by the Treaty of Maastricht in 1992. Already foreseen in the 1957 Treaty of Rome, there has been a gradual broadening in the scope of EU provisions on freedom of movement until the landmark adoption of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of EU citizens and their family members to move and reside freely within the EU.¹⁰⁴ The Directive was designed to facilitate Union citizens' exercise of the right to move and reside freely within the Member States and to simplify and strengthen the right of free movement and residence of all Union citizens. The principle of the free movement of workers is enshrined in Article 45 of the TFEU and a substantial amount of secondary legislation, while the CJEU has developed extensive case law in this area.

While the Schengen area is widely regarded as one of the primary achievements of the European Union, it has recently been placed under considerable strain by the unprecedented influx of refugees and migrants into the EU. Laid down in Article 79 and 80 TFEU, EU immigration policy and legislation aim at establishing a uniform level of rights and obligations for regular immigrants, comparable with that for EU citizens. The right to enter and reside in another EU Member State for certain categories of legally-residing third-country nationals is one of the rights that have been approximated to the rights of EU nationals. However, differences in treatment remain, owing to the different legal basis of the mobility rights. For EU citizens, freedom of movement is a 'constitutional' right, based on Articles 21 and 45 of the TFEU, whereas the possibilities for intra-EU mobility for third-country nationals are based on secondary legislation and therefore subject to the political choice of the legislature.

This section examines the EU's free movement policy and legislation and considers the extent to which there are complementarities, synergies, gaps or inconsistencies between the provisions of the Legal Migration Directives and relevant provisions in the free movement area.

1.7.1 Third-country national family members

The main complementarity between the EU's policy on freedom of movement and the EU's legal migration acquis are the provisions in Directive 2004/38/EC on facilitated mobility for the non-EU family members of EU citizens. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. Where the family members possess a valid residence card on the basis of Article 10 of Directive 2004/38/EC, they shall be exempt from the visa requirement. In circumstances where an entry visa is required, Member States are obliged to grant the TCN family member facilitated access to the necessary visa: "Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure" (Article 5, paragraph 2).

As mentioned in recital 5 of the Directive, facilitated mobility for non-EU family members of Union citizens is included in Directive 2004/38/EC in order to ensure that the right of all Union citizens to move and reside freely within the territory of the Member States "is to be exercised under objective conditions of freedom and dignity". This is an important addition to the provisions on family reunification in the EU legal migration Directives as these only cover the entry and mobility conditions of third-country national family members joining a third-country national sponsor in an EU Member State.

However, there is also an important difference between the provisions on third-country national family members in Directive 2004/38/EC and those in the legal migration Directives. The **definition of family members** is wider in Directive

¹⁰⁴ Articles 12, 18, 40, 44 and 52 ECT = TFEU ,

2004/38/EC, covering: the spouse; the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage; the direct descendants who are under the age of 21 or are dependants and those of the spouse or registered partner; and the dependent direct relatives in the ascending line and those of the spouse or registered partner. Furthermore, the definition family members also includes "any other family members", irrespective of their nationality, who, in the country from which they have come, are dependants or members of the household of the EU citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the EU citizen; the partner with whom the EU citizen has a durable relationship, duly attested.

The right to free movement is indeed conferred by the Treaties directly on EU citizens whose exercise of the right of free movement would be limited if it was not extended to their family members in the broader sense.

The definition of family member in the Family Reunification Directive covers only the sponsor's spouse and the minor children of the sponsor and of his/her spouse (although Member States are allowed to apply a wider definition if they wish).

Static EU citizens do not fall under the scope of application of EU law and are thus not entitled to family reunification under EU law. In accordance with the rules established by the Treaties such a situation is governed by national law.

Directive 2004/38/EC only applies to "all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members".

The right of family reunification of static Union citizens also falls outside the scope of application of the legal migration acquis. The Family Reunification Directive covers third-country nationals wishing to reunite with third-country national sponsors in one of the Member States. The possibility for EU citizens residing in a Member State of which they are nationals (so-called 'static EU citizens') to reunite with third-country national family members is governed by **national law** only, as confirmed in several occasions by CJEU case law.¹⁰⁵

As further elaborated in the paper on 'Third-country family members of static EU citizens' (see Task ID - gap analysis), this situation may result in **reverse discrimination** where, owing to the co-existence of EU law and national law on family reunification, EU Member States treat their own nationals who have not exercised their right to freedom of movement less favourably than nationals of other Member States or their own nationals who move or have moved between EU Member States. Traditionally, the application of the Treaty provisions on EU citizenship was conditioned on the existence of a cross-border element. In the absence of a cross-border element, a Member State could then discriminate against its own citizens. This appears to be resulting in movement of EU citizens to other Member States aimed at benefitting from more favourable provisions to reunite with their third-country national family members.¹⁰⁶ Such use of the free movement rules is perfectly legal as long as the residence of the Union citizen in the host Member State is genuine and effective.

¹⁰⁵ For instance, Joined Cases 35-36/82, *Morson and Jhanjan v. Netherlands*, [1982] ECR 3723; Case C-127/08 *Metock and Others* [2008] ECR I-6241 or Case C-434/09 *McCarthy* [2011].

¹⁰⁶ Report prepared by the UK European Migration Network National Contact Point: Misuse of the right to family reunification: marriages of convenience and false declarations of parenthood (2012), p. 3, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/family-reunification/uk_20120622_familyreunification_final_en.pdf

1.7.2 More favourable treatment enjoyed by mobile EU citizens compared to TCNs exercising their intra-EU mobility rights

Another substantial difference between EU citizens and TCNs concern their mobility rights. EU citizens who reside in a second MS can decide to move and reside in a third MS under the same rules and conditions of their first "intra-EU movement.

In contrast, if a third-country national wants to reside for more than three months¹⁰⁷ in another Member State than the one in which they are residing, they must apply for a residence permit in that country. This is also explicitly foreseen as a mandatory requirement to the second Member State in the Long-term residence Directive, the Blue Card Directive, the Students Directive and the Researchers Directive. Under the ICT and the Student and Researchers Directive, it is up to the discretion of the Member States to require a notification to the second Member State of the intended mobility or an application.

Where applications to reside in the second Member State are required, the TCN is obliged to meet the same conditions that he/she needed to meet in the first Member State (for detailed mapping of the requirements, see section on intra-EU mobility in the internal coherence section of the Intervention Logic).

As mentioned above, the differences in treatment between EU citizens and third-country nationals are justified on the basis that freedom of movement is a 'constitutional' Treaty-based right for EU citizens, whereas possibilities for intra-EU mobility for third-country nationals are based on secondary legislation. The rules/legislation/restrictions applied in secondary legislation adopted for TCNs can impact on the situation of certain third-country nationals wishing to move to a second Member State in order to take up an economic activity as an employed or self-employed person. The Long Term Residence and Blue Card directives include specific provisions to this effect, as they allow the second (or subsequent) Member States to establish quotas on the total number of long-term residents and Blue Card holders able to move into their territory "for reasons of labour market policy".¹⁰⁸ Member States can furthermore require that the third-country nationals in question pass a labour market test and "give preference to Union citizens, to third-country nationals, when provided for by Union legislation, as well as to third-country nationals who reside legally and receive unemployment benefits in the Member State concerned."

1.7.3 Relevance of CJEU case law on free movement for TCNs' intra-EU mobility rights

Another growing area of attention regarding the interaction between the EU *acquis* on free movement and legal migration is the extent to which the conclusions of the case law of the CJEU on free movement should help to define the intra-EU mobility rights of third-country nationals. In several recent decisions the CJEU appears to have concluded that, although limited to a specific issue, third-country nationals have been granted similar rights by secondary legislation. For example, in C-554/13 - Zh. and O. case of 2015 on the Return Directive¹⁰⁹, and C case of 2015 on the Qualification Directive, the CJEU used similar interpretations with respect to the 'risk to public security'.

¹⁰⁷ Combination between Schengen and legal migration *acquis*.

¹⁰⁸ However, the LTR Directive foresees a 'stand-still' clause' limiting the quota to cases where it already existed in national law by the time of adoption of the Directive; the Blue Card Directive does not contain any provision of that kind.

¹⁰⁹ See here: <http://curia.europa.eu/juris/liste.jsf?num=C-554/13>

1.7.4 Conclusion

EU policy on freedom of movement interacts in a number of ways with the management of legal migration. The main aspect of this interaction concern the intra-EU mobility rights of third-country nationals compared to the ones of EU citizens. Formally, the differences in treatment between EU citizens and TCNs in relation to mobility rights does not give rise to coherence issues, because the freedom of movement of EU citizens is a 'constitutional right' (Art 21 and 45 of the TFEU) whereas the right to intra-EU mobility for third-country nationals is based on secondary legislation and therefore subject to the will of the legislature.

It should be underlined that static EU citizens do not fall under the scope of application of EU law and are thus not entitled to family reunification under EU law. In accordance with the rules established by the Treaties such a situation is governed by national law.

However, the judgements of the CJEU on returning nationals confer Union citizens who return to their Member State of origin similar rights to family reunifications than the ones attributed by secondary legislation to Union citizens who reside in another Member State.

1.8 Regulation of social security

The free movement of persons requires effective social security coordination between Member States to facilitate mobility and ensure that persons who move to another Member State continue to be protected. The EU provides for common rules for EU citizens when moving to another Member State. The rules set out under Regulation 883/2004 and implementing Regulation 987/2009 specify coordination rules of social security between different national social security schemes.

The coordination rules apply to ten branches of social security, namely, i) Healthcare (ii) Sickness cash benefits (iii) Maternity and paternity benefits (iv) Invalidity benefits (v) Old-age pensions and benefits (vi) Survivors' benefits (vii) Benefits in respect of accidents at work and occupational diseases (viii) Family benefits (ix) Unemployment benefits, and (x) Long-term care benefits. According to article 3.5 of Regulation 883/2004, EU social security coordination does not apply to social and medical assistance¹¹⁰.

There are various situations where the interactions between the EU legal migration Directives and the EU rules on social security coordination affect the social security rights of third-country workers. These can be grouped into three 'phases' of the migration process: when third-country nationals arrive to work in a Member State, if/when they move to work in a second Member State, and if/when they move 'back' to a third country.

1.8.1 Working in a first Member State

There are strong synergies between the EU's social security coordination rules and the EU's legal migration Directives for third-country workers who arrive to work in a Member State. All of the legal migration Directives (except for the Students Directive who are covered by the provisions of the Single Permit as they are not excluded from its scope) which allow third-country nationals to work contain provisions on equal treatment with nationals as regards the branches of social security as defined in Regulation 883/2004 (and prior to that, in Regulation 1408/71). The Long Term Residence Directive additionally provides equal treatment with nationals as regards social assistance and social protection – benefits which are not coordinated under Regulation 883/2004 – although it allows Member States to limit these to 'core benefits'.¹¹¹ In the new Students and Researchers Directive, trainees, volunteers and au pairs (previously excluded in the Students Directive) are also covered by the equal treatment provisions with respect to social security, as long as they are in a working relationship that is recognised in the Member State. Article 22 of the recast Directive (EU) 2016/801 establishes that Students are entitled to equal treatment as provided in the Single Permit Directive.

However, several legal migration Directives introduce restrictions to these equal treatment provisions which mean there are gaps in the social security coverage of certain third-country nationals who are working in the EU:

The Single Permit Directive allows Member States to restrict unemployment benefits to those who have been employed in the host Member State for less than six months. It also allows them to refuse family benefits to third-country workers who have only been authorized to work for a period not exceeding six months, to third-country nationals who have been admitted for the purpose of study, or to those who are allowed to work on the basis of a visa. It should be noted that the equal treatment provisions of the Directive apply not only to those admitted to work under EU or

¹¹⁰ The terms 'social and medical assistance' are defined in the 1953 European Convention on Social and Medical all assistance granted under the laws and regulations in force in any part of its territory under which persons without sufficient resources are granted means of subsistence and the care necessitated by their condition, other than non-contributory pensions and benefits paid in respect of war injuries due to foreign occupation.

¹¹¹ On the interpretation of this exception, see ECJ ruling in Case C-571/10 *Kamberaj* ECLI:EU:C:2012:233.

national law, but also to those who are permitted to reside on other grounds, provided that they are allowed to work (although the Directive excludes some categories of people from its scope). Recital 24 of the Single Permit Directive also states that the Directive does not grant rights in situations which lie “outside the scope of Union law”, such as in the case of family members residing in a third country. This means that under the Single Permit Directive, Member States are not obliged to grant family tax benefits for members of the family who are not residing in a Member State.

