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FITNESS CHECK

on EU Legislation on legal migration

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ANNEX 1: PROCEDURAL INFORMATION

1. Lead DG, Decide Planning/CWP references

DG Migration and Home affairs (DG HOME) is the lead DG for this fitness check, given that all Legal Migration Directives being evaluated are managed by the unit HOME.B.1 "Legal migration and integration". The Decide Agenda planning reference is 2016/HOME/199.

2. Organisation and timing

Chronology

10.6.2016: 1st Inter-service group meeting
1.9.2016: Launch Roadmap for consultation
1.12.2016: Start of main support study
19.1.2017: 2nd Inter-service steering group
19.6-19.9.2017: Open public consultation
26.6.2017: 3rd Inter-service Steering group meeting
29.9.2017: RSB upstream meeting
20.1.2018: 4th Inter-service Steering group meeting
25.9.2018: 5th Inter-service Steering group meeting
14.11.2018: Regulatory Scrutiny Board meeting

Inter-service steering Group

An Inter-service steering Group was established in May 2016, with the following DGs participating actively: AGRI, CLIMA, CNCT, EAC, ECFIN, EEAS, EMPL, ESTAT, GROW, JUST, LS, MOVE, RTD, JRC, SANTE, SG, TRADE.

The focus of the ISG meetings were:

- 1st meeting (10.6.2016): Consultation on draft Roadmap and draft Terms of reference for the study
- 2nd meeting (19.1.2017): Consultation on the inception report.
- 3rd meeting (26.6.2017): Consultation on the 1st interim report (revised version), in particular the external coherence aspects and the preliminary analysis of key issues and gaps.
- 4th meeting (22.01.2018): Consultation on the draft Staff working document and the draft final report of the main study.
- 5th meeting (25.9.2018) Consultation on the SWD, agreement on Quality Checklist for the main study, final meeting of ISG before the RSB submission.

In addition, written consultations with ISG were carried out:

- Summer of 2016: on the revised Roadmap, the Terms of reference of the main study in the, and for the supporting study on Trade in services (with DG TRADE).
- May and July 2017: second major written consultation on the 1st revised interim report focusing on the external intervention logic as well as the preliminary issue analysis carried out as well as the questionnaire of the Open public consultation.
- December 2017 to January 2018 : on the draft annexes for task I of the ICF study
- March 2018: on the final draft ICF Report and complete set of annexes.
- September 2018: Written consultation final draft SWD and annexes, prior to final ISG.

3. Exceptions to the better regulation guidelines

This fitness check (including the Roadmap and the study) were initiated according to the previous Better Regulation Guidelines as in force as of 2016. Nevertheless, attempts have been made to ensure compliance with the Better Regulation Guidelines applicable as of July 2017.

The main exceptions were that not all Directives were included in the evaluation of the criteria effectiveness and efficiency. The reason for this is their recent application (deadline for transposition end 2016) and at the time of the fitness check evaluation, insufficient data is available on their implementation.

In addition, the quantification of the effectiveness and efficiency of the Directives, which has suffered from a serious shortage of relevant economic data, pre-2008 statistics and detailed information of the pre-existing status of the national migration management systems was found to be scarce.

4. Consultation of the RSB

A first upstream meeting took place on 29.9.2017. The RSB highlighted the need for triangulation of evidence, to makes sure the analysis is not just a comparative legal analysis, that the evaluation should be transparent.

The main RSB meeting took place on 14.11.2018, and the following changes were carried out on the basis of the recommendations:

RSB recommendations	Subsequent modifications of the SWD
(1) The report does not adequately situate the fitness check in the evolving overall policy context for migration	Section 1(context and scope of the evaluation) has been amended to better reflect the overall policy context for migration in the reference period and its evolution, including clarifications of magnitude of the legal migration flows covered by the fitness check compared to other migration flows (mainly asylum, irregular and visa).
(2) The conclusions do not fully reflect the analysis. The report also does not sufficiently clearly identify priority issues	Conclusions (section 6) have been amended to more clearly identify priority issues and better link them to the findings. Further coherence between the analysis and the conclusions is ensured throughout the document.
(1) The report should do more to map the legal migration policy area in the current overall migration policy context. The context has shifted significantly since many rules were first put in place. The report should better illustrate the magnitudes of the various policy dimensions by presenting key figures, i.e. the number of legal migrants subject to schemes, evolution in the number of legal migrants, number or share of legal migrants moving cross border in the EU. It would justify better the scope of the fitness check by clarifying the context and the priority questions that the analysis will inform. It should better describe the evolution of growth and competitiveness as a priority for legal migration in the single market and Schengen context.	The delineation of the scope of the legislation subject to this fitness check compared to other migration policies and other migration flows is better explained (section 1). In particular the difference – and the interaction - with other related policies (especially short stay visas, asylum, irregular migration is clarified. The number of migrants entering for legal migration purposes are presented together with data on irregular border crossing, return decision, number of visas for short stay issued and number of asylum application. These numbers are not comparable with each other, but this data enables an estimation of the magnitude of the flows considered under this fitness check. The increased importance of the Directives in terms of contributing to growth and competitiveness is better explained (section 2.1, intervention logic). The objective related to growth and competitiveness is better framed in the introduction and in relation to effectiveness (section 5.3).
(2) The report should address the efficiency issue in a more integrated way. The topic is	The approach taken to the analysis of efficiency has been better introduced to better explain the approach taken.

<p>currently analysed under effectiveness (efficient management of migration flows), efficiency (costs and benefits) and EU value added (simplification).</p> <p>The report should clearly define efficiency and address it in a structured way, while minimising overlaps between sections. The analysis of benefits of migration, which is now discussed under efficiency, could strengthen the effectiveness analysis.</p>	<p>Some sections have been moved to avoid overlaps between sections and streamline the text, namely: the simplification section moved from "EU Added value" and added to the Efficiency section. The section on Wider economic impact has been moved from the Efficiency Section to Annex 7 to strengthen the Effectiveness analysis.</p>
<p>(3) The effectiveness analysis should show more clearly to what extent the set of EU and national legislation on legal migration is successful or encounters limitations as a result of the current division of tasks. It could also more critically address the link between legal migration and labour shortages and limitations to it. While there is some evidence of labour market participation, and further analysis is under way, there is little consideration on the extent to which labour market shortage has de facto been filled by legal migrants.</p> <p>On intra EU mobility, the report should be clearer about how acquired mobility rights for legal migrants play out in practice. Such rights are not always applied by Member States and migrants may also not be aware of their rights. In this context, the report should analyse in a more granular way the actual magnitude of cross border movements by migrants and interest of different stakeholders in intra EU mobility, including businesses and workers associations.</p>	<p>The effectiveness analysis has been revised to better explain the role of the third-country workers in terms of filling skills and labour shortages in the EU. The limited data on actual matching of the supply of third-country workers with the demand in shortage sectors is however preventing a more in-depth analysis of the issue.</p> <p>The intra-EU mobility analysis suffers from lack of data on the mobility of third-country nationals, thus preventing a more granular analysis of the magnitude of such mobility. The main source of information on the mobility for the workforce among EU national is the Eurostat Labour force survey, that we consider not sufficiently robust to measure the intra-EU mobility of third-country nationals.</p> <p>More details on the actual implementation of the intra-EU mobility right has nevertheless been included in Annex 7.</p>
<p>(4) On EU value added, the report should more clearly analyse to what extent the division of labour between EU and national rules delivers the expected results. It should more clearly show how harmonised legal migration rules contribute to the stated objectives.</p> <p>The external dimension could be better explored, including the possibility of leveraging negotiations on the return of irregular migrants.</p>	<p>The impact of the division of labour and the sectoral approach has been further expanded on in the context of the EU added value section.</p> <p>The external dimension as well as the interaction with irregular migration flows have been further expanded upon in the introductory chapter, as well as flagged in the conclusions as one of the key areas where more synergies should be sought.</p>
<p>(5) The report should also revise the conclusions to better bring out the most important findings for policy makers. The findings could make clear what appears to work well and what does not.</p> <p>It would be useful to know whether the current legal migration framework is fit for purpose not only vis-à-vis its original objectives but also with a view to current challenges and political priorities.</p> <p>The report could probe into reasons behind apparent hesitancy of national authorities to move ahead.</p> <p>It could include an assessment of whether the problems identified are caused by the 'sectorial approach' rather than a more comprehensive approach.</p> <p>It should assess whether, alternatively, the problems rather relate to a lack of harmonisation</p>	<p>The conclusions have been revised to more clearly link them with the key findings and explain better what works well and what does not.</p> <p>It has been clarified in the conclusions that the current legal migration framework is, to a large extent, fit for purpose. At the same time, a number of issues and shortcomings have been identified for consideration in view of future policy developments</p> <p>This has been clarified in the introduction and the conclusions.</p> <p>The division of labour between Member States and EU competence has been further developed throughout the document, including as part of the historical analysis of the evolution of the objectives. The implications of the sectorial approach has been better explained.</p> <p>The limitations of the Directives, and the role of Member States' implementation choices, in particular as regards fragmentation due to the many may clauses and the</p>

and implementation of the existing directives. It should show the limitations of the current legislation. Some of the findings, including on efficient management lack nuances, notably given the overall fragmented system.	national parallel schemes, have been better explained in section 5.
(6) The report's analysis is extensive but also sometimes difficult to read and absorb. The large volume of evidence could be better directed at examining points of friction and tension in the parallels between EU and national attention.	The document has been streamlined and a clearer framing of the key issues and challenges has been provided both in the introduction and in the conclusions.
<i>Some more technical comments have been transmitted directly to the author DG.</i>	These have been taken into account to a very large extent.

5. Evidence, sources and quality

Main supporting study

The fitness check was supported by a main study entitled "Study in support of the Fitness Check on the EU Directives on legal migration", commissioned by DG HOME in 2016, and carried out by ICF Consulting Limited. This study was divided into four main tasks and relevant published deliverables:

- Task 1: Contextual analysis
 - 1A: Literature review
 - 1B: Contextual analysis: Historical overview (1Bi), Overview and analysis of legal migration statistics¹ (1Bii), Drivers for legal migration: past developments and future outlook (1Biii).
 - 1C : Intervention logic, internal coherence(1Ci), external(1Cii), Directive specific (1Ciii)
- Task 2: Evidence base for practical implementation of the legal migration Directives (2A), including Member State specific annexes.
- Task 3: Consultation: Public and stakeholder consultation: EU synthesis report(3Ai), OPC summary report (3Aii)
- Task 4: Evaluation: Final Evaluation report (4), evaluation framework (4A), analysis of gaps and horizontal issues (4B) and economic analysis (4C).

The study was finalised in June 2018, and is published alongside the Staff working document and its annexes on the dedicated DG HOME webpage.

Literature review

A literature review was carried out as a first step in the supporting study (ICF). A comprehensive process of collecting and organising sources and information at national, EU and international level was carried out and the information was then reviewed by on the basis of the subject matter analysed for this fitness check.

A Literature Synthesis Report was prepared and structured according to tasks I (by subtask), II (by migration phase) and IV (by evaluation criteria). In each section, the report provides a quantitative and qualitative overview of the volume and type of information available (geographical scope, type of source, main aspects covered) and where relevant identifies main information gaps. The list of literature identified by ICF is included in the annex to the report (*ICF Annex A1*). Key gaps identified relate to the evaluation criteria of "efficiency" such economic analysis of migration management, "coherence" for instance comparative analysis

¹ By "legal migration statistics" is meant mostly Eurostat data about residence permits issued (flow) or held (stock) by third-country nationals in EU Member States.

of the specific provisions contained in the Directives, "effectiveness" achievement of the objectives of specific Directives, Gaps are furthermore identified as regards certain aspects of practical application of the Directives in the Member States, intra-EU mobility as well as Directive specific literature regarding other Directives than the FRD, BCD and SPD.

Other Commission services were invited to contribute with references to key literature. National researchers carrying out the Task II research at national level identified further literature.

Based on the gaps identified, the targeted consultation strategy was further adapted, notably as regards data supporting the economic analysis. Several request were made to MS to supply further data of the effectiveness and efficiency of the implementation of the Directives. These efforts did however not result in a sufficiently robust dataset that could be used for a meaningful EU wide evaluation.

Additional literature was identified and used by the Commission in the preparation of the Staff working document. Annex 10 to the Staff working document includes a complete list of literature referred to in this Staff working document and its annexes.

Statistical evidence

The primary source of statistics on residence permits issued to third country nationals (so called flow data) or held by third country nationals residing in the EU Member States (so called stock data) is Eurostat. Comprehensive, comparable statistics on the issuance of resident permits has been collected since 2008. Data available for the first part of the reference period (1999-2007) includes national and other international sources (mostly international migration statistics). Limited data on volumes of third-country migrants is available in the impact assessments and explanatory memorandums of proposals for Directives issued prior to 2008. Pre-2008 national statistics on permits issued is not comparable at the EU level. Stock data on the number of third country nationals residing in the EU Member States (international migration statistics) have been used to estimate the change in the number of third-country national population residing in the EU for the whole reference period.

The main support study (*ICF Annex 1Bii*) includes key statistics related to the stocks and flows of residence permits, for third-country nationals residing for specific reasons and related to specific Directives, including comprehensive overviews of statistics per Member State since 2008. Annex 9 to this Staff working document includes additional statistical analysis carried out by the Commission. This annex also includes a partial update of relevant Eurostat data for 2017 (updated as far as possible in December 2018).

Whilst data on migration reported to Eurostat since 2008 is harmonised following the implementation of Regulation (EC) No 2007/862, there are still a number of shortcomings related to the data required for the analysis in this fitness check.

- Data on permits issued for work (occupation/remunerated activities):
 - Data reported related to seasonal workers are up until 2016 not necessarily in compliance with the SWD, for which harmonised reporting requirements enter into effect as of 2017 data (due to be reported by mid-2018). For the period 2008-16, there are many gaps related to seasonal work reporting that render data less robust. (As of the publication of this fitness check, MS reporting of data relating to 2017, notably as regards permits issued for seasonal work is still partial.)

- The number of national permits issued to highly skilled workers is not complete as many MS do not distinguish this category in the data reported².
- There are no further breakdown of data reported for other specific categories of workers other than highly skilled, including EU Blue Cards, researchers and seasonal workers.

Key other statistics used for this Fitness check are:

- EU Labour Force (eu-lfs) study such as educational attainment levels of TCN migrants
- Integration indicators
- The JRC Knowledge Centre on Migration and Demography (KCMD)
- JRC Foresight project

Legal analysis

The starting point of the legal analysis is based on a comparative analysis of the key legislative acts for legal migration subject to this fitness check, and selected other legislative acts relevant for external coherence.

The conformity analysis studies (by the consultant Tipik sa), for Directives 2003/86/EC, 2003/109/EC, 2009/50/EC, 2011/98/EU (carried out from 2011-2016) and by Milieu for Directives 2014/36/EU and 2014/66/EU (from 2017 - ongoing). The former were used to assess the legal implementation of the Directives in the Member States. These reports were the basis for the first implementation reports of the BCD and the SPD, as well as the second implementation reports for FRD and LTRD³.

An earlier set of conformity studies carried out in 2008 and updated 2009 (by the consultant Odysseus) contain less detailed analysis, but nevertheless provided valuable input into the Commission's implementation reports for four of the Directives that were issued between 2008-2014⁴.

The practical application study (ICF, Task 2) further analysed the conformity studies and, based on research carried out in each of the Member States, assessed implementation in the Member States, to analyse the how the Directives have been implemented and the implications of implementation choices made.

Further evidence and analysis from complaints, infringement cases and case law were compiled by DG HOME.⁵

Legal analysis concerning a specific categories of third-country nationals providing services (GATS mode 4) was provided in a separate study commissioned for the fitness check by DG HOME.⁶

Key academic literature also relied upon for the legal analysis, was in particular *Peers et al*⁷ and *Hailbronner & Thym*⁸.

² Source: Eurostat [migr_resocc]. MS reporting 0 such permits issued in 2016 are BE, BG, EE, EL, HR, LT, LU, HU, MT, SI, SK. 2017 statistics reporting is not yet completed, but RO started reporting such permits in 2017.

³ COM(2014) 287 on BCD; COM (2019)160 on SPD; COM(2019) 161 on LTRD; COM(2019)162 on FRD.

⁴ COM(2008)610 final of 8.10.2008 on FRD. COM(2011)585 final of 28.9.2011 on LTRD. COM(2011)587 final of 28.9.2011 on SD. COM(2011)901 final of 20.12.2011 on RD.

⁵ See also Annex 10 for further references.

⁶ Tans, S et al(2018) "The interaction between trade commitments and immigration rules, admitting contractual service suppliers and independent professionals in Germany, the Netherlands and Sweden".

⁷ Peers, S. Guild, E., Acosta Arcarazo, D., Groenendijk, K and Moreno-Lax, V. EU Immigration and Asylum Law (Text and Commentary), Second Revised Edition, 2012.

⁸ Hailbronner and Thym (eds), EU Immigration and Asylum Law, Second Edition, 2016, p.2.

Evidence on the baseline, historical development and future trends

The baseline year varies by Directive, and is set to the year of adoption of the proposal for each Directive. Information included in the respective impact assessments⁹ and explanatory memoranda¹⁰ accompanying the adoption of the proposals, include some information on the legislative baseline (measures in place in MS at the time of adoption of the Directive) and limited data on volumes of migrants, as well as certain economic indicators. The information is however not always detailed enough for specific provisions of the Directives.

As regards drivers related to historical development and future outlook, key additional literature include JRC Foresight study.

Evidence on practical application

A survey on the practical application was carried out for the main study (ICF, Task 2) in EU Member States providing information on the implementation of the Directives by "migration phase" in the 25 MS implementing all legal migration Directives. The research as carried out in the summer of 2017, and did not include the implementation of the newer Directives SWD and ICTD. The above mentioned conformity studies, provided the starting point on how the Directives have been implemented, including implementation choices made by the Member States. The Open Public Consultation and the targeted consultation (see below) provided further evidence on implementation (see also the synopsis report in Annex 2; ICF report on Task 3).

Complaints and infringements also provided evidence on implementation of the Directives (see also 2018 implementation reports).

The European Migration Network (EMN)¹¹ publications provide valuable information on implementation of the legal migration Directives, including studies on topics like: Intra-EU mobility, Social security for third –country nationals, EMN ad-hoc queries. The latter are requested either by MS themselves or by the Commission are valuable sources of information, although not always covering all relevant Member States.

The Commission Communications, and accompanying Staff working documents, include valuable information on practical implementation in the Member States.

Targeted and public consultations

Annex 2 provides further detail on the consultations carried out for the gathering of evidence and views from different stakeholders, alongside validation meeting with key stakeholder groups.

Key DG HOME expert groups consulted were:

- Contact Group Legal Migration (CGLM) (Member State representatives) were consulted twice, first for gathering on opinions and fact linked to the evaluation questions, secondly for validation of the preliminary findings, focussing on the internal coherence.
- Expert Group Economic Migration (representative set of stakeholders, academia) were consulted for validation
- The annual European Migration Forum was specifically consulted on the fitness check in 2017; and results from other meetings are also taken on board.

Key expert groups organised by DG EMPL were also consulted with targeted questions (SLIC, PES, Free Movement Committee, Platform on Undeclared Work).

⁹ SPD, BCD, SWD, ICT, S&RD.

¹⁰ FRD, LTRD, SD, RD and the later withdrawn 2001 economic migration proposal.

¹¹ EMN https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network

Economic analysis

The literature review identified a limited set of relevant economic data and literature published at international (e.g. OECD, IMF, IOM), EU and national level. Key shortcomings in relation to relevant economic data that would enable full were however identified early, and special efforts were made to collect data at national level and via a specific EMN ad-hoc query and the expert groups (CGLM). Annex 4 includes a detailed description of the data availability, and a feasibility analysis of the possible analytical approaches based on the data collected.

It should be noted that the most important potential data providers concerning administrative cost of implementing the Directives are the Member States. Member States were specifically asked to contribute with such economic analysis, however no Member State said they had carried out such assessment and no Member State therefore not submitted such studies or data.

Other External studies supporting the fitness check:

Complementary study on trade in service provisions: Tans, S , et al (2018) " The interaction between trade commitments and immigration rules, admitting contractual service suppliers and independent professionals in Germany, the Netherlands and Sweden", October 2017, by Simon Tans, Radboud University Nijmegen, with Petra Herzfeld Olsson, Uppsala University and Carsten Hörich, Kathleen Neeldorf, Hannah Tewoche, Martin-Luther-Universität Halle-Wittenberg.

ANNEX 2: STAKEHOLDERS CONSULTATION

1. Introduction

This chapter presents the synopsis of all stakeholder consultation activities undertaken as part of the ‘Study in support of a Fitness Check and compliance assessment of existing EU legal migration Directives’.

The aim of the consultation activities was to support the evaluative dimension of the fitness check, addressing questions concerning the relevance, coherence, effectiveness, efficiency and EU added value of the legal migration Directives.

Three main forms of consultation have been conducted:

- An Open Public Consultation (OPC), which included tailored sets of questions for different stakeholder groups.
- Targeted consultations addressing specific groups of stakeholders, including in-depth interviews, focus groups, hearings and targeted meetings.
- Expert meetings and other relevant events.

The sections below provide an overview of the stakeholders and the activities covered as well as the main results of the consultation activities.

2. Stakeholder groups covered by the consultation activities

The consultation activities aimed to elicit the views of the general public consultation, and the consultation of particular stakeholder groups on specific questions concerning the functioning of the EU’s legal migration acquis. Input from a wide range of stakeholders was collected as described in the consultation strategy. These include EU institutions’ and Member States’ representatives, social partners, civil society and non-governmental organisations at EU and Member States’ level, experts and individuals (including third-country nationals and EU citizens).

The table below provides an overview on the types of stakeholders mapped out for the consultations and the data collection method on how information was gathered from specific stakeholders.

Overview of conducted (and planned) stakeholder consultations

Stakeholder type	Data collection method
Experts on legal migration	<ul style="list-style-type: none">• OPC, analysis of position papers• First Expert workshop (on 22 February 2017)• Second Expert workshop (on 13 November 2017)• EGEM (on 22 November 2017)
National authorities in Member States	<ul style="list-style-type: none">• OPC (including targeted questions), analysis of position papers• Two meetings of the contact group “legal migration” (on 18 May and 7 November 2017),• Interviews with authorities responsible for students and with labour inspectorates

	<ul style="list-style-type: none"> Meetings of Advisory committees on employment and social policies: Free Movement of Workers, Social Security Coordination, Senior Labour Inspectors Committee (SLIC), Advisers for European Public Employment Services (PES) and Platform on Undeclared Work
Employment-related organisations and social partners	<ul style="list-style-type: none"> OPC (including targeted questions), analysis of position papers EU social partners focus group (on 29 June 2017) EGEM (on 22 November 2017) European Economic and Social Committee (EESC) analysis and meetings
Representatives of ecosystems for entrepreneurs	<ul style="list-style-type: none"> OPC Interviews
Organisations/agencies recruiting seasonal workers	<ul style="list-style-type: none"> OPC, analysis of position papers
Organisations representing students and researchers	<ul style="list-style-type: none"> OPC, analysis of position papers
International organisations	<ul style="list-style-type: none"> OPC, analysis of position papers EGEM (on 22 November 2017)
Organisations and authorities in countries of origin	<ul style="list-style-type: none"> OPC, analysis of position papers
Third-country nationals	<ul style="list-style-type: none"> OPC (including targeted questions), analysis of position papers
Non-governmental and civil society organisations	<ul style="list-style-type: none"> OPC, analysis of position papers Two Civil Society Hearings (on 23 June 2017 and on 13 November 2017), European Economic and Social Committee (EESC) analysis and meetings
Members of the European Parliament	<ul style="list-style-type: none"> OPC, analysis of position papers Targeted meetings with Coordinators of LIBE Committee (on 1 June and 12 December 2017)
Academia	<ul style="list-style-type: none"> OPC, analysis of position papers EGEM (on 22 November 2017)
Migration-related agencies (EU and non-EU based)	<ul style="list-style-type: none"> OPC Interviews (as part of Task II)
Wider public	<ul style="list-style-type: none"> OPC, analysis of position papers European Migration Forum

3. Overview of consultation activities

- **Open public consultation (OPC)**

The European Commission organised an open public consultation (OPC) on the European Union's (EU) legislation on the legal migration of non-EU citizens. The consultation was open to all stakeholders with the aim to collect evidence, experiences, data and opinions to support the evaluation of the existing EU legal framework for the legal entry and stay of third-country nationals in the EU. The questionnaire was tested with relevant NGO platforms active in the area of migration.

The on-line consultation was accessible from 19 June to 18 September 2017 in 22 official languages on the EUROPA website 'Your voice in Europe'¹². Following the consultation launch, related promotion and dissemination activities were carried out through different European Commission's and external channels.¹³

The OPC received 874 responses to the online questionnaire (including 769 open-ended answers) and 51 written contributions (33 received via upload on the EU survey platform and 18 via email).

82% of respondents replied as individuals in their private capacity, and 18% replied in their professional capacity or on behalf of an organisation/ institution. The OPC received replies from respondents residing across 59 different countries. The large majority of respondents (92% out of 834) replied that they were a resident of EU Member States, mostly the Netherlands, Germany or Belgium.

The OPC addressed specific sets of questions to the following five profiles of respondents, including the percentages of replies:

1. Non-EU citizens looking to migrate/temporarily move to the EU (4%)
2. Non-EU citizens residing or having resided in the EU (22%)
3. Employers; non-EU service providers and private recruitment agencies (9%)
4. Authorities in the EU Member States (including migration, employment, including public employment agencies, but also consulates/embassies and agencies promoting students' and researchers' mobility with third countries) (4%)
5. Other respondents (NGOs, international organisations, trade unions, academics, immigration lawyers and advisers, interested citizens, others) (61%).

The European Commission made available the results of the consultation and position papers that were submitted [online in December 2017](#).

¹² https://ec.europa.eu/home-affairs/content/consultation-european-unions-eu-legislation-legal-migration-non-eu-citizens-fitness-check-eu_en

¹³ Web page: DG HOME's webpage and news article; Dedicated Fitness Check webpage; DG Public Consultations webpage; EC Representations in the Member states and EU Delegations in selected third countries; Newsletters; Targeted announcement: announced during relevant events and meetings with Member States and stakeholders; by e-mail to Advisory committees and other in the areas of migration, employment, social affairs and education; Social media: Twitter and Facebook (via targeted ads and a dedicated page¹³); Key interested parties, e.g. the European Migration Network; contacts provided by national researchers in EU Member States; international organisations; associations representing third-country nationals and business (via targeted emails).

- **Targeted consultations**

Additionally to the OPC, which aimed to reach the wider public and in particular third country nationals, opinions and data were also collected through targeted consultations in order to gather more focused information. Data was collected via the following main activities: interviews, focus groups and hearings/meetings, as well as events, targeted meetings and workshops.

Interviews

A detailed mapping of potential organisations and stakeholders was drafted in order to identify key actors. On that basis, the following interviews were foreseen:

- Selected national authorities responsible for education/research and dealing with admission of international students (10 interviews)
- Student and Alumni Associations (3 interviews)
- Labour Inspectorates (2 interviews)
- Organisations/agencies recruiting seasonal workers (4 interviews)
- Representatives of ecosystems for entrepreneurs (4 interview)

Despite significant efforts to reach the foreseen number of interviewees, only 11 interviews out of the 23 planned were conducted, given that the stakeholders contacted either (i) refused to participate or (ii) did not react to repeated contacts.

Focus group/hearings

As part of the in-depth targeted consultations, one focus group was organised with employers' organisations and trade unions (social partners) at EU level. Additionally hearings/meetings were conducted, with (i) NGOs and civil society organisations and (ii) representatives of Member States:

- ICF conducted jointly with the European Commission the focus group with EU social partners on the 29 June 2017. The focus group allowed for the possibility of open-ended questions and semi-structured approach. The focus group focused on two themes: (i) current and future needs and challenges in the respective sectors, especially for satisfying demand through labour migration and (ii) role and impact of EU legal Directives.
- In addition, the European Commission hosted a Civil Society Hearing on 23 June, 2017, providing a platform for civil society organisations to express their views and contribute with their experiences more in detail to the evaluation questions on relevance, coherence, effectiveness, efficiency and EU added value. The European Commission hosted a second hearing on 17 November 2017 discussing preliminary findings on coherence and gaps.
- The European Commission hosted a Meeting with representatives of the Member States on 18 May 2017 (Contact Group Legal Migration) discussing the relevance, coherence, effectiveness and EU added-value of the legal migration Directives. In addition to participating in the meeting, some Member States also provided written comments on the themes discussed. The European Commission hosted a second meeting on 7 November 2017, discussing the preliminary findings on coherence and gaps. One Member State provided written comments on the themes discussed.

Events and Workshops

Several events and workshops were organised by the European Commission and ICF, outlined below:

- An Expert Workshop was organised by ICF on 22 February 2017 in Brussels. The objective of the workshop was to draw on the deep knowledge of experts at the early stage in the study to map the main problems affecting the functioning of the EU legal migration acquis. A second workshop organised by ICF took place on 14 November 2017 discussing the evaluation questions and sharpening the evaluation framework.
- The third edition of the European Migration Forum took place on 2-3 March 2017 and was jointly organised by the European Commission and the European Economic and Social Committee (EESC). The event consisted of eight workshops on specific aspects of an underlying theme: Migrants' access to the EU, to rights and to services. One of the workshops focused on the fitness check process.
- The European Economic and Social Committee (EESC) drafted the Information Report "State of implementation of legal migration legislation" (Sector for Employment, Social Affairs and Citizenship/SEC). For its preparation, the EESC collected the views of organised civil society and social partners in 8 Member States through a questionnaire (Spain, Italy, Germany, Poland, Greece, Sweden, Czechia and France); organised 4 fact-finding missions (Poland, Germany, Spain and Italy); an expert hearing in Brussels on 4 May 2017; and a debate in the SOC/EESC (13 June 2017). The Information report was adopted in Plenary on 5 July 2017.
- The European Commission consulted the European Parliament, namely the coordinators of the LIBE committee, in two meetings with the participation of the Director-General of DG HOME, on 1 June and 12 December 2017.
- The European Commission organised the third meeting of the Informal Expert Group on Economic Migration (EGEM) on 22 November 2017 discussing the preliminary findings of the legal migration fitness check study with regard to relevance, coherence and gaps as well as effectiveness and efficiency.

In addition to the inputs provided during the meetings/workshops above, the Commission consulted the relevant advisory committees assisting the European Commission in the examination of the application of employment and social policies, namely the Advisory Committees on Free Movement and on Social Security Coordination, the Senior Labour Inspectors Committee (SLIC), the Advisers for European Public Employment Services and the Platform on Undeclared Work. Representatives of members of some of these Committees followed-up the consultation by the Commission with written input on the issues of their competence.

4. Methodology

The methodological approach included a detailed description of the analysis activities for the OPC and the remaining targeted consultations. The developments in the consultation process led to the introduction of some changes, namely a reduction in the number of interviews with certain stakeholders that were covered via other consultations tools, e.g. focus groups and hearings. The sections below include a short overview of the methodology used.

- **OPC**

The OPC responses were analysed following the European Commissions' better regulation toolbox¹⁴. The received data was transferred to a 'master' Excel spreadsheet containing responses to both 'closed' and 'open' text questions.

In a first step the data was 'cleaned' removing duplicates and incomplete answers. The data was prepared for analysis by dividing the answers across the five respondent groups following the division of questions in the consultation and by moving all open-ended answers in a separate sheet. Afterwards the data was analysed through descriptive statistics, and an overview of the responses was given in writing and visually.

Furthermore, as part of the OPC respondents had the opportunity to provide open-ended answers¹⁵. These answers and additional documents received were analysed using qualitative analysis techniques. The open-ended answers and additional written input received differs largely in terms of quality and quantity. Only some of the inputs provided in response to the open-ended questions were pertinent and relevant¹⁶.

The additional documents that were uploaded as part of a response to the OPC were analysed with the assistance of the qualitative analysis programme NVIVO®¹⁷. The documents were categorised according to the type of respondent and to the pertinence of the content in relation to the study criteria.

- **Targeted consultations**

The results from the targeted consultations, including interviews, focus groups and additional events were analysed following the European Commission's Better Regulation guideline on stakeholder consultation.¹⁸ All documents received as a result of the consultation were examined using qualitative analysis techniques. The comments, position papers and contributions from the stakeholders were grouped into the categories and evaluation questions. Distribution of respondents across Member States and respondents by stakeholder categories was taken into account.

All views have been fairly reflected and comments are generally attributed to individual organisations and Member States to give an indication of the type of respondent in each group of comments. The analysis was conducted with the assistance of NVIVO® as well.

- **Limitations to the method and use of the results**

The main limitations of the OPC included the variable number of responses across the five different profiles. The majority of respondents (61%, n=874) were part of a large group of 'other' stakeholders, including NGOs, international organisations, trade unions, academics, immigration lawyers and advisers, interested citizens and other type of respondents. Thus the answers provided could be biased toward these groups of stakeholders. The second largest group are non-EU citizens residing or having resided in the EU (22%), whose answers provided a good overview of issues faced in the different migration phases. However, non-EU

¹⁴ See here: https://ec.europa.eu/info/sites/info/files/file_import/better-regulation-toolbox-54_en_0.pdf

¹⁵ To questions 11, 14, 15, 19, 23, 24, 27, 29, 30, 34, 46, 50, 53, 59, 64, 69, 70, 79, 81, 90, 91, 93, 99, 101, 102, 103 and 108.

¹⁶ In particular, it seems that several respondents merely used the OPC as a platform to complain about migrants from third countries coming to the EU, without providing information on the specific issues that these questions attempted to explore.

¹⁷ NVivo is a software package designed for qualitative research, NVivo enables researchers to organise a large volume of documents and 'code' text (words, sentences or paragraphs). It is then possible to run frequency analyses of these codes and to filter according to the research needs.

¹⁸ <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-stakeholder-consultation.pdf>

nationals looking to migrate to the EU and authorities in the EU Member States (both 4%) were among the lowest represented stakeholders. Thus, their answers cannot be regarded as representative for these stakeholders.

Further limitations included limited responses to certain questions in the OPC¹⁹. Hence answers to these questions represent only a limited number of stakeholders and not the whole stakeholder group.

Finally, a large number of responses was received from the Netherlands (22%, n=826). While basic testing could not identify a targeted campaign, it should be noted that the responses might have a bias towards the view of specific stakeholders from the Netherlands. Specifically, in the responses received for employers, these should be taken into account with caution as the majority of respondents are Dutch employers. Hence these views are taken into account as being complementary to other consultation methods to avoid bias towards one group of stakeholders.

As regards the targeted consultations, the quality and availability of information differed. Gaining information from interviews was hindered by the lack of responses from certain types of stakeholders. It was particularly difficult to reach agencies recruiting seasonal workers and thus their views were not included in the analysis.

In addition, not all evaluation criteria were equally represented among the answers provided by the interviewees. For instance, in the interviews which were carried out, EU added value was often the section that had the least detailed feedback. Further, in relation to efficiency the information provided did not go into particular detail in relation to costs and issues linked to the visa application process and thus the sub-section addressing efficiency provides only limited information. Often stakeholders consulted provided opinions that dealt more with the effectiveness of the application process rather than its efficiency and while some pertinent issues were raised these rarely provided much explanation as to why the issue arose or as to whether the issue could have been/ had been dealt with differently.

During the civil society representatives' hearings, participants did not necessarily focus on the positive effects and results brought in by the EU legislation compared to what could have been achieved at the national level.

In sum, in some cases the stakeholders provided incomplete or contradictory information, making a comparison of their views difficult. Further, stakeholder views expressed in the majority of the events and workshops were not necessarily representative for the larger public, but rather provide snapshots of challenges and views that can be utilised to show particular issues or positions of certain stakeholders.

5. The results of the stakeholder consultation

The sections below include a description of the results of the consultation activities per evaluation criteria.

o Relevance

Under this criterion, the aim is to assess whether objectives of the legal migration Directives and the way they are implemented are relevant in addressing the current and future needs of stakeholders.

¹⁹ E.g. "Question 94: How have lessons learnt from implementing EU legislation/Directives been applied elsewhere in your national migration rules?" that was directed at national authorities received only 20 responses.

Overall the outcome of the stakeholder consultation has confirmed that the legal migration Directives remain **relevant to address the needs of various stakeholders**. However, the consulted stakeholders raised several concerns.

- Third-country nationals consulted through the OPC indicated that the most relevant Directives are those addressing the needs of workers and students. However, they noted that the current conditions for how to enter, live and work in EU countries are too restrictive for third-country nationals.
- Member State representatives consulted as part of the meetings with Member States (Contact Group Legal Migration) generally confirmed the relevance of the Directives to address their needs. They emphasised the need for simplifying and streamlining the existing Directives, rather than developing additional legislation at EU level. They also remarked that while there is a need for harmonisation of legal migration rules, the Member State authorities should retain flexibility regarding their migration policy. Furthermore, national authorities responsible for education consulted via interviews confirmed the importance of attracting students in the EU and emphasised that the recast Students and Researchers Directive is relevant in addressing the needs of Member States.
- Other stakeholders consulted via the OPC (including NGOs, academia, immigration lawyers and citizens interested in legal migration) expressed different views. Some referred dissatisfaction with the EU migration legal framework, calling for a restrictive migration policy that prioritises the needs of EU nationals over those of TCNs (e.g. citizens interested in legal migration), while others emphasised the need to protect third-country nationals, avoid labour exploitation (e.g. NGOs) and ensure better recognition of formal qualifications to avoid skills mismatches and over-qualification (e.g. academia).
- Stakeholders noted (e.g. at the EMF) that several differences in migration rules remain across the EU, which point to a fragmented approach in implementing the Directives across the Member States.
- Stakeholders consulted by the EESC emphasised the need for a more ambitious, horizontal approach in the legal migration legislation, and referred dissatisfaction with the implementation of the Directives in some Member States. There was a request to consider the broader political context in the EU, including combatting illegal migration, but also ensuring equal treatment and combating labour exploitation.
- EGEM representatives were asked to provide their input on potential drivers for migration towards the EU. They emphasised that the ageing of the population is an important driver, specifically for labour migration (e.g. in the care sector).

Stakeholders were further asked whether certain **relevant categories should be covered by the EU legislation to reply to current and future challenges:**

- Representatives of social partners confirmed the importance of non-EU workers of different skills levels and the need of the legislation to focus more on these categories, as opposed to the current focus on highly skilled non-EU workers. They also requested that the needs of EU SMEs are considered.
- Several employers' associations and trade unions consulted via the OPC raised issues such as re-defining the categories for family reunification, but also on sectoral issues, e.g. on the specific needs of artists and aircraft crews in terms of intra-EU mobility.
- Other stakeholders consulted in the EMF indicated as well that the sectorial approach might not be appropriate, and that the EU Directives should address a wider category of non-EU workers. There should be a better matching of skills with the jobs available, and

better identification of the existing demand for low and medium-skilled workers who do not have legal ways to come to the EU.

- Experts consulted through EGEM emphasised the need to tackle the issue of overqualification of third-country nationals, as well as to focus more on medium and low skilled workers, which will be needed in the EU in the medium and long-term.
- Interviews with stakeholders representing European entrepreneurs' ecosystems indicated that it is important for the EU to attract entrepreneurs in innovative sectors, in order to be competitive in comparison to other regions such as the US. While current legislation does not address these categories, it would be favourable to have an overall EU-wide approach for attracting and retaining these third-country nationals.

- **Coherence - internal and external at EU level**

The assessment of coherence aims at grasping both internal coherence (possible inconsistencies, gaps and overlaps between the Directives) and external coherence in relation to national law and other EU policies.

The stakeholder consultation indicated that the objectives of the Directives are not always coherent and consistent and there are **inconsistencies, gaps and overlaps which need to be addressed**.

Internal coherence

Stakeholders (NGOs and civil society organisations, Member States, experts) indicated **inconsistencies in the legal migration provisions** in several areas, including access to information, admission conditions and rules, equal treatment, wage thresholds and labour standards, deadlines and processing time, duration of short/long term mobility, and access to work for family members. Rules vary across the Directives, creating different standards for different categories of third-country nationals. In some cases this is justified by the scope or objectives of the Directive, but there is scope for improvement. Some experts and other stakeholders added the importance of considering the specific needs of women and to reconsider the dependence on the spouse in cases of family reunification.

Stakeholders have also identified overlaps which originate from the same category and/or target group being regulated by different pieces of legislation, including the national schemes, which exacerbate the uncertainty deriving from an already complicated legal framework (Member States).

As indicated as regards relevance, stakeholders suggest the need for **simplification of the legal migration Directives** (Member States' representatives, stakeholders consulted by the EESC), indicating that the implementation of the legal instruments was overall complicated and the flexibility allowed by the Directives led to different management systems in different countries. Consulted experts suggested that more ambitious **harmonisation** is needed, with some suggesting a horizontal legal instrument. Several stakeholders referred in particular to the need to do more for building trust for allowing the recognition of permits issued in other Member States to exploit the EU's potential to the maximum.

Regarding the most relevant gaps as regards **categories of third-country nationals that are currently not fully covered by the EU legislation**, and where common EU rules would be supported, third-country nationals referred in the OPC that additional categories should be indeed included, in particular TCNs planning to launch a start-up and self-employed workers. They also agreed that additional family members should be entitled to family reunification. The civil society organisations suggested that medium and low-skilled workers should be

considered, including domestic workers. A few Member States suggested considering entrepreneurs and start-ups, highly qualified international service providers and non-removable irregular migrants. Finally, social partners responding to the OPC and experts consulted through EGEM suggested to include international service providers/short term business visits, certain categories of highly mobile third-country nationals (notably transport workers in aviation and road transport as well as artists and their crews), medium and low-skilled workers (including domestic workers), self-employed workers and investors.