While the Students and Researchers Directive extends equal treatment provisions to students, trainees, volunteers and au pairs, it allows Member States to restrict access to family benefits to researchers who have been granted the right to reside in the territory of the Member States concerned for a period not exceeding six months (Article 22(2)(b) of the Students and Researchers Directive). For students, trainees, volunteers and au pairs the restrictions set out in the Single Permit Directive also apply.

The Seasonal Workers Directive restricts equal treatment for social security by excluding family benefits and unemployment benefits subject to the application of bilateral agreements or the national law of the Member State.

In the ICT Directive, intra-corporate transferees are entitled to equal treatment with nationals as regards the branches of social security as defined in Regulation 883/2004, unless the law of the country of origin applies by virtue of the application of bilateral agreements or of the national law of the Member State of residence. This means that, depending on the latter, intra-corporate transferees may be subject to the social security legislation of the sending Member State). The ICT Directive also allows Member States to restrict the right to equal treatment with regard to family benefits to ICTs who have been authorized to reside and work in the territory of a Member State for a period not exceeding nine months.

The only work-relevant Directives which do not contain restrictions to the right to equal treatment with nationals as regards the branches of social security as defined in Regulation 883/2004 are the Blue Card Directive and the Long Term Residents Directive.

The role of bi-lateral agreements must also be mentioned in this context. Most relevant EU immigration law Directives specify that a Member State can set higher standards by means of bi-lateral agreements with third-countries (the long-term residence Directive only refers to pre-existing treaties in this context). The ICT Directive also links the equal treatment rule in social security to bilateral agreements under certain circumstances. Where a Member State has concluded a bi-lateral agreement with a third-country, the provisions on access to social security in the agreement take precedence over any rules which may apply to a third-country national’s access to social security by virtue of the EU legal migration Directives, on condition that the provision in the bilateral agreement is more favourable to the persons concerned.

Finally, while most categories of third-country workers are covered by the EU legal migration acquis, thanks to the scope of the Single Permit Directive which includes not only third-country nationals admitted for the purpose of work (via EU or national permits) but also those admitted for other purposes who are allowed to work, there are still some categories of third-country workers who are excluded, namely, self-employed third-country nationals and workers who are posted to the EU by an employer based in a non-EU country.

1.8.2 Moving from one Member State to another

Regulation 1231/2010 extended the coordination of social security rules to third country nationals who move from one country to another, or in a cross-border situation (e.g. they live in one Member State and work in another, or they have moved to from one Member State to another for work, but have children who have

stayed in the first Member State). One of the main issues has long been that TCNs who move from one Member State to another were not covered by the EU social security coordination rules and were bound by bilateral agreements between their home country and the host Member State. However this changed with Regulation 859/2003, later replaced by Regulation 1231/2010, which extends the application of social security coordination rules to third-country nationals when they are in a cross-border situation and are legally residing in one Member State.

Regulation 1231/2010 also applies in situations where a third-country national works for an employer established outside of the EU but works in several Member States during his or her stay in the EU. However, it does not apply to a third-country national who lives in an EU Member State but works in a non-EU country, if there are no links to additional Member States.¹¹² Another potential problem, is the situation inter-corporate transferees, who are subject to social security in their country of origin but during their stay in the EU, in case they move from one MS to another or their family for example reside in another MS.

Otherwise there appear to be no gaps or inconsistencies between the provisions of the legal migration Directives and the EU's social security coordination rules in cross-border situations.

1.8.3 Moving 'back' to a third country

A further set of interactions between the EU's social security coordination rules and the EU legal migration Directives take place if a third-country national 'returns' to a third country. Most of the legal migration Directives provide for equal treatment with respect to the portability of statutory pensions when moving 'back' to a third-country. That is, for the categories of third-country nationals covered by the Directives, Member States are obliged to continue to pay pensions to the third-country nationals when they 'return' to a third country. However, as the portability of pensions is expressed as an equal treatment right, this obligation only exists insofar as the Member State permits their own citizens to transfer their pensions to a third-country.

Another gap in the EU *acquis* on the portability of pensions concerns the categories of third-country workers who are not covered by the Directives. This includes self-employed workers and workers who are posted by an employer based outside of the EU (third-country nationals who are posted from one EU Member State to another are covered by the social security rules of their home State according to Regulation 883/2004).

The only Directive that does not contain specific provisions on the portability of pensions is the Long-term Residents Directive, although arguably the general rule of equal treatment as regards social security set out in the Directive would apply to portability issues too.

1.8.4 Recent developments

In 2016, the Commission adopted a new proposal (the **labour mobility package**) that included reforms to the rules for EU social security coordination, an enhanced European Network of Employment Services (EURES) and a revision of the Posting of workers Directive. It has as main objective to promote labour mobility in the EU and to tackle abuse by means of better coordination of social security legislation and to prevent social dumping in the context of posting of workers. The proposed rules on social security coordination seek to further clarify access to social assistance for non-economically active EU citizens that move to another EU MS. In addition, the proposal includes coordination rules for long-term care benefits, proposes new provisions for the coordination of unemployment benefits in cross-border cases (improved length of portability of benefits; clarifications for frontier workers and other cases with regard to

¹¹² Case C-247/09 *Xhymshiti* [2010] ECR I-11845.

defining the responsible Member State). Finally, the proposal contains new provision for the coordination of family benefits intended to replace income during child-raising periods.

1.8.5 Conclusions

The EU's rules on the coordination of social security set out under Regulation 883/2004 and implementing Regulation 987/2009 support the management of legal migration in important ways as they define the branches of social security to be covered by the relevant provisions on equal treatment in the EU legal migration Directives. Furthermore the adoption of Regulation 859/2003 (replaced by Regulation 1231/2010) extended the coordination of social security rules to third country nationals who move from Member State to another, or who are in a cross-border situation within the EU.

However, the interaction between the EU rules on social security and the EU legal migration Directives create certain gaps in the social security coverage of certain third-country workers in the EU. These gaps result from the restrictions to the right to equal treatment with nationals as regards access to social security contained in the Single Permit Directive, the (new) Students and Researchers Directive, the Seasonal Workers Directive and the ICT Directive, especially as regards access of the relevant third-country nationals to family benefits but in some cases also unemployment benefits.

Other gaps stem from the fact that certain categories of third-country national workers are not covered by the EU legal migration Directives, including self-employed workers and persons posted to work in the EU by an employer based outside of the EU.

There are also several gaps in the EU acquis affecting the right of third-country nationals to transfer their pensions when they move 'back' to a third-country. The portability of statutory pensions for third-country nationals who have worked in the EU is included in almost all of the EU legal migration Directives (except for the long-term residents Directive, where it is arguably still implicit). However, since this right derives from an equal treatment provision, it depends on the existence of such a right for the nationals of the Member State. The categories of third-country workers who are not covered by the EU legal migration Directives would only be able to transfer their pensions upon their return to a third-country if provisions exist in bi-lateral agreements to this effect.

There can be inconsistencies stemming from the interaction of the two legal frameworks. Not only the list of benefits covered by the Regulation 883/2004 is applied in the context of the legal migration directives but also the jurisprudence developed by the ECJ as regards definition and scope of the different benefits, in particular on whether a benefit can be considered social security or social assistance. This may lead to problems in the practical application of legal migration Directives. In the case for example that a national benefit is considered social assistance (such classification may not be in line with Regulation 883/2004 and existing jurisprudence) and therefore a number of categories of third country nationals can be excluded from it.

1.9 Posting of workers

1.9.1 Key aspects and issues of the Posted Workers Directive

A "posted worker" is defined as worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.¹¹³ Posted workers are different from EU mobile workers in that they remain in the host Member State temporarily while having a work contract with an employer established in the sending Member State, and therefore do not integrate in the host's labour market.

The Posted Workers Directive (PWD) 96/71/EC defines a set of mandatory rules regarding the terms and conditions of employment to be applied to posted workers.¹¹⁴ It coordinates employment laws for workers that carry out a service in another Member State other than their home state for a temporary period. It foresees three types of postings:

- The direct provision of services by a company under a service contract;
- Posting in the context of an establishment or company belonging to the same group ('intra-group posting');
- Posting through hiring out a worker through a temporary work agency established in another Member State.

The underlying rationale for this instrument was to establish a balance between the objectives of promoting and facilitating the cross-border provision of services (one of the fundamental freedoms of the EU), while providing protection to posted workers and ensuring a level-playing field between the companies in the sending and hosting countries, via the limitation of wage differentiation between them. The PWD sets out minimum mandatory rules regarding the terms and conditions of employment for posted workers to ensure fairness and protect workers' rights and employment conditions throughout the EU. These mandatory rules (which need to be applied during the stay based on the law of the host Member State) establish that posted workers are entitled by law to a set of core rights in force in the host Member State¹¹⁵:

- minimum rates of pay;
- maximum work periods and minimum rest periods;
- minimum paid annual leave;
- the conditions of hiring out workers through temporary work agencies;
- health, safety and hygiene at work;
- equal treatment between men and women.

Other aspects of the employment relationship, not listed under Article 3.1 of the PWD, remain under the legislation of the sending Member State. However, in relation to the applicable rules and the regime on social security this is only the case as long as the 'posting' does not last longer than 2 years (*on which see also the relevant fiche*): based on Regulation no 883/2004 on the coordination of social security systems, posted workers remain subject to the social security regime of the sending Member State, as long as the duration of the posting does not exceed 24 months (and that he or she is not sent to replace another person). The so-called A1 forms that usually accompany the posting provide confirmation that the concerned posted workers have social security protection in their home State and thus do not fall under the rules of the host State.

¹¹³ Article 2.1. Directive 96/71/EC of the European Parliament and Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996L0071&from=EN>

¹¹⁴ Directive 96/71/EC of the European Parliament and Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996L0071&from=EN>

¹¹⁵ Employers can however apply working conditions which are more favourable to workers.

The PWD has been the object of **controversies** across a range of stakeholders (e.g. Member States, EP, economic and social actors). The number of posted workers has increased 45% from 2010 to 2014¹¹⁶, and there are concerns that there are increased risks of abuses and fraud in its implementation. As an example of such abuses, it can be mentioned that the PWD requires, as a condition for posting, the existence of a "genuine link" between the posted worker and the sending country (Article 2.1). However, this condition is often not actually complied with. A number of fraudulent situations have been detected:

- A temporary work agency hiring out workers for a temporary service mission in another Member State – these use the PWD to circumvent the protections granted to temporary workers by the Temporary Work Agency;
- Bogus self-employed persons that actually work for only one employer;
- Subcontracting chains;
- Workers hired solely for the purpose of posting spending not much time in their home country – meaning that the temporary element is not real;
- Letter-box companies – legal entities established in an EU country, where they have no (or minor) economic activities, in order to "regime shop" for lower taxes, wages etc.

Therefore, following calls to revise the Directive, particularly from the European Parliament and trade unions associations, to avoid perceived unfair practices and abuse, the EU approved an "Enforcement Directive" in 2014 (2014/67/EU) to prevent and detect abuses in the implementation of the PWD and, in 2016, the Commission proposed a more fundamental revision of the PWD (COM(2016)128) (see *below*).

1.9.2 Interaction with the legal migration acquis

The PWD is nationality-neutral, and therefore third-country nationals employed by a company in an EU Member State who are posted from one Member State to another are covered as well as EU citizens.

Due to the nature of the posting, as explained above, such third-country nationals are however **not covered by the legal migration acquis** in the Member State where they are posted, as they do not hold a permit issued by that Member State but are holders of a permit or a visa issued by the sending Member State. In fact the Single Permit Directive is not applicable in the host Member State and they are therefore not covered by the equal treatment provisions in that Directive in the host Member State. The host Member State has nevertheless to respect the core standards in the PWD, as explained above.

A Directive which is closely interlinked with the PWD is **the Intra-Corporate Transfers (ICT) Directive**.(2014/66/EU). ICTs are in fact "international posted workers", as they are non-EU citizens posted from a company based outside the EU – and their employment contract is with that company – to one or more subsidiaries based in the EU. As in the case of intra-EU posted workers, they do not integrate the labour market of the host Member State.

However, the scope of the ICT Directive is much narrower than the PWD as it concerns only the posting of highly-skilled workers (managers, specialists, and graduated trainees) within subsidiaries of multinational companies, while the PWD has a much broader scope (see above under section 1) covering the intra-EU posting of workers at any skill level, including low-skilled. In spite of this, the negotiations on the Enforcement Directive and the related political controversies had a strong spill over effect on the ICT negotiations, which were held in parallel.

Given that Article 1.4 of the PWD states that "Undertakings established in a non-member State must not be given more favourable treatment than undertakings

¹¹⁶ Impact Assessment of 8.3.2016 for the proposal amending the PWD (SWD(2016) 52 final), page 55

established in a Member State”, it was important to establish a parallelism between the two Directives in relation to the working conditions, so to avoid that foreign companies would have a competitive advantage in the provision of services (namely for being allowed lower salaries for their posted employees) compared to EU-based ones. This entails that non-EU workers posted within the same undertaking or to the same group of undertakings from outside the EU would have to be recognised at least the same core rights as intra-EU posted workers.

Therefore, the ICT Directive aligns the equal treatment provision with the PWD regime (see Art. 18), without preventing Member States from adopting more favourable rules for the workers. This also means that the ICT Directive is the only labour migration instrument which does not foresee equal treatment with nationals as regards working and other conditions. This is explained by the different nature of the working relation of the worker, who does not integrate the labour market of the receiving Member State. However, this was one of the most controversial issues at stake during the interinstitutional negotiations, with the EP pushing for full equal treatment, against the Council wishing to maintain the parallelism with the PWD. To alleviate concerns – on both sides – one additional requirement was added to the admission conditions, i.e. the fact that the remuneration granted to ICTs should not be less favourable than the remuneration granted to nationals in comparable positions in the Member State where the work is carried out (Art. 5(4)(b)).

This last element can therefore be considered a departure from the provisions of the PWD. The legislator has considered that there could be higher risks of abuse and social dumping in the postings covered by the ICT Directive, notably given that the control of the practices of companies based outside the EU is more difficult, from an EU Member State perspective, than the monitoring of an employer based on EU territory.

In any case, the ongoing revision of the PWD, aiming at raising the working standards, including remuneration, may make this differentiation less relevant, at least if we consider the Commission's proposal.

Finally, it is to be noted that short-term posting of service providers from outside the EU, in those cases that do not fall under the scope of the ICT Directive, is currently **not covered** by the EU legal migration acquis. This is in special the case of two categories of workers covered by GATS Mode 4 provisions: contractual service providers and independent professionals (*see fiche on international service providers*).

1.9.3 Recent developments and implications for the legal migration acquis

The Enforcement Directive 2014/67/EC was adopted, after lengthy and difficult negotiations until the very end of the previous EP-term, with the aim to strengthen the practical application of the PWD by addressing issues related for instance to fraud and circumvention of rules. It aims to primarily foster better coordination between Member States, which was quite problematic. It addresses 'letter-box' companies that use posting to circumvent the law; defines Member States' responsibilities to verify compliance with the rules on posting of workers; sets requirements for posting companies to facilitate transparency of information and inspections; empowers trade unions and other parties to lodge complaints and take legal and/or administrative action against the employers of posted workers, if their rights are not respected; ensures the effective application and collection of administrative penalties and fines across the Member States if the requirements of EU law on posting are not respected. The Enforcement Directive also has provisions on subcontracting liability and on establishing a single national website.

In March 2016, the European Commission proposed a more fundamental revision of the rules on posting of workers. The main objective of the new proposal is to provide for fairer competition and respect of rights of posted workers. The proposal includes three major changes:

- Equal remuneration and working conditions as local workers (this would include also bonuses or other specific allowances not just pay).
- Member States may set out rules to oblige sub-contractors to pay equal wages.
- Changes for cross-border temporary work agencies, where these would have to offer the same employment conditions to posted agency workers as those which national temporary work agencies grant to workers.

Long-term posting – if the postings exceed 24 months the host Member State employment law would become applicable. The proposal is still under negotiation, and continues to make the object of a heated debate across Member States and other stakeholders. Any change to the current PWD may affect the ICT Directive, given the broad alignment of the working conditions between the two Directives. However, if the main elements of the Commission proposal are kept when the text is finally adopted, the new PWD is going to contribute to an increase of the rights and overall protection of posted workers, including third-country national ones under the scope of the PWD.

In June 2016, the Commission also made a proposal to revise the Blue Card Directive on highly skilled workers, which is currently under negotiations with the EP and the Council. Amongst the new elements proposed is a facilitation for short-term intra-EU mobility of Blue Card holders for certain temporary business activities in other Member States. Given that Blue Card holders, like posted workers, have an employment contract with an employer based in an EU Member State, and could be posted to provide a service in another Member State¹¹⁷, there can be some limited cases where a third-country highly skilled worker falls under both the scope of the PWD and of the facilitated short-term intra-EU mobility of the Blue Card (e.g. for example, a manager providing services in another Member State when this activity is on the list of allowed business activities). Such business activities in other Member States are already allowed today under national law but, with the facilitation for short-term mobility provided in the new proposal, it becomes more visible.

This is however not a problem in itself given that, even in cases where there would be an overlap of the personal scope of the two Directives:

the facilitation foreseen in the Blue Card Directive mainly aims at avoiding that Blue Card holders are subject to visa requirements (and other possible authorisations a Member State may require) when they move for a short term mobility to carry out a 'business activity' – clearly and specifically defined in the Directive – to another Member State. The visa requirement is an element that is not regulated by the PWD¹¹⁸, which only regulates the working conditions, not the immigration regime in a given Member State. There is therefore no overlapping there;

such facilitation is also limited in time (to three months in total across all Member States), which limits the possibility for abuses (besides the fact that this concerns a specific category of - highly skilled - workers);

finally, the obligations under the PWD are not affected by the new Blue Card (for example, the requirement to prove social security affiliation in the sending Member State remains untouched).

1.9.4 Conclusions

The Posted Work Directive (PWD) was designed to offer cross border workers a 'core set' of rights equivalent to the rights of local workers while ensuring the deepening of the functioning of the internal market and the removal of obstacles to the cross-border provision of services. Third-country nationals residing in the EU are covered by the

¹¹⁷ Already under the current Blue Card, third-country national work permit holders in one Member State can be posted to provide services for the undertaking that employs them in another Member State.

¹¹⁸ This subject to the *Vander Elst* Case law (C-43/93 Van der Elst; C-445/03 COM v. LU; C-244/04 COM v. DE).

PWD when posted to a Member State other than the one who issued them a permit or visa. Therefore:

The general concerns raised in relation the PWD – unfair practices, abuses and circumvention of the Directive, risks of social dumping – are also relevant for third-country workers already residing in the EU under these conditions;

There is a discrepancy between the PWD and the ICT Directive as regards the level of the remuneration (potentially higher for ICTs), which is however aimed at avoiding abuses and at ensuring a better protection for the workers;

While the PWD may apply also to Blue Card holders (when they provide services within the meaning of the PWD), this is not a problem in itself as the two Directives rather complement each other both under the current Blue Card Directive and under the 2016 Commission proposal to revise the Blue Card Directive;

Finally, it is to be noted that posting of service providers from outside the EU to EU Member States, in those cases that do not fall under the scope of the ICT Directive, is currently not covered by the EU legal migration acquis (except for the general principle that undertakings in third-countries should not be given more favourable treatment than MS undertakings set out in Article 1(4) of the PWD).

1.10 Temporary agency work

1.10.1 Key aspects of the Temporary agency work Directive

The Directive on Temporary Agency Work 2008/104/EC¹¹⁹ provides a general regulatory framework for the work of temporary agency workers in the EU. It applies to any persons who are protected as a worker under national employment laws in the Member States. The Directive applies to the temporary work contracts directly with the companies or to the relations of a worker with a temporary work agency. The 2008/104/EC Directive established several key provisions in the regulation of temporary work:

- The principle of equal treatment where the basic working and employment conditions of temporary agency workers should be the same as those that would apply if they had been recruited directly by the company to occupy the same job.
- The company should keep temporary workers informed of any permanent vacancies.
- Temporary agency workers should be given access to the amenities or collective facilities available to the permanent employees of the company.
- Member States must ensure that any clauses preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary worker are null and void or may be declared null and void.
- Temporary workers should not be charged any recruitment fees.
- Member States should facilitate training access for temporary workers through appropriate measures or encouragement of social dialogue on this issue.
- Temporary workers should count towards the number of employees required to establish a worker representation body. The company must provide suitable information on the use of temporary agency workers when providing information on the employment situation in that undertaking to bodies representing the workers.

1.10.2 Interaction with the legal migration Directives

The Directive on Temporary Agency Work contributes to the management of legal migration in the EU by providing a minimum level of effective protection to third-country national temporary agency workers specific to temporary agency work, that complements equal treatment conditions for third-country workers who are covered by the EU legal migration Directives. This includes all third-country nationals who are admitted for the purpose of work, or who otherwise enjoy the right to work (e.g. students in certain cases, LTRs, family members), also on the basis of national schemes (including those covered by Single Permit).

In relation to worker representation, whilst the exact provisions of Directive 2008/104/EC are not present in the Seasonal Workers, Students, Researchers, and ICT Directives, the Seasonal Workers and ICT Directives do provide for the equal access of third-country nationals to the worker representation bodies.

No significant coherence issues between this Directive and the Legal migration Directives have been identified.

The provisions on **access to employment** are subject to specific limitations in the case of four Directives:

- Of the Directives evaluated, only the Long-Term Resident Directive includes in access to employment among the equal treatment, and LTRs should enjoy equal treatment in access to temporary agency work. Such is limited insofar

¹¹⁹ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0104&from=EN>

employment does not entail even occasional involvement in the exercise of public authority and Member States may limit equal access to employment in occupations where in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or EEA citizens. This is however not likely to be a significant issue of coherence, as such post may not be likely to be filled through temporary agencies.

- In the Single Permit Directive, the rights based on the permit is limited to exercising the specific employment activity authorised under the single permit in accordance with national law (however, in many cases Single Permit holders have unrestricted access to the labour market, including family members or third country nationals with national permanent residents), whilst equal treatment provisions relate to concerns working conditions. If such a specific employment related permit is issued to a third country worker for temporary agency work, and if the income is variable, this may lead to obstacles for renewals of the permit, depending on how the MS has implemented relevant conditions.
- In the Blue Card Directive, access to the labour market is limited in the first two years to the exercise of paid employment activities under the conditions for admission and Member States may limit access to employment in occupations where in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or EEA citizens.
- In the Family Reunification Directive, access to employment is limited insofar as the Member States may decide according to national law the conditions under which family members exercise an employed or self-employed activity.

There are, however, certain coherence issues between the issues regulated by the Directive on Temporary Agency Work and of the EU legal migration Directives, namely potential gaps related to:

- Third-country nationals who are contracted by a temporary work agency based outside of the EU;
- Third-country nationals who are self-employed, as these are excluded from the scope of the Single Permit Directive; and,
- Third-country nationals who are posted workers within the EU via temporary agencies, as these are also excluded from the scope of the Single Permit Directive equal treatment provisions. The precariousness of temporary agency workers is aggravated in cases where such worker is posted to another Member States (see analysis of the Posted Workers Directive).

1.10.3 Conclusions

There are important synergies (complementarities) between the provisions on equal treatment of the Directive on Temporary Agency Work (2008/104/EC) and the EU legal migration Directives in relation to equal treatment and the specific protection for temporary agency workers. The Single Permit Directive for instance means that third-country nationals admitted for the purpose of work, or who enjoy the right to work, and who have a permit that authorizes work in a temporary agency (if national rules specific), have access to the minimum level of protection afforded to temporary agency workers by Directive 2008/104/EC.

However, there are also potential significant gaps in personal scope between the provisions on equal treatment of the Directive on Temporary Agency Work and the legal migration Directives. These gaps result from the exclusion of certain categories of third-country nationals from the scope of the Single Permit Directive (in particular self-employed workers and posted workers).

Another potential significant gap concerns third-country nationals who are contracted to work in the EU by a temporary work agency based outside of the EU, as these are

also not covered by the protections contained in the Temporary Agency Work Directive.

Potential obstacles may occur at renewal of permits, depending on implementation choices by the MS, in the case salary levels were not maintained due to the nature of temporary agency work, rendering third-country workers more vulnerable.

1.11 Employer sanctions

Provisions on employer sanctions can be found in several EU instruments regulating employment. In most cases, the provisions are in respect of non-compliance to specific items regulated in the respective instrument (see for example, the Temporary Agency Workers Directive which has a provision sanctioning employers hiring staff on a temporary basis where the work is not in fact temporary – *see also specific paper*). Sanctions against employers who have not fulfilled their obligations under the respective Directives are also foreseen in two legal migration Directives: the ICT Directive, for specific breaches of the Directive and Seasonal Workers Directives, for any breach of the Directive, also making references to the Directive 2009/52/EC (see below) in the recitals.¹²⁰

Directive 2009/52/EC has a specific scope as it provides for minimum standards for sanctions against employers for employing **illegally staying third-country nationals**. The Directive prohibits the employment of illegally staying third-country nationals and introduces minimum common standards on sanctions and measures to be applied in the Member States against employers who infringe that prohibition. The minimum sanctions include criminal penalties in cases of serious infringements, including when it concerns particularly exploitative working conditions. The measures include the setting up of effective complaints mechanisms for relevant third-country nationals to lodge complaints directly or through third-parties; and effective and adequate inspections to be carried out on the territory of the Member State, as well as the communication of data on the inspections to the Commission.¹²¹

1.11.1 Sanctions of employers in the legal migration Directives

Art. 8.5 of the Blue Card Directive states that Member States may reject an application for an EU Blue Card if the employer has been sanctioned in conformity with national law for undeclared work and/or illegal employment. There is no provision on withdrawing a permit, if similar conditions arise.