External coherence

Contributions from the stakeholders were limited and mainly referred to an overlapping between asylum and legal migration acquis, and family reunification rules in the Dublin Regulation. More specifically, Member States' authorities responsible for education/research and dealing with admission of international students indicated that EU policies, including education and research (including funding programmes such as Erasmus+, (former) Erasmus Mundus and Marie Skłodowska Curie Actions) and recognition of foreign qualifications play a role in the management of migration flows advocating for a better coherence between these policies and the legal migration acquis.

Experts consulted at the second meeting also noted that other EU policies need to be taken into consideration, such as national employment and education policy, visa policy, research policy (specifically on attracting researchers); fiscal and tax policies and incentives for individuals and companies, interplay with nationality and citizenship law, as well as social security regulations.

Finally, some stakeholders indicated overlaps and inconsistencies between national schemes and the EU Directives, noting that in some cases the national schemes might be more favourable for the TCN (experts, Member States) as arguably they are more flexible, easier to adjust and modify for the national needs, leaving more discretion at national level.

○ Effectiveness

For the analysis on the effectiveness of the legal migration legislation, the consultation process focused on assessing whether the objectives of the legal migration Directives were achieved, the effects of the Directives on stakeholders and what other factors might influence the achievement of the objectives.

The stakeholder consultation indicated that the EU legal migration framework has had a relatively positive impact on the legislation and practices of EU Member States. For example, civil society organisations in a selected number of EU Member States have found that the FRD and the LTR Directive have positively contributed to the management of legal migration and equal treatment, and that the SPD has helped simplify procedures.

However, stakeholders identified a number of implementation gaps and challenges, notably:

- The complexity and segmentation of the system presents challenges for third-country nationals as regards complex application procedures and differences in rights and benefits across EU Member States. Member States indicated that, in some cases, national instruments are more flexible or favourable compared to EU instruments.
- At EU level, stakeholders considered that the **sectoral approach**, i.e. the coexistence of specific schemes for different third-country nationals, has resulted in a very complex and fragmented system that has a negative impact on the implementation across Member States. This approach also has the potential to curtail some of the objectives for which it was conceived, e.g. equal treatment.

- Several stakeholders complained about the higher level of protection provided to high-skilled migrants and the absence of EU-level rules for the admission of low and medium-skilled TCNs (e.g. social partners and civil society organisations, stakeholders at the EMF, EESC).
- Furthermore, the differences in implementation at national and local level adds another layer of complexity, for instance when mandates of different authorities overlap. This is aggravated by the lack of policy guidelines for national authorities as well as of clear and official information for migrants (e.g. Member States, EGEM).
- Difficulties with regard to **intra-EU mobility** of migrants. Some answers to the consultation, in particular from third-country nationals residing in the EU, referred that the possibilities to move to a second Member State are reduced and that there are a number of challenges to mobility. These range from the lack of information provided from official sources to the lack of transferability of the social security benefits. For instance, when it comes to students, the non-uniform regulation across the Member States result in different time thresholds for the allowed periods abroad for exchange programmes.
- Regarding the effectiveness of current EU legislation to prevent discrimination, the views were diverse, but a majority of OPC respondents, including third-country nationals residing or having resided in the EU, considered that EU legislation effective in this aspect.

Among the **external factors** with negative impact on the effectiveness of the EU legal migration framework, stakeholders mainly referred to the high influx of refugees coming to the EU since 2015 and their subsequent access to the irregular labour market, limiting the positive impact of the implementation of the legal migration legislation (EESC).

From an **internal perspective**, stakeholders referred, along with the fragmented nature of the legislation, the fact that Member States' retain a large margin of manoeuvre in migration policies as a factor preventing the EU rules from achieving their full potential (e.g. civil society organisations).

- **Efficiency**

Stakeholders provided only limited information as regards the **efficiency** of the EU legal migration Directives, namely the cost and benefits associated with the implementation of the *acquis*, making it difficult to draw detailed conclusions on the matter based on the consultation process.

There are nonetheless some recurring issues that were raised by stakeholders which are related either entirely or partially to efficiency. These referred mainly to the admission procedures, with all stakeholders responding to the OPC, and in particular third-country nationals, referring the length and complexity of procedures ().

Another issue that was mentioned by several stakeholders (third-country nationals, employers) and which is linked to the one abovementioned, was the cost of obtaining the required information and documentation for admission procedures, as this requires certification and/or translation. Consulted experts mentioned how these requirements often vary a lot between Member States and that this entails costs as well as uncertainty among applicants. Thus, some stakeholders called for the **standardisation** of the admission process in the EU.

Member States confirmed that there had been no cost efficiency studies developed until the moment, but pointed in general currently there are more administrative costs in migration management as result of the implementation of the Directives.

- **EU Added Value**

The EU added value refers to the positive effects resulting from the implementation of the EU legislation compared to legislation exclusively at Member State level. There is also an analysis whether the issues addressed continue to require action at EU level.

Consulted stakeholders provided their views on EU-added value and mainly agreed that there have been positive effects brought in by the EU legislation:

- **Intra-EU mobility** was identified as one of the main added value of EU legislation. Stakeholders noted as positive the possibility to move to other Member States, in particular for international students from third countries and for researchers. Intra-EU mobility was noted as advantageous both for the attractiveness of the Member States' universities and research institutions and for third-country nationals.
- A further positive effect of EU legislation for international students referred to the extension of the possibility to stay in the Member State temporarily after completing their studies, as well as the right to work and be self-employed during their studies.
- Intra-EU mobility was also considered beneficial for workers but the evidence shows that, while being perceived as a significant added value, in practice its utilisation is limited. In the OPC, respondents referred to duplication of the admission procedures and problems in the transferability of social security benefits. The current provisions on intra-EU mobility were referred as complicated and requiring intensive cooperation and exchange of information between Member States. Some stakeholders suggested that there should be more exchange of good practices regarding the communication between Member States, and between Member States and institutions, employers, and third-country nationals, notably on intra-EU mobility.
- Another positive effect of EU legislation is that the Directives have contributed to a more **harmonised legal framework**. There are now similar conditions across the Member States for several categories of migrants and this creates a level playing field across the EU. Despite the improvements, the consultation identified remaining gaps perceived by some stakeholders, for instance in relation to the recognition of skills and qualifications that would benefit from further harmonised at EU level.
- Stakeholders further generally agreed that the issues addressed by the legal migration Directives continue to require action at the EU level. Others however, explained that a harmonisation must not be the main goal and that the different economic situations across the Member States need to be taken into account. Similarly, Member States representatives emphasised that particular attention should be paid to the effects of any new EU rules on individual Member States.
- Other main aspect of added value referred was the recognition of **fair treatment** as an objective of legal migration legislation and the improvement of the rights of third-country nationals across all Member States.
- Some stakeholders referred as added value the improved **legal certainty for businesses and simplified administrative procedures** for national authorities. Yet, these aspects were considered as not fully exploited, the coexistence of a multiplicity of residence permits for migrants, which are not really understood by many of the direct users, making the system overly complicated. Some stakeholders defended that national permits are in

several cases preferred and provide a broader spectrum of rights for third country nationals and are better targeted to meet the Member States' labour market needs.

- Some stakeholders defended the need to create a permit for innovators with the aim of supporting the reinforcing innovation hubs in the EU and that in the future more emphasis should be given to attracting highly skilled entrepreneurs from third countries to the EU.

6. Conclusions

Overall the stakeholders consulted agreed that the **legal migration Directives remain relevant**. However, the consultations highlight divergent views of the stakeholders on specific topics. While NGOs, third-country nationals and social partner representatives see the need to further harmonise the *acquis* and to include additional categories (e.g. entrepreneurs and medium skilled workers), others, such as most Member States' representatives, rather propose a simplification of the current *acquis*. Furthermore, while they agree that harmonisation is necessary to a certain extent, the Member States' authorities defend that the flexibility allowed by current legislation should be maintained. Finally, a percentage of employers and general public responding to the OPC) see the need for a restrictive migration policy that prioritises the needs of EU nationals over those of third-country nationals.

As regards **internal coherence**, consulted stakeholders have indicated **inconsistencies, gaps and overlaps which should be addressed**. These relate to differences in legal provisions and implementation across the migration stages, from application (deadlines and processing time) and residence (equal treatment), to mobility, long-term residence and end of stay.

The differences across the Directives create different standards for different categories of third-country nationals, although some of these differences can be explained by the different scope of each directive (e.g. the periods of stay in the EU).

Similarly to the stakeholders' views on relevance, some stakeholders suggested simplification to improve internal coherence (e.g. Member States), while others argued for a more ambitious harmonisation of the *acquis* (e.g. consulted experts, EESC, civil society organisations, some MEPs).

Stakeholders further recognised the **gaps** in the EU-level legislation as regards several categories of third-country nationals that are currently not covered by the legislation, in particular investors, third-country nationals planning to launch a start-up and self-employed workers, but also international service providers, certain categories of third-country transport workers (notably in aviation and road transport), medium and low-skilled workers and family members that are not covered by the FRD.

When consulted on **external coherence**, stakeholder contributions remained rather limited referring to overlaps with existing national permits, other EU policies (e.g. education and research) as well as the asylum and legal migration *acquis*, and family reunification rules in the Dublin Regulation.

As regards **effectiveness**, most stakeholders agreed that the EU legal migration framework has had a positive impact on the legislation and practices of EU Member States (e.g. civil society organisations, EESC). At the same time, stakeholders identify internal challenges influencing the effective implementation of the Directives, in particular:

- The complexity related to the sectoral segmentation of the EU migration system and the coexistence of separate schemes for third-country nationals, which makes uniform

implementation across Member States difficult. The different levels of protection of rights of high-skilled third-country nationals as compared to other third-country nationals was referred by some stakeholders (e.g. EESC, civil society organisations).

- Given the differences in migration schemes there are cases of overlap between the national and local authorities, creating administrative complexity. However, stakeholders noted that EU Directives could be able to support Member States in simplifying procedures if there are adequate policy guidelines for national authorities. Some stakeholders also defended high-quality and easily accessible public information on procedures and rules.
- Difficulties in the implementation of intra-EU mobility rules have impact on third-country nationals and on the attractiveness of the EU's internal market. Especially long-term residents face a number of challenges on mobility, ranging from the lack of information provided from official sources to the lack of transferability of social security benefits (OPC). Also students face issues due to non-uniform regulations across the Member States resulting in different time thresholds students are allowed to spend abroad on exchange programmes (an issue raised by the Member States).

Stakeholders did not provide detailed input as regards **external factors** influencing effectiveness, briefly mentioning the influx of refugees and their access to the labour market as a potential issue for the effective implementation of the Directives (EESC).

Stakeholders provided limited information as regards cost and benefits affecting the **efficiency** in implementing the legal migration acquis. However, stakeholders identified some costs mainly relating to the application process. Specifically, in the OPC third-country nationals mentioned length and complexity of procedures as main 'cost' associated with the application process for the legal migration Directives. They also mentioned the cost of obtaining the required documentation (certifications, translations). Consulted experts noted that the requirements and thus associated costs and benefits vary across Member States, impacting the overall efficiency of the acquis, calling for a **standardisation** of the application process.

As regards **EU added value**, stakeholders overwhelmingly agree that the EU Directives have brought positive effects across the Member States. Specifically **intra-EU mobility** was regarded as a key added value, made possible only by EU-level legislation, and even considering the effectiveness issues referred. Another positive contribution of the legal migration Directives referred was the higher degree of **harmonisation** of the procedures. However, stakeholders have different views regarding possible further harmonisation. While some stakeholders indicated that several aspects would benefit from further harmonisation (e.g. recognition of skills and qualifications), others emphasise the need to take the situations of Member States into account and that specific areas of the migration management of Member States should remain under their exclusive competence.

Several stakeholders, and in particular Member States' authorities, defended that an effort of consolidation of the implementation of existing instruments and simplification of the legal migration legislation should be envisaged.

ANNEX 3. METHODS AND ANALYTICAL MODELS

1. Brief description of the methods used

This Fitness check is primarily based on qualitative analysis of a variety of sources as set out in Annex 1. The analysis was carried out by triangulation of findings from the assessment on conformity studies, a practical implementation survey, consultation of a wide range of stakeholders and the public, analysis of statistics and economic data and a review of academic literature, policy document and different studies.

The analysis is not relying on quantitative modelling techniques, however quantification was attempted in terms of the statistical analysis of migration stocks and flows, as well as of the costs associated to the implementation of the legal migration Directives.

The consultation activities focused on fact finding and gathering of opinions and in the latter stages partial validation of preliminary findings through expert groups.

For the purpose of the analysis a number of detailed research questions were developed, laying the basis for the analysis carried out in the supporting contract²⁰.

A concise description of the qualitative and quantitative baselines are presented in the main document (section 2.2) as well as in Annex 7 related to the effectiveness assessment.

2. Description of the methodological approach by evaluation question, sources used and robustness of the results by question²¹

Relevance

Question 1: To what extent are the objectives of the legal migration Directives and the way they are implemented relevant for addressing the current needs and potential future needs of the EU in relation with legal migration?

The objectives of each Directives, as set out in the adopted Directives and their preparatory acts, as well as the overall objective of the EU legal migration policy as well a number of policy documents and opinions have been identified in the contextual analysis and in the intervention logic²². Although 1999 is the chosen baseline year for the overall objectives of the legal migration policy (related to the change of competence for EU migration policies as part of the third pillar of the Amsterdam Treaty and the year where the first proposal for the Directives covered by this fitness check, FRD, was presented), each Directive relate to a specific baseline year depending on when it was proposed.

To assess the relevance of the objectives, all nine Directives where considered, to enable a complete analysis of objectives, including the identification of gaps, although the way the newer Directives were implemented could not yet be analysed.

These objectives were compared to the current needs in terms personal scope, i.e. the volumes and category of third country migrants that are currently either present in the EU, or seeking to migrate to the EU, or for whom there is a demand from the EU due to specific skills or otherwise²³. The current needs in terms of material scope was analysed by comparing the

²⁰ ICF(2018) Support study for the "Fitness Check Legal Migration", Annex 4A (Evaluation Framework).

²¹ This section includes references to the relevant part of the support study. The corresponding section of this Staff working document may include additional analysis.

²² ICF(2018) Annexes 1Bi (Contextual analysis – historic developments) and 1Ci, ii, iii (Intervention logics).

²³ ICF(2018) Annexes 1Bii and iii (Contextual analysis : statistics, drivers) and 4B(Gap and key issue analysis)

objectives of the specific Directives and the overall objectives in the context of the analysis of the practical implementation of the Directives²⁴.

An analysis of current migration stocks and flows was carried out, and data related to current skills demand was compared to the legislation in place. This included a preliminary analysis of specific gaps in terms of categories of third country migrants and key issues (e.g. exploitation) identified on the basis of internal expert judgement. The gaps identified were subject to consultation among Member States, experts and civil society and the relevance confirmed. The intervention logics include further analysis of the personal scope of the legislation and the gaps in this request.²⁵

Based on expert judgement, and the evidence gathered in the fitness check, a description of current needs was developed, including the different challenges to the management of migration flows and protection of third-country migrants that were identified throughout this process. Key stakeholders were also asked to express their view on the relevance of the objectives²⁶. This analysis included an analysis of practical and legal challenges identified in the process and provide further information on if the way Member States implement the directives are relevant compared to the objectives of the Directive and in view of the current and future needs of the EU in the field of legal migration.²⁷

The relevance of the objectives compared to future needs was analysed based on an identification of drivers and future trends for legal migration, enabling conclusions to be drawn on the relevance of the Directives in the foreseeable future²⁸.

The judgement criteria applied to analyse this question are:

- the severity of the gaps in relation to the intended objective of the Directives (e.g. prevent exploitation of third-country workers, simplification of the application procedure) the number of persons directly affected and the impact on the economy
- the degree to which the personal scope of the Directive covers the relevant migrants, in relation to current migration flows and stock

The evaluation is deemed sufficiently robust, with exception of the quantitative assessment. Future needs in terms of legal migration, are by nature difficult to quantify, instead the analysis is primarily qualitative. The economic impact of certain material gaps was hampered by low data availability. The knowledge base on the number of third-country migrants affected by certain personal scope gaps is furthermore limited, given that comparable statistics are only gathered systematically by Eurostat on residence permits issued based on existing EU legislation, and such data is not necessarily reported regarding third-country nationals for which a gap has been identified.

Cohherence

Question 2: To what extent are the objectives of the legal migration Directives coherent and consistent, and to what extent are there inconsistencies, gaps and overlaps? Is there any scope for simplification?

²⁴ Annex 5 and ICF(2018) Annexes 1Ci and ii(internal and external intervention logics)

²⁵ Annexes 5 and 6 and ICF(2018) Annexes 1Ci, ii, iii (intervention logics) and 4B (Gap and key issue analysis).

²⁶ Annex 2 and ICF(2018) Annexes 3Ai and ii.

²⁷ Annex 8 and ICF(2018) Annex 2A(Evidence base practical application).

²⁸ ICF(2018) Annex 1B iii (Contextual analysis : Drivers - historical development and future outlooks).

The operational objectives of the Directives, as set out in the articles of each Directive, were analysed by triangulating comparative legislative analysis, evidence from implementation, academic literature, output of the consultation activities, statistics and expert judgement. The starting point is a comparative legal analysis identifying the interaction between the Directives and comparing the way in which the equivalent aspects of the material scope of each Directive are regulated. For the purpose of this analysis, all Directives have been analysed, to ensure a complete analysis of the legal migration acquis. The findings emphasise the recast S&RD, rather than the two Directives it has recast (SD and RD).

A detailed internal intervention logic document²⁹, presents the legal analysis and comparative tables, and analyses interactions, gaps, overlaps, synergies, in consistencies between the instruments as well as scope for simplification and the potential for reduction of administrative burden. Where the consultation activities, the practical application study, the conformity and evidence from complaints, infringements and case law³⁰, as well as the literature review have revealed further problematic issues in relation to the internal coherence, this has contributed to the analysis.

The judgement criteria for assessing the significance of the inconsistencies, gaps and overlaps identified in the evaluation are:

- the extent to which these are justifiable depending on the different status of the third-country migrants,
- if differences are disproportionately affecting certain stakeholders,
- if these are have an impact on the administrative burden of the admission and residence of third country nationals,
- the number of third country national and other stakeholders potentially affected by the gaps, inconsistencies or overlaps.

The extent to which possible simplification and reduction of administrative burden is deemed feasible and would have a significant impact on the effectiveness of management of migration, is assessed as a cross cutting theme, drawing also on the conclusions on effectiveness and efficiency.

Question 3: To what extent are there inconsistencies, overlaps, gaps and synergies between the existing EU legislative framework and national legal migration legislative frameworks? Is there any scope for simplification?

The evaluation of the coherence with the Directives and national legislative frameworks on the other hand, triangulated the findings of the legal implementation, the practical implementation, consultation findings and statistics on permits issued. National policies choices that lead to synergies (and non-problematic overlaps and gaps) or inconsistencies, problematic overlaps were analysed.

The practical implementation study³¹ compared the findings of the conformity assessments with application in practice. Specific attention was placed on which choices Member States have made when the Directives allow for flexibility and policy choices, and what the implications this has had. Practices and policies linked to management of migration flows, but outside of the immediate scope of the Directives were analysed. The use of national parallel schemes was investigated,

The judgement criteria applied to this assessment are:

²⁹ Annex 5.1 and ICF(2018) Annex 1C1.

³⁰ COM(2019) 160, 161, 162.

³¹ Annex 8 and ICF(2018) Annex 2A).

- extent to which the implementation choices made by the Member States are justifiable and proportionate in relation to the objectives of the Directives and category and volumes of third country nationals concerned;
- the extent to which the choices are in line with the intended effects of the Directives;
- the significance of the problem (number of persons affected, economic, administrative burden).

The scope for simplification of the Directives as well as the scope for reduction of administrative burden related to this question, is then further assessed in relation to the efficiency criteria (EQ 9 and 10).

Question 4: To what extent are the legal migration Directives coherent with other EU policies and to what extent are there inconsistencies, gaps overlaps and synergies with such policies, including with international trade commitments by the EU and its Member States?

The external coherence analysis other HOME policies and legislation, other EU policies and legislation as well as certain international commitments. The policy areas addressed were identified based on internal expert judgement on which policies were assumed to have had an impact, on the different phases of migration, including legislation directly referred to in the Directives and legislation where potentially problematic interaction has been identified through complaints, petitions, case law among other sources. The selection of policy areas analysed was then subject to consultation of other Commission services.

A legal analysis of the interaction with other policies was first carried out in the external intervention logic, based on internal and external expertise, including consultations with other Commission services. Certain external coherence policy areas were further analysed in the gap and key issue analysis (see relevance). ³²

The consultation activities and the practical application study, gathered further evidence and opinions on areas of particular concern in relation to gaps and inconsistencies with other policies. Where available, statistical and economic evidence were used to assess the significance of the potential problems identified in relation to external coherence. Evidence from complaints and infringements are also presented when relevant.

On the basis of external coherence analysis, key coherence issues were then identified relating to interactions with other EU legislation and/or policies that lead to synergies, and non-problematic overlaps; inconsistencies and problematic overlaps; and gaps related to the interaction between the material scope of the legal migration Directives. Potential scope for simplification and reduction of administrative burden related to the interaction of the legal migration Directives and other policies were analysed.

In parallel, developments and in some cases studies related to specific areas that also links with other policy fields were carried out, that also contributed to the analysis in the work related to entrepreneurship, investors, expression of interest systems and trade in services. ³³

Judgement criteria applied to the evaluation of the coherence with other policies were:

- the extent to which de facto obstacle in the management are stemming from the interaction with other EU policies, e.g. gaps in relation to recognition of qualification,
- the significance of the impact of a gap, overlap or inconsistency

³² Annexes 5.2 and 6, as well as ICF (2018) Annexes 1Cii and 4B.

³³ COM(2019) 12 of final of 23.1.2019 on Investor Citizenship and Residence Schemes in the European Union. Tans et al (2018).

Effectiveness

Question 5: To what extent have the objectives of the legal migration Directives been achieved?

Question 6: What have been the effects of the legal migration Directives, and to what extent can such effects be attributed to the EU intervention?

Question 7: To what extent do the observed effects of the implementation of the Directives correspond to their objectives?

Question 8: To what extent did different external factors influence the achievements of the objectives?

The effectiveness of the implementation of the older Directives (FRD, LTRD, SD, RD, BCD, SPD) was analysed the basis of the three overall horizontal objectives identified, and further analysed by specific horizontal objectives covering all or some of the respective Directives. Directive specific assessments are included in relation to the most relevant horizontal objective. All 4 questions are answered for each specific objective³⁴. The context of the assessment, including the relevant operational objectives, findings from the coherence assessment and other external factors that may influence the effectiveness assessment.

Each section includes a concise description of the quantitative (migration flows and stocks) and qualitative (legal situation prior to the introduction of the Directives) baseline, as far as available. The year of adoption of the proposal for the specific Directives is used as the baseline year. For several objectives there is limited or no baseline information, and another point of comparison has been used, notably the situation that was intended to be achieved with the implementation of the Directives. The key sources used for this analysis are the proposals for the respective Directive³⁵.

The observed effects of the legal migration Directives in terms of the current legislative frameworks in place in the Member States were analysed, and to what extent they are conform with the Directives, which is then compared with the baseline situation, for instance:

- Legislative changes brought in due to the Directives, the degree to which the Directives have been implemented in law, effects identified through complaints or through the practical application study.
- Statistical analysis of the number of permits issued for different reasons, and share of those issued under EU Directives, and identification of any direct impact of the introduction of the Directives if possible.
- Number and share of third country nationals covered by the respective legal provisions related to each objective, compared to the intended coverage.
- Secondary effects identified through a variety of sources, for instance increased legal certainty for migrants and employers.

Wherever the consultation activities have identified relevant information and specific views expressed by stakeholders, this is transparently presented.

The degree to which the current status of legal and practical implementation corresponds to the overall objectives as well as Directive specific objectives is analysed, thereafter an attempt was made to assess if these changes were directly due to the implementation of the Directives and the role played by a number of relevant external factors, including overall drivers for

³⁴ Annex 7.

³⁵ ICF(2018) Annex 1Bi.

migration and other EU, national and international policies. Where no changes were observed, likely reasons for this was explained as far as possible based on the evidence presented.

Judgement criteria for determining if the objectives have been achieved are:

- the degree to which the objectives of the Directive cover the intended categories of migrants;
- the degree to which specific provisions have been harmonised, to the extent foreseen by the Directives;
- the degree to which the objectives as regards specific operational objectives have been achieved (efficient procedures for application, renewals, rejections, guaranteeing of legal safeguards, ensuring equal treatment, intra-EU mobility etc.);
- the degree to which other EU policies national implementation choices played a role, compared to the role of the Directives themselves.

Key assumptions and limitations related to measuring the effectiveness of achievement of the objectives of the legislation are:

- The effect of the legal migration Directives can not only be measured in terms of volumes of migrants admitted for a specific purpose, nor on the number of permits issued, for several reasons. Firstly Member States have a treaty based right (Art 79(5) TFEU) to control the volumes of migrants admitted for economic reasons. Secondly, certain reason for migrating, such as family reunification, is a function of migrants admitted for other purposes or for purposes where the legal migration Directives do not control the volumes admitted, for instance those admitted for work or international protection. Thirdly, volumes of migrants admitted are also affected by many external factors affecting both drivers influencing the reason for the migrant (level of education, economic development of the country of origin, conflict, climate etc.), as well as the demand for migrants from the countries of destination. Finally, not all Directives have the objective to attract migrants. The volumes of permit issued are nevertheless important to assess the relative uptake of EU Directive based residence permits.
- There is a significant time-lag on the effects related to the implementation of a Directive not just to the time of adoption of the Directive, but also the time for entry into effect of the obligations of the Directive. Further delays are often caused by delays in transposition of the respective Directive but also the time-lag resulting from the reporting of permit statistics on permits.
- Many Member States had schemes and procedures in place for the management of migration flows prior to the adoption of the Directives, and no studies have been identified from the MS that distinguishes the changes introduced because of the Directives. Both the effectiveness and the efficiency analysis are therefore limited by this lack of evidence.
- The Directive includes several important areas of flexibility, that to a large extent affect the way in which the Directives are implemented, and hampers to some extent the achievement of a level playing field as regards certain provisions.

The feasibility of carrying out a counterfactual analysis was studied in order to determine the effect that can be attributable to the EU intervention, and found that possible approaches were to assess *geographical counterfactual analysis* (comparing the situation in the 25 MS implementing the Directives with the three MS that do not implement the legislation, alternatively comparing it with the EEA and or Schengen non-EU member States), *temporal counter factual analysis* comparing the situation prior to the implementation of the Directive compared to the current situation. Whilst the first approach would not necessarily provide a relevant comparison given the specific factors influencing the attractiveness of the countries

in question are often exogenous to the aspects regulated by the Directives (language, size and structure of the economy, etc.), the second approach suffers from serious data availability.

Efficiency

Question 9: Which types of costs and benefits are involved in the implementation of the legal migration Directives?

Question 10: To what extent did the implementation of the Directives led to differences in costs and benefits between Member States? What were the most efficient practices?

The efficiency analysis evaluates the implementation of the older Directives (FRD, LTRD, SD, RD, BCD, SPD), and the starting point was a qualitative identification of a typology of cost and benefits related to the implementation of the Directives. This assessment is based on evidence from the literature review, evidence gathered in consultation, both targeted consultation primarily with Member States but also the open public consultation reaching third-country nationals, the evidence gathering part of the contractors study on the practical implementation of the Directive.

Based on the typology of different costs and benefits related to the implementation of the Directives, the available quantitative evidence was sought, however little quantified data of relevance to the fitness check evaluation was identified. The economic analysis was therefore hampered by a number of important limitations:

- The evidence on the economic and social impacts of migration used for the assessment of the costs and benefits of the Directives concerns the impacts of overall migration flows, whether or not they can be attributed to the Directives, since there is very limited evidence is available that would underpin such specific assessment. Member States do not have a duty to report the specific costs and benefits associated with the implementation of the Directives to the Commission, therefore an EU wide estimate of impacts is not available.
- While comparable data on residence permits are available since 2008, there are no comparable data on the average time spent processing permit applications, on the number of applications rejected, or on the costs and benefits associated. Most of the available studies are ex-ante assessments of specific elements, carried out in support of the preparation of proposals by the European Commission.
- The information at national level is also scarce, as shown by desk research and the consultation process.³⁶ Member States' representatives confirmed that they have not carried out assessments of cost and benefits in the area of legal migration and they highlighted the difficulties surrounding the assessment of costs and benefits. In particular, very few Member States collect data on average processing time³⁷ of permit applications, which makes it very difficult to assess the associated costs. As a consequence, the efficiency assessment largely relies on the partial information gathered through the evaluation and consultation process.

³⁶ Member States were consulted at the meeting of the Contact Group on Legal Migration of 18 May 2017, a questionnaire ("ad-hoc query") was sent in December 2017 to the National Contact Points of the European Migration Network, and further followed-up with members of the Contact Group on Legal Migration in March 2018. Following this consultation, it emerged that national studies of costs and benefits arising from the implementation of the Directives are not available, with the exception of a study carried out in Germany (2015) estimating whether the fees levied by administrative agencies cover the related costs incurred in the performance of all their tasks related to immigration law.

³⁷ Most Member States reported processing times for the delivering of permits of several weeks and up to 185 days; this can be understood as the time taken to communicate a decision to the applicant, rather than as a full time equivalent per application.

- The analysis of the responses to the OPC suggests that TCNs having applied for entry and residence in the EU tend to find that the cost and time incurred in the application are either not reasonable or reasonable to a small extent. The time taken to make an application would appear to be considerable and take several weeks, including the time necessary to gather documents³⁸, and the most common issue reported by respondents is the length of the application process.

In addition to the qualitative analysis of type of costs and benefits related to legal migration, as regulated by the Directives, Annex 4 includes a table of types of costs and benefits listed by migration phase, also indicated for which types of costs and benefits quantified data is available.

Based on a case study of costs of management of migration flows from 3 MS that did submit realistic data, and other data such as number of permits issued in the different MS and rejection rates where known, an extrapolation of overall costs of implementation of the permits was carried out by the contractor, indicating how such costs and benefits would be distributed among key stakeholders (MS authorities, employers and third-country migrants)³⁹.

The robustness of the findings is strongly affected by lack of data. The absence of this kinds of data also means that the attribution of different types of costs and benefits to different stakeholders uncertain, also rendering the attempt to determine how the costs and benefits are distributed across Member States uncertain. The assessment of more or less efficient practices (EQ10) is therefore largely a qualitative assessment, based primarily on expert judgement of the findings of the practical application study (ICF Task 2) that identified a variety of practices across Member States.

Based on the assessment of most efficient practices, an attempt is also made to draw conclusions on the scope for simplification of the EU legal migration Directive and how they are implemented.

Efficient practices were identified, using judgement based on a balanced assessment of evidence of practical implementation, considering legal certainty and monetised or otherwise quantified costs.

EU Added Value

Question 11: What has been the positive effects and results brought in by the EU legislation compared to what could have been achieved at Member State or international level?

Question 12: To what extent do the issues addressed by the legal migration Directives continue to require action at the EU level?

The identification of EU added value of the implementation of the Directives so far, as well as the scope for simplification and the extent to which EU action is still required, are based on the findings related to the other evaluation criteria. Due to the challenges encountered to quantify the analysis, including the robustness concerns regarding a counterfactual analysis, the assessment of EU added value is largely qualitative.

Stakeholders were specifically asked to identify EU added value, both in targeted and in the open public consultation. Internal and external expert judgement as well as evidence related to

³⁸ Respondents report the following documents as the most common documents required: a valid travel document, proof of educational qualifications, proof of sufficient resources, health insurance, documents from the school/higher education institution they were to attend, proof of accommodation; job offer/work contract and bank guarantee.

³⁹ ICF(2018) Annex 4C (economic analysis).

practical implementation, including experience from complaints and from consultation. The analysis of key gaps and issues (Annex 5) provided specific insight related to certain categories of third-country migrants and the findings of effectiveness (Annex 7) formed an important basis for the analysis.

Judgement criteria applied are:

- the degree to which stakeholders value specific provisions of the Directive
- the extent to which the Directives contributed to the observed effects
- the existence or absence of national or international alternative legislative structures

3. Quality assurance and results

In order to ensure good quality output of the process, the Commission worked closely with the contractor to ensure latest up-to-date findings were taken into account in the supporting study. In addition, consultation of other Commission services took place on a number of occasions on the study that forms the basis for the assessment, made sure the analysis is relevant from different perspectives.

The consultation strategy was adapted throughout the process to also include validation of preliminary findings among different kinds of stakeholders, as well as to seek to complement data where specific shortcomings were identified. Open ended questions were asked and information taken on board. An analysis to identify specific campaigns was carried out in relation to the OPC, and potential bias was taken into account. A concerted effort was made to ensure good outreach and uptake of the OPC, which resulted in a relatively large number of respondents compared to other evaluations in the field of Home affairs and migration.

Triangulation of different sources of information was furthermore ensured throughout the assessment. A thorough approach to the assessment of the practical application of the Directives, starting from a logical steps in the migration chain rather than the Directives themselves, enabled the analysis of migration from a different perspective, raising application issues of importance but not directly regulated by the Directives (nationality, information provision etc.). A case study approach (identification of 10 representative" third-countries) was however abandoned when it became clear that representative data from consultation of migrants from those countries did not materialise.

Key shortcomings related to the lack of qualitative and quantitative baseline, has been addressed by relating to another point of comparison, notably what the Directives were intended to achieve.

As a result the qualitative assessment is considered solid, but for the reasons stated above, the quantitative assessment is less so.

ANNEX 4: OVERVIEW COSTS AND BENEFITS IDENTIFIED IN THE EVALUATION

<i>- I. Overview of costs – benefits identified in the evaluation</i>								
	Third-country nationals		Businesses		Administrations		Overall economy and society	
	Qualitative	Quantitative / monetary	Qualitative	Quantitative / monetary	Qualitative	Quantitative / monetary	Qualitative	Quantitative / monetary
Cost / Benefit [name]	[Description: e.g. = economic, social, environmental = one off/recurring Type of cost/benefit: e.g. compliance costs, regulatory charges, hassle costs, administrative costs, enforcement costs, indirect costs Changes in pollution, safety, health, employment = Expected? prediction from IA Unexpected?]	[high / medium / low / negligible / unknown Sources [KPIs stakeholders] -]	[e.g. increase or decrease in: time taken, person days, full-time equivalents, numbers of certificates/tonnes of CO2 equivalent / employment rate / GDP / life expectancy etc. or €]					

Pre-application (documentation) phase								
Gathering information on migration rights, conditions and procedures by third-country nationals and businesses	<p>Administrative cost: opportunity cost of time spent gathering information</p> <p>Financial cost (fees) related to the use of external services, to gather information, e.g. agencies, migration lawyers, or civil society organisations</p> <p>Indirect cost</p>	<p>Administrative cost (opportunity cost of time spent)</p> <p>Financial cost (fees) related to use of external services</p> <p>Unknown</p>		<p>Administrative cost: internal staff costs (if not externalised)</p> <p>Financial cost (fees) related to use of external services</p> <p>Unknown</p>				
Provision of information on migration rights, conditions and procedures by administrations	<p>Administrative costs/ benefits associated with provision of clear information by administrations</p> <p>Indirect cost / benefit</p>	<p>Administrative benefit: when clear information is accessible, a facilitation of the process of gathering information can be expected, as well as a reduction of use of external services</p> <p>Unknown</p>		<p>Administrative benefit: facilitation of the process of gathering information and reduction of use of external services</p> <p>Unknown</p>	<p>Administrative cost: (staff and IT) associated with provision of clear and accessible information (incl. online and other means) and answering individual queries</p> <p>Training different authorities (e.g. consular services)</p> <p>Unknown (but likely insignificant share of Government expenditure)</p>		<p>Indirect benefit from increased transparency and clear information on migration rights, conditions and procedures, public perceptions of migration may improve</p> <p>Unknown</p>	

						Trade off: costs associated with answering individual queries are reduced when clear information is easily accessible			
Preparing documentary evidence of fulfilments of admission conditions	Compliance costs: gathering documents, such as proof of family ties, proof of sufficient resources or proof of compliance of previous permit when renewing a permit, including fees Translations, authentication, apostille of documents, including fees Recognition of qualifications, including fees Hassle costs	Compliance costs, including fees Hassle costs (due to waiting time, delays, and the associated uncertainty) Expected direct costs Medium/ high OPC identified procedures for the recognition of foreign qualifications among the main difficulties - together with finding employment or an employer when not living in the EU and overall complex / lengthy procedures		Compliance costs, including fees, where applicable Hassle costs Expected direct costs Medium/ high Employers also identify procedures for the recognition of foreign qualifications among the main difficulties - together with long application procedures and number of documents required					
Costs related to securing a job offer (labour migration)	Compliance costs: Time spent searching and securing a job offer when not living in	Compliance costs, including time spent, waiting time and fees when use of private intermediation		Compliance costs Costs of international recruitment are					

directives)	the EU Travel for interview	services Medium/ high		higher than for national recruitment due to higher information barriers, especially for SMEs (OECD, EoI report, forthcoming) Medium / high				
Recruitment costs (labour migration directives)	Compliance costs: Cost associated with labour market test	Opportunity cost of waiting time and associated uncertainty Financial cost when travel costs for job interview Unknown		Cost associated with labour market test, including opportunity cost of waiting time Financial cost when employer covers travel costs for job interview Unknown			Economic benefit arising from arrival of labour migrants to fill pressing labour market needs Public perceptions of migration may improve Economic cost from waiting time when labour migration is needed (delayed production) <i>See economic impact (labour market) below</i>	

								Net impact unknown	
Application phase									
Administrative costs	One-off costs to set up new procedures			Costs of familiarisation with new requirements (including training) Expected direct costs Unknown		Costs of familiarisation with new requirements (including training) Expected direct costs Unknown			
Administrative costs	Costs of applications to prepare / process applications/ appeals (possibility if application rejected)/ renewals	Time to prepare the application/ appeal/ renewal Expected direct costs	Between EUR 186 and 622 mil. (depending on assumptions made) for preparation of application, excluding appeals and renewals	Time to prepare the application/ appeal/ renewal Training (familiarisation with new requirements) Expected direct costs	Total cost estimated between EUR 66 mil. and 132 mil. (including both administrative costs and application fees) for preparation of the application, excluding appeals and renewals) annual	Administrative costs to process applications/ appeals/ renewals, such as cost of staff, capital expenditure, administrative expense Administrative benefit from the facilitation of controlling the status (in particular as regards renewals) Expected direct costs	Insignificant share of Government spending (EMN AHQ)		

					direct cost				
Application fees	Financial cost: fees related to the application for a permit / renewal Expected direct costs / benefits	High (estimates by ICF, public consultation) Expected direct cost	Cost estimated at EUR 210 mil. (based on assumptions, EMN AHQ, task II) annual direct cost	Application fees for various types of permits are often paid by the employer (businesses or research institutions)	See previous row above	Expected direct benefits	Benefit estimated at EUR 210 mil. (excluding fees paid by employers) Annual direct benefit		
Administrative benefits	Reduction of costs to prepare/ process applications, as a result of the harmonisation/ simplification of admission procedures (SPD)/ mobility of	Reduction of costs, including waiting time Unknown		Reduction of costs, including waiting time Unknown		Reduction of processing times/ improved efficiency Unknown			

	<p>students between education institutions is facilitated (visa exemptions)/ intra-EU mobility is facilitated</p> <p>Continuous benefit</p>							
Post-application phase								
Costs and benefits related to enter and travel to an EU MS	<p>Administrative costs to obtaining an entry visa (including fees)</p> <p>Administrative costs of procedures upon arrival (registration with various institutions, such as local authorities, social security institutions, healthcare providers, immigration authorities etc.)</p> <p>Socio-economic benefits of legal admission to an EU MS</p>	<p>Administrative costs</p> <p>Unknown</p> <p>Socio-economic benefits of legal admission to an EU MS</p> <p>High</p>			<p>Administrative cost to process entry visa and procedures upon arrival</p> <p>Benefit (fees charged)</p> <p>Net impact unknown</p>		<p>Overall benefits from safe, legal and orderly migration</p> <p>Economic benefits in terms of tuition fees paid by students from third countries</p> <p>High</p>	
Delivery of the permit	Additional charges for the delivery of the permit (permit)	<p>Financial cost</p> <p>Unknown</p>			<p>Administrative cost related to issuance of permits</p>			

	card fee, residence permit fee, and other fees, e.g. biometric data processing fees) Changes of status if changes in employment				Financial benefits (fees charged) Net impact unknown			
Enforcement costs	Administrative cost				Costs related to monitoring, reporting and evaluation of legislation Unknown			
Benefits arising from the protection of fundamental rights	Benefits arising from the protection of rights, especially the right to family life (FDR) Indirect benefits associated to the facilitation of integration, health and well-being Benefits arising from clear conditions and guaranteed procedural rights	Benefits arising from the protection of the right to private and family life, the rights of the child to be with both parents Lower income requirements and lower fees for FR than in the UK, IE and DK (not bound by FRD) Benefits arising from clarity of conditions to exercise the rights and from the guarantee of procedural rights Strong impact on facilitation of				Benefits arising from the protection of fundamental rights, improved safeguards and access to justice of TCNs (a more just society) Unknown		

		integration, health and well-being (relative to a situation of family separation)						
		High						
Socio-economic costs and benefits	Costs and benefits from equal treatment with nationals as regards: working conditions, education and vocational training, recognition of qualifications, branches of social security, income-related pension, access to goods and services made available to the public, freedom of association and affiliation Benefits derived from the promotion of social cohesion through equal treatment with nationals	Socio-economic benefits: Increased well-being, productivity and human development (benefits derived from improved working conditions, improved access to education and vocational training, improved access to branches of social security, income-related pension, access to goods and services made available to the public) Higher probability to find employment in line with qualifications and lower probability of under-employment - below the level of qualifications (benefits derived from improved recognition of	Socio-economic costs from improved working conditions Socio-economic benefits: increased labour productivity, increased levels of skills and educational attainment of the labour force		Socio-economic costs associated with provision of equal treatment as regards education and vocational training, recognition of qualifications, branches of social security, income-related pension, access to goods and services made available to the public Socio-economic benefits associated with higher educational attainment levels, reduced overqualification and underemployment of TCNs Net impact unknown , but likely to be neutral or positive, see below the public finances impact		Socio-economic benefits derived from the promotion of social cohesion through equal treatment with nationals Unknown	

	Continuous costs and benefits	<p>qualifications) (OECD, 2017, Making Integration Work: Assessment and Recognition of Foreign Qualifications)</p> <p>Improved protection of interests of TCNs (benefits derived from equal treatment in freedom of association and affiliation)</p> <p>High</p> <p>Unknown</p>						
Economic costs and benefits (labour market)	<p>Economic benefit as workforce increases (TCNs are typically younger than the generally ageing EU MS)</p> <p>Economic costs and benefits on local wages</p> <p>Economic benefits of partially alleviating labour shortages</p> <p>Economic benefits of filling specific niches on the labour market</p>	<p>Economic benefits arising from participation in the labour market</p> <p>These include benefits in the country of origin (via remittances which tend to benefit mostly the individuals receiving them - the literature finds associations between remittances and some human development outcomes).</p> <p>High</p>		<p>Economic benefit as workforce increases, labour shortages can be alleviated, specific niches can be filled</p>			<p>Economic benefit as workforce increases</p> <p>Overall, most studies find no impact of <i>overall</i> migration on the wages or employment prospects of the natives (including the impact of refugees); the impact of labour migration directives is</p>	

	Economic cost if displacement effects of national or TCNs who arrived previously to the EU						therefore very likely to be negligible and might be positive	
							Economic benefit as labour shortages in specific occupations are alleviated Economic impact by filling specific niches There is very scarce evidence of displacement effects , and in contrast some evidence points to benefits through increased incentives of low-educated native workers for upskilling and positive occupational changes as a consequence of TCNs entering the labour market	

Economic costs and benefits (public finances)	<p>Fiscal costs and benefits associated with the provision of access to education, as well as to possible access to vocational guidance, initial and further training and retraining (see above);</p> <p>Fiscal costs and benefits associated to provision of healthcare services</p>				<p>Overall, net fiscal impact of migration is negligible or slightly positive, as migrants tend to contribute more (in terms of income taxes, social security contributions, health coverage, local taxes) than what they receive in benefits, including access to public services such as healthcare, education, unemployment, and public goods (OECD, 2013; ICF Task IV)</p> <p>Small positive fiscal impact of labour migration directives is likely (as fiscal impact of migration overall is neutral or slightly positive, and taking into account that overall migration includes groups who are less positively selected than labour migrants and are likely to take longer to integrate into the labour market)</p>			
Economic benefits: economic	Economic benefit as the size of the working-age						Economic benefit as the increase in the	

growth and standards of living	<p>population increases</p> <p>Economic benefit of human capital development (by those arriving with skills and those who come to study/research) and to technological progress</p> <p>Possible economic benefit via attracting highly skilled workers, and researchers, as well as by retaining student graduates and allowing them to stay to find employment</p> <p>Economic costs and benefits on standards of living</p>						<p>working-age population drives long-run economic growth and increase of the share of the population of working-age leads to decreases in dependency ratios and thus higher shares of income per capita</p> <p>Increase in diversity leads to short- and long-run benefits: higher economic growth (through skills variety, innovative networks and other channels)</p> <p>Socio-economic benefits of internationalisation of education systems as TCN students and researchers are allowed to enter and stay</p>	
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Intra-EU mobility phase								
Economic and social costs and benefits	<p>The economic and social impacts continue during this phase</p> <p>Benefits associated with facilitating process of moving between EU Member States</p>			Benefits for employers				<p>Potential benefit as labour mobility has positive impact on labour market functioning when facing asymmetric shocks within the Eurozone</p> <p>unknown</p>

ANNEX 5: DETAILED COHERENCE ANALYSIS

This annex provides a detailed analysis of the **internal coherence** of the EU legal migration Directives, and the **external coherence** with other relevant EU policies and legislation.