Articles 8.2 and 9.2 of Seasonal Workers Directive, as well as Articles 7.2 and 8.2 of the ICT Directives stipulate that an application could be, respectively, rejected or withdrawn if the employer has been sanctioned in accordance with national law for undeclared work and/or illegal employment

Art. 20.2 (c) and Art. 21.2 (c) of the Student and Researcher Directive also allow Member States to, respectively, reject applications or withdraw / refuse to renew authorisations of third-country nationals, where the host entity, another

¹²⁰ The ICT Directive states that Member States may impose sanctions against the host entity established on its territory in accordance with Article 9, where:

- the host entity has failed to notify the mobility of the intra-corporate transferee in accordance with Article 21(2) and (3);
- the intra-corporate transferee permit or the permit for long-term mobility is used for purposes other than those for which it was issued;
- the application for an intra-corporate transferee permit has been submitted to a Member State other than the one where the longest overall stay takes place;
- the intra-corporate transferee no longer fulfils the criteria and conditions on the basis of which the mobility was allowed to take place and the host entity fails to notify the competent authorities of the second Member State of such a modification;
- the intra-corporate transferee started to work in the second Member State, although the conditions for mobility were not fulfilled in case Article 21(5) or point (d) of Article 22(2) applies.

The Seasonal Workers Directive states that Member States shall provide for sanctions against employers who have not fulfilled their obligations under the Directive, including the exclusion of employers who are in serious breach of their obligations under this Directive from employing seasonal workers. Those sanctions shall be effective, proportionate and dissuasive.

¹²¹ Directive 2009/52/EC on providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:168:0024:0032:EN:PDF>

body responsible in the Member State concerned for the voluntary service scheme, an educational establishment or a third party that accepts responsibility for the third country national, the host family or the organisation mediating au pairs has been sanctioned in accordance with national law for undeclared work or illegal employment.

1.11.2 Safeguard for the migrant worker

The SWD (Articles 8.5 and 9.5), as well as the ICT Directive (Articles 7.5 and 8.6) include safeguards and protective measures for the seasonal workers and inter-corporate transferees in cases when employers are sanctioned, and stipulate that any decision to reject or withdraw the authorisation shall take account of the specific circumstances of the case, including the interests of the seasonal worker or intra-corporate transferee, and respect the principle of proportionality. The BCD does not have such provisions.

Another relevant provision of the Employer Sanctions Directive is the requirement for Member States to ensure that employers are liable to pay any outstanding remuneration to the illegally employed third-country national in respect of each infringement of the prohibition of illegal employment. However, employers who have been found to be illegally employing *legally residing* third-country nationals would not be liable to paying such back payments. Third-country nationals admitted under the Seasonal Workers Directive are an exception, as the Seasonal Workers Directive includes a specific provision on equal treatment for seasonal workers with respect to nationals with regard to “back payments to be made by the employers, concerning any outstanding remuneration to the third-country national” (Article 23(1)(c)).

1.11.3 Monitoring of employment practices

The fact that neither does Directive 2009/52/EC on employer sanctions cover irregular practices (*see different forms of exploitation in section X*) by the employer in the employment of legally residing third-country national, nor do the other EU legal migration Directives – except the Seasonal Workers one - include such monitoring and sanctions mechanisms, constitutes a gap in the functioning of the EU legal migration Directives. In particular, the equal treatment provisions contained in these Directives, which aim at ensuring fair treatment of third-country nationals, including as regards pay and working conditions, are not backed up by a requirement in EU law for Member States to monitor and enforce the provisions through obligatory inspections or minimum sanctions against the employers found to be infringing the law.

The gap in the functioning of the EU legal migration Directives, as a result of the exclusion of legally residing third-country nationals from the Employer Sanctions Directive, is only partially addressed by the EU’s Anti-Trafficking Directive¹²², for situations that fall under its scope. The EU Anti-Trafficking Directive covers all victims of trafficking, regardless of their legal status, therefore also legally residing third-country nationals. It establishes minimum rules for the definition of criminal offences and sanctions against individuals and legal persons (who may include employers) who are perpetrators, inciters or accessories in the offences of trafficking, i.e. “the recruitment, transportation, transfer, harbouring or reception of persons [...] by means of the threat or the use of force or other forms of coercion [...] for the purpose of exploitation.” While the Anti-trafficking Directive covers those situations of labour exploitation which amount to the criminal offence of trafficking in human beings, it does not cover other forms of labour exploitation, which are addressed by criminal and labour legislation at Member State level.

The Anti-Trafficking Directive also requires Member States to ensure that the investigation and prosecution of such offences are adequately supported. However, the Anti-Trafficking Directive does not include a requirement for Member States to

¹²² Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

introduce an effective inspection regime among employers who may be hiring workers that have been victims of trafficking.

1.11.4 Preliminary Conclusions

The exclusion of legally residing third-country nationals from the scope of the Employer Sanctions Directive creates two significant **gaps** in the EU's measures to counter illegal employment and exploitation. Their exclusion means that:

The equality provisions contained in the EU legal migration Directives, which aim to combat illegal employment by putting legally residing third-country nationals on an equal footing to national workers, are not backed up in all Legal migration Directives by a regime of monitoring and inspections, and reporting thereof, as well as sanctions against employers; and,

The obligation on employers to pay any outstanding remuneration to workers who have been illegally employed only extends to illegally staying third-country nationals (with the exception of seasonal workers, for whom a right to receive back-payments is included in the Seasonal Workers Directive).

1.12 Recognition of qualifications

To develop effective mechanisms for the recognition of qualification of third-country nationals – as well as the validation of non-formal skills – is crucial for the well-functioning of migration policies, and to ensure that EU can attract the relevant skilled labour force needed. It is also essential – although this goes beyond the scope of the fitness check analysis – to ensure that third-country nationals already in the EU can use their qualifications obtained abroad and can be fully integrated into the labour market and host society, also avoiding over-qualification and brain-waste (see also issue paper on Education, skills, job matching, qualifications).

The focus of this paper is on the legal aspects and particularly on Directive 2005/36/EC and the effect of the cross-references to it in the legal migration acquis. This paper shows positive synergies between Directive 2005/36 and the functioning of the EU legal migration Directives. However, as concluded below there are important gaps. These are partly addressed in the issue paper on education, skills and qualification

1.12.1 The scope of Directive 2005/36 (as amended by 2013/55) as regards third-country nationals for regulated professions

The main EU instrument regarding the recognition of qualifications is Directive 2005/36 on the recognition of professional qualifications, and its amendment (Directive 2013/55). The Directive establishes rules with regard to access to **regulated professions** (e.g. doctors, architects, and nurses) in a Member State and recognition of professional qualifications (e.g. carpenters or upholsterers)¹²³ that were obtained in one or more other Member States (Directive 2005/36 Article 1). It provides a system of “automatic recognition for a limited number of professions based on harmonised minimum training requirements (sectoral professions), a general system for the recognition of evidence of training and automatic recognition of professional experience” (Directive 2013/55, Recital (1)).

The Directive applies to EU nationals who aim to pursue “a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualifications, on either a self-employed or employed basis” (Article 2 (1)).

Further, each Member State may permit EU nationals to pursue a regulated profession on its territory, in cases where the professional qualifications have been obtained outside of the EU in accordance with its rules (Article 2(2)). According to Article 3(3), evidence of formal qualifications issued outside of the EU are recognised, if the holder has three years of professional experience in the profession concerned on the territory of the Member State which recognised that evidence of formal qualifications.

While the Directive applies to EU nationals, recital (10) states that it “does not create an obstacle to the possibility of Member States recognising, in accordance with their rules, the professional qualifications acquired outside the territory of the European Union by **third country nationals**”.

Directive 2013/55 amending Directive 2005/36 regulates additionally “partial access to a regulated profession and recognition of professional traineeships pursued in another Member State” (Article 1). It hence further applies to “all nationals of a Member State who have pursued a professional traineeship outside the home Member State” (Directive 2013/55, Article 2 (1) (a)). Recital (27) further states that Member States should take into account professional traineeships completed in third countries when considering a request to access regulated professions.

¹²³ For a list of regulated professions see: <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?newlang=en>

Recital (1) of Directive 2013/55 specifies the scope of the Directive in terms of recognition of qualifications of third-country nationals, stating that in accordance with Directive 2004/38/EC on the right to move and reside freely within the territory of the Member States, third- country family members of Union citizens benefit from equal treatment.

It further specifies that "third- country nationals may also benefit from equal treatment with regard to recognition of diplomas, certificates and other professional qualifications, in accordance with the relevant national procedures, under specific Union legal acts such as those on long-term residence, refugees, 'blue card holders' and scientific researchers."

1.12.2 Recognition of qualifications in the legal migration Directives, including and links to 2005/36 as amended

The recognition of qualifications as described in the Directive 2005/36 and its amendment (Directive 2013/55) is addressed in seven EU legal migration Directives. Table 2 below summarizes the provisions in the EU legal migration acquis as regards Directive 2005/36. The equal treatment provisions below go well beyond Directive 2005/36, as they refer to the recognition of qualifications in general. They help in preventing differential treatment with regard to recognition of qualifications based on nationality. This does not lead to easier recognition of non-EU qualifications, but rather ensures that third country nationals have the same treatment in recognising their non-EU qualifications as EU nationals with the same qualifications would.

Table 2. Provisions in the EU legal migration acquis related to Directive 2005/36 and recognition of qualifications in general

Directive	Provisions	Equal treatment provisions regarding recognition of qualifications
Directive 2011/98/EU "Single Permit" (SP)	Recital 23: A Member State should recognise professional qualifications acquired by a third-country national in another Member State in the same way as those of citizens of the Union and should take into account qualifications acquired in a third country in accordance with Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications. The right to equal treatment accorded to third-country workers as regards recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures should be without prejudice to the competence of Member States to admit such third- country workers to their labour market.	Article 12(1): Third-country workers as referred to in points (b) and (c) of Article 3(1) shall enjoy equal treatment with nationals of the Member State where they reside with regard to: d): equal treatment as regards (...) recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures
Directive 2009/50/EC "EU Blue Card" (BCD)	Recital 19: Professional qualifications acquired by a third-country national in another Member State should be recognised in the	Article 14(1d): equal treatment as regards (...) recognition of diplomas, certificates and other professional qualifications in

	same way as those of Union citizens. Qualifications acquired in a third country should be taken into account in conformity with Directive 2005/36/EC	accordance with the relevant national procedures
Directive 2005/71/EC "Researchers" (RD)	No direct mention of Directive 2005/36/EC.	Article 12(a): equal treatment as regards (...) recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures
Directive (EU) 2016/801 "Students and Researchers" (S&RD)	No direct mention of Directive 2005/36/EC.	Article 22(1), (3) and (4): Equal treatment [As established by Article 22(1) and Article 22(3), Article 12(1)(d) of Directive 2011/98/EU is applicable to researchers and trainees, volunteers, and au pairs, when they are considered to be in an employment relationship in the Member State concerned, and students] [...] 4. Trainees, volunteers, and au pairs, when they are not considered to be in an employment relationship in the Member State concerned, and school pupils shall be entitled to equal treatment in relation to [...] recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures.
Directive 2003/109/EC "Long term residents" as amended (LTR)	No direct mention of Directive 2005/36/EC.	Article 11(1)(c): Equal treatment with nationals as regards (...) recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures
Directive 2014/36/EU "Seasonal workers" (SWD)	Article 5(4): In cases where the TCN will exercise a regulated profession, as defined in Directive 2005/36/EC, the Member State may require the applicant to present documentation attesting that the third-country national fulfils the conditions laid down under national law for the exercise of that regulated profession. Article 6(6): In cases where the work contract or binding job offer specifies that the third-country	Article 18(2)(b): equal treatment as regards (...) recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures;

	national will exercise a regulated profession, as defined in Directive 2005/36/EC, the Member State may require the applicant to present documentation attesting that the third-country national fulfils the conditions laid down under national law for the exercise of that regulated profession.	
Directive 2014/66/EU "ICTs" (ICT)	Recital 22: A Member State should recognise professional qualifications acquired by a third-country national in another Member State in the same way as those of Union citizens and should take into account qualifications acquired in a third country in accordance with Directive 2005/36/EC	Article 23(1)(h): equal treatment as regards (...) recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures

1.12.3 Coherence issues with regard to the recognition of professional qualifications across different migration phases

The different scenarios described below, outline three possible phases of the migration process in which third-country nationals may need to recognise their professional qualifications. Each scenario brings a different combination of EU and national legislation into play.

1.12.3.1 Application phase

In the application phase for a first permit, a TCN may have to obtain a first time recognition for either a *non-EU professional qualification* or an *EU professional qualification* (if he/she obtained one in another EU Member State). There are no EU legal provisions covering these scenarios (TCNs are only covered by the equal treatment provisions with nationals as regards recognition of professional qualifications in the EU legal migration Directives once they have been admitted – see equal treatment provisions in **Error! Reference source not found.**). There is therefore a **gap** in coverage for TCNs applying to enter the EU, who are subject to the provisions regarding recognition of professional qualifications for TCNs enshrined in the national law of each Member State. Depending on the laws of the country of destination, TCNs may therefore face more onerous requirements for recognition of their qualifications than EU citizens holding a similar EU or non-EU qualification.

1.12.3.2 Residence phase

A TCN who is already a resident in one EU MS may wish to obtain a first time recognition for either a *non-EU professional qualification* or an *EU professional qualification*.

In general, the recognition of qualifications is regulated via national legislation, but as outlined above the Directive 2005/36 (Recital 10) and its amendment (Recital (1) of Directive 2013/55) outline the right to equal treatment for third country nationals with regard to recognition of certain regulated professional qualifications. Furthermore, seven legal migration Directives (LTR, RD, BCD, SPD, SWD, ICT, S&RD), i.e. all of them except the Student and the Family Reunification Directive, specify the right to equal treatment for third country nationals as regards "recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures". The equal treatment provisions in each of the Directives are presented in the table below:

The S&RD specifies that Member States may limit the right to equal treatment with regard to the recognition of diplomas and professional qualifications for trainees, volunteers, and au pairs, when not considered to be in employment.

Moreover, the SPD covers students and family members of third country nationals who have been admitted on the basis of Students Directive and Family Reunification Directive *who have the right to work* (as well as other third country nationals who have the right to work and have been admitted on the basis of national permits). The SPD therefore extends the right to equal treatment also to other third country nationals in addition to those covered by the six 'sectoral' EU legal migration Directives that include a specific reference to equal treatment with regard to recognition of qualifications. There is, however, a **gap** in coverage for students and family members of third country nationals who do not have the right to work, but would like to change their status in order to do so. These third-country nationals would not enjoy the right to equal treatment as regards the recognition of their qualifications.

1.12.3.3 Intra-EU Mobility phase

A TCN who has had a first EU professional qualification or a non-EU professional qualification, recognised in a first MS, might decide to move to a second MS and may need recognition of the professional qualification again.

While Directive 2005/36 and its amendment (Directive 2013/55/EU) applies to EU citizens, it can have effects on the situation of third-country nationals in these situations by virtue of the legal migration *acquis*, which provides them with equal treatment with nationals as regards the recognition of diplomas, certificates and other professional qualifications, in accordance with the relevant national procedures. Further, recital (1) of Directive 2013/55 states that, in accordance with Directive 2004/38/EC on the right to move and reside freely within the territory of the Member States, third-country family members of Union citizens benefit from equal treatment as well.

However, TCNs enjoy the right to equal treatment, and can therefore rely on the application of Directive 2005/36, only once they have obtained a legal status in the second MS, and not during the preparation of their mobility. This is a gap that could represent a serious obstacle to the exercise of intra-EU mobility for third-country nationals, since the recognition of a qualification can be a condition to obtain a work contract/job offer, which in turn can be a condition to obtain the residence permit in the second Member State.

1.12.4 Conclusion

There are positive synergies between Directive 2005/36 on the recognition of professional qualifications, and its amendment (Directive 2013/55) and the functioning of the EU legal migration Directives at two stages of the migration process:

- **During the residence phase**, the Directive 2005/36 (Recital 10) and its amendment (Recital (1) of Directive 2013/55) outline the right to equal treatment with regard to recognition of professional qualifications. Further, seven EU legal migration Directives (LTR, RD, BCD, SPD, SWD, ICT, S&RD) enable equal treatment of third-country nationals as regards "recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures". In addition, the SP covers students and family members of third country nationals who have the right to work, thus providing equal treatment for those third country nationals with regard to recognition of qualifications.
- **During the intra-EU mobility phase**, the same equal treatment provisions in the EU legal migration Directives allow for recognition of professional qualifications in accordance with the relevant national procedures. In

accordance with Directive 2004/38/EC third- country family members of Union citizens benefit from equal treatment

However, incoherencies can also be identified in respect of certain situations:

- **During the application phase:** The main gap in the recognition of professional qualifications occurs at this phase, since no EU legal provisions cover the efforts of TCN applicants to obtain recognition of the professional qualifications they may have obtained in a third-country or in another EU Member State.
- **During the residence phase:** Based on the S&RD, Member States may limit the right to equal treatment with regard to the recognition of diplomas and professional qualifications for trainees, volunteers, and au pairs, when not considered to be in employment.
Students and family members without the right to work who want their professional qualifications to be recognised would also not enjoy the right to equal treatment with Member State nationals with respect to the provisions of Directive 2005/36 (Recital 10) and its amendment (Recital (1) of Directive 2013/55).
- **During the Intra EU mobility phase,** however TCNs would not be covered by the equal treatment until they have been granted a residency permit in the second Member State, hence there is a potentially serious gap in the preparation phase (often entailing job-seeking) for intra-EU mobility.

Finally, professional qualifications not covered by the Directive 2005/36 and its amendment (Directive 2013/55) may be treated according to national law for the qualifications of third country nationals obtained in third countries, and in seven Directives (LTR, RD, BCD, SPD, SWD, ICT, S&RD) equal treatment provisions for recognising non-EU qualifications of third-country nationals as well as EU nationals with the same qualifications apply.

1.13 Education, skills, job matching, qualifications

This issue paper examines the interaction between EU Legal migration Directives in relation to the EU policies on education, skills and qualifications, and job matching, and how they contribute – or not - to the effective management of legal migration. To the extent relevant, the coherence between the relevant EU Directives and other EU instruments is assessed.

1.13.1 Relevance of the Legal migration Directives

The most relevant instrument interacting with the above policies in the legal migration acquis is Directive N° (EU) 2016/801 of (which recasts earlier Directives on Students and Researchers)(*for Directive specific analysis, see intervention logic*). However, also most of the other Legal migration Directives include relevant provisions in relation to access to education and vocational training, recognition of qualifications and access to employment services, as part of equal treatment with nationals (*for internal coherence of these provisions see internal coherence chapters*).

The overall legal migration Directives provide synergies in respect of the EU skills agenda insofar as:

- They aim to simplify and harmonise admission conditions and procedures for students, researchers, trainees and other categories(SRD) and several categories of workers with different skills levels (highly qualified TCN, seasonal workers, ICTs) and admission procedures for many other third-country workers (SPD).

Some Directives aim to facilitate access to work for certain groups, and once in employment access to equal treatment, including for recognition of qualifications (*see also external coherence chapter on recognition of qualifications for restrictions*). The SRD also introduces provisions on staying after research/studies to look for a job or to set up a business after studies.

- Once the person is in employment ensure equal treatment with nationals as regards access to education and vocational training (Long-term residence, EU Blue Card, Seasonal workers ICTs, Single permit, which also covers other groups like Students and Researchers), with the exception of the Family Reunification, Directive where such equal treatment is granted generally. In addition, the Family Reunification Directive mentions “initial and further training and retraining”.
- These equal treatment provisions also include access to advice services offered by employment offices (Single Permit) and the equivalent for seasonal work (Seasonal workers).
- They aim also to foster the intra-EU mobility of third-country nationals when it is needed (Long-term residents, the Blue Card, the Intra-corporate transfers and the Students and Researchers Directives).

1.13.2 The EU skills agenda

The 2016 EU skills agenda¹²⁴ has been developed to ensure sustainable employment across the EU and support the Member States to ensure that their populations are well equipped with a range of skills needed in the societies and labour markets, ranging from basic skills of literacy and numeracy to vocational skills and generic skills such as entrepreneurship and taking the initiative¹²⁵.

While the actions under the Skills agenda have a general and broad scope, they are undoubtedly a supporting factor in the functioning of the EU legal migration Directives.

¹²⁴ <http://ec.europa.eu/social/main.jsp?langId=en&catId=1146>

¹²⁵ <http://ec.europa.eu/social/main.jsp?catId=1146&langId=en>

For example, they help Member States to identify relevant skill gaps or mismatches, to conduct skills profiling and integration of migrants via relevant tools as outlined in the skills agenda (e.g. Europass, the EQF and peer learning and exchange between Member States and competent authorities and stakeholders, and the new the Skills Profile Tool).

They aim at further helping Member States to better identify their demand for labour, both already available in the EU (nationals, EU nationals and already residing third-country nationals) as well as the need for labour migration in general, e.g. through the Skills Panorama, which has the aim to “assess and anticipate skill needs to help make education and training systems more responsive to labour market needs and to match better skill supply and demand across Europe”¹²⁶.

The main skills agenda actions, also relevant to TCNs, include:

- 'Skills Profile Tool Kit for Third Country Nationals'
- Establishing a Skills Guarantee to support the development of basic skills amongst low-skilled adults, renamed 'Upskilling Pathways: New Opportunities for Adults' and adopted by Council on 16.12.2016.
- Promoting higher more complex skills including entrepreneurial mind-sets;
- Improving transparency and comparability of qualifications through a revision of the European Qualifications Framework for lifelong learning (EQF)¹²⁷ adopted by the Council on 22 May 2017¹²⁸.
- Better tools and services for individuals, including better data on skills needs and trends through bringing together information in the 'Skills Panorama'¹²⁹ as part of a revised Europass Framework¹³⁰
- Boosting skills intelligence in economic sectors

The ILO defines **skills mismatches** as “imbalances between skills offered and skills needed in the world of work.”¹³¹

Skills profiling can be defined as “a process aimed at identifying and analysing the knowledge, skills and competences of an individual”.¹³²

One of the key policy actions specifically targeting third-country nationals and ensuring “early profiling of migrants’ skills and qualifications”¹³³ is the 'Skills Profile Tool Kit for Third Country Nationals', launched on 20.06.2017, thus recognising the role of third country nationals in the skills policies of the Member States. The tool aims to assist services in receiving and host countries to identify and document skills, qualifications and experience of newly arrived third country nationals (in most cases, asylum seekers).¹³⁴ The tool is expected to also form a basis for offering guidance, identifying up-skilling needs and supporting job-searching and job-matching. The tool can help to produce an overview of an individual’s existing skills and qualifications,

¹²⁶ <http://skillspanorama.cedefop.europa.eu/en/content/our-mission>

¹²⁷ [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008H0506\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008H0506(01)&from=EN)

¹²⁸ [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017H0615\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017H0615(01)).

¹²⁹ <http://skillspanorama.cedefop.europa.eu/en>

¹³⁰ <https://europass.cedefop.europa.eu/>

¹³¹ http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_548911.pdf, p. 4

¹³² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:398:0001:0005:EN:PDF>

¹³³ COM(2016) 381 final Communication from the Commission, A new skills agenda for Europe, Working together to strengthen human capital, employability and competitiveness, SWD(2016) 195 final

¹³⁴ The focus of the tool on newly arrived third-country nationals is a limitation, as it does not address third-country nationals already residing in the EU

including diplomas from education and training, language skills, numeracy/ literacy and transversal skills (e.g. problem-solving and leadership), and driving skills¹³⁵.

The revised Council Recommendation on the European Qualifications Framework for lifelong learning is also very relevant as it calls for EU transparency tools to help a better understanding of foreign qualifications in the Union, and vice versa. Given the growing migration flows to and from the Union it emphasises that a fair recognition of qualifications awarded outside the Union is needed. For this purpose the revised EQF contains a specific recommendation to explore possibilities to enable the comparison of third countries' national and regional qualifications frameworks with the EQF.

In **conclusion**, the EU's skills policy should help EU Member States to identify better the skills and labour shortages that can be addressed through migrant labour, by strengthening mechanisms for identifying skills gaps and for conducting skills profiling of migrants.

1.13.3 Recognition of qualifications and validation of skills

To develop effective mechanisms for the recognition of qualification of third-country nationals and validation of non-formal skills is crucial for the well-functioning of migration policies, and to ensure that EU can attract the relevant skilled labour force needed. It is also essential – although this goes beyond the scope of the fitness check analysis – to ensure that third-country migrant already in the EU can use their qualifications obtained abroad and can be fully integrated into the labour market and host society, also avoiding over-qualification and brain waste.