1. INTERNAL COHERENCE

This analysis covers the provisions of all EU legal migration Directives⁴⁰, looking at how they operate together to achieve the general and specific objectives of the policy.

The conclusions of the analysis point to several provisions where **lack of coherence may impact on the attainment of the objectives of the Directives and/or create unnecessary administrative burdens**, while at the same time underlining where different approaches can be justified considering the different scope and objectives of each Directive.

The analysis is organised into the following clusters grouping similar provisions across the Directives, including a horizontal one on the clarity and consistency of terminology:

1. Clarity and consistency of terminology
2. Scope of the Directives
3. Admission Conditions
4. Procedural issues
5. Equal treatment and access to the labour market
6. Intra-EU mobility
7. Right to family reunification
8. Grounds for rejection, loss and withdrawal of status
9. Format and type of authorisations
10. Mechanisms of cooperation

⁴⁰ Scope of the fitness check and abbreviations used: FRD (Family Reunification Directive 2003/86/EC), LTR (Long Term Residence Directive 2003/109/EC), SD (Students Directive 2004/114/EC), RD (Researchers Directive 2005/71/EC), BCD (Blue Card Directive 2009/50/EC), SPD (Single Permit Directive 2011/98/EU), SWD (Seasonal Workers Directive 2014/36/EU), ICT (Intra Corporate Transfers Directive 2014/66/EU), S&RD (Students and Researchers Directive (EU) 2016/801). NB: The S&RD repeals SD and RD with effect from 24 May 2018, however Ireland remains bound by the RD.

1.1. Clarity and consistency of terminology

All legal migration Directives examined in this section cover a number of steps of the migration process. Most of the Directives contain provisions on admission conditions, admission procedures, rights based on the authorisation (such as the right to work and access to the labour market and the right to equal treatment with nationals in other areas), the format of the authorisation (such as a combined work and residence permit or visa), and the situation of family members. A number of Directives also contain provisions on information about migration possibilities (transparency) and intra-EU mobility.

The internal coherence check showed that in the different Directives, similar issues are frequently addressed by different wording. Differing legal techniques (general clauses vs. detailed enumerations) are used to address comparable issues and frequently these differences cannot be explained by the different scope of the Directives at stake. The reason for this lack of legal consistency lies mainly in the historic genesis of the different Directives, each of which had its own peculiarities, policy constraints and decision makers involved (FRD and LTRD were adopted by Council – with only 12 MS involved in adoption – while the latest Directives were adopted by EP and Council – with 25 MS involved in adoption). On top of this, vague formulations seem to have been sometimes deliberately used in the decision-making process as a tool for reaching agreement. On a number of issues, the coherence check gives an indication that the clarity and consistency of terminology of the EU legal migration rules could be improved.

1.2. Scope of the Directives

Overlapping scope: The scope of the SPD covers some third-country nationals falling also under the scope of other Directives (such as BCD, FRD, S&RD); others (such as LTR holders) are expressly excluded, while national permanent residence permit holders (Article 13 LTR) are covered. In addition, there is an overlap between the BCD and the RD or S&RD (for researchers) as some third-country nationals could fall under the scope of both Directives.

Double statuses: Leaving aside some express exclusions mentioned in the introductory Articles of the Directives, it is frequently unclear whether an accumulation of different statuses in the same or in different Member States is possible or not. This is particularly relevant for beneficiaries of international protection. Most legal migration Directives exclude beneficiaries of international protection (IP) from their scope of application. The only legal migration Directive which so far contains an express opening to beneficiaries of IP is the LTR Directive. 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 State to a third country in situations in which a mobile beneficiary of international protection in a first MS loses his or her residence right in a second MS. The possibility for beneficiaries of IP to obtain a legal migration status may also be considered in the context of other legal migration Directives and a first concrete step in this direction was made with the 2016 proposal for an amended Blue Card Directive.

Gaps in the scope: There are many categories of TCNs who are not yet or only partly covered by the EU legal migration Directives. See details in Annex 6.

Competing national schemes: Parallel national schemes are allowed under LTRD and BCD. With regard to FRD, S&RD, SWD and ICTD, Member States are not allowed to have parallel national schemes, but may still have (and de facto have) national rules covering situations which are outside the scope of the Directives. On the one hand, the case can be made that competing national schemes undermine the visibility and branding of EU-wide schemes. This was the position taken by the Commission in its 2016 proposal for an amended Blue Card Directive. On the other hand, the case can be made that the existence of a variety of

competing national models for attracting migrants may sometimes be a welcome "incubator" for testing differing models and creative solutions in the quickly developing field of international migration.

1.3. Admission Conditions

The rules on admission conditions vary across the Directives. In some cases the differences are a logical reflection of the specific situation of the categories of third-country nationals covered by each Directive. In other cases, the differences across Directives are more difficult to explain.

Sufficient resources: All Directives are consistent in requiring for the TCNs to have sufficient resources. The way how this is done differs, however, significantly: The BCD does not have an explicit provision but the salary threshold requirement constitutes a de facto guarantee of sufficient resources. The ICTD requires that the salary meets the salary level of a national in a comparable position. Both the ICTD and the SWD prevent Member States from asking additional documents to prove this condition other than those provided for in the Directives (notably the contract). With regard to the quantification of 'sufficient' resources, S&RD allows Member States to set a 'reference amount' to indicate what they regard as constituting 'sufficient resources', while the FRD and LTRD mention that, amongst other things, the level of minimum wages and pensions are to be taken into account. In practice, sufficient resources is one of the most important admission requirements and the CJEU already had to clarify the meaning of the resources requirement in the FRD twice (in cases C-578/08 and C-558/14).

Sickness insurance: All Directives require the TCN to have sickness insurance in respect of all risks normally covered for nationals in the Member State concerned, but slightly different descriptions are included as to what this would entail. The differences can partly be explained by the fact that some categories of TCNs are working (and therefore normally covered by sickness insurance linked to the employment) while this is not the case for other categories, such as school pupils for example.

Adequate accommodation and proof of address: Four Directives (FRD, SD, SWD and S&RD – the latter as a "may" clause for trainees, volunteers and school pupils) require proof of *accommodation*, while the LTRD, BCD, S&RD and ICTD allow Member States to require the provision of an *address* in the territory of the MS concerned (the ICTD at the latest when the permit is issued). Two Directives (FRD and SWD) specify that the accommodation should meet certain criteria to ensure an adequate standard of living to the third-country national (and the family members in the case of FRD). These differences may reflect the need for higher scrutiny of applications for these statuses in view of, for example, concerns about exploitation and irregular migration (e.g. sham marriages, trafficking) and can therefore not necessarily be considered as inconsistent.

Valid travel document: All Directives require the third-country national to present a valid travel document as determined by national legislation. All Directives except LTRD and FRD allow Member States to require the period of validity of the travel document to cover at least the initial duration of the authorisation. This distinction may be justified by the fact that LTRD and FRD permits tend to be issued for longer periods.

Public policy, public security and public health: All Directives stipulate that TCNs who are considered to pose a threat to public policy, public security or public health shall not be admitted. The FRD includes a further specification as to the type of crime and the level of danger emanating from the person. The LTRD specifies further when public health can be used as a ground for rejection. These provisions leave a significant level of discretion to Member States. In case C-544/15, the CJEU expressly clarified that its public order case-law

developed in the context of the free movement Directive 2004/38/EC cannot be directly applied when it comes to admission of TCN students.

No risk of overstaying/ensuring return travel costs are covered: The SWD requires Member States to verify that TCNs do not present a risk of irregular immigration, while the SD and the S&RD require evidence of sufficient resources to cover return travel costs. The RD and S&RD as regards researchers specify that the responsible research organisations may be obliged to assume responsibility for the costs related to return incurred by public funds. The other Directives don't contain comparable provisions.

Integration conditions: Two Directives (FRD and LTRD) stipulate that Member States may require compliance with integration 'measures' or 'conditions'. The fact that integration 'measures' or 'conditions' are currently only foreseen in FRD and LTRD corresponds to the fact that the integration needs of different categories of migrants may differ: those who come as temporary migrants with a clear perspective to return to their home country after their stay in the EU (such as seasonal workers or intra-corporate transferees) may have a more limited need for integration support; likewise highly skilled migrants (such as Blue Card holders, students or researchers) already dispose of qualifications and skills allowing them to better face integration challenges. FRD and LTRD currently do not frame in any detail the conditions under which integration measures or conditions may be imposed. Faced with this gap, the CJEU developed, in a number of judgements (Cases C-153/14; C-579/13; C-540/03), certain criteria, essentially linked to proportionality, with which such measures or conditions must comply. One may consider fostering integration by more detailed and harmonised rules in the migration directives, building upon the steer provided by the CJEU on this aspect. Requiring compliance with integration 'measures' or 'conditions', may have a beneficial impact for integration, if these measures are well designed and framed in a welcoming context. On this last aspect, one may consider following the approach already chosen by the Commission in its proposal for a Qualification Regulation (COM(2106)466) and to establish also in the field of legal migration a right of legal migrants to have access to language courses, civic orientation and integration programmes as well as vocational training.

Right to admission: Some of the Directives do not specify clearly whether Member States are obliged, upon fulfilment of all admission conditions, to grant an authorisation, while the most recently adopted ones are clear (SWD, ICTD, S&RD). This regulatory gap was filled by CJEU jurisprudence: In its judgment in Case C-540/03, the CJEU clarified that the FRD imposes precise positive obligations – with corresponding clearly defined individual rights – on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation. In case C-491/13, the CJEU ruled that the conditions for the admission of students listed in SD are exhaustive, meaning that Member States are not allowed to introduce additional conditions. The reasoning set out in these two judgments applies to all legal migration Directives, without prejudice to Article 79(5) TFEU for those Directives regulating admission for work purposes.

Admission conditions for the purpose of work: The three main Directives covering specific categories of TCNs who wish to migrate for the purpose of work require as an admission condition the presentation of a valid work contract (BCD, SWD, ICTD), a binding job offer (BCD, SWD) or a training agreement (in the case of ICT trainee employees, as well as trainees under the S&RD). The SWD and ICTD are prescriptive about the elements that should be included in the contract, while the BCD outlines that the salary should be specified in the contract. The more prescriptive provisions of the SWD and ICTD were introduced to ensure that MS authorities can check that the contract is in line with national law, collective agreements and practices.

Volumes of admission: Article 79(5) TFEU expressly respects the "*right of Member States to determine "volumes of admission" of third-country nationals coming from third countries to their territory in order to seek work*". The right to be admitted may therefore be limited – as far as first admission under the Directives covering economic migration (i.e. BCD, SWD, ICTD and some of the categories of S&RD) is concerned – by Member States under Article 79(5) and the corresponding Articles on "volumes of admission" in the relevant Directives. Article 79(5) TFEU does not cover third-country nationals coming to the EU for purposes other than work (such as students, school pupils, family members), and it does not cover cases of intra-EU mobility of third-country workers. The current mainstream understanding of Article 79(5) and the corresponding Articles in the Directives interpret it as allowing Member States to establish national quota and to be able – on that basis – to refuse admission even if all other requirements of the Directive are met. In this context the – still open – question arises to what extent MS may use such quota for fixing e.g. a permanent quota of zero, thereby undermining the *effet utile* of the *acquis*. One may consider improving legal certainty by making the Articles on "volumes of admission" in the relevant Directives clearer and more precise as regards the practical aspects of the eventual application of this right by Member States.

The principle of Union Preference: The promotion of this principle, according to which third-country nationals may only accede to the EU labour market, if a post cannot be filled by a worker already forming part of the EU labour market, had been a central objective of the EU legal migration policy in its early phase. It had been endorsed as political objective in *the Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment* (OJ C 274, 19.9.1996, p. 31). The 2001 Commission proposal on economic migration (COM(2001)386) expressly aimed at making this principle legally binding, by providing transparent and predictable rules for demonstrating that there is an "economic need" for a third country worker. The subsequently adopted legal migration directives did not follow the line of prescribing an obligation on Member States to respect Union preference, but rather regulated access to the labour market per category of third-country national, taking into account their different characteristics (LTRD, FRD, BCD, SWD, ICTD and S&RD). For some categories access to the labour market is (nearly) unconditional (ICTs, family members covered by Directive 2003/86/EC); for others (Seasonal workers, Blue Card holders, Researchers, mobile LTR) it is subject to an optional labour market test or other requirements.

Labour market tests: The legal migration Directives regulate access to the labour market per category of TCNs, taking into account their different characteristics. For ICTs, no labour market test can be carried out but the ICT is limited to the specific employment activity authorised under the permit. The FRD links access to the labour market to the rights of the sponsor and allows for additional limitations during the first 12 months. In other Directives (SWD, BCD, S&RD for those that are considered workers, LTRD with regard to intra-EU mobility) access to the labour market is subject to an *optional* labour market test. Details of the conduct of these optional tests at national level are not regulated and applicants are faced with a variety of differing national procedures, which may also have an impact on the length of the overall procedure – within the limits set by the Directives.

1.4. Procedural issues

Access to information on admission conditions and procedures: Three of the Directives (LTRD, FRD and BCD) lack an explicit obligation on Member States to provide information, while this is a specific requirement in the four more recent ones (SPD, SWD, ICTD and S&RD). Three Directives (SWD, ICTD and S&RD) specify that information should be

“easily” accessible. The type of information to be provided is not specified in the SPD, while in the other Directives there are minimum requirements in this regard.

Submission of application (who can submit the application): The ‘employment-related’ Directives (i.e. SPD, BCD, ICTD and SWD) allow for the application to be lodged by either the TCN, his/her employer or a host entity (whether it is the employer or not). Similarly, the RD and S&RD allow for the application to be submitted by the TCN or the host entity, and the FRD provides for this to be done by the TCN or the sponsor. The LTRD specifies that the TCN concerned is to lodge the application. The rules reflect the specificities of the different categories covered.

Submission of application (where to submit application): All Directives with the (logical) exception of the LTRD allow for applications from outside the territory of the Member State. Six Directives also allow for applications to be lodged in the territory of the Member State: the ‘older’ Directives, FRD and RD, contain a may clause; the later ones, BCD and S&RD, provide for this when the TCN holds a residence permit or a long-stay visa; while the SPD allows this only in accordance with national law. The SWD and ICTD do not allow for the submission of applications in the territory of the Member State. For coherence reasons, one may consider the option to allow as a general rule both *in-loco* applications of legally staying TCNs and applications from abroad.

Deadlines for processing applications: The timeframes for national authorities to process the application vary significantly across the Directives and show an overall reduction of time allowed for processing in the more recent Directives. The analysis has shown that there is room for aligning the 9 months of the FRD, the 6 months of the LTRD, the 4 months threshold of the SPD and the 90 days in the BCD, SWD, ICTD and S&RD.

Three Directives (SWD, ICTD and S&RD) do not offer the option for Member State to extend the timeframe in exceptional circumstances.

The timeframe set in the Directives obliges Member States to take a ‘decision’. In some Member States, this could be (and de facto is, in practice) interpreted as delivering the residence permit, while in others it could be interpreted as a ‘temporary authorisation’ before receipt of the permit, which would already allow for travel. The Directives could clarify what is meant by “taking a decision”. Moreover, legal certainty could be increased by clarifying to what extent the time needed for the delivery of a – eventually needed - visa is included in the procedural deadline, as is already the case in SWD.

Fast-track procedures: Some Directives (SD, RD, ICTD) provide Member States with the option to put in place fast-track/accelerated procedures. The ICTD offers an option to put in place a system of "recognised entities" while the S&RD provides for a faster and, for students and researchers, simplified procedure in case the Member State has put in place approval procedures for host entities. Comparable possibilities for accelerated fast-track procedures could also be made available under the other Directives.

Requesting further information when the application is incomplete: All Directives except LTR and FRD contain a clause which obliges Member States to inform the applicant of the need to submit additional information.

Providing reasons for rejection; right to appeal and consequences of administrative silence: The Directives require – albeit with different wording – a written notification of the decision, the provision of reasons for rejection (not in SD and RD), information on the right to redress (not in FRD) and the right to mount a legal challenge. In relation to the consequences of administrative silence FRD, LTRD, SPD, BCD, SWD, ICTD and S&RD lay down the obligation for national competent authorities, when examining applications for residence permits, to give a written notification of the decision to the applicant within a set deadline. In

addition, some of these Directives include provisions stating that Member States shall set out in their legislation the consequences of an absence of a decision on granting a permit within a specific deadline, without specifying substantive safeguards. ICTD and SWD do not contain any explicit provision on the issue. It results that the current situation as regards these procedural aspects is ambiguous and calls for more coherence. The analysis has shown that there is room for improvement, taking notably into account that the right to good administration is – as set out by the CJEU in its judgment in Cases C-383/13, *G & R*⁴¹, and C-249/13, *Boudjlida*⁴² – a fundamental right recognised as a general principle of EU law and enshrined in the CFR, which forms an integral part of the EU legal order. This right includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file; the right of every person to have recourse to a legal adviser; the obligation of the administration to pay due attention to the observations by the person concerned and examine carefully and impartially all the relevant aspects of the individual case and the obligation of the administration to give reasons for its decisions.

Administrative fees: Five Directives (SD, SPD, SWD, ICTD and S&RD) stipulate that Member States may require the payment of fees for handling applications. Four of them (excluding the SD) provide that the fees shall not be disproportionate or excessive. The SPD adds that the fees may be based on the services actually provided for the processing of applications and issuance of permits. The vagueness of these provisions led to two judgements of the CJEU (Case C-309/14 and C-508/10) in which the CJEU developed more concrete proportionality criteria. The analysis has shown that there would be room for aligning the fee-related provisions in the Directives with CJEU case-law so as to enhance legal certainty.

1.5. Equal treatment and access to the labour market

Seven Directives (LTRD, RD, BCD, SPD, SWD, ICTD, S&RD) include provisions on equal treatment of TCNs with respect to nationals of the Member State concerned, covering a number of detailed aspects. The ICTD also foresees such equal treatment, but with regard to the terms and conditions of employment, it guarantees at least equal treatment with posted workers under Directive 96/71/EC. The FRD and SD do not include provisions on equal treatment. As per the SPD, with its very broad scope which also includes holders of purely national permits, equal treatment also applies to (i) any holder of a residence permit who is allowed to work and (ii) those who have been admitted for the purpose of work.

The inclusion of specific equal treatment provisions in each Directive, as well as specific restrictions, reflects a differentiation between the different categories of TCNs covered by the Directives, as well as the length of stay in the territory of a Member State. However, this differentiation does not seem justified in all cases and sometimes seem to have been rather the result of negotiations with Member States in view of the specificities of their national systems. The FRD and the SD do not grant equal treatment although those covered by this status and who are allowed to work benefit from the SPD. This means that family members and students (under the SD) who are not allowed to work are not benefiting from equal treatment rights.

There is also an issue of technical **consistency between the asylum acquis and the legal migration Directives**: The Qualification Directive 2011/95/EU, as well as other asylum instruments, contains provisions on the rights of TCNs, including on access to the labour

⁴¹ Judgment of the Court of Justice (CJEU) of 10 September 2013, *G. M. G. and N. R. v Staatssecretaris van Veiligheid en Justitie*, C-383/13 PPU.

⁴² Judgment of the Court of Justice (CJEU) of 11 December 2014, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, C-249/13.

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.

Attention should be paid to the fact that TCNs benefit from general rights guaranteed under international and constitutional law to *any person*. In all those cases in which equal treatment is already guaranteed by other existing and binding legal instruments (e.g.: freedom of association, equal working conditions) the mentioning of equal treatment rights in the legal migration Directives is rather a declaratory confirmation of rights already available to all persons present on EU territory.

Article 20 of the EU Charter of fundamental rights (equality before the law) applies to all persons, including TCNs; 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 equal treatment clauses in all EU migration Directives.

Freedom of association and affiliation: Six of the Directives (i.e. LTRD, SPD, BCD, SWD, ICTD and S&RD) stipulate that TCNs should have equal treatment in respect of this right. The wording is the same for all Directives. The provision is missing in the FRD, but family members who are allowed to work in accordance with Article 14 of the Directive are covered by the SPD. The SWD adds to this the right to strike and take industrial action.

Access to education and vocational training: Five Directives provide for equal treatment with regard to education and vocational training, while such provision is missing in the SD, RD and ICTD. Different restrictions are allowed in the five Directives. While some appear ‘logical’, such as the restriction in the SPD that the right can be limited to those who are in employment or are registered as unemployed, the reason why others have been introduced in one or more Directives (but not in others) cannot be easily explained, such as the restrictions related to language proficiency and the fulfilment of specific educational prerequisites.

Recognition of professional qualifications: Seven Directives (LTRD, RD, BCD, SPD, SWD, ICTD, S&RD) give the right to equal treatment as regards “recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures”. Equal treatment under the Directives only applies once an authorisation has been granted. Given that recognition of diplomas and professional qualifications is typically an issue with high importance not only for holders of an authorisation but also for applicants, the analysis has shown that there may arguably be a case for extending – exceptionally – equal treatment also to persons who have submitted an application (but were not yet granted an authorisation) under one of the Directives.

Access to social security, social assistance and social protection: Some inconsistencies were identified. While it is justified that equal treatment with regard to social security is primarily granted in the employment-related Directives, as in the others there is a need for the TCNs to have sufficient resources so that they do not have to make use of social assistance systems, the references to social security are different in the Directives. Some refer to branches of social security as defined in Regulation (EC) 883/2004 (SPD, SWD, S&RD) and others to provisions in national law regarding these branches.

The only Directive that provides for equal treatment regarding social assistance and social protection is the LTRD but it can be limited to core benefits.

Restrictions may be put in place by Member States in case of short-term employment / short-term stay in the SPD (but may not be restricted for those in employment, or those who have been employed for 6 months and are registered as unemployed); in the SWD (with regards to unemployment and family benefits); and in the S&RD and ICTD (researchers and ICTs are

excluded from family benefits if their stay is authorised for respectively less than 6 and 9 months). The analysis has shown that such restrictions may be justified in certain circumstances, but that there could be scope for aligning the differences in the required periods of stay.

Some inconsistencies have also been identified with regard to the **export of pension benefits**. The ICT refers to payment of old age, invalidity and death statutory pensions, the BCD to statutory pensions in respect of old age, and the SWD to statutory pensions (based on previous employment).

Tax benefits: No coherence issues identified. The equal treatment right to tax benefits is guaranteed in five Directives (LTRD, RD, SPD, SWD, S&RD) and, through the SPD, arguably also applicable to the BCD and the FRD (insofar as the family member is allowed to work). Of all the Directives, it is not guaranteed in the ICTD, which can be explained by the fact that ICTs are only temporarily in one or several Member States and are in general not residents for tax purposes in these countries.

Public goods and services: Some inconsistencies identified. Seven Directives provide for equal treatment in access to goods and services (with family members, and students under the SD being covered by the SPD if allowed to work). The LTRD allows for Member States to restrict the right to persons who have their registered or usual place of residence in the Member States. The SPD specifies that access to public goods and services might be limited to those TCNs who are in employment. Of all the Directives, equal treatment in access to **housing** is not provided in the SWD as accommodation is a pre-requisite for admission. Furthermore, three Directives (BCD, SPD and S&RD) allow Member States to restrict equal treatment provisions regarding access to housing.

Working conditions: Some inconsistencies identified. The SPD, S&RD and SWD include health and safety at the workplace while SWD gives an indication as to what is included in the term "working conditions" and provides for equal treatment as regards "terms of employment" as well. The ICTD (a special case in itself since it only covers temporary posting and no genuine access to the labour market) refers to the conditions fixed by the Posted Workers Directive 96/71/EC, except for remuneration, where equal treatment with nationals is an admission condition. The analysis has shown that there is room for simplification as regards the wording on working conditions across the Directives.

Access to employment and self-employment: Some inconsistencies identified. All nine Directives include provisions on access to employment subject to restrictions, but only the FRD and LTRD provide a 'general' equal treatment right in relation to employment and self-employment (subject to some restrictions). For the remaining categories of TCNs employment is restricted to the purpose for which the TCN has been admitted for, except for students. The restrictions are category-specific and thus vary depending on the category. Access to employment is closely related to admission conditions for the purpose of work, labour market testing and Union Preference discussed above (see section on admission conditions).

1.6. Intra-EU mobility

According to the Convention Implementing the **Schengen** Agreement, third-country nationals – who are in possession of a valid travel document and a residence permit or a long-stay visa issued by a Member State applying the Schengen acquis in full – are allowed to enter into and move freely within the territory of the Member States applying the Schengen acquis in full, for a period up to 90 days in any 180 days period. This "**Schengen mobility**" does not provide for a right to work in other Member States. However, under the **van der Elst case-law** of the CJEU (for further details see external coherence section dealing with posting of workers) third-country workers who are regularly and habitually employed by a service provider

established in a Member State can be posted to another Member State (host country) without being subject in the latter State to administrative formalities, such as the obligation to obtain a work permit.

This section is dealing with provisions on intra-EU mobility which go beyond mere "Schengen mobility" and which can be found in the LTRD, the BCD, the ICTD, the SD, the RD as well as in the S&RD. Looking at the mobility provisions in these Directives, it is necessary to conceptually distinguish **two types of intra-EU mobility**: while in LTRD and BCD the objective of mobility is to move to another Member State and to settle there/to find a new job there, the purpose of mobility under ICTD, SD, RD and S&RD is rather to provide for temporary mobility to other Member States. Many of the differences outlined below can be explained by this fact.

Prior residence requirement in the first Member State: Blue Card holders may benefit from the facilitated intra-EU mobility procedure provided for in the BCD after 18 months of residence in the first Member State (12 months according to the 2016 proposal for amending the BCD). If they wish to move to another MS before that period, they must apply for a new Blue Card in the second Member State as if it was a first application. Long-term residents may use the intra-EU mobility provisions as soon as they are granted the status, i.e. after a period of five years of legal residence. There is no requirement to have resided for a certain duration in a Member State before being able to use intra-EU mobility provisions in the ICTD, SD, RD and S&RD.

Length of stay in the second Member State: The RD, ICTD and S&RD (for researchers) provide for two types of mobility provisions: short-term mobility and long-term mobility. The BCD does not include provisions on short-term mobility for work purposes, nor do the SD and the S&RD for students.

Short term mobility: The ICTD defines short-term mobility as a period of up to 90 days in any 180-day period per Member State. The RD, although not specifically calling it "short-term", provides for different rules for stays under or above 3 months. Under the S&RD, short-term mobility for researchers can last up to 180 days in any 360 days. This means that when an assignment to a second Member State lasts e.g. 140 days, an employer of an ICT is obliged to apply for long-term mobility, while in the case of a researcher under the S&RD, this would still be considered as short-term mobility.

Long-term mobility: The LTRD, the ICTD, the BCD, the SD, the RD and the S&RD foresee long-term intra-EU mobility. A maximum duration of mobility is only set in the S&RD as regards students, at 360 days per Member State, Member States may set a limit for researchers as well, which cannot be lower than 360 days.

Procedural requirements for exercising mobility: Two different procedures exist as regards mobility: applications and notifications, the latter being a lighter procedure requiring the transmission of documents and allowing Member States to object, otherwise the mobility is tacitly approved. Both procedures are provided for long-term mobility in the ICTD and S&RD for researchers, while notification is optional for short-term mobility in these Directives (meaning that Member States may opt to allow mobility of ICTs, researchers and students without any procedure).

The different Directives provide for differing optional and mandatory requirements to apply for or to notify mobility. The point in time when an application or notification must be submitted also differs. This situation is exacerbated by a very fragmented legal framework of rejection or objection grounds.

Substantive requirements for exercising mobility: Several differences have been identified. A key finding is that only the ICTD and the S&RD for students provide for a real

simplification of the mobility process with regards to long-term mobility. The three other Directives providing for long-term mobility (LTRD, BCD, S&RD for researchers) contain relatively heavy requirements for the exercise of long-term mobility which come close to the requirements for a first application in an EU Member State.

The type of documentary evidence required differs across the Directives. However, this is to a large extent justified by the different types of activities for which the permit is granted (for example the fact that under the LTRD and the S&RD, Member States may require proof of sufficient resources but under the BCD or the ICTD they may not, is justified by the fact that LTR and students do not necessarily have an income already in the second Member State and researchers are not necessarily considered as workers, whereas BC holders and ICT already have per definition resources through their employment).

Accompanying family members: The LTRD, the BCD, the ICT for long-term mobility and the S&RD for researchers foresee facilitation for family members to accompany the TCN in the second Member State. Family members of ICTs exercising their right to short-term mobility are not granted facilitated right to move. The legal technique which is used for the facilitation is to provide derogation from the 'standard' requirements under the FRD. For instance, LTR family members must have resided with the sponsor in the first Member State in order to be able to move to the second one. This is not the case for Blue Card holders, ICT or researchers. This difference may be explained by the assumption that the family members have already joined the LTR in the first Member State in the five years of residence, while this may not be the case for the other categories if they were residing in the first Member State for a short period.

1.7. Right to family reunification

Provisions on family reunification can be found in the FRD, the RD, the BCD, the ICTD as well as in the S&RD for the category of researchers. The SD, the SPD and the SWD do not foresee any special rules on family reunification and the general regime of the FRD applies. Specific rules on family reunification in the LTRD are provided only in relation to intra-EU mobility. The FRD only sets minimum standards for family rights and applies without prejudice to more favourable provisions. Therefore, the fact that the family reunification provisions in the BCD, the ICTD and the S&RD are more generous on some aspects is not in itself a coherence issue. The absence of more favourable family reunification rules for holders of LTR status (the most stable and "integration-oriented" status) may be considered as incoherent compared to other Directives.

All Directives concerned **define family members** in line with the categories of TCNs compulsorily covered by the FRD, namely the sponsor's spouse and the minor children of the sponsor and of his/her spouse.

Minimum period of residence: The FRD applies where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more. This does not apply for refugees. The other four Directives (RD, BCD, ICTD and S&RD) formulate a similar derogation from the FRD, not requiring any minimum period of residence for the sponsor.

Reasonable prospects of obtaining the right of permanent residence: The BCD, ICTD and S&RD formulate a similar derogation from the FRD that the sponsor is not required to have reasonable prospects of obtaining the right of permanent residence.

Integration measures/conditions: The FRD provides the option for Member States to apply integration conditions for children aged over 12 years and arriving independently from the rest of their family before authorising entry and residence. For all other family members under the FRD, Member States may require the TCN to comply with integration measures, in

accordance with national law. With regard to refugees and/or family members of refugees, the integration measures may only be applied once the persons concerned have been granted family reunification. In the case of family members of EU Blue Card holders, of ICTs as well as of researchers under the S&RD, the integration measures can only be applied after they come to the Member State.

Procedural time limits: Under the FRD, the competent authorities of the Member State shall give the person, who has submitted the application written notification of the decision no later than after nine months. This time limit is six months under the BCD and 90 days under the ICT and the S&RD. These differing time limits (notably the difference between the 6 months of the BCD and the 90 days in the ICT and S&RD) may be considered an incoherence.

Family members' access to the labour market: Under the FRD, Member States may for the first 12 months of residence restrict the family members' access to the labour market. By way of derogation from the FRD, the BCD, the ICTD and the S&RD do not foresee any time limit in respect of access to the labour market. The S&RD allows, however, restricting access to the labour market in exceptional circumstances such as particularly high levels of unemployment. On this aspect, the S&RD is incoherent with the BCD and ICTD.

1.8. Grounds for rejection, loss and withdrawal of status

Six Directives (FRD, LTRD, BCD, SWD, ICTD and S&RD) include sometimes lengthy provisions on grounds for rejection. Seven Directives (FRD, LTRD, RD, BCD, SWD, ICTD and S&RD) include provisions on grounds for withdrawal or loss of status ranging from general clauses to casuistic lists.

From a systematic point of view, admission conditions and reasons for *rejection* mirror the same reality and should ideally be congruent. As regards rules on *withdrawal*, the two main justifications for having such rules in place are (1) considerations of proportionality (it may be undue to withdraw an already granted authorisation just because of a minor irregularity in the application file) and (2) newly arising developments (such as unemployment, committing an offence, etc.). Looked at from this systematic angle, all provisions discussed in this section offer significant scope for simplification and alignment. Moreover the differing binding value of the respective provisions ("shall clauses", "may clauses" and "shall, if appropriate" clauses) contribute to the lack of legal clarity.

Rejection grounds related to employer/ host entity: Four Directives (BCD, SWD, ICTD and S&RD) provide for Member States to reject the application (a 'may clause' in the BCD and S&RD and an obligation in the SWD and ICTD, if it is proportionate) if the employer has been sanctioned for undeclared work and/or illegal employment. The SWD, ICTD and S&RD allow Member States to reject the application if "the host entity's business is being or has been wound up under national insolvency laws or no economic activity is taking place". The same three Directives also allow rejection if the employer or the host entity has failed to meet its legal obligations regarding social security, taxation, labour rights or working conditions. The ICTD and S&RD allow Member States to reject the application if "the host entity was established or operates for the main purpose of facilitating the entry of third-country nationals falling under the scope of this Directive". The S&RD further provides for rejection in case of non-compliance of the terms of employment with national law and collective agreements and practices, while the SWD includes a specific ground for rejection – i.e. "within the 12 months immediately preceding the date of the application, the employer has abolished a full-time position in order to create the vacancy".

While some of the differences, including the use of 'may' clauses, can be explained by the 'nature' of the status, it is not clear why some other grounds do not apply to all statuses, such

as the business not having any economic activity taking place, or being established for the purpose of facilitating the entry of third-country nationals.

Rejection based on ethical recruitment: The BCD includes a ground for refusal (as a ‘may’ clause) in cases when the recruitment would result in third countries suffering from a lack of qualified workers (i.e. ethical recruitment). The provision on ethical recruitment concerns ‘brain drain’ of qualified workers (such as medical professions) and for this reason the provision features only in the BCD.

Admission conditions no longer satisfied and lapse/expiration of document or status: All Directives provide that if the conditions for admission are no longer satisfied this can result in withdrawal or loss of status. The BCD provides that modifications in the contract of the TCNs that affect the admission conditions shall be subject to prior communication (or prior authorisation). If such prior communication did not reach the competent authorities for reasons “independent of the holder's will”, this should not be a reason for withdrawal/non-renewal. The LTRD stipulates that the “expiry of a long-term resident's EC residence permit shall in no case entail withdrawal or loss of long-term resident status”. Another safeguard is the obligation of Member States to introduce a ‘facilitated procedure for the re-acquisition of long-term resident status’. Looked at from a systematic angle, safeguards inspired from these clauses in the LTRD and the recent Directives could also be included in the other Directives so as to make sure that minor irregularities or issues outside the permit holders will not lead to disproportionate consequences.

Threat to public policy, public security and public health: Six Directives (FRD, LTRD, BCD, SWD, ICTD and S&RD) stipulate that threat to public policy, security and health may constitute a ground for rejection, withdrawal or non-renewal of the application. The extent to which the **case law of the CJEU** on the free movement Directive 2004/38/EC can be applied – by analogy – to similar provisions in the migration acquis is not clear. For example, in a case on the Return Directive (C-554/13, Zh. and O.), the Court used similar interpretation with respect to the ‘risk to public security’. On the other hand, in a recent case concerning the Students Directive (C-544/15, Fahimian) the Court acknowledged that there is a difference between the public policy and security notion in free movement law and immigration law.

Withdrawal or non-renewal related to employer/ host entity: Three Directives (SWD, ICTD, S&RD) include provisions which allow for a withdrawal of the authorisation or refusal to renew the authorisation on the basis of grounds related to the employer or host entity respectively. These grounds are very similar to those listed for the rejection of the application, but the BCD does not include this as a ground for withdrawal or refusal. Other provisions are very close to the employer related rejection ground described above.

1.9. Format and type of authorisations

Residence permit vs (long-stay) visa: Most Directives provide for the issuance of residence permits. The S&RD and SWD also allow for long-stay visas to be issued and the SWD for short-stay visas, as it is the only Directive covering stays below 90 days. Those Directives which provide only for a residence permit to be issued are still without prejudice of the obligation for the TCN to obtain a visa to enter the territory, if the residence permit is not issued outside of the Member State itself. The main argument explaining such national practices are practical difficulties in issuing residence permits in third countries. National practices of issuing first a visa and only as a second step a residence permit risk prolonging in practice the procedures leading to the issuing of the actual residence permit and may contribute to legal uncertainty, when it comes to applying the procedural safeguards (deadlines, right to appeal, fees, equal treatment etc.) contained in the legal migration Directives.

Format of authorisation: The legal migration Directives include the requirement to use the uniform format as laid down in the Regulation (EC) No 1030/2002. In those cases in which legal migration authorisations may be issued in the form of long-stay visas (S&RD and SWD) or short stay visas (SWD) these must be issued in accordance with Council Regulation (EC) No 1683/95 laying down a uniform format for visa and Annex VII of the Visa Code 810/2009. It results that there is full coherence with the EU legislation on uniform formats of residence permits and visas.

Seven out of nine Directives include provisions with regard to the format of the permit (FRD, LTR, BCD, SPD, SWD, ICT and S&RD) which provide that Member States shall issue a residence permit using the uniform format as laid down in Regulation (EC) No 1030/2002. Three (SPD, SWD and ICT) of the four employment-related Directives with the exception of BCD stipulate that Member States may indicate additional information related to the employment relationship of the TCN. Five Directives (LTR, BCD, SWD, ICT and S&RD) provide that the type of permit (e.g. long-term residence, Blue Card, etc.) shall be included in the permit.

1.10. Mechanisms of cooperation

Four Directives (LTRD, BCD, ICTD and S&RD) contain provisions regarding the establishment of contact points in the Member States responsible for information sharing, in particular on issues linked to intra-EU mobility. The way in which information is exchanged between the national contact points is currently not regulated yet, but some Member States have shown interest in getting further steer on the communication tools to be used. Five Directives (SPD, BCD, SWD, ICTD and S&RD) include the obligation to report statistics to the Commission on the volumes of TCNs who have been granted an authorisation under those Directives. The BCD and S&RD (for researchers) also provide for such an obligation as regards admitted family members, but not the ICTD. The analysis has shown that there may be scope for aligning all Directives and including both the obligation to establish a contact point, where relevant, and to report statistics. There may also be added value in giving further steer on the communication tools to be used in between national contact points for exchanging personal information related to intra-EU mobility.

2. EXTERNAL COHERENCE

This analysis aims at highlighting the main synergies and inconsistencies between the EU legal migration Directives and a number of relevant EU policies and pieces of legislation, encompassing the broader areas of migration and home affairs, justice and fundamental rights, employment and education, international relations.

The analysis is organised into the following sections:

1. Integration of third-country nationals
2. Visa, border management and large-scale IT systems
3. Asylum
4. Irregular migration and return
5. Fundamental rights and non-discrimination
6. Employment
7. Education, qualifications and skills
8. Exploitation
9. International dimension of migration policy: interaction with external policies

2.1. Integration of third-country nationals

1. Issue definition

The EU *legal migration and integration policy are closely interconnected*. Providing, by binding legal migration rules, for fair treatment and rights to third-country nationals is a key factor for integration. Migration law may also provide for the possibility to impose integration requirements, such as language tests, as an admission condition. The Presidency Conclusions of the 14 and 15 October 1999 Tampere European Council contained a statement, which guided the development of the EUs legal migration policy from its early days until today: *The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens.*

The EU legal migration *acquis* is characterised by a *gradualist approach, of linking the rights which are granted to the length of stay*. Depending on the circumstances of the individual case, EU migration law can provide for ‘visas and short stay residence permits’ (Article 77(2)(a) TFEU), or ‘long-term visas and residence permits’ (Article 79(2)(a) TFEU), or it can result in ‘removal’ in situations of ‘unauthorised residence’ (Article 79(2)(c) TFEU). This gradual approach contrasts, for instance, with the classic position of US law which has traditionally distinguished categorically between the distinct category of ‘immigrants’ with a permanent right to residence from day one and ‘non-immigrants’ with a temporary status.⁴³

Article 79(2)(a) TFEU (conditions of entry and residence) and Article 79(2)(b) TFEU (rights of third-country nationals) allow for the adoption of binding legislation at EU level, setting out admission conditions and rights of third-country nationals. This entails that EU migration legislation can include rules on immigrant integration, such as the requirement for integration measures in Article 7(2) FRD or integration conditions in Article 5(2) LTRD. As highlighted above, even provisions that are not officially labelled as integration instruments also do have a profound impact upon immigrant integration, such as provision on labour market access, access to education and non-discriminatory treatment in other fields. Likewise selective immigration rules (requiring a certain level of education, skills or income) may impact on integration outcomes, by fostering admission of those with higher chance of successful integration.

Article 79(4) TFEU focuses on incentive and support measures and allows in that specific context for the adoption of measures to provide incentives and support for national integration policies ‘excluding any harmonisation of the laws and regulations of the Member States.’ Measures that can be adopted on this basis include the Asylum, Migration and Integration Fund as well as the EU cooperation on integration, exemplified by the adoption in 2004 of the “Common Basic Principles for Immigrant Integration Policy in the EU” by the Justice and Home Affairs Council and in 2010 of common statistical indicators⁴⁴.

As regards the relation between Articles 79(2) TFEU and 79(4) TFEU, it must be underlined that **the exclusion of harmonisation under 79(4) concerns incentives and support measures mentioned in Article 79(4) only**, not measures adopted under other legal bases, such as in particular Article 79(2) TFEU. Whenever the interpretation of Article 79(2) TFEU allows for legally binding measures concerning immigrant integration, Article 79(4) TFEU does not prevent recourse to Article 79(2) TFEU. This entails that **EU migration legislation can include rules on immigrant integration**, such as the requirement for integration

⁴³ Thym in section C1, MN7 of Hailbronner/Thym (eds.), *EU Immigration and Asylum Law – A Commentary*, 2nd edition C.H. Beck, Hart, Nomos, (2016).

⁴⁴ Zaragoza Declaration, adopted in April 2010 by EU Ministers responsible for integration, and approved at the Justice and Home Affairs Council on 3-4 June 2010.

measures in Article 7(2) FRD or integration conditions in Article 5(2) LTRD. As highlighted above, provisions that are not officially designated as integration instruments also do have a profound impact upon immigrant integration, such as labour market access, access to education and non-discriminatory treatment in other fields as well as the length of residence permits granted.

2. Interaction with the legal migration *acquis*

I. Rights and non-discrimination

Article 18 TFEU (interdiction of any discrimination on grounds of nationality) has been interpreted by the CJEU as allowing for different treatment of EU citizens and third-country nationals⁴⁵. Article 21 of the Charter (non-discrimination on other grounds than nationality.) 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 are without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals in the territory of Member States.

It results that *different treatment of third-country nationals is not per se illegal* (unless such differing treatment constitutes discrimination based on race or ethnic origin).

However, according to the CJEU case-law, the principle of equality enshrined in Article 20 of the Charter is still applicable to third-country nationals, which implies that any different treatment of third country nationals in respect to nationals of Member States must be justified by a legitimate objective and be proportionate. While it can be understood and accepted that migrants do not enjoy the same level of rights than citizens, it is important that the differentiation of rights can be explained and justified by legitimate considerations and that it is done in a proportionate manner.⁴⁶ The legal migration Directives establish how far foreigners enjoy – or don't enjoy – rights similar to rights enjoyed by own nationals. They can therefore be characterised as a fine-tuning of legitimate differences in treatment.

Not being subject to *unjustified* discrimination is an important aspect for integration: Most legal migration Directives include provisions on equal treatment of TCNs with respect to nationals of the Member State concerned. The inclusion of specific equal treatment provisions in each Directive, as well as specific restrictions, reflects a *differentiation between the different categories of TCNs* covered by the Directives, as well as the length of stay in the territory of a Member State (*for details see annex 5.1 on internal coherence*). This differentiation does not seem justified in all cases and sometimes seem to have been rather the

⁴⁵ See Judgment of the Court of Justice (CJEU) of the 4 June 2009, *Athanasiou Vatsouras and Josif Koupantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, C-22/08 and C-23/08, para. 51-52: "The first paragraph of Article 12 EC prohibits, within the scope of application of the EC Treaty, and without prejudice to any provisions contained therein, any discrimination on grounds of nationality. That provision concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries."

⁴⁶ See Judgment of the Court of Justice (CJEU) of 22 May 2014, *Wolfgang Glatzel v Freistaat Bayern*, C-356/12, para. 43: "The principle of equal treatment is a general principle of EU law, enshrined in Article 20 of the Charter, of which the principle of non-discrimination laid down in Article 21(1) of the Charter is a particular expression. According to settled case-law, that principle requires the EU legislature to ensure, in accordance with Article 52(1) of the Charter, that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (...). A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment concerned (...)."

result of negotiations with Member States in view of the specificities of their national systems. It may also not always be fully in line with the needs of integration policy, which sees early access to certain rights (in particular early labour market access) as critical for successful integration. For instance, under the FRD, Member States may for the first 12 months of residence restrict the family members' access to the labour market.

The EU has been supporting Member States in their integration policies for several years already and the EUs legal migration directives provided an important legal frame for this process, as regards the rights of TCNs. During those years, most Member States developed their own integration policies and the EU played an important role in supporting some of these actions in particular through EU Funds (Asylum Migration and Integration Fund but also ESIF Funds, in particular ESF and ERDF). However, notwithstanding the efforts made, third-country nationals across the EU continue to fare worse than EU citizens in terms of employment, education, and social inclusion outcomes. In 2017, around 57% of third-country nationals of working-age (20-64) were in employment, compared to around 73% of host-country nationals. The employment gap was therefore around 15 percentage points, on the rise compared to around 11 percentage points back in 2011. In terms of educational attainment, third-country nationals were more likely to have a low level of education in 2017 (43.6%) compared to host- country nationals (21.2%) - and less likely to have reached tertiary education (respectively 26.3% and 31.6%). Third-country nationals were in 2016 more likely to be affected by poverty or social exclusion (49%) than host country nationals (22%) and the resulting gap (around 27 percentage points) has been stable since 2013.⁴⁷

The Commission Communication on an "Action Plan on the integration of third country nationals"⁴⁸ analysed the integration challenges in the EU and found that education and training are among the most powerful tools for integration and access to them should be ensured and promoted as early as possible. Employment is a core part of the integration process, since finding a job is fundamental to becoming part of the host country's economic and social life, ensuring access to decent accommodation and living conditions. Early integration into vocational training might prove particularly effective for integration into the labour market and progression towards a higher level of qualification. Access to adequate and affordable housing is also a basic condition for third-country nationals to start a life in the new society. Moreover, integration is not just about learning the language, finding a house or getting a job. It is also about playing an active role in one's local, regional and national community, about developing and sustaining real people-to-people contacts through social, cultural and sports activities and even political engagement.

From a pure integration policy angle, the limitations of rights contained in the legal migration Directives, notably as regards early access to work and waiting periods for family reunification may be considered as detrimental. These limitations may also be considered as negative from an economic perspective. From a migration management perspective, these limitations may, however, be justified by other considerations, such as a perceived need to protect national labour markets, channel migration flows, avoid undue pull-factors and uphold high levels of social welfare for own nationals. The current situation is the result of these conflicting policy interests.

II. Integration conditions/requirements

Two Directives (FRD and LTRD) expressly stipulate that Member States may require compliance with integration 'measures' or 'conditions'. These Directives do not define

⁴⁷ Eurostat [lfsa_ergacob] Last update: 29-06-2018.

⁴⁸ COM(2016) 377 final of 7.6.2018. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Action Plan on the integration of third country nationals.

integration ‘measures’ and ‘conditions’. They also do not frame the conditions according to which they may be imposed and they do not specify, to what extent Member States are obliged to provide support for complying with them. This creates legal uncertainty. The issue was already dealt with by the CJEU in a number of judgements (Cases C-153/14; C-579/13; C-540/03) and the internal coherence check lead to the conclusion that there is a gap in terms of material scope, in the sense that legal certainty is not sufficiently guaranteed due the absence of a more detailed definition and harmonised approach on this issue.

The fact that integration ‘measures’ or ‘conditions’ are currently only foreseen in FRD and LTRD is due to the fact that the integration needs of different categories of migrants may differ. Those who come as temporary migrants with a clear perspective to return to their home country after the stay in the EU (such as seasonal workers or intra-corporate transferees) may have a more limited need for integration support; likewise highly skilled migrants (such as blue card holders, students or researchers) already dispose of qualifications and skills allowing them to face integration challenges better than others.

Most Member States currently do not require TCNs to fulfil any specific integration measures in order to reunite with family, though such measures are under investigation or subject to proposals in some instances (FI, IE, LU, NO). Where integration measures exist prior to admission for family reunification, Member States usually require family members to demonstrate **basic language proficiency**, corresponding to A1 level of the Common European Framework of Reference for Languages (CEFR) (AT, DE, NL); or to take a **civic integration exam** (NL). Exemptions apply to family members of persons granted refugee status or subsidiary protection in some cases (AT, DE, NL). Preparatory classes or online tutorials to obtain elementary knowledge of the language are usually at the initiative of family members and any costs must be borne by them (AT, DE, NL). Fees depend on the country of origin, course provider or course format (examination fee ranges from €75 to €130 for levels A1, A2 and B1 in AT, €150 in NL). Some Member States may additionally require family members to acquire further language proficiency after admission (usually A2 or B1) (AT, NL), or to take a civic integration exam after admission (NL, UK) – as part of their general integration programme or as part of requirements for permanent settlement in the country (AT, DE, LV, NL, UK). Free-of-charge language training may be provided in some instances (EE, LV and NO). Next to language proficiency, Member States’ integration programmes may also include courses about their history and values, social orientation or professional guidance (BE, DE, EE, NL, SE). Further integration measures may also be in the form of reporting to an integration centre (AT), signing a declaration of integration (BE, NL) or an integration contract (FR) prescribing civic training and language training. The non-respect of these integration measures may sometimes lead to withdrawal/non-renewal of a residence permit or refusal of long-term permits.⁴⁹

It must be underlined that integration programmes may also be compulsory for migrants who have migrated to an EU Member State on other grounds than family reunification. For instance, in France the obligation to follow the Republican Integration Contract is linked to the prospect of a permanent and stable residence, and can then concern other types of migrants or people who had their stay regularized. Some of them might be in need of integration measures as much as beneficiaries of international protection or family migrants.

The effects of integration requirements were examined, *inter alia*, in the OECD International Migration Outlook 2017 as well as in an EMN focused 2016 study on family reunification referred to above. The findings of existing papers on this issue give a mixed picture:

⁴⁹ European Migration Network (EMN) Synthesis Report for the EMN Focussed Study 2016: *Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices*, (2016).

- Some evidence suggests that language and civic integration requirements have a positive effect on abilities in the host-country language and on labour market outcomes. Based on survey responses from 2 500 adult family migrants who moved to Germany between 2005 and 2012⁵⁰, respondents' self-declared German language abilities at arrival. The results suggest that those arriving after the introduction of a pre-arrival language requirement in 2007 had considerably stronger German language abilities than those arriving before. While about one-third of all family migrants considered the language requirement to be a heavy burden, according to further results of the same survey, almost 90% of those subject to the requirement considered it useful.
- Effects of the civic integration requirement in the Netherlands were examined⁵¹ in a 2013 study concluding that passing the Dutch civic integration exam – which entails a post-arrival language requirement – had a significant positive effect on the probability of recent migrants to find employment in the Netherlands. The positive effects appear stronger for migrants with a lower level of education than for those with a high education level. For migrants who are already long-standing residents of the Netherlands, however, Witvliet et al. (2013) do not find a significant effect from passing the exam. This suggests that policy interventions targeting migrants' language abilities might be more effective at an early stage of their integration process. Moreover, the efficiency of the Dutch approach of making language and civic test obligatory while putting most of the responsibilities in particular language learning on immigrants has been questioned including by the Dutch Court of Audit. The low success rate in language examination and the quality of integration courses are clear issues of concern.
- A 2013 study on the impact of family reunification policies in Austria, Germany, Ireland, The Netherlands, Portugal and the United Kingdom on the integration of family members⁵² found evidence that restrictive measures (such as integration requirement or age limits) impact negatively on integration, resulting in experiences of stress and frustration due to long periods of separation. Women, low-skilled persons, certain nationals and elderly people face more often difficulties in meeting the requirements on integration and income.
- According to OECD⁵³: "*Although compulsory measures do indeed address the past inadequate investment in host-country human capital of certain immigrants, they also assume that it is immigrant behaviour that is at fault rather than policy or market failure. In many cases, however, the lack of investment in the past may not have been a consequence of immigrant (or their spouses) unwillingness or reluctance, but rather of ignorance of the possibilities available, of inconvenient offerings (e.g. lack of simultaneous childcare for the children of the participants, offers which are insufficiently adapted to their abilities), or because such investment was not expected to yield a sufficient return.*" According to OECD, generally available evidence suggests that well-designed measures that are proposed to migrants have in any case "voluntary" take-up rates of above 90% (e.g. former integration contract in France; pre-school programmes in Germany⁵⁴). From that point of view, the costs and benefits of making participation to measures compulsory has to be carefully considered.

⁵⁰ Büttner, T. and Stichs, A., *Die Integration von Zugewanderten Ehegattinnen und Ehegatten in Deutschland*, (2013).

⁵¹ Witvliet et al. (2013).

⁵² Strik, T., De Hart, B., and Nissen E., *Family Reunification: a Barrier or Facilitator of Integration? A Comparative Study*, (2013).

⁵³ See Box 1 in Liebig, T., *The Labour Market Integration of Immigrants in Denmark*, (2007).

⁵⁴ Liebig, T., *The Labour Market Integration of Immigrants in Germany*, (2007).

III. Incentives and support measures ("soft law")

As regards incentives and support for integration, Article 79(4) TFEU expressly excludes any harmonisation of the laws and regulations of the Member States. This means that the EU competence in this field is limited, in essence, to promoting integration by means of policy coordination and funding. Incentives and support measures usually take either the form of promoting policy coordination or providing for financial support.

Policy coordination aims at coordinating and liaising between the different actors and stakeholders in the field of immigrant integration. Different fora and groups serve this purpose: The **European Integration Network**⁵⁵ (former: National Contact Points on Integration) has a strong mutual learning mandate. It supports exchanges between Member States through targeted study visits, peer reviews, mutual assistance and peer learning workshops on specific aspects of integration.

Between 2009 and 2014, an Integration Forum at European level provided a platform where civil society and European institutions could discuss integration issues. As of 2015, the Integration Forum evolved into the **European Migration Forum**⁵⁶, covering a broader range of topics related also to migration and asylum.

Moreover, EU policy cooperation in the areas of *education, youth, culture and sports* as well as in employment and social inclusion addresses the challenges related to migrant integration.

In the context of the **Europe 2020 Strategy for Growth and Jobs**⁵⁷ targets are set in the fields of education, employment and social inclusion, aimed at monitoring and promoting structural reforms. Integration outcomes of third country nationals in Member States have also been analysed and monitored within the Country Reports and Country-Specific Recommendations in the framework of the European Semester, with a focus on integration into the labour market, and education, in order to promote better outcomes and social inclusion.

The EU is **funding** integration actions through dedicated funding and more broadly through instruments addressing social and economic cohesion across Member States. Under the current *Multi-annual Financial Framework 2014-2020*, EUR 765 million has been earmarked by Member States for integration under their **Asylum Migration and Integration (AMIF)** national programmes. Significant amounts are also available to Member States for the current programming period under the **European Structural and Investment Funds (ESI Funds)** and there is considerable scope for these funds to support integration measures. In particular, the *European Social Fund (ESF)* and the *European Regional Development Fund (ERDF)* support social inclusion, education and labour market related investment. For example, under the ESF, EUR 21 billion are available to all Member States for promoting social inclusion, combatting poverty and discrimination, whereas under the ERDF, Member States have allocated EUR 21.4 billion. ERDF can contribute to measures supporting investments in infrastructure for employment, social inclusion and education as well as housing, health, business start-up support and the physical, economic and social regeneration of deprived communities in urban and rural areas, including through the **Urban Innovative Actions**

⁵⁵ This network was created in 2016, and replaces the previous Network of the National Contact Points on Integration (NCPI). This measure, aiming at giving a higher profile to the NCPIs and enlarge its activities, was announced in the Action plan on integration of third-country nationals adopted by the Commission on 7 June 2016.

⁵⁶ Detailed activity reports are available at European Economic and Social Committee, 'European Migration Forum'.

⁵⁷ COM(2010) 2020 final of 3.3.2010. Communication from the Commission – Europe 2020. A strategy for smart, sustainable and inclusive growth.

Programme. The Commission is actively working with all relevant stakeholders to ensure that all funding instruments are used to their maximum potential and in an integrated and strategically coordinated way.

Funding and policy coordination in the field of integration complement the objectives of the legal migration acquis. The framework provided for by the legal migration Directives (as interpreted by the CJEU) on rights of third country nationals and on integration measures is a helpful and important frame for steering policy coordination and funding. Two issues are of particular relevance:

- **Support for enforcing existing rights:** Projects aimed at self-empowerment of migrants can encourage migrants to make better use of their existing rights under the legal migration Directives.
- **Support access to integration measures:** Member States can be encouraged, by providing financial support, to provide for integration programmes. An express obligation to do so already exists for beneficiaries of international protection in the asylum acquis (Article 35 of the Qualification Regulation). In its proposal for a Qualification Regulation (COM(2106)466) the Commission proposed to enhance this obligation and to establish a right of beneficiaries of international protection to have access to language courses, civic orientation and integration programs as well as vocational training. The proposal also contains a rule (proposed new Article 34) according to which Member States may make participation in integration measures compulsory and enforce this through conditioning access to certain social assistance benefits.

3. Conclusions

The **limitations of rights** contained in the current legal migration Directives, notably as regards early access to work and waiting periods for family reunification may be considered as negative from an integration angle and from an economic perspective. These limitations may, however, be justified by other considerations, related mainly to migration management considerations. The current situation is the result of these conflicting policy interests.

As regards **access to already existing rights** under the legal migration Directives, incentives and support measures under the EU integration policy is complementary in providing important flanking support. Projects aimed at self-empowerment of migrants contribute to make access of migrants to their rights a reality in the EU.

Requiring **compliance with integration ‘measures’ or ‘conditions’**, may have a beneficial impact for integration, if these measures are well designed, well managed, well targeted and framed in a welcoming context, avoiding undue administrative red tape, financial burden, stress or frustration for the migrant. The legal migration Directives currently do not frame in any detail the conditions under which integration measures or conditions may be imposed. Faced with this gap, the CJEU developed, in a number of judgements (Cases C-153/14; C-579/13; C-540/03), certain criteria, essentially linked to proportionality, with which such measures or conditions must comply.

Right to have access to integration programmes: Member States need to be encouraged to set up not only legal requirements, but also well designed and welcoming integration programmes which serve both migrants and host society's needs. The approach already chosen by the Commission in its proposal for a Qualification Regulation (COM(2106)466) is relevant also in the field of legal migration, notably when it comes to family reunification and acquisition of long-term residence status: a right of migrants to have access to language courses, civic orientation and integration programs as well as vocational training would equip them with a minimum level of knowledge of language and host society allowing them to integrate as quickly as possible.

2.2. Visa, border management and large-scale IT systems

1. Issue definition

The Schengen acquis as regards borders and visas started being developed before the EU legal migration acquis, but they have recently grown in parallel and have influenced each other.

The origin of the Schengen acquis lies in the Schengen Agreement on the gradual abolition of checks at common borders signed in 1985 between the Benelux countries, Germany and France. In 1990, the Convention implementing the Schengen Agreement was signed and put in place concrete policies on the abolition of internal borders, the issuance of uniform visas and other common rules. On 26 March 1995, seven of the Schengen Member States (the original 5 and Portugal and Spain) decided to abolish their internal border checks. In 1999, the Treaty of Amsterdam incorporated the Schengen acquis into EU law.

The geographical scope of the Schengen acquis is different from the EU legal migration acquis, which applies to 25 EU Member States (all but DK, UK and IE⁵⁸). The Schengen acquis applies to 22 EU Member States (all but UK, IE, CY, HR, RO and BG) and to 4 non-EU States (Norway, Iceland, Switzerland and Liechtenstein).

What is called the Schengen acquis is a wide range of legislative instruments which were adopted to implement the Schengen Agreement and the abolition of checks at internal borders which was provided for in the agreement. That legislation covers the borders policy⁵⁹, visa policy⁶⁰, police cooperation, judicial cooperation, the databases supporting those policies⁶¹ and the funding of those policies⁶². This acquis interacts with the legal migration acquis in a number of areas.

2. Interaction with the legal migration acquis

I. Scope of the two acquis: Short stay vs. long stay

While the Schengen acquis covers the conditions of entry of third-country nationals coming for less than 90 days per 180-day period, the legal migration acquis mostly regulates the admission and residence of third-country nationals coming for more than 90 days, with one exception: the Seasonal Workers Directive.

a. Seasonal Workers Directive

The SWD is the only legal migration Directive which regulates admission also for stays under 90 days. This is the case because of the specific situation of seasonal workers, who are staying in the EU usually for short periods of time. During the negotiations, the inclusion of short stays in the Directive was very much debated, notably because of the interaction with the Schengen acquis. But the negotiations concluded that all seasonal workers should be treated in the same way, and therefore the Directive covers all seasonal workers, whatever their duration of stay and grants them the same rights and obligations.

The drafting of the Directive is very much influenced by the need to ensure coherence and consistency with the Schengen acquis. The conditions for admission are notably divided in two Articles (Articles 5 and 6), to reflect the fact that for stays under 90 days, the Schengen acquis also applies, i.e. the Visa Code for those third-country nationals who must be in

⁵⁸ IE opted in for the Researchers Directive.

⁵⁹ Notably the Schengen Borders Code (Regulation (EU) 2016/399) or the Decision on a simplified regime for the control of persons at the external borders (Decision No 565/2014/EU).

⁶⁰ Notably the Visa Code (Regulation (EC) No 810/2009), the Regulation on the uniform format for visas (Regulation (EC) No 1683/95) or the Regulation listing the third countries whose nationals must be in possession of visas (Regulation (EC) No 539/2001).

⁶¹ The Schengen Information System, the Entry-Exit System, the Visa Information System.

⁶² The Internal Security Fund.

possession of a visa and the Schengen Borders Code for all third-country nationals. Therefore a number of conditions for admission in Article 6 are not included in Article 5 because they apply by virtue of the Schengen acquis: the check that the person is not a threat to public policy, public security or public health, the need to have a valid travel document or sufficient resources.

The Directive provides for the issuance, when all conditions are fulfilled, of either a short-stay visa (possibly in conjunction with a work permit) or only a work permit for those third-country nationals that are not subject to the visa obligation in case of stay of a maximum of 90 days, or a residence permit or a long-stay visa (or both) in case of a stay above 90 days.

A number of questions were raised in the implementation of the Directive with regards to the coherence of the Schengen acquis and the provisions of the Directive, notably with regards to the double obligation in the Visa Code to have an "*adequate and valid travel medical insurance, where applicable*"⁶³ in line with Article 15 and in the Seasonal Workers Directive to provide "*evidence of having or having applied for sickness insurance for all the risks normally covered for nationals of the MS concerned for periods where such an insurance coverage and corresponding entitlements to benefits are provided in connection with or as a result of the work carried out in that MS*".

In Article 15(6), the Visa Code allows MSs to consider the insurance requirement to be met "where it is established that an adequate level of insurance may be presumed in the light of the applicant's professional situation". This clarifies that this is not a double obligation, but that one could replace the other.

b. bilateral visa waivers for more than 90 days

The Schengen Convention also allows Member States to extend beyond 90 days the stay of a third-country national in accordance with a bilateral agreement concluded before the entry into force of this Convention and notified to the Commission (Article 20(2)). This is applicable to the nationals of third countries who are exempted from the visa obligation in line with Regulation (EC) 2018/1806.

As pointed out in the Impact Assessment of the Visa Code revision⁶⁴, for example the nationals of Canada, New Zealand, USA, etc. can stay in such Schengen States for the period provided by the bilateral visa waiver agreement in force between the two countries (generally three months), on top of the general 90 days stay in the Schengen area. This would mean that the third-country national could remain for up to 6 months in a Member State without requiring a long-stay visa or a residence permit.

Most of the EU acquis on legal migration applies to third-country nationals coming to a Member State for more than 90 days⁶⁵. Those bilateral visa waivers therefore allow TCNs to stay more than 3 months without though having to apply for a residence permit or a long-stay visa, thereby possibly circumventing the EU visa and legal migration acquis.

c. Applications from the territory

The issue of the delimitation of the scope of the two acquis finds another area of application with regards to the possibility for third-country nationals to apply from the territory of the Member State where they are staying. Two Directives (S&RD and BCD) provide for the

⁶³ Visa Code. Article 21(3)(e).

⁶⁴ SWD(2014) 68 final of 1.4.2014, Annex 7. Commission Staff Working Document. Impact Assessment – Accompanying the document: Proposal for a Regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast).

⁶⁵ Except the SWD (also applies for stays under 3 months) and the Blue Card (where a contract of at least a year is required).

possibility for Member States to allow third-country nationals who entered their territory with a Schengen visa or under the visa exemption to apply for a residence permit directly from the territory. While this is meant to facilitate migration for the third-country nationals in question, this may also cause some practical problems for the third-country nationals, notably when they enter the EU. If they state at the border that they intend to stay for more than 90 days, they could be refused entry, as they do not hold an authorisation for a stay of more than 90 days. However, such a refusal of entry would not take into account the fact that they may be allowed to apply for a residence permit or long-stay visa from the territory. In that case, in order to be allowed to enter the EU, the TCN should indicate that they plan to stay for up to 90 days, which at the time of entry is what they are allowed to do. Their stay above 90 days is dependent on the result of the application they would submit later on.

II. General provisions on long-stay visas and residence permits

All legal migration Directives provide for the issuance of a residence permit if the conditions of admission are fulfilled. In two cases, Member States are allowed to issue other documents instead (SWD and SRD). In cases when a residence permit is issued and the Member State concerned does not issue them to third-country nationals outside of its territory, the Member State should issue a long-stay visa, so that the third-country national may enter its territory and receive the residence permit there.

a. definition

Long-stay visas are defined in Article 18 of the Schengen Convention: "*Visas for stays exceeding 90 days (long-stay visas) shall be national visas issued by one of the Member States in accordance with its national law or Union law. (...) Long-stay visas shall have a period of validity of no more than one year.*"

Residence permits are defined in a different way in the borders acquis and in the legal migration acquis.

In the legal migration acquis, a residence permit is an authorisation issued using the format laid down in Regulation (EC) No 1030/2002 entitling its holder to stay legally on the territory of a Member State.

Article 1(2)(a) of Regulation (EC) No 1030/2002 defines a residence permit as *any authorisation issued by the authorities of a Member State allowing a third-country national to stay legally on its territory with the exception of:*

(i) visas

(ii) permits issued pending examination of a request for asylum, an application for a residence permit or an application for its extension;

(iia) permits issued in exceptional circumstances with a view to an extension of the authorised stay with a maximum of one month;

(iii) authorisations issued for a stay of a duration not exceeding six months by Member States not applying the provisions of Article 21 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

The Schengen Borders Code however, has a wider definition. Article 2(16) defines a residence permit as:

(a) all residence permits issued by the Member States according to the uniform format laid down by Council Regulation (EC) No 1030/2002 and residence cards issued in accordance with Directive 2004/38/EC;

(b) all other documents issued by a Member State to third-country nationals authorising a stay on its territory that have been the subject of a notification and subsequent publication in accordance with Article 39, with the exception of:

(i) temporary permits issued pending examination of a first application for a residence permit as referred to in point (a) or an application for asylum; and

(ii) visas issued by the Member States in the uniform format laid down by Council Regulation (EC) No 1683/95

b. format

The formats of both long-stay visas and residence permits are harmonised at EU level.

Long-stay visas, in accordance with Article 18(1) of the Schengen Convention must be *issued in the uniform format for visas as set out in Council Regulation (EC) No 1683/95 with the heading specifying the type of visa with the letter D. They shall be filled out on accordance with the relevant provisions of Annex VII to Regulation (EC) No 810/2009.*

This format is used in the legal migration *acquis* where the issuance of a long-stay visa is provided for (SRD, SWD).

Regulation (EU) No 1030/2002 lays down a uniform format for residence permits for third-country nationals, which is referred to in all legal migration Directives.

c. conditions of issuance

All legal migration Directives provide that a third-country national who is a threat to public policy, public security and public health shall not be granted admission.

Those concepts are not defined at EU level (although there are CJEU cases), but the Schengen *acquis* provides that at least the Schengen Information System must be checked before a residence permit is issued. Article 25(1) of the Schengen Convention provides that "where a Member State considers issuing a residence permit, it shall systematically carry out a search in the Schengen Information System".

The Convention clarifies that, if an alert exists in SIS, there must be a consultation between the two Member States concerned but, with some limits, the final say whether or not a residence permit shall be issued remains with the Member State concerned. Article 25(1) provides that "where a Member State considers issuing a residence permit to an alien for whom an alert has been issued for the purpose of refusing entry, it shall first consult the Member State issuing the alert and shall take account of its interests; the residence permit shall be issued for substantive reasons only, notably on humanitarian grounds or by reason of international commitments. Where a residence permit is issued, the Member State issuing the alert shall withdraw the alert but may put the alien concerned on its national list of alerts". The recently adopted Regulation (EU) 2018/1860 will – once applicable – provide a legal basis for Member States to also consult each other on existing national return decisions before granting or extending a residence permit or long-stay visa.

d. conditions of entry

When third-country nationals enter the European Union, border guards must check that they fulfil the conditions of entry as provided for in Article 6(1) of the Schengen Borders Code. However, as regards third-country nationals holding a residence permit or a long-stay visa, Article 6(5)(a) may apply: *third-country nationals who do not fulfil all the conditions laid*

down in paragraph 1 but who hold a residence permit or a long-stay visa shall be authorised to enter the territory of other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit or the long-stay visa, unless their names are on the national list of alerts of the Member State whose external borders they are seeking to cross and the alert is accompanied by instructions to refuse entry or transit.

e. Issuance of a visa before a residence permit

Most of the legal migration Directives⁶⁶ include a provision stating that the Member States "shall grant the third-country national every facility to obtain the requisite visa" where their application for admission was accepted. This provision refers to the need, in case the Member State does not issue the residence permit outside of its territory, for the third-country national to apply for a visa to enter the territory of the Member State to collect the residence permit. The Single Permit Directive provides that the visa procedure for initial entry and the permission to work on the basis of the visa are excluded from the single permit application procedure. This step can extend the overall time needed to obtain the single permit.

In such cases, a long-stay visa should be issued to the third-country national, and not a short-stay visa, as the purpose of the entry is to stay for more than 90 days in a 180 day period. It seems some Member States issue short-stay visas (see Annex 8).

In 2015, the Ben Alaya judgement⁶⁷ clarified that Member States may not add any conditions for admission to those listed in the respective Directive. This implies that a third-country national who fulfils the conditions for admission (and does not meet any of the grounds for rejection) must be issued a visa in order to enter the territory and receive his or her residence permit. This is why the wording of the provision usually included in the Directives was amended in the SRD, which provides in Article 5(2) that "a Member State shall issue the third-country national with the requisite visa" where the Member State issues residence permits only on its territory and all the admission conditions are fulfilled. This clarifies that the issuance of such a visa is inherently linked to the issuance of the residence permit.

f. Rights of visa holders

The Single Permit Directive provides for equal treatment rights with nationals of the Member State where the third-country worker resides, including those working on the basis of a visa. However, this Directive also allows Member States to exclude those working on the basis of a visa from family benefits. Some Member States issue long-stay visas for work purposes (for a maximum of one year) before granting the single permit. This can result in a situation where a TCN would be residing in a Member State for more than six months (general minimum period for exclusion established by the SPD) but still be excluded from family benefits. In addition, the provisions establishing the single application procedure and its safeguards do not apply to third country nationals allowed to work on the basis of a visa.

The Seasonal Workers Directive and the Students and Researchers Directive, which both provide for the possibility for Member States to issue visas instead of residence permits, ensure that the rights of those third-country nationals holding a visa are the same as those holding a residence permit. However, under the Students and Researchers Directive, the rights of third-country nationals who are considered to be in employment except researchers (i.e. students, and depending on national law possibly trainees, volunteers and au pairs) are aligned to the equal treatment rights of the Single Permit Directive. This means that the restriction

⁶⁶ SWD Article 12(7), ICTD Article 13(7), BCD Article 7(1) second subparagraph, RD Article 14(4), FRD Article 13(1), but not the SD.

⁶⁷ Judgment of the Court of Justice (CJEU) of 10 September 2014, *Mohamed Ali Ben Alaya v Bundesrepublik Deutschland*, C-491/13.

with regards to access to family benefits would also apply to those categories, but given their specificities may have less impact in practice.

III. Intra-EU mobility

In accordance with Article 21 of the Schengen Convention, third-country nationals who hold valid residence permits or long-stay visas issued by one of the Member State may, on the basis of that permit and a valid travel document, move freely for up to 90 days in any 180 day period within the territories. However two Directives have so far provided for more favourable mobility provisions, with regards to the duration of stay in other Member States and the geographic scope of the mobility allowed: the ICT Directive and the Students and Researchers Directive.

a. period of stay in second Member States

While the Schengen Convention allows for a stay on a basis of a residence permit or a long-stay visa for up to 90 days in any 180 day period in other Schengen Member States, the ICT Directive allows for a stay of up to 90 days per Member State on the basis of an ICT permit issued by one of the Member States bound by the Directive, if it is for the purpose of the intra-corporate transfer. This right may be subject to a notification procedure, if the Member State where the mobility is to take place has transposed such an option: in such a case the TCN needs to submit a number of documents to the authorities of that Member State and is then entitled to move and stay in that Member State for up to 90 days, on the basis of the ICT permit issued by the first Member State. Second Member States are also allowed to apply these provisions to stays above 90 days.

The Students and Researchers Directive provides for an even longer period of stay in a second Member State on the basis of the residence permit or long-stay visa issued by the first Member State: researchers are entitled to stay for up to 6 months in a second Member State, which may require a notification. Second Member States are also allowed to apply these provisions to stays above 6 months.

Students who are covered by a Union or multilateral programme that comprises mobility measures or by an agreement between two or more higher education institutions are entitled to stay for up to 360 days in a second Member State on the basis of a residence permit or long-stay visa issued by the first Member State. This right may be subject to a notification procedure, if the second Member State has transposed such an option. Given the duration of stay allowed and the practical problems the students may face (to open a bank account, etc.), Member States are in that case allowed to issue a document to the student attesting that he or she is entitled to stay on its territory, but this document is only of a declaratory nature⁶⁸.

b. non Schengen MSs

The ICT Directive and the Students and Researchers Directive also create an autonomous mobility scheme as compared to the one provided for under Article 21 of the Schengen Convention in the sense that those Directives allow for mobility, on the basis of the residence permit (or long-stay visa in the case of the Students and Researchers Directive) issued by the first Member State, in all the Member States which are bound by those Directives, i.e. including Member States which are not yet fully applying the Schengen acquis, namely Bulgaria, Croatia, Cyprus and Romania. While Decision No 565/2014/EU already allowed

⁶⁸ Recital 47, Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast).

those Member States to recognise a residence permit issued by a Schengen Member State as valid for stay on their territory for up to 90 days, the contrary was not possible.

Those Directives entitle third-country nationals to cross an external border of the Schengen area with a residence permit (or long-stay visa in the case of the Students and Researchers Directive) issued by a non-Schengen Member State. In such a case, they would need to provide evidence that they are exercising mobility in line with the Directives. The Directives therefore give more mobility rights than the Schengen acquis to those third-country nationals.

3. Conclusions

The main interaction between the legal migration Directives and the Schengen acquis takes place with the Seasonal Workers Directive: the complementarity of the two regimes was ensured in law. However, it remains to be seen if issues arise for third-country nationals in its practical application. A number of other issues may arise from a practical implementation point of view, notably with regards to the possibility of applying for residence while being on the territory of the Member State concerned for a stay of less than 90 days.

Even for third-country nationals falling under the scope of other Directives, the Schengen acquis is bound to play a role in the procedure to obtain residence in a Member State, notably because in a majority of cases, Member States only issue residence permits on their territory and a long-stay visa must first be issued for the third-country national to enter the territory. The Ben Alaya judgement clarified that the issuance of the requisite visa is closely linked to the granting of a residence permit, as no criteria for admission can be added to those listed in the Directives.

In the future, the legal migration acquis and the large IT systems in the field of borders and visas may interact more than currently. The entry-exit system (EES)⁶⁹ and ETIAS⁷⁰ are designed to cover third-country nationals staying for less than 90 days in a 180 day period, and specific exclusions were inserted in the Regulations to exclude third-country nationals holding a long-stay visa or a residence permit from the scope, even when they exercise their mobility rights in line with the legal migration Directives. On the other hand, on 16 May 2018, the Commission proposed to extend the Visa Information System⁷¹ to include information on long-stay visas and residence permits. If this proposal is adopted, data on third country nationals holding those documents may also be subject to interoperability between the different systems (draft regulations proposed by the Commission in December 2017⁷²).

⁶⁹ Regulation (EU) 2017/2226 of the European Parliament and of the Council 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, p. 20.

⁷⁰ Proposal for a Regulation of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624, COM/2016/0731 final - 2016/0357 (COD). A provisional agreement was reached in June 2018, but the Regulation is not formally adopted.

⁷¹ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 767/2008, Regulation (EC) No 810/2009, Regulation (EU) 2017/2226, Regulation (EU) 2016/399, Regulation XX/2018 [Interoperability Regulation], and Decision 2004/512/EC and repealing Council Decision 2008/633/JHA, COM(2018) 302 final, 2018/0152 (COD).

⁷² Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/2226, COM(2017) 793 final, 2017/0351 (COD) and Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU

2.3. Asylum

1. Issue definition

The EU asylum acquis deals with the access to the asylum procedure and stay of those third-country nationals who are entering EU territory to seek international protection. Taking into account their specific situation and their need for protection, beneficiaries of international protection are – as a general rule but not always – offered rights by the asylum acquis which go beyond the rights offered to "ordinary" legal migrants under the EU legal migration acquis.

The EU asylum acquis consists of a number of legal instruments laying down criteria and mechanisms for determining which Member State is responsible for considering an application⁷³, common standards in relation to a uniform status of refugees or for persons eligible for subsidiary protection⁷⁴; a common system of temporary protection⁷⁵; common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status⁷⁶; and standards concerning reception conditions⁷⁷.

The EU asylum acquis and the legal migration acquis are to a large extent "self-standing" legal regimes; there are, however, numerous *overlaps and coherence issues* to be considered. This analysis focuses on the most relevant interfaces, namely:

- rules on family reunification;
- the challenges posed by double statuses;
- admission to the EU for protection purposes;
- consistency of the rights granted under the asylum acquis and the legal migration acquis (including labour market access);
- the situation of beneficiaries of purely national protection statuses.

2. Interaction with the legal migration acquis

I. Family reunification

The family reunification Directive (FRD) offers facilitated family reunification to refugees⁷⁸ as sponsors but not to beneficiaries of subsidiary protection (BSPs)⁷⁹. Family reunification of BSPs is expressly excluded from the scope of application of the FRD and therefore does not

information systems (police and judicial cooperation, asylum and migration), COM(2017) 794 final, 2017/0352 (COD).

⁷³ 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).

⁷⁴ 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).

⁷⁵ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

⁷⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

⁷⁷ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). Asylum Reception Conditions Directive 2013/33/EU.

⁷⁸ As defined in Article 2(d) of 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).