Some aspects of the recognition of qualifications of third-country nationals are regulated in the Legal migration Directives, via equal treatment provisions, and recognition of qualifications for regulated professions as regulated by Directive 2005/36/EC (as amended by Directive 2013/55/EC), that to some extent covers third-country nationals and qualifications obtained in third countries. The coherence between these instruments is analysed in the *external coherence* papers, and substantial gaps are identified.

Other and recent policy developments that partly complement this EU legislation enhancing the transparency and comparability of skills and qualifications and the validation of non-formal and informal learning are also briefly highlighted below.

Many jobs in the EU are outside regulated occupations but require (for the employers to hire) evidence of the skills needed. The uncertain value of non-EU qualifications is a big issue here where better transparency/comparability can help. The area of transparency, assessment, validation, recognition of skills and qualifications is mostly a competence of the EU MS. As highlighted above when referring to the Skills Agenda, the EU is nevertheless playing a role for instance through tools and mechanism such as the EQF or the Skills Profile Toolkit, as well as the Council recommendation on validation of non-formal and informal learning, the Lisbon Recognition Convention for academic recognition and the ENIC-NARIC, a platform for cooperation between Member States authorities on this alter issue.

A recent [study](#) for DG EMPL on **obstacles** to recognition of skills and qualifications (Ecorys, 2016) identified examples of relevant **obstacles** to the recognition of qualifications¹³⁶:

¹³⁵ The Tool Kit is currently in a testing phase. A demo version is available online for public consultation. The test version of the tool can be accessed here: <http://skpt-test.eu-west-1.elasticbeanstalk.com/#!/profile/personal-info/general>

¹³⁶ Example of **recommendations identified**: Provide opportunities for **cross-country collaboration**; Develop an **online data base** of recognition **practices**; Provide specific recognition services for **refugees**; Establish an **entitlement** to recognition; Ease the **requirements** around visas and work permits related to recognition; Develop **tools for employers** to understand foreign qualifications more easily.

- Difficulties in **understanding** foreign qualifications and the validity of foreign documents
- Lack of **entitlement** to recognition of foreign qualifications
- Lack of **documentary proof** of education/employment
- Lack of **evidence** regarding the effect of recognition, and potential effects on providing the correct guidance

With regard to the **recognition of academic qualifications**, the Commission is funding the Toolkit project for access to and continuation of higher education. It will envisage the possibility to develop a common methodology for academic recognition for asylum seekers and refugees and a common background paper describing undocumented qualifications. In addition, information about educational systems of the main countries of origin of these groups will be systematised and organised in the format of country profiles.

With regard to recognition of skills acquired through non-formal and informal learning, the Council of the EU adopted the “**Recommendation on the validation of non-formal and informal learning**” of 20-12-2012 that called on Member States to set up arrangements for the validation of skills acquired outside the formal education and training system by 2018. While the Recommendation does not focus on migrants, it does place particular emphasis on the validation of skills for disadvantaged groups, “since validation can increase their participation in lifelong learning and their access to the labour market”¹³⁷. Further, the EU developed European Guidelines for validating non-formal and informal learning which provide guidance to Member States and stakeholders in setting up and implementing the validation of non-formal and informal learning¹³⁸. In 2016, the European Inventory on the validation of non-formal and informal learning has been published: it provides the state of play of validation in 33 countries (EU Member States, EEA countries, Switzerland and Turkey)¹³⁹. Each country chapter contains a short section addressing the validation of skills of migrants. In most countries there exists no specific policy in this regard. The 2018 edition of the Inventory should address the validation of migrants' skills more in depth (e.g. through a thematic report) and a dedicated section on the validation of skills of migrants should be included in each country report.

In conclusion, whilst the EU has been developing a number of tools and policies to facilitate the recognition of qualifications and the validation of skills obtained in non-EU countries, this remain to a large extent a national competence, which often complicates the admission of third-country nationals to the EU.

1.13.4 Job matching

Job matching can be defined as matching the qualifications of workers with those qualifications or skills required for their jobs.¹⁴⁰

Job-matching is part of the EU's agenda for growth and jobs, embodied in the Europe 2020 strategy already, and recently relaunched with the Skills Agenda (see above). The Europe 2020 strategy aims to reach an employment target of 75% of people aged 20–64 in work by 2020¹⁴¹. Part of Europe 2020 and implemented through the

¹³⁷ Council of the European Union (2012). Council Recommendation of 20 December 2012 on the validation of non-formal and informal learning. Resolutions, recommendations and opinions 2012/C 398/01. Official Journal of the European Union. Brussels, p. 3.

¹³⁸ .Cedefop (2015). European guidelines for validating non-formal and informal learning. Luxembourg: Publications Office. Cedefop reference series; No 104.

¹³⁹ <http://www.cedefop.europa.eu/en/publications-and-resources/publications/4153>

¹⁴⁰

http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573893/EPRS_BRI%282016%29573893_EN.pdf

¹⁴¹ https://ec.europa.eu/info/strategy/european-semester/framework/europe-2020-strategy_en

European Semester is the European employment strategy (EES) which aims to create sustainable employment across the EU.

Some aspects of this are regulated in the Legal migration Directives, via equal treatment provisions notably as regards access to advice services offered by employment services. Another potentially problematic issue relates to the EURES regulation, as explained below.

1.13.4.1 Relevance of the EU Legal migration Directives for job matching

Job matching for TCNs differs across the stages of the migration process:

- **Application phase during which the TCNs is searching for a job in the 1st Member State while still outside of the EU**

In the initial application stage from a third-country, Directives such as EU Blue Card holders, Seasonal workers and ICTs require TCNs to either have a valid job offer or contract (and hosting agreement for Researchers). Member States may choose this option when implementing the Single Permit Directive. In these cases, the legal migration Directives do not regulate any aspects to how such a job or job offer was arrived at. EU policies do not seem to address job matching for TCNs who are outside of the EU; hence, TCNs are covered by national policies and practices that might be in place with regard to job matching of TCNs outside of the EU.

- **Residence phase**

A third-country national who is already resident in one EU Member State may wish to change jobs. In this stage, the legal migration acquis provides for certain aspects of equal treatment with nationals of the Member State for third-country workers (those admitted for the purposes of work, or for other purposes who have the right to work), e.g. in some cases students, with respect to **"access to advice services afforded by employment offices"** (Single Permit Directive, Art 12(1)(h)).

The Blue Card Directive, Seasonal Workers Directive and (recast) Student and Researchers Directive also provide for the right to access services afforded by employment offices (although the Seasonal Workers Directive specifies that these services should be related to seasonal work, and the Student and Researchers Directive allows Member States to restrict in the case of trainees, volunteers, and au pairs, when they are not considered to be in an employment relationship (see internal coherence section in the Intervention Logic on equal treatment).

- **Intra-EU mobility phase**

In this stage a TCN who is a resident in one Member State might decide to move to a second Member State and search for another job. Four legal migration Directives provide for intra-EU mobility of TCNs for employment purposes:

Although the Directives that include specific provisions on intra-EU mobility (EU Blue Card, LTR, Students and researchers (some categories) also include the equal treatment provision in relation to access to "advice services", that equal treatment right does not apply until the person has obtained a permit in the second Member State. Obtaining a permit is often dependent on already having a job or job offer. Equal treatment does not apply in the job-application phase whilst being present in or before in the second Member State. This is therefore a gap in the EU legislation, and a possible obstacle to intra-EU mobility.

1.13.5 Potential issues the EURES Regulation

Currently, skills and job matching across borders within the EU is regulated through the EURES Regulation (EU) 2016/589.¹⁴² EURES enables cooperation between the European Commission, the Member States' Public Employment Services and other organisations (such as social partners), to encourage intra-EU labour mobility for workers who have the nationality of Member States. Whilst EURES is predominantly a tool to facilitate mobility of workers in the EU, it also encourages job matching. Its network activities is supported by a common IT platform for automated matching of job vacancies with job applications and CVs¹⁴³, exchange of vacancies and CVs, enabling job seekers, employers and employment services to search and match candidates with jobs. The portal also offers information on living and working conditions in the Member States mobility.

The EURES Regulation 2016/589 applies to the "Member States and citizens of the Union without prejudice to Articles 2 and 3 of Regulation (EU) No 492/2011" (Article 2). However, recital (4) of the Regulation emphasises that "in order to help the workers who enjoy the right to work in another Member State to exercise that right effectively, assistance in accordance with this Regulation is open to all citizens of the Union who have a right to take up an activity as a worker and to the members of their families in accordance with Article 45 TFEU". A recital of the Regulation invites Member States to "give the same access to any third-country national benefiting, in accordance with Union or national law, from equal treatment with their own nationals in that field"¹⁴⁴.

In practice, national arrangements exist to make sure that third country nationals legally residing in an EU Member State and benefiting of equal treatment in that respect will have access to services available with the Public Employment Services and may also make use of services for (EU) mobility.

Therefore third-country nationals in the intra-EU mobility stage who have the right to work can make use of the search functions of the portal and services for mobility within the Public Employment services (PES), as well as other national policies and practices in terms of job matching that might be implemented across Member States.

However as regards the automated job matching provided by EURES, and the advice function provided to users, it is clear that this cannot be used by third-country nationals when applying from outside the EU. They will only be able to consult, like all users, available vacancies on the EURES website.

In conclusion, there are some synergies between the job-matching initiatives supported by the EU and the functioning of the EU legal migration Directives at two stages of the migration process:

- During the residence phase, the EU legal migration acquis' equal treatment provisions allow third-country nationals who have been admitted for the purpose of work, or who are allowed to work, to benefit from the employment advisory services set up in the Member States.

¹⁴² Regulation (EU) 2016/589 on a European network of employment services (EURES), workers' access to mobility services and the further integration of labour markets, and amending Regulations (EU) No 492/2011 and (EU) No 1296/2013

¹⁴³ Regulation (EU) 2016/589, Article 19

¹⁴⁴ Regulation (EU) 2016/589, recital (4): In order to help the workers who enjoy the right to work in another Member State to exercise that right effectively, assistance in accordance with this Regulation is open to all citizens of the Union who have a right to take up an activity as a worker and to the members of their families in accordance with Article 45 TFEU. Member States should give the same access to any third-country national benefiting, in accordance with Union or national law, from equal treatment with their own nationals in that field. This Regulation is without prejudice to the rules on the access of third-country nationals to national labour markets as set out in the relevant Union and national law.

- During the intra-EU mobility phase, the same equal treatment provisions in the EU legal migration Directives allow third-country who have the right to work in a second (or subsequent) Member State to benefit from such services EURES as well as other national policies and practices in terms of job matching that might be implemented across Member States.. However, this is not applicable to third-country nationals wishing to apply for a job in the EU form outside.
- The stages of the migration process where there is a clear gap in job-matching support is the application stage, where third-country nationals at present do not have the legal right to access EURES– other than for consulting available vacancies - in their efforts to obtain a job offer or contract with an EU-based employer

1.13.6 EU education policies and interaction with legal migration

Under the 2004 Students Directive, intra EU-mobility is possible for students under certain conditions, notably if the student participates in an exchange programme or has been in a Member State as a student for no less than 2 years. Further, the student mobility shall be “within a period that does not hamper the pursuit of the relevant studies, whilst leaving the competent authorities sufficient time to process the application”¹⁴⁵. The 2005 Researchers Directive allows short-term mobility for researchers under the same hosting agreement; for longer mobility, a new hosting agreement may be required. However, as both of these Directives are repealed by the 2016 Students and Researchers Directive, the provisions regarding intra-EU mobility rights for students and researchers will change with its transposition in May 2018. Directive EU 2016/801 strengthened the intra-EU mobility rights for both students and researchers. However, restrictions apply to the duration of the mobility and the requirements necessary to conduct the mobility. It will need to be seen to what extent the full implementation of the above Directive can lead to improvements in that respect. Moreover, student mobility is restricted to those covered by “a Union or multilateral programme that comprises mobility measures or of an agreement between two or more higher education institutions (Article 31)”. Those that are not covered by any programme, need to submit a separate application for entry and stay in a second Member State.

Migration has also become a key issue for EU education and youth initiatives implemented through the international dimension of Erasmus+ (including the European Voluntary Service), Creative Europe and Marie Skłodowska-Curie actions for researchers. The Valletta Summit Action Plan calls to use Erasmus+ and Marie Skłodowska-Curie actions to support mobility of students and researchers between Europe and Africa, as well as to encourage joint research projects.