⁷⁹ Excluded according to Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Article 3(2)(c).

fall under the normal regime applicable to any third-country national under the directive. Currently it remains covered by national law only, except for the situations covered by *family unity* under the Qualification Directive which also applies to the family member of BSPs, provided the family member was already present in the MS while the sponsor was still an applicant. 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 of the family reunification directive. Given the approximation of refugee status and subsidiary protection status done within the asylum acquis in the last years, several stakeholders (in particular representatives of the UNHCR and other civil society organisations) have called for the extension to beneficiaries of subsidiary protection of the more favourable family reunification rules currently granted only to refugees (given also the approximation of refugee status and subsidiary protection status achieved within the EU asylum acquis in the last years); whereas Member States representatives expressed their general opposition to changes in the family reunification rules.

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%)⁸⁰. The absence of facilitated family reunification rules under the family reunification directive for BSPs in the EU therefore affects ca 37% of all third country nationals benefitting from protection in the EU⁸¹. This being said, according to the 2016 EMN Focused Study on Family Reunification of Third-Country Nationals in the EU⁸², the majority of Member States grant family reunification also to BSPs under national law (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 making more visible the effects of the lack of EU harmonisation in this area.⁸³

In some Member States, BSPs either have no right to family reunification under EU law (except the right to *family unity* with family members already present in the same Member State under the Qualification Directive 2011/95/EU) or are subject to more restrictive conditions than refugees, such as waiting periods and income requirements, creating a disparity in their treatment if compared to the refugees when it comes to enjoying family life. The fact that BSPs are excluded from the Family Reunification Directive may potentially lead to applicants for international protection aiming at choosing the Member State with more favourable provisions. The case can also be made that 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 of BSPs more challenging.

Against that background, this different treatment appears to be difficult to justify as the overall situation and needs for family reunification of BSPs may be similar to those of refugees. In this context it needs to be highlighted that that there is still 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

⁸⁰ Eurostat, table migr_asydcfsta.

⁸¹ ICF (2018), Annex 1Cii (External coherence), section 1.3.

⁸² European Migration Network (EMN) Synthesis Report for the EMN Focussed Study 2016: *Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices*, (2016).

⁸³ 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.

permits. Hence there might be a link/justification for having different family reunification rights of both categories. This difference of residence rights has been maintained by the Commission proposal for a Qualification Regulation⁸⁴.

II. Double statuses

Most legal migration Directives exclude beneficiaries of international protection (IP) from their scope of application. The only Directive which – so far – contains an express opening to beneficiaries of IP is the LTR Directive, since Directive 2011/51/EU amended the LTR Directive 2003/109 and now provides 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 the Qualification Directive, are proposed 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 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.

There is an arguable case for addressing in more detail the issue of double statuses. 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 currently still exists 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 in practice 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. This gap may be closed by the creation of a central repository of residence permits and long-stay visas issued by Member States, as proposed by the Commission in May 2018 in its proposal COM(2018)302 to upgrade the Visa Information System (VIS).

III. Access to protection

Neither the asylum *acquis*, nor the visa *acquis* or 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 CJEU in its judgement in case C 638-16 PPU. In

⁸⁴ COM(2016) 466 final of 13.7.2016. 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.

its May 2015 Communication on a "European agenda on migration"⁸⁵ the Commission urged the enhancing of safe and legal ways for persons in need of international protection to reach the EU. The Commission encouraged Member States to be more generous on resettlement and to also use, next to resettlement, other legal avenues available to persons in need of protection, including private/non-governmental sponsorships and humanitarian permits as well as family reunification clauses.

The Commission put forward an initiative to further enhance resettlement to the EU with 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 protection⁸⁶. At the same time, other legal avenues available to persons in need of protection under the EUs legal migration *acquis* and national migration law, including private/non-governmental sponsorships and humanitarian permits as well as family reunification clauses remain applicable.

IV. Rights

The Qualification Directive, the Reception Conditions 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 terminology as in the legal migration Directives is used for framing the concrete rights offered. See for instance the formulation of the rights in Article 26 of the Qualification Directive 2011/95/EU as opposed to Article 12(1) SPD.

This leads to a situation similar to the one identified in the internal coherence review, when comparing the differing legal migration directives amongst themselves. In the different Directives, similar issues are addressed by different wording and frequently these differences cannot be explained by the different scope of the Directives at stake. The reason for this lack of legal consistency lies mainly in the historic genesis of the different Directives, each of which had its own peculiarities, policy constraints and decision makers involved. On top of this, vague formulations seem to have been sometimes deliberately used in the decision-making process as a tool for reaching agreement. There is therefore room for more technical and terminological consistency of the wording used in the EU legal migration directives and the EU asylum *acquis*, notably as regards the provisions dealing with access to the labour market and right to equal treatment.

V. Purely national protection statuses

Holders of purely national protection statuses (8% of those granted protection in the EU in 2016⁸⁷) 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.

⁸⁵ COM(2015) 240 final of 13.5.2015. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration.

⁸⁶ COM(2016) 468 final of 13.7.2016. Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council.

⁸⁷ ICF (2018), Annex 1Cii.

There is therefore currently a relevant gap at EU level as regards the rights of holders of purely national protection statuses.

3. Conclusions, including scope for simplification

Given the approximation of refugee status and subsidiary protection status done within the asylum acquis in the last years, the question arises whether the difference in treatment in relation to family reunification should be abandoned. When considering the currently existing uneven treatment, it should, however, also be borne in mind that there is still a difference in the current acquis concerning the foreseen residence permit validity of refugees and BSPs reflecting the presumably more temporary need of protection of BSPs. Hence there might be a justification for having different family reunification rights of both categories.

The possibility for beneficiaries of IP to obtain also a legal migration 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.

Currently there are no express provisions at EU level as regards legal admission to the EU for protection purposes, but the Commission already made a proposal to further address this issue by a Union Resettlement Framework, providing resettlement for a meaningful number of refugees, having regard to the overall number of refugees seeking protection in the Union.

There is a case for aiming at more *technical* consistency of the wording used in the EU legal migration directives and the EU asylum acquis as regards rights of third-country nationals, notably concerning the provisions dealing with access to the labour market and right to equal treatment. In this context the emphasis is only on the consistency of the technical wording and not on the different levels of right which may be justified by the differing scope of the legal instruments.

There is currently a gap at EU level as regards the rights of holders of purely national protection statuses. This gap is particularly relevant with regard to the exclusion from the personal scope of the Single Permit Directive.

2.4. Irregular migration and return

1. Issue definition

The Return Directive⁸⁸, which entered into force in 2010, is the main legal instrument of the EU return acquis. The purpose of the Return Directive is to regulate the return of illegally staying third-country nationals to third countries of origin or transit. 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 (which may be a legal short-term stay or a long-term stay covered by a residence permit, a long-stay visa or other authorization) or they do not, in which case they fall under the scope of application of the Return Directive. The Return Directive also provides for a number of procedural safeguards and guarantees to third country nationals throughout the return procedure.

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 an authorisation or right to stay in the EU under one of the legal migration / asylum Directives or national legislation. If a third-country national does not have a lawful residence on the territory of a Member States, he/she shall be subject to a return decision. The scope of the EU return acquis therefore starts where the scope of the legal migration (or asylum) acquis ends. From a legal point of view there is no gap in between; however, in practice, third-country nationals who cannot be returned are sometimes in a limbo situation.

The Return Directive does not address **readmission** procedures⁸⁹ to third countries – which are covered by specific bilateral or EU readmission agreements between Member States or the EU and third countries. Additionally, the Return Directive concerns only return to third countries of origin or transit and no procedures of ‘taking back’ between Member States.

It is also important to underline that the Return Directive does not harmonise the reasons for ending legal stay, which are regulated by the relevant provisions in the legal migration Directives, the asylum acquis and national legislation.

2. Interaction with the legal migration acquis

I. Situation of third-country nationals who cannot be returned

While approximately 1 million third-country nationals were found to be illegally present in the EU in 2016, only around 500,000 received orders to leave the EU, and around half of that figure (250,000) were effectively returned⁹⁰. The rate of effective returns to third countries was around 37% in 2014, 2015 and 2017 (and was only substantially higher, i.e. 46% during 2016). In other words: in most recent years, up to 63% of those who are obliged to leave because they have no right to stay (irregular migrants) or no more right to stay (rejected asylum seekers or over-stayers) were not returned in practice, in spite of the fact that they are known to the authorities and have been issued valid return decisions. The main reasons for non-return relate to practical problems in the identification of returnees who frequently have no documents and no interest in cooperating. Another major reason for non-return relates to

⁸⁸ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

⁸⁹ The term "readmission" relates to arrangements in place between returning Member States and third-countries of return covering the practical and technical modalities of return (documentation, issuing of laissez passer, transport arrangements, etc.).

⁹⁰ COM(2017) 558 of 27.9.2017. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the delivery of the European Agenda on Migration, p. 9 and Eurostat table *migr_eirtn*.

challenges in obtaining the necessary documentation from non-EU authorities which may have little incentives to cooperate on readmission and a readmission policy which is still not working as smoothly as it should.

The presence of a significant number of ‘non-removable returnees’ in the EU poses very concrete practical and social challenges, such as destitution, which need to be tackled. The exact quantitative dimension of ‘non-removability’ is difficult to establish. Extrapolating from statistics on numbers of return decisions which could not be enforced (amounting on average to ca 60% out of 500.000 per year) one can assume – with a lot of precaution - that the issue concerns up to 300.000 migrants per year. Current Member State approaches of dealing with the issue differ widely, including formal toleration statuses, de facto toleration, granting of temporary residence permits or inaction⁹¹.

Non-removable returnees benefit from the ‘safeguards pending return’ listed in Article 14 of the Return Directive. These basic minimum safeguards include a number of rights relating to family unity, emergency health care, respect for situations of vulnerability, education and documentation. According to ECJ case law, enjoyment of the right to health care also gives rise to a concomitant requirement to make provision for the basic needs of the person. Article 14 of the Return Directives does not provide for a right to work, but Member States are free to grant such right under national law.

The variety of differing Member State approaches for dealing with non-removable returnees may constitute an incentive for secondary movements since this category of migrants may try to move to those Member States which offer the best conditions of stay. A ‘common discipline’ amongst Member States concerning the treatment of non-removable persons could prevent Member States from adopting ‘permissive’ national measures which may cause ‘reputational damage’ to less ‘generous’ Member States. Such common discipline might also help to avoid a pull-factor for irregular immigration since the adoption of uncoordinated ad-hoc measures by Member States may be in some cases be a potential stimulus for further irregular immigration to the EU as a whole.

In addition, it has been argued that the existence of large numbers of ‘non-removables’ with few rights and limited possibility to work in order to come up for their own living contributes to a negative public perception of migration and undermines the public acceptance of a sustainable EU migration policy as a whole. Common standards which would allow at least certain categories of ‘non-removables’ to work may contribute to alleviate this phenomenon.

II. Regularisation

Currently there is no general obligation under Union law to grant a permit to an irregular migrants (such as in particular non-removable returnees), but Member States are free to do so any moment. This is expressly clarified by Article 6(4) of the Return Directive: *‘Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay’*. The most frequently applied pathway to legal stay, used by Member States for different reasons, notably to avoid destitution and social problems, is regularisation under

⁹¹ For an exhaustive overview of Member State practices see study done by Ramboll and EurAsylum, *Situation of Third-Country Nationals Pending Postponed Return/Removal in EU Member States and the Schengen Associated Countries*, (2013).

national law and most Member States have provisions in place allowing for a case-by case regularisation under certain circumstances.

At political level, the European Council agreed in its 2008 European Pact on Immigration and Asylum⁹² to use only case-by-case regularisation rather than generalised regularisation, under national law, for humanitarian or economic reasons.

Based on a study done by Ramboll for the European Commission in 2013 on the '*Situation of third-country nationals pending postponed return/removal in EU MS*', an informal brainstorming paper⁹³ which set out a possible frame for common standards on regularising (or not regularising) non-removable returnees had been presented by Commission services and was discussed with Member States experts in 2014.

In essence, this brainstorming paper proposed a 'may' clause allowing Member States to offer the possibility for 'in loco' applications for regularisation after a minimum factual stay of 18 months and a 'shall' clause providing a right to regularisation after 5-10 years of factual stay linked to fulfilment of three criteria: social integration, good conduct and impossibility to carry out return in the foreseeable future. For non-co-operating non-removable returnees, no pathway to legalisation should be offered, provided that the door would remain open for non-cooperating returnees to move to the category of 'co-operating' at any point in time.

In reaction to this paper, Member States experts expressed opposition to the development of harmonised EU solutions in this field. It was argued that the current rules and the current level of harmonization is fully satisfying and that there is no need for additional best practices or interpretative texts, which – in Member States perception – might risk leading to undesired effects. The reasons given for this opposition included the consideration that successful return should be the primary objective and all efforts should be focused on increasing return rates. Discussing rights of irregular migrants (as well as pathways to regularization) would send a wrong policy signal and might even encourage irregular migration.

As regards the conduct of case-by case regularisations, the Commission finally recommended in its 2015 Return Handbook⁹⁴ assessment criteria that could be taken into account by Member States and which should include both individual (case related) as well as horizontal (policy related) elements such as in particular: the cooperative/non-cooperative attitude of the returnee; the length of factual stay of the returnee in the Member State; integration efforts made by the returnee; personal conduct of the returnee; family links; humanitarian considerations; the likelihood of return in the foreseeable future; need to avoid rewarding irregularity; impact of regularisation measures on migration pattern of prospective (irregular) migrants; likelihood of secondary movements within Schengen area.

The Commission's arguments made in favour of a more harmonized approach at EU level (level-playing field argument; avoidance of secondary movements and humanitarian considerations) remain valid, even though Member States so far showed a preference to tackle the issue at national level only.

III. Absence of harmonised rules for ending legal stay for reasons of national and public security

Another issue, recurrently coming up in the political debate, notably in the aftermath of major security incidents involving third-country nationals, concerns the absence of common EU

⁹² Council of the European Union, doc. 13440/08, p.7.

⁹³ Contact Group "Return Directive, Migrapol CC Return Dir 50, 'Brainstorming on best practices in relation to 'non-removable returnees'.

⁹⁴ Commission Recommendation C(2017) 6505 of 27.9.2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks.

rules for expelling third-country nationals for reasons of national and public security. Member States repeatedly called on the Commission to propose horizontal legislation making the expulsion of criminals, suspected terrorists or hatred preachers mandatory, notably during the preparation of the proposal for the Return Directive. The Commission did not give in to this request for reasons which remain valid until today:

- Legal migration directives as well as the asylum acquis already contain tailor made 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. A scrupulous application of these clauses is a more appropriate way of enhancing security in a proportionate manner, than to substantially change the different directives.⁹⁵
- 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. Any common EU rules in this field would therefore have to provide for significant discretion to Member States (“may” rather than “shall” clauses) anyhow and the added value of such rules would therefore be limited.⁹⁶

IV. Irregular stay in one Member State of holder of valid permit in another Member State

Overlaps between the Return Directive and the legal migration acquis may occur in the event where the holder of a residence permit granted by a (first) Member State is found to be irregularly staying in a second Member State. This is a particularly relevant issue in the context of legal migration Directives that contain provisions on intra-EU mobility of third-country nationals and/or readmission between Member States.

Passing back a third-country national from one Member State (where the person is irregularly staying) to another Member State (where the person is holding valid a residence permit) is not considered as ‘return’ as defined in the Return Directive but rather a ‘taking back’ procedure or ‘going back to a Member State’. Article 6(2) of the Return Directive provides that third country nationals that have a right of residence in another Member State shall first be required to go immediately to that Member State and, in case of non-compliance, can be subject of a return decision (or they can be subject immediately to return procedures for reasons of public policy or national security).

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. A return decision ordering return to a third country must 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.

Based on information received from Member States at expert group meetings, the practical application of these rules appear to pose practical challenges as there are no harmonised rules, procedures, forms nor templates for the second Member State to request the first Member State to accept re-entry of a third-country national. Likewise – as already highlighted in the internal coherence analysis - many Directives (LTR, BCD, ICT and S&RD) contain provisions regarding the establishment of contact points in the Member States responsible for

⁹⁵ COM(2005) 391 final of 1.9.2005. 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, p.4-5.

⁹⁶ ibid.

information sharing on issues linked to intra-EU mobility, but the concrete way in which information is exchanged between the national contact points is currently not regulated yet. The recently adopted Regulation (EU) 2018/1860 will – once applicable – provide a legal basis for Member States to consult each other on existing national return decisions before granting or extending a residence permit or long-stay visa.

Given the practical challenges faced by Member States in managing ‘taking back’ procedures between second and first Member States, there may be a case for developing further procedural guidance, forms and templates. There may also be added value in giving further steer on the communication tools to be used in between national contact points for exchanging personal information related to intra-EU mobility

V. Status pending renewal of a residence permit

Following Article 6(5) of the Return Directive, in cases where 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. According to the Return Handbook, 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. The Return Directive does not provide for a general obligation on Member States to issue permits to bridge the gap pending renewal of a permit.

Article 18(5) of the Blue Card Directive also expressly underlines that a Member State may issue a residence permit or an authorisation to stay for the duration of the renewal procedure until a decision on the application has been made. The nature and format of such national permits is, however, left to MS discretion.

In conclusion, third-country nationals who apply for renewal of an already expired permit are in principle illegally staying, unless provided otherwise by the national laws of the Member State concerned. At the same time, the Return Directive prevents Member States from issuing a return decision in such situation. One may therefore conclude that there is a gap at EU level of harmonised rules on whether a person has or not a right to stay during a renewal application (or an appeal against a refusal of renewal). National practices differ and migrants waiting for renewal of their permit are sometimes facing difficult situations, particularly if they need to travel.

VI. Relation between the opening of new legal migration channels and irregular migration

Policy makers in the field of migration frequently use the argument that more open legal admission channels would reduce irregular migration pressure and smuggling to the EU. So far, little evidence for verifying or falsifying this argument is available. The first – and so far only – attempt made by the Commission to analyse more deeply the issue was its 2004 Communication "Study on the links between legal and illegal migration"⁹⁷ which was based on a limited fact-finding exercise conducted in cooperation with Member States' experts and which examined the links between existing ways of legal migration (horizontal admission rules, bilateral agreements, use of quota and regularisation measures). This study concluded that "*There is a link between legal and illegal migration but the relationship is complex and certainly not a direct one since a variety of different factors has to be taken into consideration. No measure taken on its own can be seen as having a decisive impact. This does not, however, prevent particular actions from having specific impacts.*" Therefore, so far little evidence has been produced to back the anecdotal claim that opening more legal

⁹⁷ COM(2004) 412 final of 4.6.2004. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Study on the links between legal and illegal migration.

migration channels will lead to reducing irregular migration fluxes. While this may seem intuitive, there is evidence that might suggest how this correlation is more complex. For example, the role of migrant social networks in perpetuating migration flows is well established in the literature, especially in the US's case. Extensive and esteemed research⁹⁸, shows how migrants that settle in a destination country are likely to determine the arrival of new migrants, who use the social capital accumulated by previous migrant peers/family/friends to make their journey.

3. Conclusions

The Return Directive complements the legal migration Directives by establishing the rules for returning third-country nationals who no longer have an authorisation or a right to stay in the EU under one of the legal migration Directives. The analysis has shown that in spite of this complementarity, some issues at the interface between legal migration and return acquis still deserve further consideration.

The situation of third-country nationals in a protracted situation of irregularity is currently decided solely at national level (e.g. through toleration statuses or long-term postponement of return), which may create in practice grey areas that the adoption of the Return Directive sought to eliminate. The variety of differing Member State approaches for dealing with non-removable returnees may constitute an incentive for secondary movements since this category of migrants may try to move to those Member States which offer the best conditions of stay. A common discipline amongst Member States concerning the treatment of non-removable persons could prevent this from happening. In addition, the argument can be made that the existence of large numbers of 'non-removables' with few rights and limited possibility to work in order to come up for their own living contributes to a negative public perception of migration and undermines the public acceptance of a sustainable EU migration policy as a whole. Common standards which would grant at least certain categories of 'non-removables' a right to work might contribute to alleviate this phenomenon.

An arguable case can be made that it would be in the common European interest to develop a more harmonised approach on a closely related issue, namely in the field of regularisation. A number of arguments playing in favour of an EU approach could be identified (notably the level-playing field argument as well as avoidance of secondary movements and humanitarian considerations). These arguments remain valid, even though Member States so far showed a preference to tackle the issue at national level only. Further work in this field is required.

In the context of security incidents or threats involving third-country nationals, the Commission has been asked in the past – and will probably also be asked in the future – to propose horizontal legislation making the expulsion of criminals, suspected terrorists or hatred preachers mandatory. The Commissions constant line, valid until today, has been to reject this request with the argument that a scrupulous application of existing public order clauses in migration directives is a more appropriate way of enhancing security in a proportionate manner, than to substantially change the different directives or to adopt horizontal rules. Moreover, 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 to a third country. No further initiatives seem to be required in this field.

Given the practical challenges faced by Member States in managing intra EU mobility of third-country nationals and in particular in conducting eventually necessary 'taking back' procedures between second and first Member States, there may be a case for developing further procedural guidance, forms and templates for this kind of procedure. There may also

⁹⁸ De Haas, H., *The Internal Dynamics of Migration Processes: A Theoretical Inquiry*, (2010).

be added value in giving further steer on the communication tools to be used in between national contact points for exchanging personal information related to intra-EU mobility.

Third-country nationals who apply for renewal of an already expired permit are in principle illegally staying, unless provided otherwise by the national laws of the Member State concerned. At the same time, the Return Directive prevents Member States from issuing a return decision in such situation. National practices differ and migrants waiting for renewal of their permit are sometimes facing difficult situations, particularly if they need to travel. One may therefore conclude that there is a gap at EU level of harmonised rules on whether a person has a right to stay during a renewal application (or an appeal against a refusal of renewal) and through which kind of document/paper such right should be manifested.

Currently little evidence is available for making a statement that more open legal admission channels would reduce irregular migration (or would have the contrary effect). Further research is needed.

2.5. Fundamental rights and non-discrimination

1. Issue definition

The construction of an area of freedom security and justice under Title V TFEU, including the setting up of a common immigration policy, is, as all other EU policies and actions, based **on respect for fundamental rights**. This is expressly confirmed by Article 67(1) TFEU. The content, interpretation and application of the EUs legal migration acquis must therefore take into account all relevant fundamental rights considerations. All legal migration directives have recitals underlining that they need to be understood and interpreted as respecting fundamental rights. This section explores the coherence of the legal migration Directives with fundamental rights, taking into account the main sources of fundamental rights.

According to Article 6 TEU, the EU Charter of Fundamental rights (hereafter the Charter) has the same legal value as the Treaties. Article 6(2) however clarifies that the provisions of the Charter shall not extend in any way the competences of the EU as defined in the Treaties. In fact, according to its Article 51(1), the **Charter** applies to Member States only when they are implementing EU law, which means that its scope of application is limited to those situations which are governed by EU law (see Case C-617/10 Fransson). It does not apply to national law which is not implementing EU law. Given the EU competences in migration policies, national migration legislation implementing EU law in this area or any national measure affecting any of the rights guaranteed to individuals by EU law has to respect the rights enshrined by the Charter.

Regarding the personal scope of the Charter, the latter applies irrespective of the nationality of individuals concerned. The Charter contains, however, a specific chapter on the rights of Union citizens (making reference for example to the free movement and residence rights) and a few other provisions which limit the personal scope of their application.

As reaffirmed by Article 6 TEU, the rights, freedom and principles in the Charter shall be interpreted in accordance with the general provisions governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. Among such sources, particular reference is made to fundamental rights as guaranteed by the European Convention on Human Rights (hereafter the ECHR) and fundamental rights as they result from the constitutional traditions common to the Member States.

In particular, Article 52(3) of the Charter 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. There are a number of correspondences between the Charter and ECHR Articles. 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.

In situations which cannot be regarded as governed by EU law, and where therefore the Charter does not apply, Member States remain bound to their obligations as regards respect of fundamental rights as deriving from their national constitutions or the international agreements to which they are parties, and in particular the ECHR (to which all Member States are parties). According to Article 1 ECHR, the provisions of the Convention are applicable to any person falling under the jurisdiction of the Contracting States, irrespective of their nationality.

2. Interaction with the legal migration acquis

I. Principle of non-discrimination on grounds of nationality

Third-country nationals who reside in the EU may invoke fundamental rights guarantees in various domains. However the extent of certain fundamental rights can differ due to the different "status" recognised to EU citizens and third-country nationals. In comparison with EU citizens, the rights of third country nationals are affected by a number of limitations. ECJ and ECtHR case law makes it clear that the relevance of equal treatment guarantees can be limited in the field of immigration law, where difference in treatment can be justified in a number of areas by reference to the residence status of the third country national in a certain State. For example, regarding intra-EU mobility rights, the Charter provides in its Article 45(2) that similar intra-mobility rights as to EU citizens may be granted to third-country nationals who are legally residing in one of the Member States. The enjoyment of this right will therefore depend on the conditions set by the EU and/or national legislator as regards access to third-country nationals to the territory of Member States and the rules on residence status. The same example can be referred to the enjoyment of other rights such as the right to engage in work (see Article 15(3) of the Charter).

Is this compatible with the principle of non-discrimination based on nationality as a key principle of EU law? To what extent does the principle of non-discrimination allow for differentiated treatment of EU citizens and third-country nationals?

Article 18 TFEU provides that "*within the scope of application of the Treaties [...] any discrimination on grounds of nationality should be prohibited*". Case law of the ECJ⁹⁹ clarified that 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.

Article 21(1) of the Charter also provides for the respect of the principle of non-discrimination based on any grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation 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 specify that this paragraph corresponds to the first paragraph of Article 18 TFEU and therefore cannot be invoked by third-country nationals. In the same vein, 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 are 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.

⁹⁹ See Judgment of the Court of Justice (CJEU) of the 4 June 2009, *Athanasiou Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, C-22/08 and C-23/08, para 51-52: "The first paragraph of Article 12 EC prohibits, within the scope of application of the EC Treaty, and without prejudice to any provisions contained therein, any discrimination on grounds of nationality. That provision concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries.".

A very relevant provision in this specific context is **Article 20 of the Charter** enshrining the equality of treatment 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. In a case¹⁰⁰ related to differing treatment of third-country nationals in relation to integration measures to be followed by long-term residents and not imposed on EU nationals, the CJEU set out its approach on how to apply the principle of equality when it comes to differing treatment of third-country nationals: "*according to settled case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. [...] the situation of third-country nationals is not comparable to that of nationals as regards the usefulness of integration measures such as the acquisition of knowledge of the language and society of the country. Therefore, since those situations are not comparable, the fact that the civic integration obligation at issue in the main proceedings is not imposed on nationals does not infringe the right of third-country nationals who are long-term residents to equal treatment with nationals*".

The ECtHR, in its case law on Article 14 ECHR (principle of non-discrimination) also follows a case-by-case approach in evaluating whether there is a breach to the principle of non-discrimination on grounds of nationality in the enjoyment of the rights and freedoms set forth in the Convention. In some 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. The tighter the link of a third-country national with a Member State (e.g. in terms of length of residence, degree of integration and family ties), the less inclined the ECtHR is to allow a differentiated treatment for EU and non-EU national in the enjoyment of the rights and freedoms set forth in the Convention. 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. 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.

Both the Charter and the ECHR give guidance on the possibilities and limits for legitimate differentiation of migrant's rights as opposed to citizen's rights. The scope for differentiated treatment always depends on the nature of the rights at stake and the situation of the individual. The Charter and ECHR provide for guiding principles only which need to be translated into concrete (secondary) legislation. The practical importance of such secondary legislation (including the equal treatment Articles in the legal migration directives) is very high, since it translates fundamental rights into the realities of everyday life of migrants in the EU.

II. Non-discrimination rules set out in secondary legislation

It was already highlighted above that EU Member States can legitimately differentiate rights accorded to persons on the basis of their citizenship provided it is done on the basis of an objective justification (i.e. with a view to achieving a legitimate objective of general interest) and in a proportionate manner. The legal migration directives set out to what extent third-country nationals enjoy – or don't enjoy – rights similar to rights enjoyed by own nationals. Against that background, migration law could be characterised as a fine-tuning of legitimate differentiated treatment.

¹⁰⁰ Judgment of the Court of Justice (CJEU) of 4 June 2015, *P and S v Commissie Sociale Zekerheid Breda and College van Burgemeester en Wethouders van de gemeente Amstelveen*, C-579/13, para. 41-43.

The possibility to differentiate rights on the basis of citizenship or migratory status does not apply, however, in those cases in which third-country nationals benefit from basic general rights guaranteed by the 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 persons present on EU territory. This applies in particular to the provisions in the legal migration directives dealing with freedom of association and equal treatment in relation to membership of worker or employer organisations (Article 12 Charter) and fair and just working conditions (Article 31 Charter). With regard to these basic rights it cannot be argued that a different treatment based on nationality may be justified or proportionate.

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. A detailed comparison and analysis of the equal treatment clauses in all legal migration Directives was carried out in the context of the *internal coherence check* of the EU legal migration acquis. The main findings of this analysis are the following.

Seven Directives (LTRD, RD, BCD, SPD, SWD, ICTD, S&RD) include provisions on equal treatment of TCNs with respect to nationals of the Member State concerned, covering a number of detailed aspects. The ICTD also foresees such equal treatment, but with regard to the terms and conditions of employment, it guarantees at least equal treatment with posted workers under Directive 96/71/EC. The FRD and SD do not include provisions on equal treatment. As per the SPD, with its very broad scope which also includes holders of purely national permits, equal treatment also applies to (i) any holder of a residence permit who is allowed to work and (ii) those who have been admitted for the purpose of work.

Freedom of association and affiliation: Six of the Directives (i.e. LTRD, SPD, BCD, SWD, ICTD and S&RD) stipulate that TCNs should have equal treatment in respect of this right. The wording is the same for all Directives. The provision is missing in the FRD, but family members who are allowed to work in accordance with Article 14 of the Directive are covered by the SPD. The SWD adds to this the right to strike and take industrial action which could be added to the other Directives too for the sake of consistency.

Access to education and vocational training: Five Directives provide for equal treatment with regard to education and vocational training, while such provision is missing in the SD, RD and ICTD. Different restrictions are allowed in the five Directives. While some appear ‘logical’, such as the restriction in the SPD that the right can be limited to those who are in employment or who registered as unemployed, the reason why others have been introduced in one or more Directives (but not in others) cannot be easily explained, such as the restrictions related to language proficiency and the fulfilment of specific educational prerequisites.

Recognition of professional qualifications: Seven Directives (LTR, RD, BCD, SPD, SWD, ICT, S&RD) give the right to equal treatment as regards “recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures”. Equal treatment under the Directives only applies once an authorisation has been granted.

Access to social security, social assistance and social protection: Some inconsistencies were identified. While it is understandable that equal treatment with regard to social security is primarily granted in the employment-related Directives, as in the others there is a need for the TCNs to have sufficient resources so that they do not have to make use of social, assistance systems, the references to social security are different in the Directives. Some refer

to branches of social security as defined in Regulation (EC) 883/2004 (SPD, SWD, S&RD) and others to provisions in national law regarding these branches.

The only Directive that provides for equal treatment regarding social assistance and social protection is the LTRD but it can be limited to core benefits.

Restrictions may be put in place by MSs in case of short-term employment / short-term stay in the SPD (but may not be restricted for those in employment, or those who have been employed for 6 months and are registered as unemployed); SWD (with regards to unemployment and family benefits) and the S&RD and ICT (researchers and ICT are excluded from family benefits if their stay is authorised for respectively less than 6 and 9 months). While such restrictions may be explained in certain circumstances, the differences in the period of stay could be aligned.

Tax benefits: No coherence issues identified. The equal treatment right to tax benefits is guaranteed in five Directives (LTR, RD, SPD, SWD, S&RD) and, through the SPD, arguably also applicable to the BCD and the FRD (insofar as the family member is allowed to work). Of all the Directives, it is not guaranteed in the ICT, which can be explained by the fact that ICTs are only temporarily in one or several Member States and are in general not residents for tax purposes in these countries.

Public goods and services: Some inconsistencies identified. Seven Directives provide for equal treatment in access to goods and services (with family members, and students under the SD being covered by the SPD if allowed to work). The LTR allows for Member States to restrict the right to persons who have their registered or usual place of residence in the MS. The SPD specifies that access to public goods and services might be limited to those TCNs who are in employment. Of all the Directives, access to **housing** is not provided in the SWD as accommodation is a pre-requisite for admission. Furthermore, three Directives (BC, SPD and S&RD) allow Member States to restrict equal treatment provisions regarding access to housing.

Working conditions: Some inconsistencies identified. The SPD, S&RD and SWD include health and safety at the workplace while SWD gives an indication as to what is included in the term "working conditions" and provides for equal treatment as regards "terms of employment" as well. The ICT Directive (a special case in itself since it only covers temporary posting and no genuine access to the labour market) refers to the conditions fixed by the Posted Workers Directive 96/71/EC, except for remuneration, where equal treatment with nationals is an admission condition.

Access to employment and self-employment: Some inconsistencies identified. All nine Directives include provisions on access to employment subject to restrictions, but only the FRD and LTR provide a 'general' equal treatment right in relation to employment and self-employment (subject to some restrictions). For the remaining categories of TCNs employment is restricted to the purpose for which the TCN has been admitted for, except for students. The restrictions are category-specific and thus vary depending on the category.

The inclusion of specific equal treatment provisions in each Directive, as well as specific restrictions, reflects a differentiation between the different categories of TCNs covered by the Directives, as well as the length of stay in the territory of a Member State. However, this differentiation does not seem coherent in all cases. The internal coherence check of the legal migration directives led to a number of suggestions for consolidating and making more coherent the non-discrimination clauses in those legal instruments. The suggestions include the following points:

- The FRD does not grant equal treatment although those covered by this status and who are allowed to work benefit from the SPD. This means that family members who are not allowed to work are not benefiting from equal treatment rights.
- Further harmonising the provisions on freedom of association and affiliation could enhance the coherence of the legal framework.
- Further harmonising the restrictions in relation to access to education and vocational training could enhance the coherence of the legal framework.
- There would be scope for reviewing and aligning the terminology used in relation to access to social security, social assistance and social protection.
- There would also be scope for harmonising and specifying the wording on working conditions across the Directives. Similarly, access to employment services could also be included in the LTRD.

III. Right to family life and family reunification

The scope and interpretation of the right to family life, as defined in the Charter interpreted in light of 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 ECHR 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. 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. 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 Directive¹⁰¹, 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. 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. 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. In a later landmark case¹⁰², 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

¹⁰¹ Judgment of the Court of Justice (CJEU) of 27 June 2006, *Parliament v Council*, C-540/03.

¹⁰² Judgment of the Court if Justice (CJEU) of 4 March 2010, *Rhimou Chakroun v Minister van Buitenlandse Zaken*, C-578/08.

conditions for family reunification must be interpreted strictly and should not undermine the objective of the Directive to promote family reunification.

The internal coherence check of the legal migration directives showed that provisions on family reunification can be found in the FRD, the RD, the BCD, the ICT, as well as in the S&RD for the category of researchers. The SD, the SPD and the SWD do not foresee any special rules on family reunification and the general regime of the FRD applies. Specific rules on family reunification in the LTRD are provided only in relation to intra-EU mobility. The FRD only sets minimum standards for family rights and applies without prejudice to more favourable provisions. Therefore, the fact that the family reunification provisions in the BCD, the ICTD and the S&RD are more generous on some aspects is not in itself a coherence issue.

All Directives concerned **define family members** in line with the categories of TCNs compulsorily covered by the FRD, namely the sponsor's spouse and the minor children of the sponsor and of his/her spouse.

Minimum period of residence: The FRD applies where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more. This does not apply for refugees. The other four Directives (RD, BCD, ICTD and S&RD) formulate a similar derogation from the FRD, not requiring any minimum period of residence for the sponsor.

Reasonable prospects of obtaining the right of permanent residence: The BCD, ICTD and S&RD formulate a similar derogation from the FRD that the sponsor is not required to have reasonable prospects of obtaining the right of permanent residence.

Integration measures/conditions: The FRD provides the option for Member States to apply conditions for integration for children aged over 12 years and arriving independently from the rest of their family before authorising entry and residence. For all other family members under the FRD, Member States may require TCN to comply with integration measures, in accordance with national law. With regard to refugees and/or family members of refugees, the integration measures may only be applied once the persons concerned have been granted family reunification. In the case of family members of highly-skilled migrants who have an EU Blue Card, of ICTs as well as of researchers under the S&RD, the integration measures can only be applied after they come to the Member State.

Procedural time limits: Under the FRD, the competent authorities of the Member State shall give the person, who has submitted the application written notification of the decision no later than after nine months. This time limit is six months under the BCD and 90 days under the ICTD and the S&RD. These differing time limits (notably the difference between the 6 months of the BCD and the 90 days in the ICTD and S&RD) may be considered an incoherence.

Family members' access to the labour market: Under the FRD, Member States may for the first 12 months of residence restrict the family members' access to the labour market. By way of derogation from the FRD, the BCD, the ICTD and the S&RD do not foresee any time limit in respect of access to the labour market. The S&RD allows, however, restricting access to the labour market in exceptional circumstances such as particularly high levels of unemployment. On this aspect, the S&RD is incoherent with BCD and ICTD.

In conclusion, the current EU legal migration acquis fully respects the right to family life as set out in Article 7 of the Charter and Article 8 ECHR. It even goes beyond the minimum requirements of ECtHR case law. Nevertheless there would be scope for improvements: The absence of more favourable family reunification rules for holders of LTR status (the most stable and "integration-oriented" status) may be considered as incoherent compared to other Directives. A more consistent approach on procedural time limits and family member's access

to the labour market would also contribute to legal clarity and coherence. Moreover (as highlighted in the context of external coherence with the asylum *acquis*), given the approximation of refugee status and subsidiary protection status done within the asylum *acquis* in the last years, the question arises whether it would be appropriate to abandon the currently existing difference in treatment in relation to family reunification.

IV. Free movement within the EU territory

Another substantial difference between EU citizens and TCNs concerns their intra-EU mobility rights.

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 directly impact on the situation of 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.

According to the Schengen Convention, third-country nationals who are in possession of a valid travel document and a residence permit or a long-stay visa issued by a Member State applying the Schengen *acquis* in full are allowed to enter into and move freely within the territory of the Member States applying the Schengen *acquis* in full, for a period up to 90 days in any 180 days period. This "**Schengen mobility**" does not provide for a right to work in other MS.

Provisions on **intra-EU mobility** which go beyond mere "Schengen mobility" can be found in the LTR, the BCD, the ICT as well as in the S&RD. Looking at the mobility provisions in these Directives, it is necessary to conceptually distinguish **two types** of intra-EU mobility: whilst in LTR and BCD the objective of mobility is to move to another MS and to settle there/to find a new job there, the purpose of mobility under ICT and S&RD is rather to provide for temporary mobility to other MS. Many of the differences outlined and discussed in the internal coherence check (differing prior residence requirement, differing periods of authorised mobility, differing procedural and substantive requirements) can be explained by this fact.

The Treaty and the Charter confer on all EU citizens (and their family members) a fundamental right to move and reside freely within the European Union. This fundamental right - and all the provisions of EU law adopted to give it effect - recognises the privileged position of EU citizens as core stakeholders of the European Union. Unlike for intra-EU mobility of TCNs, the right of EU citizens to move and reside freely is one of the elements of EU citizenship.

The differences in treatment between EU citizens and TCNs in relation to mobility rights does not give rise to a discrimination nor to a coherence issue, because EU law does not preclude different treatment between mobile EU citizens and TCNs and, in any case the freedom of movement of EU citizens pursues a different set of objectives, compared to intra-EU mobility for third-country nationals that is based on secondary legislation reflecting Article 79(2)(b) TFEU, which calls to *define the conditions governing freedom and movement and of residence in other Member States*, steered by the policy objective set out in the 1999 Tampere Conclusions to ensure fair treatment of third country nationals and to gradually – depending on the length of stay – approximate their legal status to that of Member States' nationals.

3. Conclusions

Third-country nationals who reside in the EU may invoke fundamental and human rights guarantees in various domains. However already at primary law level, a difference is made between EU citizens and third-country nationals. The Charter and the ECHR give guidance on

the possibilities and limits for legitimate differentiation of migrant's rights as opposed to citizen's rights. The scope for differentiated treatment always depends on the nature of the rights at stake and the situation of the individual.

Article 20 of the Charter, enshrining the principle of equality before the law, is an important benchmark in this context: it precludes comparable situations from being treated differently, and different situations from being treated in the same way unless the treatment is objectively justified. The practical importance of secondary legislation is very high, since concrete provisions in legislation must translate fundamental rights principles into the realities of everyday life.

The inclusion of specific equal treatment provisions in the legal migration Directives, as well as specific restrictions, reflect a differentiation between the different categories of TCNs covered by the Directives, as well as the length of stay in the territory of a Member State. The differentiation may be justified in many cases, but it does not seem justified in all cases. The internal coherence check of the legal migration directives led to a number of suggestions for consolidating and making more coherent the non-discrimination clauses in the legal migration directives.

The current EU legal migration *acquis* fully respects the right to family life as set out in Article 7 of the Charter and Article 8 ECHR. It even goes beyond the minimum requirements of ECtHR case law. Nevertheless there would be scope for improvements: The absence of more favourable family reunification rules for holders of LTR status (the most stable and "integration-oriented" status) may be considered as incoherent compared to other Directives and a more consistent approach on procedural time limits and family member's access to the labour market would also contribute to legal clarity and coherence.

The differences in treatment between EU citizens and TCNs in relation to intra-EU mobility rights does not give rise to discriminations nor to coherence issues, because discriminations on the basis of nationality between EU citizens and TCN are not prohibited and, in any case, 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 rights derived from secondary legislation adopted under Article 79(2)(b) TFEU. This being said, the policy objective set out in the 1999 Tampere Conclusions to ensure fair treatment of third country nationals and to gradually – depending on the length of stay - approximate their legal status to that of Member States' nationals remain valid and relevant.

2.6. Employment

This section examines the interaction between the EU Legal migration Directives and the EU policies on employment, social security coordination, posted workers, temporary agency, job-matching, undeclared work, and how they contribute to the effective management of legal migration.

2.6.1. EU instruments in the field of employment policy¹⁰³

The interactions between EU instruments in the field of employment policy and legal migration Directives take place when third-country nationals are residing in the EU – as employment policy concerns people residing in the EU. Therefore in this sub-section the first phase of migration (i.e. the pre-migration phase) is not analysed – however, it is covered in the sub-sections related to job matching or to recognition of professional qualifications. Regarding the phase of intra-EU mobility of third-country nationals, it is partly covered below but more extensively in the sub-sections related to coordination of social security, posted workers, job matching and recognition of professional qualifications.

Given the relevance of employment in the overall integration process, there are obvious links between this sub-section and the section on the interaction between the EU legal migration *acquis* and the integration policy (*see above 2.1*).

1. Issue definition

Third-country nationals are considerably less active on the labour market than other groups: in 2016, they were on average 9.2 pps less likely to be economically active than host country nationals (68.6% versus 77.8%), with a gap exceeding 15 pps in BE, FI, FR, DE, NL and HR. The inactivity gap is particularly high when comparing native and third-country national women – about 15 pp on EU-average and more than 25 pps in BE, FI, FR, NL and DE.

Combined with higher unemployment rates, these lower participation rates translate into lower employment rates among third-country nationals than among host country nationals (56.5% versus 71.7%) with a gap exceeding 20 pps in AT, DE, HR, BE, FI, NL and SE. This situation worsened with the economic crisis starting in 2009 although it had been unfavourable for a longer period of time¹⁰⁴.

Labour market outcomes of migrants are influenced by many factors, in particular their individual characteristics (age, gender, education level, professional experience, proficiency in host-country language). Lower educational attainment and literacy may for instance explain why in many Member States they have lower employment and higher unemployment rates; yet even when accounting for such differences in individual characteristics, there remains a gap in the probability of being employed. Part of this issue can be related to discrimination practices or other unobserved characteristics (for instance the country where the highest educational attainment was achieved, professional experience, original reason for migration, family patterns, etc.).

In addition to the overall pattern in terms of labour market participation, third-country nationals residing in the EU are also affected by lower quality of employment, characterised by a higher proportion in low-skilled and low paid occupation and by higher incidence of

¹⁰³ TFEU provides that Member States are to regard their economic policies and promoting employment as a matter of common concern and shall coordinate their action within the Council.

¹⁰⁴ Grubanov-Boskovic, S., Natale, F., Scipioni, M., *Patterns of Immigrants' Integration in European Labour Markets: What do Employment Rate Gaps Between Natives and Immigrants Tell us?* (2017).

over-qualification, in-work-poverty and non-standard work contracts such as temporary contracts¹⁰⁵.

2. Interaction with the legal migration *acquis*

The analysis below is focused on:

- a) whether third-country nationals are covered by the various EU instruments in the field of employment policy (or if they are excluded);
- b) whether the various EU instruments in the field of employment policy include measures to target the specific needs and often unfavourable labour market situation of third-country nationals in the EU, as described above.

I. Coordination of EU employment policies: general framework

The aim of the European employment strategy is the creation of more and better jobs throughout the EU. It is part of the Europe 2020 strategy and is implemented through the European Semester. The Europe 2020 Strategy specifically identifies better integration of migrants as contributing towards reaching the 75% headline employment target of the population aged 20-64.

Since 2011, country-specific recommendations to improve the integration of non-EU migrants to the labour market were issued to a number of Member States, referring to the labour market integration of "people with a migrant background". In the 2017 Semester, three Member States received a migrant-specific CSR (BE, AT, FR) and in addition, integration was identified as a challenge in recitals and country reports of other Member States (including DE, DK, IT, FI, NL, SE).

The Employment guidelines¹⁰⁶ underpin the Europe 2020 strategy and were recently updated to take into account the European Pillar of Social Rights and its 20 general principles. While all the guidelines are relevant, some can be highlighted to be of particular relevance for third-country nationals given their situation as described in the issues section, as follows:

- *Guideline 6: Enhancing labour supply: access to employment, skills and competences*, especially the call for Member States, in cooperation with social partners, to promote productivity and employability, to tackle high unemployment and inactivity and continue to address youth unemployment and the high rates of young people not in education, employment or training (NEETs), to eliminate the barriers to participation and career progression to ensure gender equality and increased labour market participation of women.
- *Guideline 7: Enhancing the functioning of labour markets and the effectiveness of social dialogue*, which calls for reducing and preventing segmentation within labour markets and foster the transition towards open-ended forms of employment; Employment relationships that lead to precarious working conditions should be prevented, including by prohibiting the abuse of atypical contracts.
- *Guideline 8: Promoting equal opportunities for all, fostering social inclusion and combatting poverty*. Member States should promote inclusive labour markets, open to all, by putting in place effective measures to promote equal opportunities for under-represented groups in the labour market. They should ensure equal treatment regarding employment,

¹⁰⁵ Eurostat, Migrants in Europe - A statistical portrait of the first and second generation and the Eurostat portal on integration indicator, (2011); Eurostat Portal, <https://ec.europa.eu/eurostat/web/migrant-integration/data/database>; OECD and EU, Indicators of Immigrant Integration 2018: Settling In, (2018).

¹⁰⁶ COM(2017) 677 final of 22.11.2017. Proposal for a Council Decision on guidelines for the employment policies of the member states.

social protection, education and access to goods and services, regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

In conclusion, there is an overall coherence between the EU framework of coordination of employment policies and the EU legal acquis in the field of legal migration. Indeed TCNs are covered by EU coordination policies in the field of employment, in so far as they are not excluded:

- this framework covers everyone (including those that are economically inactive and should be supported/incentivised to participate to the labour market);
- it would particularly benefit third-country nationals whose outcomes are less favourable than for nationals;
- and because it contains specific references to the need to improve labour utilisation of third-country nationals in the EU and that adopted recommendations to some MS referred specifically to the need to improve labour market situation of people with a migrant background (in particular third-country nationals).

II. Other instruments of coordination of EU employment policies

In addition to the general framework described above, some EU-wide instruments have been designed and adopted over the last few years to address the needs of specific groups such as unemployed youth (Youth Guarantee Council Recommendation and related initiatives), long-term unemployed (Council recommendation) or those with a low level of education or skills (so called Upskilling Pathways Council Recommendation). These initiatives have been designed as soft policy measures, through recommendation to the Member States, coordination of the measures, joint work of benchmarking/monitoring and often supported by EU funding instruments. These three initiatives are relevant for the analysis here given the large share/overrepresentation of third-country nationals among the target groups (youth unemployed, long-term unemployed, adults without sufficient education/skills).

a) The **Youth Guarantee** is a commitment by all Member States to ensure that all young people under the age of 25 years receive a good quality offer of employment, continued education, apprenticeship or traineeship within a period of four months of becoming unemployed or leaving formal education. All EU countries have committed to the implementation of the Youth Guarantee in a Council Recommendation of April 2013¹⁰⁷.

By definition it targets all young people (under the age of 25 years) so there is no distinction by nationality and young third-country nationals residing in the EU are covered.

Moreover, some provisions of the Council recommendation go beyond and ask Member States to "*develop effective outreach strategies towards young people, including information and awareness campaigns, with a view to catchment and registration with employment services, focusing on young vulnerable people facing multiple barriers (such as social exclusion, poverty or discrimination) and NEETs, and taking into consideration their diverse backgrounds (due in particular to poverty, disability, low educational attainment or ethnic minority/ migrant background)*".

Three years on from when the Youth Guarantee took off, youth unemployment has dropped from a peak of 23.7% in 2013 to 18.7% in 2016. Even if such trends should be seen in the

¹⁰⁷ Council Recommendations of 22 April 2013 on establishing a Youth Guarantee, p. 1.

context of cyclical factors, the European Commission's assessment is that 'the Youth Guarantee accelerates progress by increasing opportunities for young people'¹⁰⁸.

In terms of young third-country nationals, their unemployment rate has decreased from 37.1% in 2013 to 29.7% in 2016 and the gap with host-country nationals has reduced from 14.0 pps to 11.4 pps in 2016¹⁰⁹. Nevertheless, youth unemployment among third-country nationals remains extremely high.

b) Addressing **long-term unemployment** is a key employment challenge of the Commission's jobs and growth strategy. On 15 February 2016 the Council adopted the Commission's Proposal for a Recommendation on the integration of the long-term unemployed in the labour market¹¹⁰.

This Council Recommendation puts forward three key steps:

- encouraging the registration of long-term unemployed with an employment service;
- providing each registered long-term unemployed with an individual in-depth assessment to identify their needs and potential at the very latest at 18 months of unemployment;
- offering a job integration agreement to all registered long-term unemployed at the very latest at 18 months.

Similarly to the Youth Guarantee, the Recommendation on long-term unemployment does cover any people in need without regard to his/her nationality. This is important given that third-country nationals represent around 10% of all persons unemployed in the EU and around the same proportion of those being long-term unemployed (i.e. more than 12 months).

However, even if recital (4) recognizes that *among the most vulnerable to long-term unemployment are people with low skills or qualifications, third-country nationals, persons with disabilities and disadvantaged minorities such as the Roma (...)*, and recital (18) refers to the need for individualised approach and to guide long-term unemployed persons towards "support services sufficiently tailored to individual needs, such as (...) migrant integration (...) aimed at addressing barriers to work and empowering those persons to reach clear goals leading to employment", the recommendation did not contain specific provisions to target the needs of third-country nationals.

c) In May 2017, the Council adopted the revision of the European Qualifications Framework¹¹¹ (EQF). The EQF is a tool to help education and training authorities and providers to determine the level and content of learning acquired by an individual. Its purpose is to improve the transparency, comparability and portability of people's skills and qualifications. On top of that, and targeted at the needs of third-country nationals, a (revised) qualifications framework was needed in order to better monitor the acquired skills and qualifications abroad. The revision of the European Qualifications Framework improves the understanding of qualifications acquired abroad, while facilitating the integration of migrants into the EU labour market. Having a better understanding of third-country qualifications supports the European Agenda on Migration. The growing migration flows to and from the

¹⁰⁸ European Commission, Employment, Social Affairs and Inclusion: The Youth Guarantee.

¹⁰⁹ Eurostat, [Ifsa_urgan]. Unemployment rates by sex, age and citizenship (%).

¹¹⁰ Council Recommendation of 15 February 2016 on the integration of the long-term unemployed into the labour market.

¹¹¹ Council Recommendation of 22 May 2017 on the European Qualifications Framework for lifelong learning and repealing the Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning.

European Union highlight the need for a better understanding of skills and qualifications awarded outside the EU, as well as the need to foster integration of migrants into EU labour markets as also underlined in the EU Action Plan on the Integration of third-country nationals¹¹².

d) In June 2016, the Commission proposed the setting up of a "Skills Guarantee" to address the challenge of the large number of adults not having the level of education or skills to function in the EU labour markets. The resulting initiative, now called "**Upskilling Pathways**"¹¹³ was adopted by the Council on 19 December 2016.

It aims to help adults acquire a minimum level of literacy, numeracy and digital skills and/or acquire a broader set of skills by progressing towards an upper secondary qualification or equivalent (level 3 or 4 in the European Qualifications Framework (EQF) depending on national circumstances).

The Upskilling Pathways targets all adults who have a low level of skills, e.g. those without upper secondary education (and who are not eligible for Youth Guarantee support). It is very relevant given the fact that third-country nationals in the EU are largely over-represented among those without upper secondary education: in 2016, 42.8% of third-country nationals in the EU (aged 25-54) had not finished upper secondary school compared to only 19.0% among host country nationals.

A number of provisions in the 'Upskilling Pathways' Recommendation is specifically targeting the needs of third-country nationals; in particular several specific recitals address the over-representation of third-country nationals in the target group or refer to the Common Basic Principles for Immigrant Integration Policy in the EU adopted in 2004. Moreover, in the section of the provisions on "A tailored and flexible learning offer", it is proposed that Member States include for "migrants from third countries (...) opportunities for language learning and preparation for training".

Finally the 'Upskilling Pathways' Recommendation suggest to "identify priority target groups for the delivery of upskilling pathways at national level. In doing so, take also into account the gender, diversity and various sub-groups in the targeted population". Nevertheless Member States are invited to take into account "national circumstances, available resources and existing national strategies" and it is therefore currently unclear what will be the impact on Member States' approach and whether they will sufficiently target the specific situation of third-country nationals.

e) As a **conclusion regarding the inclusion of third-country nationals in the three group-specific instruments** of coordination of EU employment policies covered above, there is coherent approach with the Directives on legal migration and in particular the overall objective of fair treatment contribution to integration and the contribution to competitiveness and growth. Not only are third-country nationals residing in the EU are covered as part of the target group of each of these initiatives, but there are also some specific positive provisions to address their specific needs, although it is less developed in the Council Recommendation on long-term unemployed.

III. European Social Fund

In addition to the tool of coordination covered above, the main EU instrument in the field of employment policies is the European Social Fund. Under the current Multi-Annual Financial

¹¹² COM(2016) 377 final of 7.6.2018. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Action Plan on the integration of third country nationals.

¹¹³ Council Recommendation of 19 December 2016 on upskilling pathways: new opportunities for adults.

Framework, its legal basis is defined by the Regulation¹¹⁴ (EU) No 1304/2013 of 17 December 2013 and its global budget is around € 86 billion.

The main mission of the ESF is to: *promote high levels of employment and job quality, improve access to the labour market, support the geographical and occupational mobility of workers and facilitate their adaptation to industrial change and to changes in production systems needed for sustainable developments, encourage a high level of education and training for all and support the transition between education and employment for young people, combat poverty, enhance social inclusion, and promote gender equality, non-discrimination and equal opportunities, thereby contributing to the priorities of the Union as regards strengthening economic, social and territorial cohesion.*

It is clear from the Regulation that the ESF aims at benefiting all persons in need in the EU, including disadvantaged people such as the long-term unemployed, people with disabilities, migrants, ethnic minorities, marginalised communities and people of all ages facing poverty and social exclusion.

Moreover, the Regulation encourages Member states to "report on ESF-funded initiatives in the national social reports annexed to their national reform programmes, in particular as regards marginalised communities, such as the Roma and migrants".

Nevertheless, taking into account the mission of the ESF as set out in the Treaty, the support by the ESF must always aim for, even if indirectly, the integration of the beneficiaries into the labour market. To this purpose, third-country nationals can only be supported by the ESF provided they are legally able to participate in the labour market.

Given that under some of the Legal Migration Directives, the access to the labour market by third-country nationals may be limited, this may restrict their eligibility to the support from ESF-funded activities that could promote their employability.

This applies in particular to third-country nationals under the Family Reunification Directive given that their access to the labour market may be restricted, either because their access to employment is granted in the same way as the sponsor or because Member States may decide to limit the access during the first 12 months (labour market test). Moreover this may also apply to other categories of third-country nationals under other EU Directives whose labour market may be restricted (in particular through labour market test) in some cases.

In **conclusion**, while the ESF can and does support financially some measures for the employability of third-country nationals residing in the EU, the eligibility of those without a labour market access may be limited, therefore constituting a potential lack of coherence between the EU legal migration Directives and the EU (funding) instruments for employment policies.

IV. Impact of specific provisions in the EU acquis on legal migration (access to the labour market; right to intra-EU mobility) that may restrict the impact of EU instruments in the field of employment policies

In addition to the coverage of (and specific measures for) third-country nationals' employment under the EU instruments in the field of employment policy, it is also relevant to look at to what extent some provisions in the Legal migration acquis are consistent with the overall aim of EU employment policy in particular the promotion of:

¹¹⁴ Regulation (EU) No 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006.

- a high level of employment, based on inclusive labour markets, open to all, 'with equal opportunities for under-represented groups in the labour market';
- the use of the right to free movement of workers between EU countries and the promotion of the mobility of learners and workers 'with the aim of enhancing employability skills and exploiting the full potential of the European labour market'.

Two sets of provisions in the EU acquis on legal migration are likely to limit the impact of EU instruments in the field of employment policies because of potentially restricted rights granted to certain categories of third-country nationals (under some EU Directives):

- those related to the right to access the labour market;
- and those related to the right to intra-EU mobility for legally residing third-country nationals.

The impact of these provisions can be summarised as follows.

a) In terms of labour market access

Some restrictions to the labour market access for third-country nationals exist in several EU Directives on legal migration. They often take the form of the possibility to 'apply a labour market test' to newcomers (i.e. to verify if a given position could not be filled by an EU national or an already residing third-country national) for instance in the Students Directive.

Under the Family reunification Directive, the access to the labour market may also be restricted by the fact that it is granted in the same way as the sponsor. Moreover, even when there is an access to the labour market, Member States may limit it (possibility to 'apply a labour market test') during the first 12 months.

Finally, in some Directives, the access to the labour market is limited to the original job position for which the third-country national was originally issued a work permit (ICT Directive) or the right to change job can be limited (to only one time in the case of the Seasonal Workers Directive).

All in all, it implies that the objective of the EU framework of coordination of employment policy of promoting employment for all and mobility between jobs and occupations may be partly hampered by the restrictive right to access the labour market for third-country nationals that do reside (or "stay" in the case of Seasonal workers) legally in the EU.

b) In terms of intra-EU mobility

Rights to reside and work in another Member State than the one where the residence permit was granted are rather limited (and/or made conditional) in the EU acquis on legal migration.

Some Directives (Family Reunification, Single permit) do not grant any right to third-country nationals to be mobile between EU Member States while others foresee this possibility but with some restrictions or conditions that need to apply (Long Term residence, Researchers, Blue Card).

Overall, it appears that mobility of legally residing third-country nationals is a relatively limited phenomenon overall¹¹⁵, despite the fact that migrants are generally more likely to be mobile than the rest of the population, due to both their characteristics (in terms of age, skills and possibly looser tie to the country of residence) and their previous migration experience.

¹¹⁵ Poeschel, F., *Raising the Mobility of Third-Country Nationals in the EU. Effects from Naturalisation and Long-Term Resident Status*, (2016); European Migration Network (EMN), Synthesis Report - *Intra-EU Mobility of Third-Country Nationals*, (2013); European Policy Centre (EPC), Yves Pascoau, *Intra-EU Mobility of Third-Country Nationals - State of Play and Prospects*, (2013).

In a specific paper, the European Policy Centre¹¹⁶ had identified the restrictive rights to intra-EU mobility for third-country nationals as hindering the economic potential of intra-EU mobility of workers:

Improving intra-EU mobility to legally residing migrant workers would help to address a series of current shortcomings. Firstly, it would constitute an appropriate response to the asymmetrical effects of the crisis, as the reallocation of already residing labour migrants between states would allow for the absorption of the shocks resulting from the crisis. Secondly, improving migrants' mobility rules within the EU, which currently offer few possibilities to exercise intra-EU mobility, would constitute a step further in accomplishing the single European labour market. Currently, the number of migrant workers moving to another state is rather low. According to the EU-Labour Force survey, in the overall pool of working-age foreigners who have arrived from another EU member state since less than one year, third country nationals represent 7% on average in 2004-2010 and 10% for the last year available (2011). One explanation for these rather low figures may reside, amongst other reasons, in the current rules which are not very liberal in this field. Finally, improving intra-EU mobility would contribute to making the EU more attractive for migrant workers. This is crucial in the short and the long-term with forthcoming labour demand in consideration.

In conclusion, while there may be legitimate reasons for Member States to impose restrictions in the rights granted to third-country nationals to be mobile between EU Member States, the current state of play of the provisions across EU Directives on legal migration seem to point to inconsistencies with the overall aim of promoting mobility across EU labour markets and further accomplishing the single European labour market. It is particular problematic in the current context of asymmetries implied by the Eurozone crisis as an Economic and Monetary Unions requires a strong capacity the labour factor to be strongly mobile between EU Member States¹¹⁷.

3. Conclusions

From the analysis above, one can conclude that there is overall coherence between the EU instruments for employment policies and the EU legal acquis in the field of legal migration.

In particular general EU instruments for employment policies (the European employment strategy and the ESF) and specific ones (such as the Youth Guarantee, etc.) do cover third-country nationals as they can and do benefit from these instruments similarly to EU nationals. Moreover, some of these tools include specific support measures that target the specific needs of third-country nationals, given that they are, due to a series of factors, more likely to face unfavourable employment outcomes (unemployment and inactivity, in-work poverty, non-standard, over-qualification).

However, there are inconsistencies when certain categories of TCNs who have more limited or no rights to work or to intra-EU mobility are not entitled to work or to move within the EU.

116 European Policy Centre (EPC), Yves Pascouau, *Intra-EU Mobility of Third-Country Nationals - State of Play and Prospects*, (2013).

117 European Commission, DG for Employment, Social Affairs and Inclusion, *Employment and Social Developments in Europe 2013, Chapter 5: Convergence and Divergence in EMU - Employment and Social Aspects*, (2014); Jauer, J., Liebig, T., Martin, J. P., and Puhani, P., *Migration as an Adjustment Mechanism in the Crisis? A Comparison of Europe and the United States* (2014).

2.6.2. Social security

1. Issue definition

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 under Regulation 883/2004 and its implementing Regulation 987/2009. These Regulations lay down the rules for the coordination of the different social security schemes in the Member States in cross-border situations. In addition, Regulation 1231/2010 extends 883/2004 to third country nationals legally staying in the EU and who are in a cross- border situation.

2. Interaction with the legal migration acquis

The EU rules on the coordination of social security support the management of legal migration as they serve as a point of reference for defining the branches of social security covered by equal treatment provisions in the EU legal migration Directives. All of the legal migration Directives 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. 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.

The reference to this list of benefits¹¹⁸ - for reasons of legal clarity and in order to avoid lengthy self-standing definitions - entails also the application of the existing and future jurisprudence developed by the CJEU as regards definition and scope of the different benefits. This is relevant in particular with regard to whether a benefit can be considered social security or social assistance. As a consequence, in practice, the line between social security benefits and social assistance (an issue of high relevance for migrants) will be fixed in cases which are unrelated to migration law and focus primarily on coordination of social security.

In addition, several legal migration Directives introduce restrictions to the equal treatment provisions, (in particular as regards unemployment benefits and family benefits) linking their enjoyment to a minimum length of stay. Member States are free to apply these derogations, as long as the situation of the migrant worker is limited to one Member State.

These derogations can, however, not be used by Member States in cross-border situations, because Regulation 1231/2010 extending Regulation 883/2004 to third country nationals, renders applicable the equality of treatment obligation of Article 4 of Regulation 883/2004 also to third country nationals. Therefore in some legal migration Directives access to social security benefits can be limited, while Regulation 1231/2010 gives full unlimited access as in Regulation 883/2004 but only for those in cross-border situations

There are therefore 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.

¹¹⁸ It should be noted that each Member State is free to determine the details of its own social security system, including which benefits are provided, the conditions for eligibility, how these benefits are calculated and what contributions should be paid.

a) 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'.¹¹⁹ 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.

Several legal migration Directives introduce restrictions to these equal treatment provisions:

The Single Permit Directive (2011/98/EU) 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 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).

While the Students and Researchers (recast) Directive 2016/801/EU (to be implemented by 23 May 2018) extends equal treatment provisions to students, trainees, volunteers and au pairs, it will allow 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 will also apply. The current Directive 2004/114/EC on students does not contain equal treatment provisions while Directive 2005/71/EC on researchers sets out equal treatment for researchers and does not allow the introduction of exceptions.

The Seasonal Workers (2014/36/EU) Directive allows Member States to exclude equal treatment for social security with respect to family benefits and unemployment benefits.

In the ICT Directive (2014/66/EU), 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. The ICT Directive also allows Member States to restrict the right to equal treatment with regard to family benefits to ICTs who have been authorised to reside and work in the territory of a Member State for a period not exceeding nine months.

¹¹⁹ On the interpretation of this exception, see Judgment of the Court of Justice (CJEU) of 24 April 2012, *Servet Kamberaj v Istituto per l' Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others*, C-571/10.

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.

Another aspect to be considered in the interaction between the legal migration directives and social security coordination rules in this phase is the role of bilateral agreements. More favourable conditions for social security benefits for third country nationals could be established by bilateral agreements.

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 and not covered by the ICT Directive.

b) Moving from one Member State to another

Regulation 1231/2010 extended the coordination of social security rules to third country nationals who are legally resident in one Member State move from one country to another, or are 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). 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 an additional Member States.¹²⁰

As stated above, the restrictions to social security benefits permitted under the legal migration Directives are not applicable in cross-border situations, because Regulation 1231/2010 extending Regulation 883/2004 to third country nationals, render applicable the equality of treatment obligation of Article 4 of Regulation 883/2004 also to third country nationals. ICTs are however in a particular situation because Directive 2014/66/EU sets out that in the event of intra-EU mobility, Regulation 1231/2010 would not be applicable if bilateral agreements exist ensuring that the ICT is covered by the national law of the country of origin. There is therefore scope for inconsistencies between the two legal frameworks when a third country national is in a cross-border situation.

c) 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. In order to define the scope of the obligation, the legal migration Directives refer to statutory old age, invalidity and pensions based on the third country national previous employment and acquired in accordance with the legislation referred to in Article 3 of Regulation 883/2004. This means that national legislation regulating old age, invalidity and death pensions is applicable to third country nationals, including the conditions and rates applicable to nationals when they move to a third country. As the portability of pensions is expressed as an equal treatment right, this obligation

¹²⁰ Judgment of the Court of Justice (CJEU) of 18 November 2010, *Alketa Xhymshti v Bundesagentur für Arbeit – Familienkasse Lörrach*, C-247/09.

only exists insofar as the Member State permits their own citizens to transfer their pensions to a third country.

Recital 24 of the Single Permit Directive states that the Directive does not grant rights in situations which lie “outside the scope of Union law”. This is not contrary to the provisions in the legal migration directives stipulating the export of statutory pensions, including survival pensions which would be paid to third country nationals (family members) residing in a third country.

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) are not covered by the EU *acquis* on portability of pensions.

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.

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 (Regulation 883/2004/EC), 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 Member States. 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 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.

The revised measures should not result in the extension or reduction of rights of third country nationals compared with EU citizens in an analogous situation.

3. Conclusions

There is a significant complementarity between rules on the coordination of social security and the legal migration Directives but also a number of potential inconsistencies can be observed. The EU rules on the coordination of social security set out under Regulation 883/2004 and implementing Regulation 987/2009 complement 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. In addition since the legal migration Directives establish the minimum social security benefits that Member States should grant to third country nationals, more favourable conditions can be established by bilateral agreements or national legislation.

However as social security coordination rules apply in cross-border situations and the legal migration framework regulates primarily situations limited to one Member State there can be some inconsistencies between the two legal regimes. As stated above, in practice the distinction between the classification of what is a social security benefit or social assistance benefit (an issue of high relevance for migrants) will be fixed in cases which are unrelated to migration law and focused primarily on coordination of social security.

In addition, in relation to cross-border situations, the adoption of Regulation 859/2003 (replaced by Regulation 1231/2010) extending 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, rendered inapplicable the restrictions to equal treatment allowed in the legal migration Directives. This is relevant, in particular, in the case of family benefits if the third country national works in one Member States and his/her family resides in a second Member State. In this case even if the Member State where the work is carried out has established a limitation to family benefits, they would be payable for the children that reside in the second Member State. In the case of ICTs, further complications can also arise in the practical application of social security rules in cross-border situations due to the fact that in the ICT Directive, bilateral agreements and national law take precedent over Regulation 1231/2010.

Some inconsistencies may also derive from the fact that certain categories of third-country national workers are not covered by the EU legal migration Directives and from the various restrictions to equal treatment allowed in the Directives. While such restrictions may be justified in certain circumstances, the differences in the period of stay could be aligned. This could facilitate the application of social security rules and its coordination in cross-border situations.

Finally, another area of interaction is the portability of statutory pensions for third-country nationals who have worked in the EU which 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 bilateral agreements to this effect or it is established by national law only with respect to third country nationals.

2.6.3. Posting of workers

1. Issue definition

The free movement of services and persons in the internal market require EU common rules, notably providing the definition of posted workers for service provision in the internal market and establishing mandatory rules regarding the terms and conditions of employment to be applied to these workers.

The relevant Directive, the Posted Workers Directive (PWD - 96/71/EC), dates of 1996 and was amended in 2018 by Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018. It applies to workers who carry out a service in the territory of a Member State other than the State in which they normally work. These workers are different from:

- EU mobile workers, since 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;
- Posted workers from third countries or from companies established outside the European Union.

The PWD covers three types of postings: 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; posting through hiring a worker through a temporary work agency established in another Member State.

The rationale for this instrument was to establish a balance between the objectives of promoting and facilitating the cross-border provision of services, while providing protection to the posted workers and promoting the levelling of the playing field for 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 (listed in the Directive). The non-listed aspects of the employment relationship remain under the legislation of the sending Member State. For these aspects, there is no time limit for the posting in the Directive.

Regarding social security, based on Regulation 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).

Given that the PWD is nationality-neutral, 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. The PWD Directive does not regulate nor affect rules on visas and other immigration requirements, but there has been some ECJ case-law interpreting Treaty provisions on the freedom to provide services that tried to clarify the relation between the two.

In the judgments in cases Vander Elst C-43/93 and Commission v Luxembourg C-445/03 the Court took the view that third-country workers who were regularly and habitually employed by a service provider established in a Member State (country of origin) could be posted to another Member State (host country) without being subject in the latter State to administrative formalities, such as the obligation to obtain a work permit.

Some ambiguities of interpretation nevertheless exist, in particular on whether the second Member State may still impose a visa (or residence permit) requirement in case of long-term (more than 90 days) postings.

In that regard, par 41 of the judgement in case C-244/04 sets out that: "*.....a requirement that the service provider furnishes a simple prior declaration certifying that the situation of the workers concerned is lawful, particularly in the light of the requirements of residence, work visas and social security cover in the Member State where that provider employs them, would give the national authorities, in a less restrictive but as effective a manner as checks in advance of posting, a guarantee that those workers' situation is lawful and that they are carrying on their main activity in the Member State where the service provider is established. Such a requirement would enable the national authorities to check that information subsequently and to take the necessary measures if those workers' situation was not regular. Such a requirement could in addition take the form of a succinct communication of the documents required, particularly when the length of the posting does not allow such a check to be effectively carried out.*"

This implies that prior to long-term posting only a simple declaration may be required but that Member States may subsequently require – after long-term posting was launched - the submission of an application for a "Van-der Elst residence permit (or long-stay visa)" – which then should be issued in a facilitated/speedy procedure. Since the practical application of van-der Elst case law varies significantly in Member States¹²¹, it may be helpful to provide further harmonised interpretative steer on this issue.

¹²¹ Mazzeschi, M., *Mobility of Non-EU Workers within EU – Implementing Vander Elst*, (Abstract of the article), (2014).

While the PWD may apply also to holders of legal migration permits, such as for instance Blue Card holders when they provide services within the meaning of the PWD, such accumulation of statuses is not per se a problem: there is rather a complementarity between the relevant legal migration Directives and the PWD.

Therefore there are limited interactions with the legal migration acquis. The interactions are primarily related to two relevant Directives:

(1) Single Permit Directive (2011/98/EU):

Due to the nature of the posting, third-country nationals are 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. Therefore the Single Permit Directive is not applicable in the host Member State and they are not covered by the relevant 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, and there is no evidence of relevant differences in treatment.

(2) Intra-Corporate Transfers/ICT (2014/66/EU):

The Directive applies to non-EU citizens posted from a company based outside the EU – their employment contract being with that company – to one or more subsidiaries based in the EU. Similarly to intra-EU posted workers, they do not integrate the labour market of the host Member State, but the scope of the ICT Directive is much narrower (only highly-skilled, specific profiles of workers) and limited (there are time-limits for postings) than the PWD.

However, 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 established in a Member State*”, the ICT Directive refers to the PWD in relation to the working conditions, so to avoid that foreign companies would have a competitive advantage in the provision of services compared to EU-based ones.

For non-EU workers posted within the same company from outside the EU to have at least the same core rights as intra-EU posted workers, the ICT Directive aligns the equal treatment provision with the PWD regime (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.

To ensure a balance between fair competition concerns and the purpose of maintaining the parallelism with the PWD, the ICT Directive has an additional provision, under admission conditions, that the remuneration granted to ICTs should not be less favourable than the remuneration granted to nationals in comparable positions in the host Member State (Art. 5(4)(b)). This provision is therefore different from the provisions of the PWD. However, if the proposal for revision of the PWD is adopted as formulated, this difference will be watered-down.

Therefore, there are no major inconsistencies to be signalled.

(3) Short-term postings/trade policy commitments:

Short-term postings of service providers from outside the EU do not fall under the scope of the ICT Directive, contrary to short-term intra-EU postings which are covered by the PWD. Therefore they are not covered by harmonised EU legislation. This is in particular the case of two categories of workers covered by GATS Mode 4 provisions: contractual service providers and independent professionals (this is further analysed in section "trade in services" of Annex 6).

Recent developments

The PWD has been object of several controversies, with a background of an important increase of intra-EU postings (45% from 2010 to 2014) and increase of concerns about the unfair practices/levelling of the playing field, as well as risks of abuse and fraud. Therefore, following calls to revise the Directive, notably by the EP and some Member States, the Commission provided:

- The Enforcement Directive 2014/67/EC, aiming at strengthening the practical application of the PWD by addressing issues related for instance to fraud and circumvention of rules; and
- A proposal for a more fundamental revision of the PWD (COM(2016)128).

The main objective of the amendment was to provide for fairer competition and respect of rights of posted workers. The amended PWD (adopted in 2018 and to be transposed by 2020) provides for the following: Remuneration will apply from day 1 of posting, so that posted workers will benefit from the same rules on remuneration as local workers of the host members. The rules on allowances are also clarified. The concept of long-term posting is introduced. This means that a worker will be considered to be posted long-term after 12 months (with the possibility of a 6 months extension subject to a justified notification by the service provider). After this period, the posted worker will be subject to nearly all aspects of the labour law of the host country. The number of potential collective agreements which may apply in member states having a system for declaring collective agreements or arbitration awards of universal application is increased. Collective agreements can be applied to posted workers not only in the construction sector, as it is so far, but in all sectors and branches. Temporary work agencies are to guarantee to posted workers the same terms and conditions which apply to temporary workers hired in the member state where the work is carried out. Cooperation on fraud and abuse in the context of posting is enhanced. For the international road transport sector, the rules would be stipulated in the forthcoming sector-specific legislation.

Overall, the new PWD is going to contribute to the alignment in what regards 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 facilitates 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 State, 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. Such business activities in other Members States are already allowed today under national law but, with the facilitation of short-term mobility, this will become more visible.

However, there is a very low risk of coherence problems with the PWD, even in case of 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 when they move for a short term mobility. The visa requirement is not regulated by the PWD, so there is no overlapping;

- such facilitation is also limited in time (to three months in total across all Member States), which limits the possibility for abuse (besides the fact that this concerns only 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).

3. Conclusions

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

- There is a difference 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 legislation (except for the general principle that undertakings in third-countries should not be given more favourable treatment than Member States undertakings set out in Article 1(4) of the PWD).

2.6.4. Temporary agency work

1. Issue definition

The Directive on Temporary Agency Work 2008/104/EC 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 key provisions cover among others aspects of working and employment conditions; information obligations; access to training; access to worker representation bodies.

2. Interaction with the legal migration acquis

The Directive on Temporary Agency Work applies to third-country nationals that are temporary agency workers, providing them a minimum level of effective protection that complements equal treatment conditions of 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, long term residents (LTRs), family members), also on the basis of national schemes (including those covered by Single Permit).

Regarding access to employment, the relevant provisions are subject to specific limitations in the case of four legal migration Directives:

The Long-Term Residents Directive is the only one which includes equal treatment in access to employment; LTRs should therefore enjoy equal treatment in access to temporary agency work. Member States may still 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. This is however not likely to be a significant issue of coherence, as such postings are not likely to be filled through temporary agencies.

In the Single Permit Directive, the rights based on the permit are limited to exercising the specific employment activity authorised 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 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 Member State has implemented the 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.

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.

Regarding worker representation, while 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.

These aspects do not seem to entail significant coherence issues between the Temporary Agency Work Directive and the legal migration Directives.

There are, however, certain coherence issues regarding the personal scope, with potential gaps related to:

- Third-country nationals who are contracted by a temporary work agency based outside of the EU; and
- Third-country nationals who are posted workers within the EU via temporary agencies, as these are excluded from the scope of the Single Permit Directive equal treatment provisions. However these cases should be covered by the Posted Workers Directive, and therefore a minimum set of employment rights assured.

3. Conclusions

There are 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. If a third-country national admitted for the purpose of work, for example under the Single Permit Directive, is employed through a temporary agency, he/she will have access to the minimum level of protection afforded to temporary agency workers by Directive 2008/104/EC, in addition to the equal treatment rights provided in the legal migration acquis.

However, there is also a potential gap in personal scope between the provisions on equal treatment of the Directive on Temporary Agency Work and the legal migration Directives, which are the cases of third-country nationals contracted by a temporary work agency based outside of the EU, and therefore not covered by EU legislation.

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

2.6.5. Job matching

1. Issue definition

Job matching can be defined as matching the qualifications of workers with those qualifications or skills required for a job. 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 below* 2.7.3). The Europe 2020 strategy aims to reach an employment target of 75% of people aged 20–64 in work by 2020. Part of Europe 2020 and implemented through the 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.

Currently, skills and job matching across borders within the EU is regulated through the EURES Regulation (EU) 2016/589. 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. While 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 CVs, 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”.

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 limited to EU nationals and therefore not available to third-country nationals who are only able to consult, like all users, available vacancies on the EURES website.

2. Interaction with the legal migration acquis

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

1) 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). In these cases, the legal migration Directives do not regulate any aspects to how such a job or job offer was obtained. 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.

2) 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).

3) 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.

3. Conclusions

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.
- During the intra-EU mobility phase, the same equal treatment provisions in the EU legal migration Directives allow third-country nationals who have the right to work in a second

(or subsequent) Member State to benefit from such services that offer for third country nationals what EURES offers for EU/EEA nationals, in line with 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 from 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.

2.6.6. Undeclared work

1. Issue definition

Undeclared work can be defined as "any paid activities that are lawful as regards their nature, but not declared to public authorities, taking into account differences in the regulatory systems of the Member States"¹²². This phenomenon, which of course concerns workers regardless of their nationality, is relevant to both legally residing and irregularly staying TCNs who engage in a legitimate work activity (e.g. in the construction or agricultural sectors), but whose pay is not declared by the employer. Most vulnerable are the illegally staying TCNs, since they may only engage in undeclared work activities, or in illicit sale of prohibited goods or services. Undeclared work is a **form of abuse** (of employment, tax, social security rules) **which however does not necessarily constitute a form of exploitation**.

To tackle **undeclared work**, in which both legally residing third-country nationals and EU nationals may be involved, in 2016¹²³ the European Commission launched the **European Platform on undeclared work** with the aim of enhancing cooperation between authorities and other actors at national and trans-national level, to ultimately improve Member States' capacity to tackle undeclared work and improve cross-border cooperation.¹²⁴

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

On 13 March 2018, the Commission presented a **proposal to establish a European Labour Authority**¹²⁵, which will take over the technical and operational tasks of a number of existing EU-level bodies in the field of employment policy, including the Platform on undeclared work.

¹²² COM(2007) 628 final of 24.10.2007. Communication from the Commission to the Council, the European Parliament, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Stepping up the fight against undeclared work.

¹²³ Established by Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work (Text with EEA relevance).

¹²⁴ Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work.

¹²⁵ COM(2018) 131 final of 13.3.2018. Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority.

2. Interaction with the legal migration acquis

The concept of **undeclared work** is explicitly referred to in four legal migration Directives. In relation to the application phase, the Blue Card Directive (Art. 8.5), the Seasonal Workers Directive (Art. 8.2), the ICT Directive (Art. 7.2), and the Students and Researchers Directive (Art. 20.2,) specify that the Member States can **reject** the applications if the employers or host entities have been “sanctioned in accordance with national law for undeclared work and /or illegal employment”.

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

The aim of these provisions – to prevent third-country nationals from working for employers who have been sanctioned for undeclared or illegal work – is consistent with the EU’s efforts to support Member States in tackling undeclared work. One coherence issue concern the fact that **third-country nationals may be reluctant to report undeclared work if they know that their permit or authorisation may be withdrawn or not renewed if the employers are sanctioned for undeclared work**¹²⁶. The SWD (Art.9.5), ICT (Art.8.6), and S&RD (Art.21.7) contain provisions that any decision to withdraw the authorisation shall take account of the specific circumstances of the case, including the interests of the third country national, and respect the principle of **proportionality**. Nevertheless, this formulation leaves sufficient discretion of the Member State, and does not guarantee third country nationals the right to continue their employment in a legitimate manner with another employer should they report such cases.

3. Conclusions

The work of the **European Platform on undeclared work** is **complementary with, and supportive of, the objectives of the EU legal migration Directives**, as the measures supported by the Platform aim to improve working conditions, promote integration in the labour market and social inclusion, including better enforcement of law within those fields, also for legally residing third-country nationals, thus helping to avoid their exploitation. However, the rules of the EU legal and irregular migration Directives that focus on withdrawing, or not renewing, permits of third-country nationals if the employer has been guilty of exploitative practices, may constitute in practice a disincentive for third country workers in vulnerable situations to report situations of abuses or exploitation. Against that background, special rules to protect third country workers who complain against their employers could be considered in order to address these potential negative consequences.

¹²⁶ On the importance of protecting persons who complain against their employers, see European Trade Union Confederation (ETUC), Platform for International Cooperation on Undocumented Migrants (PICUM) and Solidar, *Joint Comments on Expected Commission Proposals to Fight ‘Illegal’ Employment and Exploitative Working Conditions*, (2007); See also: European Parliament, Committee on Employment and Social Affairs, Report on effective labour inspections as a strategy to improve working conditions in Europe, (2013).