Each year Erasmus+ funds the short-term mobility of around 30,000 young people, students and academic staff in both directions as a worldwide extension of the classic Erasmus mobility. Students can be mobile between 3 and 12 months while university staff gets support for mobility periods lasting between 5 and 60 days. From 2018 onwards, Erasmus+ will also support traineeships for students in enterprises and organisations lasting between 2 and 12 months.

Through these policies, the Commission urges Member States to develop comprehensive education internationalisation strategies, including an interplay of key elements such as widespread international student and staff mobility; the internationalisation and improvement of curricula and digital learning; and strategic cooperation, partnerships and capacity building with the institutions within and beyond Europe.

European education systems and the youth sector must be more open and better connected to the rest of the world. Online language learning for newly arrived

¹⁴⁵ Directive 2004/114/EC “Students”, Article 8

migrants available, including refugees, is made available through Erasmus + online linguistic support (100,000 licences for refugees over three years). Promoting social inclusion through education, including of third country nationals, is one of the focuses of Erasmus+.

The Marie Skłodowska-Curie actions (MSCA), part of Horizon2020 programme will enable 15,000 researchers to move to Europe for training, ranging from doctoral candidates to highly experienced researchers, irrespective of their nationality It encourages transnational, intersectoral and interdisciplinary mobility, both incoming and within Europe. The actions aim to enable research-performing organisations (including universities, research centres, and companies) to host researchers from other countries, thus creating strategic research partnerships with leading institutions worldwide.

The EU's external education policies positively influence the functioning of the legal migration Directives by helping to improve the curriculum to accommodate more third country nationals or by providing grants. Further, the internationalisation of higher education helps to make European universities more attractive to TCN students and researchers, thus helping to fulfil the objective of attracting talent to the EU. While the Student and Researcher Directives contribute directly to the internationalisation of education strategies in the EU by regulating the admission, residence and intra-EU mobility of third-country students and researchers, there are also potential inconsistencies between the legal migration Directives and the external education policies of the EU.

Finally, the EU also has a number of policies in place to support the internationalisation of its education and training systems globally as well as supporting the sustainable development of its key partners through partnerships and exchanges between the European learners and education practitioners and their counterparts elsewhere in the world (Erasmus+, Marie Skłodowska-Curie, Communication on European higher education in the world (COM(2013) 499 final), but this is not directly relevant for the Fitness Check (*see also International Dimension paper*).

1.13.7 Potential coherence issues

The potential **coherence issues** in relation to the EU's **education and skills policy** are summarised below:

- Equal treatment to education and vocational is in several Directives linked to the status of third-country worker (EU Blue Card, Seasonal workers and those covered by the Single permit), whilst in the LTR and Family reunification it covers all permit holders independently of worker status. There may still be gaps for those not covered by the legal migration Directives.
- Permitted restrictions (due to derogations and may-clauses) to **equal treatment** in respect of the right of third-country nationals covered by the Student and Researcher Directives to **access work**. Legal obstacles (due to derogations and may-clauses) to equal treatment in respect of the right of third-country nationals covered by the Directives to access work. In most of the legal migration Directives (Seasonal Workers, EU Blue Card, Students and Researchers, and ICT) the access to employment is tied to the specific employment activity authorised under the permits. Only in the Family Reunification and Long-term residence Directives is this not the case. The right to work for researchers is tied to the specific employment activity authorised under the permits (and in the case of students to the maximum number of hours they are allowed to work while conducting their studies). The right to self-employment is only provided as an optional clause for students (not for researchers).
- Restrictions to **equal treatment as regards access to education and vocational training** may apply in the Long-term residence, Single Permit, EU

Blue Card, Seasonal workers, ICTs and Students and Researchers Directives. In the Students and Researchers Directives equal treatment with regard to access to education can be restricted to exclude study and maintenance grants or other grants and loans in the case of researchers (Article 22 (2) (a)). Under the Single Permit and Family Reunification Directive Member States may have specific prerequisites including language proficiency and the payment of tuition fees, in accordance with national law, with respect to access to university and post-secondary education and to vocational training which is not directly linked to the specific employment activity. With regard to the Long-term residence Directive, Member States may require proof of language proficiency for access to education and training. Restrictions to equal treatment as regards access to education and vocational training, if not applied in a proportionate manner, may be inconsistent with the objective to support the upskilling of third-country nationals.

- Permitted restrictions to **intra-EU mobility** may apply for students and researchers. As described above the 2004 Students Directive enabled intra EU-mobility for students only under certain conditions, while under the 2005 Researchers Directive a new hosting agreement was required for researchers in order to undertake long-term mobility. While intra-EU mobility was strengthened under Directive EU 2016/801, several restrictions continue to apply. The mobility for students is only foreseen for those that are covered by programmes, those that are not covered by programmes have to submit a separate application.
- Obstacles to intra-EU mobility for groups of third-country nationals may be inconsistent with the objective to support job-matching across the EU for third-country nationals, taking into account though that Member States may have different skills intensity.
- Lack of measures to address the **risks of brain drain** in third countries envisaged in the EU legal migration acquis, notwithstanding acknowledgement of the risk in the EU Blue Card Directive, the Researchers, and the Students and Researchers Directive (with regard to researchers only)(see also *international paper*)¹⁴⁶.
- **Visa** issues remain one of the main difficulties encountered by universities, academic staff, students, young people and youth workers coming from third countries when participating in Erasmus+ projects. There is no obligation for EU Member States to cooperate between themselves to ensure consular representation in third countries. This leads to the cancellation of 'mobilities' and heavy additional costs under the Erasmus+ programme. However, admission for both students and researcher, and their subsequent mobility to other Member States is likely to be facilitated once the new recast Directive on Students and Researchers is fully implemented by Member States.

In **conclusion**, the legal migration Directives provide synergies in respect of the EU skills agenda and external education policy, since they aim to simplify and harmonise admission conditions and procedures for third country nationals with different key skill sets. The provisions of the Directives on access to employment and on equal treatment (in terms of access to education and training) and on intra-EU mobility should also facilitate the objective of job-matching and up-skilling for third-country nationals resident in the EU. However, several potential inconsistencies were identified including the variety of admission conditions and procedures permitted by the Directives, which may discourage skilled third-country nationals from coming to the EU.

¹⁴⁶ Directive (EU) 2016/801 "Students and Researchers", Recital (13); Directive 2005/71/EC "Researchers", Recital (6)

1.14 International dimension of migration

The Global Approach to Migration and Mobility (GAMM)¹⁴⁷ is, since 2005, the overarching framework of the EU external migration and asylum policy. The framework defines how the EU conducts its policy dialogues and cooperation with non-EU countries, based on priorities and embedded in the EU's overall external action, including development cooperation. This chapter reviews the coherence of the EU legal migration framework with the EU's main external migration policy instruments, cooperation and development policies and key issues related to brain drain and circular migration.

1.14.1 External migration policies

With a view to increasing EU dialogue and cooperation with countries of origin and transit in order to manage migration flows more effectively, the GAMM was adopted in 2005. The GAMM has four main aims, including better organising legal migration, as well as fostering well-managed mobility and maximising the development impact of migration and mobility and promoting international protection, and enhancing the external dimension of asylum. The GAMM emphasises the importance of good governance of migration, assisting the contribution of migrants to the development of their country of origin through a wide range of measures and counteracting brain drain and brain waste, and promoting brain circulation.

Legal migration is therefore a key part of the EU's approach to a comprehensive governance of migration as also reinforced by the European Agenda on Migration.

However, legal migration is a complex domain of shared competence between Member States and the EU. In particular, in terms of actual admission of labour migrants, Member States maintain a national competence in determining the quotas/volumes of admission.

In practice, Mobility Partnerships (MPs) and Common Agendas on Migration and Mobility (CAMMs) are the principal bilateral cooperation frameworks which the EU has developed to deepen the migration dialogue with countries of origin and transit. Mobility partnerships always include a commitment to negotiate visa facilitation in parallel to a readmission agreement. They also contain, in most cases, a commitment to reduce the negative effects of brain drain (ethical recruitment clause). However, the Commission's report on the implementation of the GAMM (2012-2013) indicated that more could be done to enhance the use of Mobility Partnerships to facilitate mobility of migrant workers and other persons such as students, service providers or professionals in cooperation with partner countries.

The Commission Communication of 8 June 2016 on establishing a new Partnership Framework with third countries under the European Agenda on Migration establishes a new approach in this field, with the stated aim to integrate positive and negative incentives in the EU's development policy, "rewarding those countries that fulfil their international obligation to readmit their own nationals, and those that cooperate in managing the flows of irregular migrants from third countries, as well as those taking action to adequately host persons fleeing conflict and persecution. Equally, there must be consequences for those who do not cooperate on readmission and return" (see section 1.5 below). Among the immediate actions it calls for in the framework of the new comprehensive cooperation with third countries on migration, it mentions "stemming the irregular flows while offering legal migration channels, including increased resettlement efforts".¹⁴⁸ The EU is committed to develop common and tailor-

¹⁴⁷ Global Approach to Migration and Mobility, https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en

¹⁴⁸ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/communication_external_aspects_eam_towards_new_migration_ompact_en.pdf

made approaches to migration featuring development, diplomacy, mobility, legal migration, border management, readmission and return together with countries of origin and transit.

Overall, it can be observed that so far, in the external dimension of migration policy, EU actions aimed at preventing/reducing irregular migration and to return to countries of origin and transit irregularly arrived migrants, have been much more developed than actions to favour mobility and migration from third-countries, particularly for work purposes.

1.14.2 Development cooperation

The EU's development policy seeks to eradicate poverty in third countries within a context of sustainable development. Currently the EU provides more than 50% of global development aid and is the biggest donor. In contrast, the main long term priorities of the EU legal migration policy, as spelt out in the European Agenda on Migration adopted in May 2015, are to attract the workers that the EU economy needs in view of the future demographic challenges the EU is facing, particularly by facilitating the entry in the EU. These sets of EU policy objectives have some complementarities and potential synergies, but also some issues where contradictions might emerge.

EU action on development is guided through two main policy documents: the **European Consensus on Development**¹⁴⁹ adopted in 2005 and the **2030 Agenda for Sustainable Development**,¹⁵⁰ which builds on the achievements of the Millennium Development Goals (MDGs) that expired in 2015. The new Sustainable Development Goals for 2030 approved by the United Nations in September 2015 include migration as a transversal dimension of sustainable development for the first time, including a target "10.7 facilitate orderly, safe, and responsible migration and mobility of people, including through implementation of planned and well-managed migration policies".¹⁵¹ This establishes a link between EU development cooperation policy and migration policy, to the extent that SDGs' targets commit not only developing countries, but also for developed ones.

The EU further seeks to promote **Policy Coherence for Development (PCD)**¹⁵² in order to maximise the development impact of other EU policies, notably trade, environment, climate change, security, agriculture, fisheries, social dimension of globalisation, **employment and decent work, migration, research and innovation**, information society, transport and energy. In 2009, the EU adopted a more operational and targeted approach to PCD, clustering the above-mentioned policy areas into five main challenges, including **making migration work for development** in recognition that migration is closely linked to development.

Within this area, the EU seeks to:

- Promote a balanced and comprehensive approach to migration and development, in particular by harnessing the positive links and synergies between migration and development within the framework of the GAMM and
- Pursuing implementation of initiatives in the field of reduction of transfer costs for remittances, enhancing dialogue with diaspora and preventing brain drain. There are several remittances-related projects in the framework of the Thematic Programme on Migration and Asylum 2007-2013, and this has been a

¹⁴⁹ https://ec.europa.eu/europeaid/policies/european-development-policy/european-consensus-development_en

¹⁵⁰ <https://ec.europa.eu/europeaid/node/1368>

¹⁵¹ <https://europa.eu/eyd2015/en/iom/posts/migration-inequality-and-new-development-goals>

¹⁵² <https://ec.europa.eu/europeaid/node/537> . See in particular the Policy Coherence for Development 2015 EU Report (http://ec.europa.eu/europeaid/policy-coherence-development-pcd-2015-eu-report_en).

focus of EU action. An example is the pilot project with the Organisation of Eastern Caribbean States (OECS) on remittances and diaspora engagement in development policies.

The EU's development cooperation funding instruments at geographic and thematic levels, such as Global Public Goods and Challenges (GPGC) in the areas of Migration and Asylum also include among their thematic priorities cooperation in the field of migration and asylum. In addition, at the Valletta Summit on Migration between EU and African countries of November 2015, the European Commission has launched an "Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa"¹⁵³, made up of **€1.8 billion** from the EU budget and the European Development Fund (EDF), to be complemented by contributions from EU Member States and other donors. The Valletta Action Plan, agreed at the Valletta Summit, included a commitment by the EU and Member States to launch pilot projects that pool offers for legal migration. However, the work on the legal migration and mobility pillar has been limited and hard to implement. Most actions taken under this pillar concern scholarships and students mobility, through funding through from the Erasmus + and Marie Curie programmes. Since the adoption of the Valletta Action Plan, the EU has doubled the scholarship schemes to third country students and researchers from Valletta countries reaching 8000 scholarships for students and 560 for researchers.

Notwithstanding these initiatives, in practice, coherence between the EU's legal migration and development policies still encounters difficulties. One contributing factor may be different objectives pursued by different policies.

1.14.3 Circular migration and brain drain

Circular migration and brain drain are two different phenomena in the migration context however they are presented jointly as circular migration is often a solution for brain drain problems.

There is no universally agreed definition of brain drain, though similarities in the way this term is defined across a number of sources suggest that there is a common understanding of what constitutes brain drain.

The EMN definition of the term '*brain drain*' is: the loss to a country as a result of emigration of a highly-qualified person.¹⁵⁴ The reverse of brain drain is '*brain gain*': the benefit to a country as a result of the immigration of a highly-qualified person.¹⁵⁵ The EMN Glossary also contains the following two terms related to brain drain: '*Brain waste*': the non-recognition of the skills (and qualifications) acquired by a migrant outside of the EU, which prevents them from fully using their potential; and '*Brain circulation*' the possibility for developing countries to draw on the skills, know-how and other forms of experience gained by their migrant nationals – whether they have returned to their country of origin or not – and members of their diaspora.¹⁵⁶

Definitions of '*circular migration*' also vary and existing definitions include several elements namely:

- Spatial element: migration between the country of origin and the country of destination
- Temporal element: migration is not permanent
- Iterative/repetitive element: migration process includes more than one cycle of migration

¹⁵³ http://europa.eu/rapid/press-release_MEMO-15-6056_en.htm

¹⁵⁴ EMN Glossary, https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary/b_en

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

- Developmental element or scope: circular migration involves the idea that the country of origin, country of destination and the migrant worker will benefit from circular migration.

In the EU context, the European Commission defined it as “a form of migration that is managed in ways allowing some degree of legal mobility back and forth between two countries”.

Brain drain is not a new phenomenon. Brain drain is usually more detrimental to less developed countries, though rich states can also suffer from loss of talent as a result of emigration. The reason why brain drain is considered so detrimental to less developed countries is because highly-skilled workers, scientists, engineers and doctors, whose education and training may have been funded nationally, play a crucial role in a state’s economic growth and development. Large-scale emigration of this kind thus puts a state’s economy at risk and affects important sectors, such as education, healthcare and engineering.

The causes of emigration and brain drain are multiple. On the one hand, the socio-economic situation in a country of origin can create incentives for highly-skilled workers to emigrate, for example, low wages, unfavourable working conditions, high levels of unemployment or political instability (so called push factors). On the other hand, more developed countries have means to attract highly-skilled workers from abroad, including higher wages or standard of living, more opportunities for career development or more sophisticated education or healthcare systems (so called pull factors).

While international migration can be an important factor enabling economic development in the countries of origin, for example, from remittances, for the benefits to be fully realised, it is understood that the conditions for circular migration (and ‘brain circulation’) must also be present. Obstacles in the way of circular migration act as a break on the potential of international migration to provide ‘win-win-win’ solutions for countries of origin, countries of destination and migrant workers themselves.

The following **EU level responses** to address brain drain beyond the Legal Migration Directives can be highlighted:

- As stated above, the Global Approach to Migration and Mobility (GAMM) emphasises the need to counteract brain drain and brain waste, and promote brain circulation.
- The 2005 Commission Communication on a Policy Plan for Legal Migration, which proposed a number of legislative measures on legal migration, i.e. the Directives on highly-skilled, seasonal, ICT and remunerated trainees, emphasises the ethical recruitment for certain sectors particularly vulnerable to brain drain, such as human resources in the healthcare sector (e.g. Africa). The Communication further notes the intention of the Commission to enhance collaboration on economic migration with third countries and to develop initiatives offering win-win opportunities to countries of origin/ destination/ labour migrants: one possible action suggested by the Commission in this regard was a feasibility assessment (2007) and setting up of a system for monitoring the migration of skilled workers from developing countries to the EU in order to identify sectors and countries of origin subject to significant brain drain (2008), as well as potentially setting up a ‘returnees database’ following the feasibility analysis.
- The above-mentioned Communication follows on from a 2005 Green Paper on an EU approach to managing economic migration which similarly refers to the management of migration flows in cooperation with countries of origin and transit, taking into account their reality and needs. The Green Paper contains a Commission proposal to grant Community preference (which is usually enjoyed

by TCNs who are long-term residents) to workers who are TCNs and who are already on the territory of and/ or have worked legally in a Member State before leaving it following the expiration of their work permit. The aim of such a proposal is to encourage migrants to become legal/ give them the possibility of remaining or returning to a Member State after a period of residence outside the EU and thereby to promote temporary migration and brain circulation which would benefit both countries of origin and the EU.

- Mobility Partnerships (MPs), as mentioned above, include in most cases, a commitment to reduce the negative effects of brain drain (ethical recruitment clause) and develop circular migration programmes. However, the Commission's report on the implementation of the GAMM (2012-2013) indicated that more could be done to enhance the use of Mobility Partnerships to facilitate mobility of migrant workers and other persons such as students, service providers or professionals in cooperation with partner countries.
- The Commission's 2014 proposals to amend the EU's Visa Code, which sets out detailed rules for visa applications, by inter alia permitting Member States to issue multiple entry visas with a long period of validity to frequent travelers is also a significant step. The proposal aims to ensure that the EU visa policy fosters economic growth and cultural exchanges by further facilitating travel to the EU of legitimate travelers while ensuring a high level of security. However, the proposals are still being discussed and Member States have not welcomed them.
- Within its Action Plan to assist Member States to tackle the key challenges facing the health workforce in the medium to longer term, DG SANTE acknowledges the importance for many Member States of the international recruitment of health workers, including doctors and nurses. While the Action Plan focusses in particular on the needs of the European health workforce, it also promotes compliance among Member States with the work of the World Health Organisation's Global Code on international recruitment of health professionals (<http://www.who.int/hrh/migration/code/practice/en/>).

The following provisions of the EU legal migration Directives also partly address the problem:

- The EU Blue Card Directive and Student and Researchers Directive include provisions for mitigating the effects of brain drain. The EU Blue Card Directive allows Member States to reject applications in order to ensure ethical recruitment from countries suffering from a lack of qualified workers (Article 3(3)), for example in the health sector (Article 8(2) and recital 22). Member States using this possibility must communicate to the Commission and the other Member States the countries and sectors involved (Article 20). However, the report on the implementation of the EU Blue Card Directive (COM(2014) 287 final) indicated that very few Member States are making use of these provisions. At the time the implementation report was published, no MS had entered into an agreement with a third country that lists professions which should not fall under the Directive in order to ensure ethical recruitment in sectors suffering from a lack of personnel in developing countries. While 6 Member States (BE, CY, DE, EL, LU and MT) had transposed the option to reject an application in order to ensure ethical recruitment in such sectors, no rejections on these grounds had been reported. The same provisions have been retained in the proposal for a revised Blue Card Directive. The Students and Researchers Directive states that, when implementing the Directive, Member States "should not encourage brain drain from emerging or developing countries and should take measures to support researchers' reintegration into their countries of origin in partnership with these countries of origin, with a

view to establishing a comprehensive migration policy” (Paragraph 13 in the Preamble).

- Another aspect of the EU legal migration acquis that addresses the issue of brain drain is the possibility for TCNs residing in the EU to visit their countries of origin for short or long periods of time, without losing their residence status in the EU. The Long-Term Residence Directive stipulates that TCNs may lose their right to long-term residence if they are absent from the EU for a period of 12 consecutive months (though Member States may derogate from this provision). In the Blue Card Directive, periods of absence from the territory of the EU must be shorter than 12 consecutive months and not exceed in total 18 months within the period of five years of legal and continuous residence in the EU (required for obtaining long-term residence status). Again, Member States may also derogate from this provision.
- A further aspect is the possibility for third-country nationals, who return to their countries of origin after a period of residence in the EU to re-enter the EU under simplified procedures – thus facilitating circular migration. However, these possibilities are only available in two EU legal migration Directives: the Seasonal Workers Directive specifically provides for re-entry to the EU for third-country nationals recruited as seasonal workers at least once within a period of five year period. The Long Term Residence Directive foresees an obligation for Member States to provide for a facilitated procedure for reacquisition of the Long Term Residence status (Article 9(5)).

More generally, the Legal Migration Directives have been criticized by observers from the point of view of mitigating brain drain on grounds that the main labour migration opportunities target highly qualified workers (with the exception of seasonal workers).

1.14.4 Climate change and environmentally induced migration

Environmental factors have always acted as a driver of human mobility. With the emerging awareness of the rate and magnitude of climate change, interest in the question of how environmental change is likely to affect population movements in the future has grown significantly. With the publication of the Climate Change adaptation strategy in 2013¹⁵⁷, the Commission published a Staff Working document¹⁵⁸ on the topic of climate change related migration, or more specifically environmentally induced migration related to climate change, was raised in the context of climate change adaptation. Such migration would be due to increased intensity and frequency of natural disaster, increased inundation of low-lying coastal zones and land degradation and desertification in drylands, with increased water shortages and disturbed food and water supplies or other potential effects related to temperature increases.

Preliminary conclusions were that these migration flows would primarily take place at an intra-state level (rural to urban), or intra-regional migration between countries in certain regions. Such migratory be from third-countries to the EU could also be relevant, both in a temporary time-perspective but also in in terms of longer term sustainable durable solution, however this was not at the time of publication found to be likely to affect migratory flow to the EU. The paper concluded that the impacts on migratory flows need to be further monitored both at a global level and at the EU level.

Whilst the adaptation responses would include international protection and resettlement, and planned relocation as a last resort solution, the wider migration and

¹⁵⁷ https://ec.europa.eu/clima/policies/adaptation/what_en. The EU Climate change adaptation strategy is currently subject to an evaluation.http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_clima_011_evaluation_adaptation_strategy_en.pdf

¹⁵⁸ SWD(2013) 138 final of 16.4.2013.

development perspective as set out in GAMB (see above) is of relevance, including the need to foster mobility and facilitating labour migration.

1.14.5 Readmission and links with reciprocity

Current EU legal migration law is non-reciprocal. As a general starting point, all third-country nationals are subject to the same rules and those who fulfil the requirements set out in the directives are admitted. The admission of a third country is currently not made dependant on his or her country of origin.

The "more favourable provisions clause" contained in most legal migration directives allow Member States (or the EU as a whole) to have in place more favourable provisions (under bilateral or multilateral agreements) applicable to nationals of certain third countries in relation to the matters where Member States kept a room for manoeuvre (essentially the rights granted to third-country nationals, where Member States are allowed to provide for more favourable provisions under national law). This mainly concerns rights of third-country nationals, for examples access to social security, more generous rules on family qualification and access to work for family members etc.

Less favourable provisions are not foreseen in the legal migration directives and therefore currently not allowed under EU legal migration law.

Translated into the context of international relations this means that the EU can currently use its legal migration acquis to implement the so-called "*more for more*" principle (i.e. grant legal migration facilitation to third countries in recognition for well-functioning cooperation in other fields, such as readmission) but that it is prevented from using the "*less for less*" principle (penalising non-cooperating third countries by making more difficult the admission of their citizens to the EU) if this would imply going below the minimum standards afforded by the legal migration directives applicable to any third-country national.

1.14.6 Preliminary Conclusions

External relations and development cooperation policy have various complementarities and potential synergies with the legal migration Directives. The main complementarities exist in relation to facilitating the transfer of remittances, reducing the effects of brain drain and enabling circular migration, including by permitting the exportability of social security benefits.

However, there are also areas where contradictions emerge between the two policy areas. These relate to the availability and quality of legal migration channels. In particular, the fact that the main labour migration opportunities are for highly qualified third-country nationals and ICT workers (who are also highly qualified) appears inconsistent with the EU's commitment to reducing brain drain.

The lack of EU legislative response to counter brain drain beyond the options permitted by the EU Blue Card and Students and Researchers Directive, and the limited opportunities for circular migration permitted in the Seasonal Workers, LTR and EU Blue Card Directive means that it is up to Member States to develop initiatives in this area. So far, only a few Member States have done so.

EU legal migration law is non-reciprocal – contrary to short stay visa policy – i.e. it only allows the EU to grant certain legal migration facilitation to third countries in recognition for well-functioning cooperation in other fields (such as readmission), for example increased rights. However, it does not allow penalising non-cooperating third countries by making more difficult the admission of their citizens to the EU if this would imply going below the minimum standards afforded by the legal migration directives applicable to any third-country national.

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