2.7. Education, qualifications and skills

This section examines the interaction between EU Legal migration Directives in relation to the EU policies on education, qualifications, and skills, and how they contribute to the effective management of legal migration.

2.7.1. EU (higher) education policy

1. Issue definition

In recent years EU higher education policy has experienced a drive towards increased internationalisation. Since 2011, the Modernisation Agenda for Higher Education¹²⁷ has provided strategic direction for EU and Member State activities in the area of internationalisation. A key part of this has been to support the international mobility of students, staff and researchers as a way for them to develop their experience and skills. "Mobility" in this context means mobility of both students, staff and researchers from within the EU moving outside the EU, as well as the other way round, including third-country nationals coming to the EU. The Communication "European Higher Education in the World"¹²⁸ also prioritised the promotion of international mobility of students and staff as a key element of internationalisation.

2. Interaction with the legal migration acquis

The main interlinkage between education policy and the immigration acquis lies in the relation with the provisions concerning third-country national students and researchers (Directives 2004/114 and 2005/71 and the recast EU/2016/801).

The above-mentioned Communication called for the rules on immigration of third-country nationals to support the efforts of higher education institutions to increase their international profile rather than creating obstacles to mobility. The Communication explicitly mentioned the (then proposed) recast of Directives 2005/71/EC and 2004/114/EC as an instrument that should make it easier and more attractive for non-EU national students and researchers to enter and stay in the EU.

Higher education policy should also be seen in the context of the competition for talented students and researchers and the efforts to retain them to stay in the EU having finalized studies or research. More and more the potential of international students in particular is seen to meet the needs of academia and industry, given demographic trends, insufficient local student participation in particular in the STEM fields, and increased demand for innovation in the knowledge economy¹²⁹. The "New Skills Agenda for Europe"¹³⁰ explicitly mentions the Students and Researchers recast as an instrument to make it easier to attract and retain talent.

Intra-EU mobility provisions for third-country national students are essential, for them to be able to make use of the European Higher Education Area (Bologna process). The renewed EU agenda for higher education¹³¹ puts emphasis on further facilitating the mobility of students

¹²⁷ COM(2011) 567 final of 20.9.2011. Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee of the Regions – Supporting growth and jobs – an agenda for the modernisation of Europe's higher education system.

¹²⁸ COM(2013) 499 final of 11.7.2013. Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee of the Regions – European higher education in the world.

¹²⁹ European Parliament, DG for Internal Policies, Study: Internationalisation of higher education, (2015).

¹³⁰ COM(2016) 381 final of 10.6.2016. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A New Skills Agenda for Europe: Working together to strengthen human capital, employability and competitiveness.

¹³¹ COM(2017) 247 final of 30.5.2017. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – On a renewed

within the European Higher Education Area, highlighting the importance for students, be they from within or outside of the EU, to be able to move within the European Higher Education Area.

The main funding instruments to support the above-mentioned policies are **Erasmus+ and Marie Skłodowska-Curie Actions**.

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+ can also support traineeships for students in enterprises and organisations lasting between 2 and 12 months.

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.

Migration has 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.

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

A policy to proactively attract talent from abroad should arguably go hand in hand with advanced provisions on equal treatment in a number of key areas. For researchers, the 2005/71 Directive granted equal treatment, without any restrictions, in the areas of recognition of diplomas, certificates and other professional qualifications, working conditions, branches of social security, tax benefits and access to goods and services and the supply of goods and services made available to the public. The recast Directive 2016/801 goes a step backwards, allowing for restrictions in a number of areas. This means that for example equal treatment with regard to access to education can be restricted to exclude study and maintenance grants or other grants and loans. For students, Directive 2004/114 did not include any provisions regarding equal treatment. Directive 2016/801 provides for students' equal treatment on the basis of the Single Permit Directive (Article 12(1) and (4)), however again the restrictions foreseen in the Single Permit Directive also apply (Article 12(2)).

Given the importance of mobility of third-country national students and researcher to and within the EU, the rules that govern the admission, stay, and **intra-EU mobility** for these groups are of key importance. Generally, the Directives contribute to the internationalisation of education strategies in the EU by aiming at facilitating the admission, residence and intra-EU mobility of third-country national students and researchers. Under the 2004 Students

EU agenda for higher education; among other things, the Communication proposes to simplify student mobility by building on existing Erasmus+ projects for the electronic exchange of student data and explore the feasibility of establishing electronic student identification systems to allow cross-border access to student services and data.

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”¹³². The 2005 Researchers Directive allows short-term mobility for researchers under the same (initial) hosting agreement held in the first Member State; for longer mobility, a new hosting agreement may be required. The two Directives have been recast through the 2016 Students and Researchers Directive (Directive EU 2016/801; deadline for transposition into national law May 2018). One of the main changes has been the strengthening of intra-EU mobility provisions for students and researchers (and researchers' family members). At the same time, for students, intra-EU 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 an application for entry and stay in a second Member State, and do therefore not benefit from any kind of facilitation.

With regard to **family reunification**, while Directive EU 2016/801 provides for further improvements for the family reunification of researchers' family members, the situation of students and their family members in essence remains unchanged when compared to the situation under Directive 2004/114/EC, meaning that they do not benefit from any kind of facilitation for family reunification. Given the growing importance to attract international students, as well as the right they enjoy under the recast Directive to stay in the respective EU Member State for at least 9 months to look for a job or set up a business, there could be a case to more strongly reflect the situation of students' family members in the set of EU-level rules.

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 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.

3. Conclusions

The Students and Researchers Directives, and to an even greater extent the recast thereof, provide synergies in with the EU (higher) education policy. Their aim is to facilitate the admission and stay of third-country national students and researchers. As such, they form an indispensable part of the internationalisation process that EU (higher) education has been and is undergoing. 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. While globally the level of facilitation of entry and stay of students in particular could still be enhanced significantly, the recast Directive 2016/801 in key areas provided for significant improvements. Further ameliorations in the overall drive to make the EU more attractive to third-country national students could be brought about in the facilitation of intra-EU mobility of students not covered by programmes, and by introducing facilitation for family members to accompany students.

¹³² Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purpose of studies, pupil exchange, unremunerated training or voluntary service. Article 8.

2.7.2. Recognition of professional qualifications (Directive 2005/36/EC)

1. Issue definition

Any third-country national who aims to pursue a regulated profession (e.g. doctors, architects, and nurses) in an EU Member State (a professional activity access to which or the pursuit of which is subject to the possession of specific professional qualifications), and who has acquired that professional qualification outside the EU or in another Member State, need to have his/her qualifications recognised. It is the same need of recognition that applies to EU nationals who have acquired their qualifications in one Member State and want to pursue a regulated profession in another Member State.

The main EU instrument addressing this issue is Directive 2005/36/EC on the recognition of professional qualifications, as amended by Directive 2013/55/EU. The Professional qualification Directive (PQD) establishes rules with regard to access to regulated professions in a Member State and recognition of professional qualifications (e.g. carpenters or upholsterers)¹³³ that were obtained in one or more other Member States. 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/EU, Recital (1)).

2. Interaction with the legal migration acquis

The PQ Directive applies to EU nationals who aim to pursue a regulated profession in a Member State other than that in which they obtained their professional qualifications, on either a self-employed or employed basis. While third-country nationals are not explicitly included in the scope of the PQ Directive, recital (10) of Directive 2005/36/EC 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”.

Recital (1) of Directive 2013/55 further specifies the scope of the Directive in terms of recognition of qualifications of third-country nationals, stating 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.”

The recognition of qualifications is addressed in seven EU legal migration Directives (*see table below*). The equal treatment provisions in those Directives go well beyond Directive 2005/36, as they refer to the recognition of qualifications in general, aiming at preventing differential treatment 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 non-EU qualifications.

¹³³ For a list of regulated professions see: European Commission, ‘Regulated professions database’.

Directive	Provisions	Equal treatment provisions regarding recognition of qualifications
Directive 2011/98/EU "Single Permit" (SPD)	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 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	Article 14(1d): equal treatment as regards (...) recognition of diplomas, certificates and other professional qualifications in 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 (LTRD)	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)	<p>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.</p> <p>Article 6(6): In cases where the work contract or binding job offer specifies that the third-country 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.</p>	Article 18(2)(b): equal treatment as regards (...) recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures;
Directive 2014/66/EU "ICTs" (ICTD)	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

There are three 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) 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 as regards recognition of professional qualifications in the EU legal migration Directives once they have been admitted). 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.

Recognition of diplomas is a widely posed requirement, especially for work-related permits, but its existence and the related guidance are relatively difficult to find. This, together with the complex process of recognition itself and the multitude of requirements especially concerning regulated professions make recognition one of the more burdensome requirements for TCNs. It has been documented¹³⁴ that when there are requirements in terms of qualification level in order to be eligible to a work-related residence permit, some potential highly skilled migrant workers are sometimes excluded because of the excessive requirements or procedures, the impossibility to have access to recognition procedures from outside the country or the lack of knowledge in the destination country (by the administration or by the employer) about the value of the non-EU qualification.

The length of the procedure for getting foreign qualifications recognised varies considerably between Member States and between individual cases. For instance in Germany, if an applicant requests the recognition of a degree which has been previously recognised and exists in the database (Anabin), the procedure takes mere minutes. However, if the degree is previously unknown to the German authorities, the procedure takes from 4 to 12 weeks. The latter timeline is similar to several other EU Member States' practices, where processing times for recognition range between 1 and 4 months¹³⁵.

2) Residence phase

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

In this case, all third-country nationals who are under the scope of the above-mentioned EU legal migration Directives (all but the Students and the Family Reunification Directives) benefit from the equal treatment provisions as regards "recognition of professional diplomas,

¹³⁴ European Commission, *Obstacles to recognition of qualifications*, (2017); OECD and EU, *Recruiting Immigrant Workers: Europe 2016*, (2016).

¹³⁵ SWD(2016) 193 final of 7.6.2016. Commission Staff Working Document. Impact assessment. Accompanying the document: Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing the Directive 2009/50/EC.

certificates and other qualifications", which implies that the Professional qualification Directive applies to them in the same way as it applies to EU nationals.

Some categories of third-country nationals legally residing in the EU are however excluded by this general rule: 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; the SPD covers only students and family members of third country nationals *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). Therefore, students and family members of third country nationals who do not have the right to work do not enjoy the right to equal treatment as regards the recognition of their qualifications obtained in another EU Member State or outside the EU.

3) Intra-EU mobility phase

A TCN who has had a *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. As stated above, 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.

3. Conclusions

There are positive synergies between Directive 2005/36/EC on the recognition of professional qualifications (as amended by Directive 2013/55/EU) and the functioning of the EU legal migration Directives at two stages of the migration process, with some remaining gaps:

During the application phase, no EU legal provisions cover the recognition of the professional qualifications that TCNs have obtained in a third-country or in another EU 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.

During the residence phase, the equal treatment provisions of seven EU legal migration Directives enable most of the third-country nationals legally residing in the EU to have their professional qualifications recognised in the same way as EU nationals. However, Member States may limit the right to equal treatment for trainees, volunteers, and au pairs, when not considered to be in employment; and students and family members without the right to work do not enjoy the right to equal treatment.

During the intra-EU mobility phase, TCNs are not 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.

2.7.3. Recognition, validation and transparency of skills and qualifications

1. Issue Definition

Third country nationals face difficulties when using their skills and qualifications in the EU Member States. Different kinds of issues may arise depending on the migration phase: a) difficulties to value their skills and qualifications when applying (from outside the EU) to a work-related residence permit explained above; b) under-use of their skills and qualifications when residing in an EU country (brain waste, over-qualification, over-unemployment); c) specific issues in the case of mobility to another EU country.

a) During the "residence phase", there is evidence that third-country nationals' skills and qualifications are largely under-used in the local labour markets. For instance almost two third of third country nationals with high level of education are either unemployed/inactive or in employment but overqualified for their job¹³⁶. This "brain waste" is driven by a multifaceted factors including: the lack of knowledge in the host country (by the administration or by the employer) about the value of the non-EU qualification; the lack of use by migrants of existing recognition procedures of their qualifications; the under-development of 'validation' measures of migrants skills and experience; and other factor such as language skills, the intrinsic value of the (foreign) qualification, the lack of local network and other factors

b) If the third-country national wants to be mobile between EU Member States, there are potentially other obstacles that apply, in particular if a job offer is needed to obtain a work/residence permit in the second country (this may occur in the frame of the long-term residence Directive or the current Blue Card Directive) and that having one's qualifications recognised is necessary for this.

From this overall contextual presentation, it appears clearly that the issues faced by third country nationals when using their skills and qualifications in the EU Member States are:

- driven by a multitude of factors and that legislation in itself (either at EU or national level) can only resolve some of them;
- mainly regulated at national level, in line with the Treaty (with the exception of the recognition of qualification for regulated occupations, i.e. Directive 2005/36, specifically covered in another section)
- and therefore in areas where the EU policies are mainly constituted of soft law (i.e. Council recommendations) and areas where the EU support Member States through coordination, common tool, funding, etc. and not through harmonisation of policies/legislations.

Regarding the question of the legal access to recognition of diploma/qualifications, the situation in terms of coverage by the EU legal migration acquis is already described in the specific section on professional qualifications (*see above 2.7.2*).

¹³⁶ SWD(2016) 195 final of 10.6.2016. COMMISSION STAFF WORKING DOCUMENT, Analytical underpinning for a New Skills Agenda for Europe, Accompanying the document "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A NEW SKILLS AGENDA FOR EUROPE: Working together to strengthen human capital, employability and competitiveness" COM(2016) 381 final of 10.6.2016.

2. Interaction with the legal migration acquis

I. EU policies in the field of recognition, validation and transparency of skills and qualifications

The section below describes the EU policies in the field of recognition, validation and transparency of skills and qualifications, with the exception of the Directive on recognition of qualification for regulated occupations, i.e. Directive 2005/36, specifically covered above.

It is clear that most of these policies are regulated at national level and that the scope of EU intervention is mainly soft law (i.e. Council recommendations) and EU support through coordination, common tool, funding, etc. Nevertheless, there have been many recent policy developments in this field at EU level, notably through the adoption of the 2016 EU Skills agenda¹³⁷.

The following policies at EU level can be defined as relevant regarding recognition, validation and transparency of skills and qualifications:

a) Recognition of academic qualifications

The Convention on the Recognition of Qualifications concerning Higher Education in the European Region (11/04/1997), commonly known as the Lisbon Recognition Convention, is an international convention jointly developed by and adopted within the frames of the Council of Europe and UNESCO¹³⁸. It is designed as a legal instrument which binds over 50 countries¹³⁹ to adopt fair practices in the recognition of HE qualifications. The Lisbon Recognition Convention enhances internationalisation and mobility by introducing and improving qualifications recognition policies and processes, fostering mutual trust, and building capacity for qualifications recognition. This relies on information and transparency tools, including national and regional qualifications frameworks.

The two main principles of the Lisbon Recognition Convention are:

- Any applicant should have appropriate access to an assessment of his/her foreign qualification and
- A foreign qualification should be recognised unless *substantial differences* can be demonstrated in regard to the length of study, curriculum contents, etc.

While the aim of the Lisbon Recognition Convention is to ensure that holders of a qualification can continue their studies in a tertiary education institution in another country, it is nevertheless also used by labour market actors to ensure that the worker hold equivalent-type of qualifications to those nationals would be required (not legally but in practice) for a certain job.

¹³⁷ European Commission, Employment, Social Affairs and Inclusion: ‘Skills and qualifications’. The main aim of the 2016 EU Skills agenda was focussed 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. Nevertheless, the 2016 EU Skills agenda also include specific initiatives to help Member States to identify relevant skill gaps or mismatches, to improve transparency and comparability of qualifications across borders, improve documentation of skills and qualifications as well as encourage early skills profiling of migrants.

¹³⁸ Convention on the Recognition of Qualifications concerning Higher Education in the European Region: ETS No: 165.

¹³⁹ The Convention has amongst others been ratified by Australia and New Zealand; from the EU Member States only Greece is not a party to it.

The Lisbon Recognition Convention – supported by two networks of national recognition centres (ENIC-NARICs in the EU Member States with the exception of Greece and ENICs in wider Europe) – aims to guide recognition practice in signatory countries, while leaving the final decision on selection of students to High Education institutions in most countries, in line with the principles of institutional autonomy.

In November 2018, Member States agreed a Council Recommendation on promoting automatic recognition, for the purposes of further learning, of higher education and upper secondary education and training qualifications and the outcomes of learning periods abroad. In agreeing the text, Member States have made a political commitment to take steps by 2025 to ensure that a qualification or learning outcome from one Member State is recognised in another Member State. It does not, however, apply to third-country qualifications. Individual governments of EU countries remain responsible for their education systems and are free to apply their own rules, including whether or not to recognise academic qualifications obtained elsewhere. Applicants generally need to go through a recognition procedure.

While many third-countries are not signatories of the Lisbon recognition convention, it appears in practice that qualifications from third countries are often covered in the same way as qualifications from countries that are signatories of the Lisbon recognition convention. Indeed principles (fairness, transparency etc.) are generally applied in the same way¹⁴⁰. However, as the uncertainty about the value of foreign qualification is the main obstacle, the situation for those holding third-country qualifications depends mainly on whether the country has developed tools to identify and assess their value of foreign qualification. While there is currently no EU wide tool/measure to assess the value of foreign qualifications or to share information, recognition authorities share and request information through the ENIC-NARIC network, in particular via a dedicated email list for ENIC-NARIC centres. In addition, Erasmus+ has financed projects to improve recognition of third-country qualifications. The REACT project¹⁴¹, led by the Norwegian recognition authority, NOKUT, expands NOKUT's previous Erasmus+ project on Refugees and Recognition¹⁴², which developed a toolkit for recognition authorities to improve recognition of qualifications from five sending countries. Another project is the ENIC-NARIC guide for credential evaluators and admission officers on the recognition of qualification holders without documentation. The second edition (2016) of the European Recognition Manual for Higher Education Institutions also provides detailed guidance for the evaluation of foreign qualifications.

b) Transparency of qualification frameworks and the European Qualification Framework

In order to improve transparency of qualifications across EU MS, the EU has adopted in 2008 a recommendation on European Qualification Framework (EQF)¹⁴³. The main goal of the EQF is to improve the transparency, comparability and portability of citizens' qualifications issued in accordance with the practice in the different Member States. The significant progress that has been made during the last years across Europe in implementing National Qualifications frameworks (NQF) and a learning outcomes approaches (and, thus, enhancing transparency) has partly been triggered by the EQF.

¹⁴⁰ Findings from the European Commission's seminar on recognition of foreign qualifications (Brussels, 30 June 2015).

¹⁴¹ <https://www.nokut.no/en/about-nokut/international-cooperation/erasmus-projects/react--refugees-and-recognition/>

¹⁴² <https://www.nokut.no/en/about-nokut/international-cooperation/erasmus-projects/refugees-and-r>

¹⁴³ Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning.

The EQF is a common reference framework which serves as a translation device between different qualifications systems and their levels, whether for general education, for High education or for vocational education and training (VET). Qualifications are not directly allocated to EQF levels, but linked to EQF levels via the referencing of national qualifications levels to the EQF levels. By acting as a translation device, the EQF, via credible NQFs generating mutual trust, aids in the understanding of qualifications allocated to national levels across the different countries and education systems in Europe and supports the establishment of mutual trust across countries. It can be used as a source of information supporting decisions on recognition.

However, it is important therefore to highlight that this transparency tool is focused on intra-EU mobility and does not cover as such non-EU qualifications. The 2008 EQF Recommendation did not make explicit reference to the use of the EQF in cooperation with third countries and until now there have not been structures and procedures foreseen for referencing qualifications frameworks outside Europe to the EQF.

However, the EQF is increasingly being used as a reference point for third countries and establishing closer links between the qualification levels of the EQF and those of third countries could help to improve mutual understanding of qualifications systems and could support the comparison and recognition of qualifications gained outside Europe. Therefore, the recently adopted revised Council recommendation¹⁴⁴ on EQF provides that the Commission should, in cooperation with the EU Member States, *"Explore possibilities for the development and application of criteria and procedures to enable, in accordance with international agreements, the comparison of third countries' national and regional qualifications frameworks with the EQF"*.

In the long-run this has the potential of improving the transparency and comparability of third-country qualifications compared to those of the European Union member States.

c) Validation of skills (previous experience, informal and non-formal learning)

The validation of learning outcomes, namely knowledge, skills and competences acquired through non-formal and informal learning can play an important role in enhancing employability and mobility, as well as increasing motivation for lifelong learning, particularly in the case of the socio-economically disadvantaged or the low-qualified.

Therefore, in 2012, a Council recommendation on the validation of non-formal and informal learning was adopted¹⁴⁵ with the aim to encourage Member States to develop specific validation mechanisms.

Since then the monitoring of the implementation of this recommendation has been done through a biennial *European Inventory on validation of non-formal and informal learning*, as a kind of overview of validation practices and arrangements across Europe.

The last inventory (published in 2016) shows that there has been a lot of progress in the adoption by EU Member States of validation practices and arrangements across Europe. Nevertheless, such policy development did not take place in all Member States.

¹⁴⁴ Council Recommendation of 22 May 2017 on the European Qualification Framework for lifelong learning and repealing the recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualification Framework for lifelong learning.

¹⁴⁵ Council Recommendation of 20 December 2012 on the validation of non-formal and informal learning.

Given the fact that third-country nationals often have difficult to have their formal degrees (formally) recognized, it is even more important for them to have their previous work experience validated through validation arrangements. Indeed, arrangements for validation of non-formal and informal learning are in principle not restricted to learning outcomes gained in the European context and can also support migrants from outside Europe for making their learning achievements visible and eventually getting them recognised.

Nevertheless, there is no, to our knowledge, automatic coverage by third-country nationals (already residing in the EU) by existing validation arrangements. Moreover, equal treatment under the legal migration directives refers to "recognition of diplomas, certificates and other professional qualifications" and not more specifically to equal access to "schemes for the assessment, validation and accreditation of their prior learning and experience.

d) The Europass framework for skills

Another important initiative at EU level in the field of skills is the Europass framework¹⁴⁶. It is the main framework for the documentation of qualifications, skills and learning experiences allowing the presentation of acquired knowledge, skills, competences and qualifications in a transparent and structured way.

The Europass framework includes the Europass CV, the Diploma Supplement for higher education, the Certificate Supplement for Vocational Education and Training (VET) and the European Skills Passport. They support the international comparability of learning outcomes acquired in various contexts, for example, in formal education, through validation of non-formal and informal learning, through mobility or work experience and voluntary activities. Sometimes they have supported the implementation of EU programmes e.g. Youthpass. These tools support the better understanding of qualifications in recognition processes.

Similarly to other initiatives covered above, the Europass framework is mainly aimed at facilitating intra-EU mobility – however it can also facilitate the documentation of the skills for third-country nationals, in particular those residing already in the EU.

Moreover, in the frame of the current revision of the Europass framework¹⁴⁷, the Commission proposed that "*Europass shall provide information on (inter alia): (c) recognition practices and decisions in different countries, including third countries, to help individuals and other stakeholders understand qualifications; (...) (f) any additional information on skills and qualifications that could be relevant to the particular needs of migrants arriving or residing in the Union to support their integration*".

Therefore in the long-run (and assuming the adoption of the proposal by the EP and the Council) it can be expected that this framework will help in ensuring better information for both migrants and practitioners regarding recognition practices and decisions as well as information on skills and qualifications to support the integration of migrants.

Recent developments

Two other relevant recent developments in the area at skills at EU level have been the following.

¹⁴⁶ European Commission, Europass: 'Connect with Europass'.

¹⁴⁷ COM(2016) 625 final of 4.10.2016. Proposal for a Decision of the European Parliament and of the Council on a common framework for the provision of better services for skills and qualifications (Europass) and repealing Decision No 2241/2004/EC.

The development by the European Commission of an EU 'Skills Profile Tool for Third Country Nationals'. It is aimed at helping "early profiling of migrants' skills and qualifications" by assisting services in receiving and host countries to identify and document skills, qualifications and experience of newly arrived third country nationals. While the natural target group is refugees and asylum seekers, the tool can also be used on other categories of third-country nationals in need such as family migrants. 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, including diplomas from education and training, language skills, numeracy/ literacy and transversal skills (e.g. problem-solving and leadership), and driving skills. It has been presented publicly on 20 June 2017 following a wide consultation of the various actors in the field and the final version is operational (free and on-line) since November 2017¹⁴⁸.

In the frame of the EU Skills Agenda, the Commission also proposed a Council recommendation to ensure that every adult without upper secondary school level is proposed a second chance to reach this level of skills/qualification, either through education, training or practice work experience (so called 'Skills Guarantee'). In December 2016, the Council adopted the final version of the recommendation on renamed 'Upskilling Pathways: New Opportunities for Adults'¹⁴⁹. The recommendation includes the need to provide "A tailored and flexible learning offer" through: "*Provide an offer of education and training (...) meeting the needs identified by the skills assessment. For migrants from third countries, include, as appropriate, opportunities for language learning and preparation for training*". Therefore not only legally residing third-country nationals are covered by this initiative, but indirect obstacle are also addressed specifically for migrants.

These two developments are rather supportive of better documentation and visibility of the skills and qualifications of third-country migrants - as well of providing upskilling opportunities to third-country nationals.

3. Conclusions

The conclusions regarding the coherence are based on both the analysis above as well as the analysis of the coverage by equal treatment provisions in the legal migration directives (cf. the summary table in the specific section on professional qualifications is also valid for recognition of diploma by education institutions and qualifications in non-regulated professions).

Overall there is not a lack of overall coherence between the EU acquis on legal migration and the EU policies in the field of recognition, validation and transparency of skills and qualifications. While most of these policies are in practice regulated at national level, the legal provisions in terms of equal treatment support the 'coverage of third-country migrants' by the existing instruments, at least for those residing in the EU.

However there are some potential gaps in the way third-country nationals are covered by equal treatment in some cases:

¹⁴⁸ European Commission, Policies, information and services: 'EU Skills Profile Tool for Third Country Nationals'.

¹⁴⁹ Council Recommendation of 19 December 2016 on upskilling pathways: New opportunities for adults.

- issue of access to recognition/validation procedures in the application phase. There is no established *legal right* to apply to recognition/validation procedures from outside the country, even if some Member States do apply this;
- there are some gaps for some specific categories during the residence phase for instance in the S&R directive and other groups;
- in the legal migration directives, the provisions on equal treatment refer to "recognition of diplomas, certificates and other professional qualifications" and not more specifically to equal access to "schemes for the assessment, validation and accreditation of their prior learning and experience"¹⁵⁰. There is no comparable information about whether Member States do apply a differential access to validation measures for third-country nationals compared to host country nationals. It is therefore a *potential gap* which is identified here. It is valid for both the application and the residence phase.

In addition to ensuring equal access to recognition/validation procedures, it appears that other policy actions (at EU or national level) that are well beyond the EU legal migration acquis can support a better use of the skills and qualifications by third-country nationals residing in the EU. Indeed, the main issue when it comes to the use of skills and qualifications held by third-country nationals is not the nationality of the applicant but rather where the qualifications was obtained¹⁵¹ due in particular to the uncertainty (for several actors) about the value of non-EU qualifications – as well as the lack of information and the cost and uncertainty of the process for the migrant him/herself. Therefore, a number of policy initiatives (non legislative) would help to improve¹⁵²:

- information for third-country nationals about recognition procedures, their outcomes and the benefits that can result;
- comparability and transparency of third-country qualifications for actors involved in the EU Member States (higher education institutions, integration and migration authorities, public employment services, employers);
- sharing of good practices across EU member states on how to evaluate foreign qualifications;
- tool to document qualification: regarding this point the recently developed "EU Skills profile tool" is a good step and the challenge will be to ensure its use by the relevant services in the EU Member States for asylum seekers and refugees but also potentially for

¹⁵⁰ In the context of the revision of the 2011/95/EC ("Qualification Directive") into a Regulation (proposal 2016/0223 (COD)) the European Commission proposed that beneficiaries of international protection would not benefit only from equal treatment in the field of "*recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications*" but also to equal access to "*schemes for the assessment, validation and accreditation of their prior learning and experience*". It also foresees (similarly to the existing Directive) that "*competent authorities shall facilitate full access to the procedures (...) to those beneficiaries of international protection who cannot provide documentary evidence of their qualifications*". This later aspect is not identified as a gap in the analysis above as it is assumed that this provision is more specifically needed by beneficiaries of international protection due to the forced and unprepared nature of their migration to the EU, compared to more classical case of "legal migrants" such as workers, students, family members, etc.

¹⁵¹ Based on Labour force survey: In 2011-12, in the EU, the over-qualification rate among (tertiary educated) foreign-born **trained abroad** was 41.6%, while the foreign-born **trained in the host country** were only slightly more likely to be over-qualified (22.7%) than native-born (19.1%).

¹⁵² See more specific recommendations in: European Commission, *Obstacles to recognition of qualifications* (2017); OECD, *Making Integration Work: Assessment and Recognition of Foreign Qualifications*, (2017).

other categories of third-country nationals in need of document and making visible their skills and qualifications.

A number of policy initiatives have been taken recently at EU level to address at least part of these issues, in particular in the frame of the EU Skills agenda (such as the revision of EQF, Europass, etc.). Nevertheless, there are not likely to solve all the issues identified above, at least in the short and medium term.

2.8. Exploitation

1. Issue definition

In its Communication "Towards a reform of the Common Asylum System and Enhancing Legal Avenues to Europe"¹⁵³, the Commission stated that the overall objective of this Fitness check would be to improve existing rules as far as possible **also in light of the need to prevent and combat labour exploitation**, which the Fundamental Rights Agency (FRA) has shown¹⁵⁴ to be common among third-country workers.

While focusing on **labour exploitation**, this section will analyse the interaction of the legal migration legislation with EU policies addressing the **different forms of abuses and exploitation** to which third-country nationals in the EU are subject, ranging from irregular working conditions to trafficking in human beings.

Labour exploitation

There is no universally agreed definition of labour exploitation; as a phenomenon it is a continuum, ranging from slavery and forced labour on one end, and sub-standard employment conditions or terms on the other end. The FRA has defined labour exploitation as “work situations that deviate significantly from standard working conditions as defined by legislation or other binding legal regulations, concerning in particular remuneration, working hours, leave entitlements, health and safety standards and decent treatment”.¹⁵⁵

Definition of labour exploitation in relevant EU legislation is only partial. The **Employers' sanctions Directive** (Directive 2009/52/EC)¹⁵⁶ defines ‘particularly exploitative working conditions’ as ‘working conditions, including those resulting from gender based or other discrimination, where there is a striking disproportion compared with the terms of employment of legally employed workers which, for example, affects workers’ health and safety, and which offends against human dignity’. 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**.

More in general, there are a number of EU **employment policy instruments** which aim at ensuring decent working conditions and are applicable to all workers, including third country national workers in the EU: the Safety and Health at Work Framework Directive¹⁵⁷; the Directive and the Framework Agreement on fixed-term work¹⁵⁸; the Working Time Directive¹⁵⁹; the Temporary Agency Work Directive¹⁶⁰; the Posted Workers Directive.

¹⁵³ COM(2016) 197 final of 6.4.2016. Communication from the Commission to the European Parliament and the Council – Towards a reform of the Common Asylum System and enhancing legal avenues to Europe.

¹⁵⁴ European Union Agency for Fundamental Rights, *Severe Labour Exploitation, Workers Moving within or into the European Union*, (2015).

¹⁵⁵ *ibid.*

¹⁵⁶ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

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

¹⁵⁸ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

¹⁵⁹ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

¹⁶⁰ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

The causes of labour exploitation of legally residing third-country nationals are complex. The scale of the informal economy affects the opportunities for illegal employment and exploitation (for nationals and non-nationals). Lack of protection for workers, poor enforcement of control mechanisms and low presence/visibility of trades' unions also increase the opportunity for exploitation.

Trafficking in human beings

The EU has two main pieces of legislation which address trafficking in human beings: **Directive 2004/81/EC**¹⁶¹ which 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); and **Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims**¹⁶², which establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings, and introduces common provisions to strengthen the prevention of this crime and the protection of the victims thereof.

The "**purpose of exploitation**" is one of the constitutive elements of the offence of trafficking in human beings. In the context of defining the offence, the Directive provides an indicative list of forms of exploitation associated with trafficking: "the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs".

Scale of the problem

Estimating the size of the problem of labour exploitation is challenging for a number of reasons. First, there is no definition of 'labour exploitation'. Therefore, comparing and aggregating data on the range of practices linked to labour exploitation across the EU would imply availability of comparable: (1) criminal justice data on a range of *reported* crimes (from severe forms of labour exploitation, to forced labour, to trafficking for the purposes of labour exploitation); (2) data from institutions issuing sanctions on administrative violations linked to labour laws and standards. Second, as other categories of crimes, the levels of unreported crime are significant.

For instance, the 2015 Eurostat report *Trafficking in Human beings* shows that in 2011, there were 1736 registered victims of trafficking for the purpose of labour exploitation in the EU¹⁶³, while (using the methodology of 'capture recapture method'), the International Labour Organisation reported that in 2012 there were 616,000 victims of labour exploitation in the EU¹⁶⁴, concluding that the reporting rate was only 3.6% (1 in 28 cases of forced labour

¹⁶¹ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

¹⁶² Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

¹⁶³ Eurostat, *Trafficking in Human Beings*, (2015), p. 90. Labour exploitation of victims of trafficking covers the following sectors: agriculture, construction, textile industry, horeca (hotel/restaurant/catering), care, fisheries, and others.

¹⁶⁴ International Labour Organization (ILO), *Forced Labour: an EU Problem*, (2012).

reported).¹⁶⁵ Although official statistics may seem of limited use with such high rate of unreported cases, this rate is also an important indicator of the extent of the issue. The 2017 update used a different methodology (a global household survey by Gallup) but reached an estimate of 684,000 victims of ‘modern slavery’ in the EU in 2016¹⁶⁶.

However, **there is no data available on the scale of the problem with specific regard to third-country nationals**. Some national research on the exploitation of legally residing third-country workers, such as seasonal workers, is available in certain Member States and only examining certain sectors of the labour market.¹⁶⁷

The different forms of abuses and exploitation to which third-country nationals are subject have an impact on different socio-economic aspects, which lead to the following main challenges that policy and legislation need to address:

- **Fundamental rights:** first and foremost, exploited third-country nationals constitute a group of people whose rights are violated. In the case of persons who are trafficked and subjected to forced labour or other forms of severe exploitation, the third-country nationals are victims of gross violations of fundamental rights.¹⁶⁸
- **Social challenges:** as a result of the distorted competition nationals face from exploited third-country nationals, social tensions between nationals and third-country nationals or between third-country nationals themselves may also arise. Additionally, criminal networks often benefit from exploitative labour and failing to tackle labour exploitation empowers these criminal networks.
- **Micro-economic challenges:** exploitation distorts competition among economic actors and creates social dumping.
- **Macro-economic challenges:** when third-country nationals are exploited, tax revenues decrease as exploitation often takes place in the context of undeclared work;
- **Political challenges:** governments need to help employers to meet their labour demands, without imposing excessive regulatory burden on hiring third-country nationals, and at the same time guaranteeing social fairness and the respect of rights for third-country nationals.

2. Interaction with the legal migration acquis

I. Labour exploitation

The legal migration Directives do not address directly the issue of **exploitation** of third-country nationals; however, the **equal treatment** provisions of those Directives aim at ensuring that third-country nationals have the same rights as EU nationals in many important areas such as working conditions, freedom of association, education, social security, and therefore aim at preventing abuses and exploitation.

¹⁶⁵ International Labour Organization (ILO), *ILO Global Estimate of Forced Labour – Results and methodology*, (2012), p.39.

¹⁶⁶ International Labour Organization (ILO), Walk Free Foundation and International Organization for Migration (IOM), *Global Estimates of Modern Slavery – Forced labour and Forced Marriage*, (2017); The Walk Free Foundation, *Global Slavery Index* (2016), pp.58-66. The data does not include Malta.

¹⁶⁷ See for example research in Axelsson, L., Hedberg, C., Malmberg, B., & Zhang, Q. *Chinese restaurant workers in Sweden: policies, patterns and social consequences*, (2014); Ollus, N., Jokinen, A. and Joutsen, M. (eds) *Exploitation of migrant workers in Finland, Sweden, Estonia and Lithuania: Uncovering the links between recruitment, irregular employment practices and labour trafficking*, (2013).

¹⁶⁸ Article 5(3) of the Charter of Fundamental Rights of the European Union.

The **Single Permit Directive** is particularly relevant in this respect as it defines a common set of rights for most non-EU migrants working in a Member State. As set out in the internal coherence analysis (*Annex 5.1*) the equal treatment provisions in the EU legal migration acquis cover a number of work-related areas, including (among others) working conditions, including pay and dismissal and health and safety, the right to association and access to social security.

However, **not all equal treatment provisions are applicable to all categories of third-country workers**. For example, self-employed workers are explicitly excluded from the Single Permit Directive and are not covered by the EU acquis. Also, the provisions on equal treatment in the EU legal migration Directives are subject to limitations and are sometimes presented as options for Member States. Moreover, **on their own, equal treatment provisions cannot prevent exploitation**. They are a necessary starting point in order for third-country nationals to secure employment and fair working conditions, but the legal migration Directives – except the Seasonal Workers Directive – do not provide specific mechanisms to ensure their enforcement (i.e. there are no provisions relating to inspections, monitoring nor sanctions against employers).

Sanctions against employers constitute a further means to address, among other issues, labour exploitation. As stated above, the scope of the Employers' sanctions Directive 2009/52/EC is limited to the employment of **illegally staying** third-country nationals, therefore not covering third-country nationals legally residing under the legal migration acquis. However, specific sanctions against employers who have not fulfilled their obligations are included in the ICT Directive ("may clause") and the Seasonal Workers Directive ("shall clause").

The fact that neither does Directive 2009/52/EC cover irregular practices in the employment of legally residing third-country national, nor do the EU legal migration Directives – except the Seasonal Workers – 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 Employers' Sanctions Directive, is only partially addressed by the EU Anti-Trafficking Directive, for situations that fall under its scope (see below).

II. Trafficking in human beings

The key interaction of **Directive 2004/81/EC** with the EU 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 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. 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 measures foreseen in **Directive 2011/36/EU** on preventing and combatting trafficking in human beings may also benefit **third-country victims of trafficking who are holders of a residence permit under the EU legal migration Directives**. The definition of ‘trafficking’ in Directive 2011/36/EU covers a wide range of forms of 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, thus preventing their exploitation. However, exploitation of third-country nationals 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 providing the salary and working conditions set out in the application). These forms of exploitation may be particularly relevant to some categories of legally residing third-country nationals. There is therefore an important gap in EU law, which can be less or more relevant depending on how these other forms of exploitation are addressed at national level.

3. Conclusions

The prevention of abuses and exploitation of legally residing third-country nationals is highly relevant in relation to the overall objectives of the EU legal migration acquis, which aims to attract and retain third-country nationals, effectively responding to demands for labour at certain key skills levels, while counteracting a distortion of the EU labour markets by ensuring equal treatment.

The existing legal migration Directives only partially respond to the problem. The equal treatment provisions of the legal migration Directives are necessary to begin the process of preventing and addressing situations where the working conditions of third-country nationals deviate significantly from the standard working conditions as defined by legislation. However, the legal migration Directives do not cover all third-country nationals who work in the EU (e.g. self-employed workers are excluded), and in some cases the provisions are subject to limitations. Moreover, the legal migration Directives – except the Seasonal Workers Directive – do not require Member States to establish monitoring mechanisms, nor sanctions against employers who do not comply with the provisions on equal treatment.

Other pieces of EU legislation address certain aspects of the problem, but there are still gaps. The implementation of the EU employment acquis complements the equal treatment provisions in the legal migration Directives by harmonising basic obligations for Member States in respect of certain aspects of working conditions (e.g. safety and health, working time). The implementation of the temporary agency work Directive is particularly relevant in this regard. The personal scope of the EU Anti-Trafficking Directive includes legally residing third-country nationals. However, the Directive only covers those situations of labour exploitation which amount to the criminal offence of trafficking in human beings, while it

does not cover other forms of labour exploitation, which are addressed by criminal and labour legislation at Member State level. Other EU instruments, including the Facilitation Package and the Employer Sanctions Directive address other forms of labour exploitation, but only cover third-country nationals in an irregular situation.

There are consequently gaps in the response at EU level. While the inspections and sanctions against employers who hire third-country nationals illegally (required by the Employer Sanctions Directive) can indirectly help legally residing third-country nationals who are victims of exploitation in the hands of the same employers, there is only one EU instrument (the Seasonal Workers Directive) which specifically addresses their situation.

There would be added value in developing a requirement at EU level for Member States to enforce compliance by employers with the equal treatment provisions in all the EU labour migration Directives. The efforts of Member States currently focus on cases of severe labour exploitation, or on employers who hire irregular migrants. While some countries have begun to expand the scope of the Employer Sanctions Directive by applying it also to third-country nationals who are legally-staying, this is not the case in all Member States.

2.9. International dimension of migration policy: interactions with external policies

1. Issue definition

This section reviews the coherence of the EU legal migration framework with the EU main external migration policy instruments, including issues related to brain drain, circular migration, and reciprocity. It also reviews the coherence with other external policies which have an impact on migration, namely:

- cooperation and development policies
- climate change and environmentally induced migration,
- trade policy

2. Interaction with the legal migration acquis

I. External migration policy instruments

The EU's Global Approach to Migration and Mobility (GAMM)¹⁶⁹ 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.

The GAMM has four main aims: better organising legal migration, and fostering well-managed mobility; preventing and combatting irregular migration; maximising the development impact of migration and mobility; and promoting international protection, 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, while established following the general principles of the GAMM, the Mobility Partnerships (MPs) and Common Agendas on Migration and Mobility (CAMMs) are the main framework for bilateral cooperation 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.

¹⁶⁹ European Commission, Migration and Home Affairs: 'Global Approach to Migration and Mobility'.

The Commission Communication of 8 June 2016 on establishing a new Partnership Framework with third countries under the European Agenda on Migration¹⁷⁰ provides an ambitious and forward-looking European approach to deepening cooperation with countries of origin, transit and destination, where migration becomes a key component of the overall relationships between the EU and third countries of origin or transit of migrants. Migration issues are now at the heart of the overall relations with the priority partners – alongside other key foreign policy issues such as security, trade and poverty reduction. The EU is committed to develop, with specific third countries, common and tailor-made approaches to migration featuring development, 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 initiatives aimed at preventing/reducing irregular migration, and at supporting return to countries of origin and transit, have been much more developed than initiatives to favour mobility and migration from third-countries, particularly for work purposes.

II. Circular migration and brain drain

A key aspect of external migration policy also included in the GAMM is the promotion of circular migration and the avoidance of 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.¹⁷¹ The reverse of brain drain is '*brain gain*': the benefit to a country as a result of the immigration of a highly-qualified person.¹⁷² 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.¹⁷³

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;

¹⁷⁰ COM(2016) 385 final of 7.6.2016. Communication from the Commission to the European Parliament, the European Council and the European Investment bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration. See also COM(2016) 700 final of 18.10.2016. Communication from the Commission to the European Parliament, the European Council and the Council, First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration.

¹⁷¹ European Migration Network (EMN), Asylum and Migration Glossary 3.0, (2014).

¹⁷² ibid.

¹⁷³ ibid.

- Temporal element: migration is not permanent;
- Iterative/repetitive element: migration process includes more than one cycle of migration;
- 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 richer/more developed 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, such as 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 conditions or 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, more sophisticated education or healthcare systems or better security, political and societal conditions (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 and promote circular migration 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 emphasised the need for ethical recruitment for certain sectors particularly vulnerable to brain drain, such as human resources in the healthcare sector.
- Mobility Partnerships (MPs), include, in most cases, a commitment to reduce the negative effects of brain drain (ethical recruitment clause) and to develop circular migration programmes.
- Within its Action Plan to assist Member States to tackle the key challenges facing the health workforce in the medium to longer term, the Commission 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 professionals¹⁷⁴.

The following provisions of the EU legal migration Directives also consider the issue of brain drain and include provisions on circular migration:

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)).

¹⁷⁴ Further information: World Health Organization, 'Health workforce'.

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).

III. Development cooperation

The EU 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 and comprehensive management of the migration flows. These sets of EU policy objectives have some complementarities and potential synergies, but also some potential inconsistencies.

EU action on development is guided through two main policy documents: the **2030 Agenda for Sustainable Development**, which builds on the achievements of the Millennium Development Goals (MDGs) that expired in 2015, and the “**New EU Consensus on Development ‘Our World, Our Dignity, Our Future’**” adopted in 2017, which is EU’s response to Agenda 2030. The Sustainable Development Goals for 2030 approved by the United Nations in September 2015 include migration as a traversal 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”.¹⁷⁵ 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)**¹⁷⁶ 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;
- Pursue 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 2014-2020, and this has been a focus of EU action. An example is the project “Maximizing the Impact of Global Remittances in Rural Areas (MIGRRA)” implemented by International Fund for Agricultural Development (IFAD) on maximising the potential of remittances for the local economic and social development focusing on rural areas.

¹⁷⁵ <https://europa.eu/eyd2015/en/iom/posts/migration-inequality-and-new-development-goals>

¹⁷⁶ See in particular SWD(2015) 159 final of 3.8.2015, *Policy Coherence for Development 2015 EU Report*, (2015).

In addition, under humanitarian aid and development cooperation, the EU budget and EU Trust Funds, as well as, outside the EU budget, the European Development Fund (EDF), address migration and asylum both geographically and thematically, such as Global Public Goods and Challenges (GPGC)

In this context, at the Valletta Summit on Migration between EU and African countries of November 2015, the European Commission launched an “*Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa*¹⁷⁷”, 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 Joint 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 Joint 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.

In the mid-term review Communication¹⁷⁸ on the Delivery of the European Agenda on Migration, adopted on 27 September 2017, the Commission announced its intention to coordinate pilot projects with selected third-countries, and provide financial support to Member States willing to engage themselves in hosting certain numbers of migrants coming through legal channels. Based on this initiative, several Member States have developed, during 2018, targeted projects to promote labour migration schemes - in partnership with priority third countries.

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 that sometime can be pursued by these two policy areas.

IV. 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 2013¹⁷⁹, the Commission published a Staff Working document¹⁸⁰ on the topic of climate change related

¹⁷⁷ European Commission, Press Release Database, Fact sheet: ‘A European Union Emergency Trust Fund for Africa’.

¹⁷⁸ COM(2017) 558 final of 27.9.2017. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the delivery of the European Agenda on Migration.

¹⁷⁹ The EU Climate change adaptation strategy is currently subject to an evaluation. European Commission, Evaluation Roadmap: ‘Evaluation of the EU Adaption Strategy’.

¹⁸⁰ SWD(2013) 138 final of 16.4.2013. Commission Staff Working Document. Climate change, environmental degradation, and migration. Accompanying the document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – An EU strategy on adaption to climate change.

migration, or more specifically environmentally induced migration related to climate change. Such migration would be due to increased intensity and frequency of natural disasters, such as increased inundation of low-lying coastal zones, 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 flows from third-countries to the EU could also be relevant, both in a temporary time-perspective but also in terms of longer term sustainable solution. However, at the time of publication it was considered that scientific evidence was still not sufficiently clear-cut on how this is likely to affect migratory flows 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, in order to ensure that the EU migration policies are adequately prepared to address the challenge.

Whilst the adaptation responses would include international protection and resettlement, and planned relocation as a last resort solution, the wider migration and development perspective as set out in GAMM (see above) is of relevance, including the need to foster mobility and facilitating labour migration.

V. Trade and Investment Policy

The objectives of the EU trade and investment policy can be summarised as follows:

- To create a global system for fair and open trade, mostly via the participation in the World Trade organisation;
- Opening markets with partners to foster growth and jobs for Europeans by increasing their opportunities to trade, mostly via the WTO and bilateral/regional free trade agreements (FTA);
- Promote a rules-based system for international trade and investment;
- Trading in line with EU's values, notably with the objective of combatting poverty in the world and promoting development of the less developed partners.

There are two main interactions between trade policy and the European Agenda on Migration: one wider interaction related with the link of trade discussions to the conclusion of migration related agreements, and one more specific interaction related to the entry and stay of natural people for business purposes. These two aspects are reflected in the Communication of 2015 "*Trade for All - New EU Trade and Investment Strategy*" which states that "*the economic potential of the temporary movement of service providers in particular is highlighted in the European Agenda for Migration. The agenda also calls for the better use of synergies across policy areas in order to incentivise the cooperation of third countries on migration and refugees issues. Trade policy should take into account the policy framework for the return and readmission of irregular migrants*".

With respect to the Legal Migration Directives, the interaction with trade policy notably refers to measures on temporary movement of natural persons for business purposes and service provision under the WTO/GATS and the services' chapters of the bilateral free trade agreements. In particular, the main aspect of interaction is the link of these disciplines to the **ICT Directive** (2014/66/EC).

Trade in services can take several forms and is therefore categorised, in accordance with the General Agreement on Trade in Services (GATS), in four distinct "modes of supply". "Mode 4" requires the presence of a natural person in the territory of the trading partner, and hence touches upon migration policy.

The GATS Annex on Movement on Natural Persons Supplying Services specifies that the agreement "does not apply to measures affecting access to the employment market or to rules on citizenship, residence or employment on a permanent basis", therefore to migration policy.

It is clear that trade agreements, and in particular those negotiated by the EU, aim to steer clear of migration policies, by adopting a different vocabulary (professionals vs. workers, mobility vs. migration) and by underlining the temporary nature and specific purpose of stays. However, it is also clear that the liberalisation agreed in those trade agreements cannot have any effect as regards entry and temporary stay of natural persons for business purposes if no adequate admission policies are put in place in the host countries. The EU partners remain vigilant regarding this.

However, in general the rules on admitting Mode 4 service suppliers remain fragmented and incomplete based on the legislation and implementation by the different Member States.

ICT Directive is the exception, covering a part of the categories of natural persons that are covered by Mode 4: intra-corporate transferees (managers and specialists) and graduate trainees. For these categories, the Directive introduced from 2016 (in the Member States applying it, that exclude UK, Ireland and Denmark), **harmonised, non-reciprocal**, rules regarding the entry, stay, intra-EU mobility and rights of third-country nationals posted in the EU territory as ICT.

In this framework, there are two main aspects that can be underlined as relevant in the interaction between trade policy and the Legal Migration legislation:

- With the Directive in force, the EU has given access to the EU market to ICT and graduate trainees without major restrictions, notably labour market testing. Member States may limit, however, the volumes of admission of these third-country nationals to their territories. The rules for admission and rejection are established by the Directive. There are no coherence issues of the Directive with trade policy, given that the Directive is in line with the multilateral Mode 4 disciplines and, since its adoption, duly considered in the EU bilateral trade agreements.
- With regard to the other Mode 4 categories of natural persons, there are no harmonised rules of entry and stay at EU level, continuing to be subject only to national admission procedures. These categories are: business visitors for establishment purpose; business service sellers; contractual service suppliers and independent professionals (*see for details Annex 6.6*).

Given that trade in services in general is an offensive trade interest for the EU, while the temporary stay of natural persons tends to be an offensive interest for our partners, in particular when these are developing economies based on small companies and independent service providers, it is expected that the issue will continue to be discussed and that the EU partners will require a closer coordination of the migration rules regarding entry and stay with the needs for the market access that is provided to them by FTA.

VI. Reciprocity

Current EU legal migration law is non-reciprocal, i.e. it applies in the same way to all third-country nationals, irrespective of the migration rules that their country of origin applies to EU nationals. This implies that all third-country nationals are subject to the same rules, and those who fulfil the requirements set out in the Directives are admitted.

The "more favourable provisions clause" contained in most legal migration Directives allow Member States (or the EU as a whole) to keep in place more favourable provisions (under existing bilateral or multilateral agreements) applicable to nationals of certain third countries. This mainly concerns rights of third-country nationals, for example access to social security, more generous rules on family reunification and access to work for family members, etc.

The possibility for Member States to apply less favourable provisions is not foreseen in the legal migration Directives, and therefore currently not allowed under EU legal migration law.

Therefore, while within the context of the overall bilateral relations with third countries the EU could use the possibility to apply a more favourable treatment under its current legal migration acquis as an incentive (i.e. grant legal migration facilitation to third countries in recognition for well-functioning cooperation in other fields, such as readmission), doing the opposite would require a fundamental change of the existing legal migration Directives.

3. Conclusions

Different aspects of external, development, climate change and trade policy, have important interactions with the EU Migration Agenda, and there are also 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, attracting third country workers and permitting the exportability of some social security benefits.

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. There could be scope to strengthen the legal framework in this area and to further use funding possibilities for initiatives projects promoting circular migration.

Regarding development policy, several initiatives are being developed to interlink more closely the two policies.

Regarding the interaction with trade policy, the main aspect refers to the current gaps in the coverage of the relevant categories of natural persons not covered by the ICT Directive (issue developed in Annex 6.6).

Finally, it is noted that 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 allowing for 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.

ANNEX 6: DETAILED RELEVANCE ANALYSIS

Legislation on migration policy is a shared competence between the EU and Member States, which implies that EU legislation on legal migration must comply with the principles of subsidiarity, and that the Member States shall exercise their competence to the extent that the Union has not exercised its competence.

Having adopted so far a "sectoral approach" in the field of legal migration, the EU has exercised its competence only with regard to some categories of third-country nationals and some aspects of the migration management. This annex focuses on the relevance of the legal migration Directives, elaborating on the main findings presented in Section 5.1 of the Staff working document. It includes an assessment of the **relevance of the Directives' specific objectives**, and a detailed analysis of the **areas which have not been covered so far** under EU law (personal and material gaps), with the main objective of assessing **whether the objectives of the legal migration *acquis* are still matching the current needs and problems**.

The analysis covers the following issues:

1. Relevance of the Directives' specific objectives
2. Relevance of the material scope of the Directives
3. Third-country family members of non-mobile EU citizens
4. Low and medium skilled workers (other than seasonal workers)
5. Self-employed (including entrepreneurs)
6. Job seekers and working holiday visas
7. Investors
8. Trade in services
9. Transport workers and other highly mobile workers

1. Relevance of the Directives' specific objectives

Directive	Relevance of the objectives
FRD	The specific objectives of the FRD remain relevant, to support the EU in addressing needs with regard to family reunification, predominantly to mitigate the risks of population decline as well as to strengthen the sustainability of the EU welfare system and growth of the EU economy through a growing number of integrated third-country nationals and their families. The high share of family reunification permits, confirms the relevance of the Directives' objectives. However, restrictive implementation at Member State level affects the objectives' relevance.
LTRD	The specific objectives of the LTRD remain relevant in addressing the needs of the EU with regard to promoting the integration of legally residing TCNs, as well as enhancing the attractiveness of the EU through promoting mobility within the Union.
BCD	The specific objectives of the BCD continue to be relevant when looking at the needs of the EU labour markets to attract and retain highly skilled TCNs. However, as the number of permits issued under this Directive was below expectations, a new proposal aims to offset some of the shortcomings identified in its implementation ¹⁸¹ .
SPD	The specific objectives of the SPD remain relevant as they aim to reduce the 'rights gap' between TCN workers and nationals of Member States. By creating level playing field in terms of wages and working conditions between third-country workers (in the relevant categories covered by the Directive) and nationals in the country of residence, the equal treatment provisions remain relevant as they aim to have positive results for both third-country nationals that obtain a single permit and for EU citizens. The equality provisions should make TCN workers feel more valued and reduce the possibilities for their exploitation, while it should reduce the incidence of unfair competition between EU citizens and third-country workers. Ensuring equal treatment is also relevant to promote economic and social cohesion within and between Member States. The specific objective to reduce administrative burden and costs for the national administration, as well as for third country workers and their employers through the introduction of a single application procedure is still relevant to contribute to efficient management of migration flows.

¹⁸¹ Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (2016/0176). The new EU Blue Card proposal is currently under negotiation. Further information is available at: <http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM%3A2016%3A378%3AFIN>

SWD	The specific objectives addressed by the SWD remain relevant as they intend to address labour shortages in lower-skilled seasonal professions across Member States, and at the same time reducing the exploitation of the seasonal workers and facilitating the re-entry of bona fide seasonal workers.
ICTD	The specific objectives covered by the ICTD continue to be relevant to address the EU's needs to attract highly skilled TCN in specific sectors. The temporary transfer of personnel within multinational companies who share their know-how is seen as beneficial to enhance productivity and stimulate innovation.
S&RD (recast), SD, RD	The specific objectives of the recast S&RD (replacing the SD and RD) continue to be relevant with regard to needs across the EU to foster innovation and thus make the EU more attractive for students, researchers and trainees alike, considering that they represent a source of highly skilled human capital in the global competition for talent.

2. Relevance of the material scope of the Directives (key relevance issues grouped by migration phases)

Migration phases	Key relevance issues
Pre-application (information and documentation)	<p>Not all Directives include such provisions. Only the four more recent Directives (SPD, SWD, ICTD and S&RD) contain explicit provisions obliging Member States to provide access to information to third-country nationals and where relevant to their employers (i.e. SPD) and host entity (i.e. ICTD).</p> <p>However, even for those Directives, the practical implementation study and the consultation have revealed problems with regard to the availability, quality and completeness of information related to the admission conditions and application procedures as provided in some Member States. Shortcomings in such transparency can be an obstacle for the applicant, and may lead to additional costs (see effectiveness and efficiency). The provisions requiring Member States to provide information transparently are therefore very relevant.</p>
Application	<p>All Directives have established application procedures, which are relevant to ensure legal certainty, fairness and transparency of the process for all stakeholders. The practical implementation study confirmed that such measures remain relevant, although some gaps were also identified, for instance:</p> <p>Not all Directives include provisions on application fees (not the FRD, LTRD, RD and BCD) and, even when they are included (in the SD, SPD, ICTD, SWD and S&RD), they are not uniform. In practice, a number of complaints, preliminary rulings by the CJEU¹⁸² and an EU wide survey of fees charged¹⁸³ found that some Member States still charge disproportionately high fees. Disproportionate fees may represent an obstacle to attract and retain migrants, as also confirmed by feedback received through the OPC. The operational objective of ensuring that fees charged are not disproportionate continues to be relevant.</p> <p>The Directives regulate the maximum procedural time between the submission of the application and when the decision is issued. The practical application study however identified that additional time is often required to deliver the permit, which is not regulated by the Directives. There is no compulsory timeframe for the physical issuance of the permit.</p>

¹⁸² Judgement of the Court of Justice (CJEU) of 26 April 2012, *Commission v Kingdom of the Netherlands*, C-508/10, and Judgment of the Court of Justice (CJEU) of 2 September 2015, *Confederazione Generale Italiana del Lavoro (CGIL), Istituto Nazionale Confederale Assistenza (INCA) v Presidenza del Consiglio dei Ministri, Ministero dell'Interno, Ministero dell'Economia e delle Finanze*, C-309/14.

¹⁸³ European Migration Network, EMN Inform - Applicable fees for issuance of residence permits to third-country nationals, (2014).

	<p>Complaints also revealed situations where applicants find themselves without an effective redress mechanism if a formally established deadline passed without a decision being taken ("administrative silence"). A review of the transposition of the provisions requiring Member States to establish what would be the consequences if no decision is taken by the competent authority within the deadline, showed diverse approaches taken by Member States: in some Member States administrative silence equals to tacit rejection; in others to tacit approval; in some others redress procedures can immediately be triggered. The diverse application and further concerns related to legal certainty and coherence with other provisions, like the obligation to notify a reasoned rejection in writing, show that it remains relevant to address the issue of administrative silence in view of seeking to establish efficient and fair procedures.</p> <p>Ensuring equal treatment with nationals is a key operational objective of the legal migration Directives, which also applies to recognition of foreign qualifications. Evidence from interviews with migrants indicate that difficulties regarding the recognition of diplomas and qualifications were encountered in some Member States. The procedures are generally time consuming and complex.</p>
Entry and travel	<p>In some cases, the Schengen <i>acquis</i> interacts with the legal migration <i>acquis</i>. One Directive (SWD) covers stays under 90 days; this is however exceptional.</p> <p>Most Directives (FRD, RD, BCD, ICTD, SWD, S&RD) require that Member States facilitate the issuance of a visa needed to enter the territory in order to physically receive the residence permit. In some cases, Member States issue short-stay (Schengen) visas for that purpose, in others a long-stay visa. In most cases, visa procedures are not regulated by the Directives and the time needed to get a visa is not included under the deadlines fixed to issue decisions on the permits. Practical application studies – in particular in relation to the SPD – show that the time required to apply for a visa sometimes can extend considerably the overall time of the application. Moreover, complaints showed that a TCN can be denied admission because the entry visa is rejected or delayed, although the substantive conditions for issuing the permit had in principle been fulfilled. This was however clarified in the <i>Ben Alaya</i> CJEU judgement¹⁸⁴, where the Court clearly stated that no additional admission conditions can be imposed other than those listed in the Directives. There is a need for clear provisions that ensure the coordination between the two processes, in order to provide for fair and transparent procedures (<i>see also section on external coherence</i>).</p>

¹⁸⁴ Judgment of the Court of Justice (CJEU) of 10 September 2014, *Mohamed Ali Ben Alaya v Bundesrepublik Deutschland*, C-491/13.

Residence	<p>All Directives (apart from the FRD and the SD, but these categories are covered by SPD when they are allowed to work) have included equal treatment provisions, which meet the need of third-country nationals to be granted fair treatment and integrate in the host societies, as well as the need to reduce unfair competition and prevent exploitation. The open consultation showed that migrants who are residing, or who have resided in the Member States are significantly more concerned about shortcomings in equal treatment compared to Member States authorities, which shows a mismatch of perceptions. The equal treatment provisions address different areas; below some examples of why they remain relevant in terms of needs and where there may be gaps:</p> <ul style="list-style-type: none"> - Problems with family benefits (e.g. for TCNs that stay less than 12 months in a Member State; those working on the basis of a visa, only for permanent residents), or equal treatment for social security benefits granted only to those who are employees or registered as unemployed have been identified in the legal analysis, as well as in the practical application. - concerns raised by different stakeholders about exploitation of third-country workers show the importance of the basic legal principle of equal treatment in relation to working conditions being enforceable through the courts. However there appears to be gaps in terms of effective enforcement to address such concerns. - complaints related to undue discrimination in terms of access to employment for LTR holders in different Member States, whereby these TCNs are restricted from professions that go beyond the restrictions allowed in the Directive, show that this principle is relevant to retain.
Intra-EU mobility	<p>Five Directives have established rules on intra-EU mobility, which meet the needs of third-country nationals to have facilitated access to residence permits in a second Member State, as well as the need to promote the EU growth and competitiveness by promoting labour mobility. While this is a relevant objective, available data¹⁸⁵ is not sufficient to measure the extent of use of such provisions, and not all types of intra-EU mobility for third-country nationals are covered adequately by the Directives.¹⁸⁶</p>
End of legal stay	<p>Among the sectors with distinctive skills and labour shortages, such as health care and medical professions, there is also concern from some countries of origin that their educated professionals are being recruited by EU Member States on the expense of the health care systems in their countries of origin. The promotion of circular migration and</p>

¹⁸⁵ European Migration Network (EMN) study on intra-EU mobility of third-country nationals, (2013).

¹⁸⁶ See e.g. section on highly mobile workers, Annex 6.

	<p>prevention of brain drain, are therefore relevant operational objectives of the legal migration Directives, but these seem only to partly match those needs. In the legal migration Directives, provisions on ethical recruitment are limited to the BCD¹⁸⁷. The evaluation, as well as the stakeholders' feedback, have however showed no evidence that the current EU legislation is problematic in this respect.</p> <p>Similarly, provisions facilitating circular migration for TCNs who have settled in the EU exist in the LTRD and BCD; however these provisions are limited, allowing only short-term visits to third countries or the TCN risks otherwise to lose his/her status. At the same time, the SWD and LTRD provide for facilitation to re-entry in the EU after the end of the TCN stay.</p> <p>Some Member States only grant the possibility to export pensions to third-country nationals moving outside the EU when bilateral agreements exist with the third-country concerned.</p>
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¹⁸⁷ Global Health Alliance, *Brain drain to brain gain- Supporting the WHO Global Code of Practice on International Recruitment of Health Personnel for Better Management of Health Worker Migration*.

3. Third-country family members of non-mobile EU citizens

1. Issue definition

Family reunification has been one of the main reasons for immigration into the EU for the past 20 years. There are three main scenarios of family reunification with third-country nationals, for which the applicable rules depend on the status of the ‘sponsor’. While family reunification is regulated by the Family Reunification Directive (FRD)¹⁸⁸ for sponsors who are third-country nationals legally residing in the EU, and by the Freedom of Movement Directive¹⁸⁹ for ‘sponsors’ who are ‘mobile’ EU citizens¹⁹⁰, **there are no EU rules for ‘sponsors’ who are EU citizens residing in a Member State of which they are nationals**, and who did not exercise their right to free movement (so-called ‘**non-mobile EU citizens**’), except for a specific category of non-mobile EU citizens covered by the CJEU *Zambrano* case-law¹⁹¹. The Commission had originally proposed to apply the FRD also to non-mobile Union citizens¹⁹²; however, during the negotiations of this Directive the Commission agreed to make family reunification of this group of persons the object of a separate proposal which to date has not yet been elaborated.

One of the main problems deriving from the fact that the third scenario is not covered by EU law is the so-called “**reverse discrimination**”, which occurs when 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 have moved between EU Member States and have returned. Reverse discrimination is possible because EU law and national law on family reunification may provide for different levels of rights for different groups. While family reunification of non-mobile EU citizens falls under national law, family reunification of mobile EU citizens is regulated under EU law.

2. Scale of the issue

During 2008-2015 over 5.6 million permits were issued in the EU for family reasons. In 2015, EU Member States issued around 2.6 million first residence permits to third country nationals (TCN), out of which the highest number was for family reasons (753 thousand, or 28.9 % of all first permits issued).¹⁹³ The first permits issued for family reasons cover two scenarios:

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

While available statistics distinguish between sponsors who are EU citizens and sponsors who are third country nationals, they do not distinguish between mobile and non-mobile EU

¹⁸⁸ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

¹⁸⁹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

¹⁹⁰ Those EU citizens who move to or reside in another Member State than that of their nationality. The term “EU citizens” in this context refers to all citizens of the EU Member States and citizens of associated countries (EEA and CH).

¹⁹¹ According to this ECJ case-law, Union citizens have a right under Article 20 TFEU to be joined by their TCN family members if otherwise they would be forced to leave the territory of the Union, depriving them of ‘the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union’ (Judgment of the Court of Justice (CJEU) of 8 March 2011, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, C-34/09, para 42). This case-law concerns mainly third country national family members of minor Union citizens living in their home state.

¹⁹² COM/99/0638 final of 1.12.1999, Proposal for a Council Directive on the right to family reunification.

¹⁹³ Eurostat: Statistics Explained, ‘Residence permits statistics – Number of first permits issued by reason, EU-28, 2008-2017’.

citizens sponsors. Moreover, data on the profile of non-EU nationals, both sponsors and family members, is limited. A recent study¹⁹⁴ by the European Migration Network (EMN) has observed a general lack of comprehensive data on family reunification, already at national level; therefore, it is not possible to reliably determine the number of family reunification cases of non-mobile EU citizens across Member States.

Eurostat data tell us that the overall number of family permits for TCN in 2016 was around 778 000. Out of those, around 466 000 (around 60% at EU level) were granted to TCN family migrants joining non-EU citizens and around 311 000 (40%) to those who join EU citizens.¹⁹⁵ These data do not tell us, however, how many of the 60% were covered by the Family Reunification Directive 2003/86 (some important categories of TCNs such as family members of beneficiaries of subsidiary protection are excluded from Directive 2003/86). It does not tell us either how many of the 40% came under purely national law (TCN family members of non-mobile EU citizens) or under the provisions of the free movement directive 2004/38 (TCN family members of mobile EU citizens).

With regard to the question of how many non-mobile EU citizen sponsors actually face reverse discrimination, there are numerous court cases before the Court of Justice of the European Union (CJEU) which give an indication of the scale of the problem.¹⁹⁶

3. Responses

EU level responses

Article 79 TFEU (as well as the former Article 63 TEC) provide for a clear and uncontested legal basis to adopt at EU level, as a measure of the EUs common immigration policy, rules on family reunification, including on family reunification of EU citizens with their third-country family members. Whereas the first proposal for the family reunification directive 2003/86/EC (COM(1999)638) included family reunification of citizens of the Union who do not exercise their right to free movement, this group was not covered by the final text of the Directive. This was due to fact that during the negotiations in Council Member States made clear that they were concerned about such a wide scope of application and the Commission agreed to make family reunification of this group of persons the object of a separate proposal which however to date has not yet been elaborated.

However, EU law covers at least to a certain extent (regarding rights but not the admission conditions) the situation of (some) family members of non-mobile EU citizens: **where family members of non-mobile EU citizens have the right to work, they are covered by the Single Permit Directive**, in terms of the format of the permit (Article 7) as well as the right to

¹⁹⁴ European Migration Network (EMN), Synthesis Report for the EMN Focussed Study 2016 - Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices, (2016).

¹⁹⁵ Source: Eurostat [migr_resfam]. The overall number of family permits for TCN in 2017 was around 830 000. In 2017, out of those, around 538 000 (around 65% at EU level) were granted to TCN family migrants joining non-EU citizens and around 290 000 (35%) to those who joined EU citizens.

¹⁹⁶ For example: See, among others, Judgment of the Court of Justice (CJEU) of 14 December 1982, Joined cases *Procureur de la République and Comité national de défense contre l'alcoolisme v Alex Waterkeyn and others and Procureur de la République v Jean Cayard and others*, C-314-81/81 and C-83/82, (goods); Judgment of 23 January 1986, *Paolo Iorio v Azienda autonoma delle ferrovie dello Stato*, C-298/84, (workers); Judgment of 3 October 1990, Joined cases *Nino and others*, C-54/88 and C-91/88 and C-14/89, (establishment); Judgment of 21 October 1999, *Peter Jägerskiöld v Torolf Gustafsson*, C-97/98, (services); Judgment of 23 February 2006, *Heirs of M. E. A. van Hiltens-van der Heijden v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, C-513/03, (capital). See, also, Judgment of 19 October 2004, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, C- 200/02, (Article 18 EC).

equal treatment (Chapter 3). **Those family members who do not have the right to work (such as children) are, however, excluded from these provisions.** Furthermore, Member States may choose to give access to certain benefits only to third-country nationals who are actually in employment or have registered as jobseekers after a minimum of six months of employment.

National level responses

According to a study of the European Migration Network (EMN)¹⁹⁷, in the majority of Member States¹⁹⁸ there are differences in the requirements to be met by third-country national sponsors under the Family Reunification Directive in comparison to those foreseen for non-mobile EU citizen sponsors. In more than half of all Member States (AT, BE, BG, CY, CZ, DE, EE, ES, FI, FR, HR, HU, IE, LU, LV, PL, SI, SK) such requests are treated differently, whereas the rules are largely similar in (some) others (LT, NL, NO, SE).

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

On the other hand, **national rules on family reunification for non-mobile EU citizen sponsors are generally less favourable than EU rules on family reunification for mobile EU citizen sponsors** (as implemented at national level),¹⁹⁹ though certain Member States are obliged by national legislation or jurisprudence to provide non-mobile citizens with the same rights as mobile Union citizens (e.g. CZ, ES, NL).

4. Main consequences of the gap

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

- **Reverse discrimination:** Depending on the national legal framework, family reunification for non-mobile EU citizen sponsors may fall under less favourable rules than those applicable to mobile EU citizens and TCN sponsors. According to recent CJEU case law, instances of reverse discrimination do not infringe the EU principle of non-discrimination, as this principle is not applicable to purely internal situations.²⁰⁰
- **Disparity between TCN family members of non-mobile EU citizens compared to TCN family members of TCN sponsors:** certain EU countries might apply more favourable provisions (such as a wider definition of family or unrestricted access to the

¹⁹⁷ European Migration Network (EMN), Synthesis Report for the EMN Focussed Study 2016 - Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices, (2016).

¹⁹⁸ This Report was prepared on the basis of national contributions from 26 EMN NCPs (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Latvia, Luxembourg, Malta, Netherlands, Poland, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom, Norway).

¹⁹⁹ Cambien, N., *The Scope of EU Law in recent ECJ Case Law: Reversing 'Reverse Discrimination' or Aggravating Inequalities?* (2012), p. 127.

²⁰⁰ ibid. p. 129.

labour market) to the TCN family members of non-mobile EU citizens compared to TCN family members of TCN sponsors²⁰¹.

- **Disparity between family reunification rules:** Whether or not EU citizens can benefit from the rules of family reunification under the Freedom of Movement Directive depends on the existence of a cross-border element. Purely internal situations fall outside the scope of the Directive. In its numerous judgments, the CJEU has developed a broad approach when it comes to identifying a ‘cross-border’ element. Some scholars argue that it is very difficult to draw the line between the Treaty provisions on free movement and EU citizenship, which may lead to legal uncertainty.²⁰²

5. Conclusions

The existing EU legal migration Directives only partially cover family reunification with third-country nationals. The Family Reunification Directive only covers sponsors who are non-EU citizens residing legally in an EU country and their third-country national family members; therefore, other scenarios, including sponsors who are EU citizens are not covered. The Single Permit Directive provides for rights to family members who have the right to work, but certain key aspects of equal treatment can be limited to those who are or have been in employment. Furthermore, that Directive does not cover aspects linked to procedures and admission criteria.

No other EU legislation currently responds to the full scope of the issue. The Freedom of Movement Directive only applies to ‘sponsors’ who are ‘mobile’ EU citizens, namely those who move to, reside in or return to a Member State other than that of their nationality, and their third-country family members who accompany or join them. The ECJs Zambrano case-law covers, based on Article 20 TFEU, a specific, but quantitatively small group of third country nationals, namely third-country family members (parents) of minor Union citizens living in their home Member State.

The identified gap is relevant to the overall objectives of the EU legal migration *acquis* of an efficient management of migration flows, fair treatment of third-country nationals including facilitating their integration, as well as the increase of EU global attractiveness.

The existence of the gap at EU level implies that family reunification rights for non-mobile EU citizens are less protected. Based on national legislation currently into force, family members of non-mobile EU citizens benefit in most cases of more favourable provisions compared to family members of third-country nationals. However, there is no guarantee this will be the case in the future as Member States remain free to redefine their policy at any moment.

There would be added value in addressing the issue at EU level. The lack of a comprehensive EU legal instrument on family reunification with third-country nationals and uncoordinated national initiatives may cause disparity as regards the treatment of third-country nationals and non-mobile EU citizens and lead to disparity between applicable family reunification rules and situations of reverse discrimination.

²⁰¹ European Migration Network (EMN), Synthesis Report for the EMN Focussed Study 2016 - Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices, (2016).

²⁰² Shuibne, N. N., *Free Movement of Persons and the Wholly Internal Rule: Time to Move On?* (2002); A. Tryfonidou, A., *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe* (2008); also see Lenaerts, K., "Civis Europaeus Sum": from the Cross-Border Link to the Status of Citizen of the Union, (2011), p.6.

4. Low and medium skilled workers (other than seasonal workers)

1. Issue definition

Medium and low-skilled workers from third countries, other than seasonal workers, encompass a broad group that can potentially contribute to addressing existing and future labour shortages in the EU, which represent a major challenge for European competitiveness. With regard to future trends, it is estimated that changes in the demographic structure, technological advancements and climate change will significantly impact the future of employment across the EU²⁰³. As emphasised in a recent Commission Communication, the EU needs a more proactive labour migration policy to attract third-country nationals (TCNs) with the skills and talents required to address demographic challenges and skills shortages.²⁰⁴

According to an EMN study on current labour shortages and the need for labour migration from third countries²⁰⁵, the EU experienced significant labour shortages in the period 2011-2014, i.e. not sufficiently covered by Member States' or other EU nationals. While some Member States face shortages in highly skilled jobs, some other Member States rather face shortages in medium and low-skilled occupations, hence there are disparate labour market needs between different Member States. As shown in the table below, a number of Member States stated that they faced occupational labour shortages with regard to medium skilled and low-skilled occupations, such as agriculture and fisheries, and personal care.

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

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

Source: National reports EMN study 2015 on labour shortages

²⁰³ European Centre for the Development of Vocational Training (Cedefop), *Future Skill Needs in Europe: Critical Labour Force Trends*, (2016).

²⁰⁴ COM(2016) 197 final of 6.4.2016. Communication from the Commission to the European Parliament and the Council - Towards a Reform of the Common Asylum System and Enhancing Legal Avenues to Europe.

²⁰⁵ European Migration Network (EMN), Study 2015, *Synthesis Report - Determining Labour Shortages and the Need for Labour Migration from Third Countries in the EU*.

Third-country nationals can play a key role in meeting labour market shortages in selected sectors, including in household services, agriculture, transportation, construction and tourism-related services such as the hotel and restaurant industries²⁰⁶. Recent to medium-term forecasts (2006-2015) of skills supply suggest that substantial labour market shifts will occur away from primary and traditional manufacturing sectors towards services and knowledge-intensive jobs²⁰⁷. These sectoral changes will have a significant impact on future occupational skills needs. While there will be a continued demand for high and medium-skilled workers, labour demand for low-skilled workers will likewise increase²⁰⁸.

Regarding the latter, a significant expansion in the number of jobs is to be expected in the retail and distribution industry. In this context, it is worthwhile noting that even though employment is expected to fall in a number of occupational categories, in particular as regards skilled manual labour and clerks, the estimated net job losses will be offset by the need to replace workers reaching retirement age. About 85% of all jobs openings will be the result of retirement or other reasons which lead to labour inactivity²⁰⁹. Conversely, the tendency on the labour market to replace leaving or retiring workers with high-qualified ones, will lead between 2016 and 2025 to a reduction in the share of those working in elementary occupations with low qualifications (from 44% to 33%); while the share of high-skilled workers working in occupations demanding lower skills levels will increase from 8% to 14%²¹⁰. The IOM study additionally highlights the issue of highly-qualified TCNs who work in low-skilled jobs in the EU. In a 2007 OECD study, it was highlighted that immigrants are much more likely to hold jobs for which they appear to be over-qualified, suggesting significant skills mismatches²¹¹.

In most Member States, public and policy debates are characterised by concerns about the use of labour migration as a tool for addressing labour shortages, particularly for the medium and low-skilled occupation sectors. Therefore, Member States tend to prioritise labour market activation measures for the national labour force, including TCNs already residing in the Member States. According to the abovementioned EMN study²¹² several Member States see attracting TCNs to fill such labour shortages only as a secondary measure (these include: AT, BE (Flanders), CY, IE, MT, LT and LU).

Due to the difference in current labour market needs across Member States²¹³, some question whether harmonisation of policies at EU level would be effective in addressing this issue. There is an argument that the entry and residence of workers is better regulated at national level as national legislation can react more quickly than EU legislation to changing labour market needs²¹⁴. In this respect, the OECD has suggested that also at EU level there are means

²⁰⁶ European Commission, DG for Employment, Social affairs and Equal Opportunities, *Employment in Europe 2008*, p. 43-109.

²⁰⁷ European Centre for the Development of Vocational Training (Cedefop), *Future Skills Needs in Europe – Medium Term Forecast*, Synthesis report, (2008).

²⁰⁸ European Commission, DG for Employment, Social affairs and Equal Opportunities, *Employment in Europe 2008*, p. 43-109.

²⁰⁹ European Centre for the Development of Vocational Training (Cedefop), *Future Skill Needs in Europe: Critical Labour Force Trends*, (2016).

²¹⁰ *ibid.*

²¹¹ OECD, *International Migration Outlook 2007*, (2007).

²¹² European Migration Network (EMN), Synthesis Report for the EMN Focussed Study 2015, *Determining Labour Shortages and the Need for Labour Migration from Third Countries in the EU*.

²¹³ *ibid.*

²¹⁴ Emerged in the consultation process of the Fitness check, especially by Member States.

of building flexibility into the legislative framework, e.g. by using implementing or delegating acts²¹⁵.

2. Legal definition

The Single Permit Directive provides for an encompassing definition of third-country worker as "*a third-country national who has been admitted to the territory of a Member State and who is legally residing and is allowed to work in the context of a paid relationship in that Member State in accordance with national law or practice*". However, **in the legal migration acquis there is no definition of "medium and low-skilled workers"**.

Relevant definitions have been developed by international organisations. Some of them focus on **qualifications**: for example, the International Organisation for Migration (IOM) defines low and medium skilled TCNs based on their educational attainment. Thereby, the low skilled are defined as those with pre-primary and lower-secondary education (ISCED 0-2) and the medium-skilled as those with upper and post-secondary education (ISCED 3-4).²¹⁶

With regard to **skills levels**, the International Labour Organisation (ILO) ISCO-08 classification is also used, which differentiates between 10 major groups – armed forces 0, highly-skilled from 1 to 3, medium-skilled from 4 to 8, low-skilled 9.

The Blue Card Directive includes a definition of "highly qualified employment" which is linked to the possession of "the required adequate and specific competences as proven by higher professional qualifications". The proposal for a new Blue Card Directive²¹⁷ includes instead a definition of "**highly skilled employment**" which is also linked to the possession of "the required competence, as proven by higher professional qualifications", though those qualifications can be attested by either "higher education qualifications" (i.e. the successful completion of a post-secondary higher education or equivalent tertiary education programme, corresponding at least to level 6 of ISCED 2011 or to level 6 of the European Qualification Framework) or by "higher professional skills" (i.e. skills attested by at least three years of professional experience of a level comparable to higher education qualifications and relevant to the work or profession to be carried out), while in the current Directive reliance on skills is only by way of an option for the Member States. On this basis, one can consider that medium and low-skilled workers are all workers whose qualifications (or skills) would not comply with the requirement under the Blue Card Directive.

3. Scale of the issue

Eurostat provides (flow) data on first residence permits issued for remunerated activities (see table below), which is not disaggregated by skill level. However, data is available for residence permits issued for highly skilled, researchers, seasonal workers²¹⁸ and EU Blue Card.

²¹⁵ OECD and EU, *Recruiting Immigrant Workers: Europe 2016*, (2016), p. 276.

²¹⁶ IOM, *Labour Market Inclusion of the Less Skilled Migrants in the European Union*, (2012). Further information on the ISCED levels is available at Eurostat: Statistics Explained – International Standard Classification of Education (ISCED).

²¹⁷ COM(2016) 378 of 7.6.2016. Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment.

²¹⁸ Seasonal workers data vary greatly from one year to the next depending if PL provided data, since there was no obligation to provide data until 2017 and the definition was not harmonised.

First permits issued for remunerated activities (EU -25)

	2012	2013	2014	2015	2016	2017
Highly skilled workers	19,755	21,940	24,922	25,818	25,446	28,645
Researchers	7,943	8,957	9,307	9,819	9,826	11,423
Seasonal workers	20,323	17,092	188,152	333,362	458,191	540,226
Other remunerated activities	312,149	357,875	212,315	199,866	216,981	293,733
EU Blue card	1,646	5,096	5,825	4,908	8,988	11,559
Remunerated activities reasons total	361,816	410,960	440,521	573,773	719,432	885,586

Source: Eurostat [migr_resocc] as of 28.2.2019. Comment: Please note that data for Italy and Poland (seasonal workers) has a strong impact on the distribution of these permits between categories and development over time. See Annex 7, section 4.1 for further analysis of this influence.

Although no harmonised EU data exists on medium and low-skilled TCNs entering the EU, some proxy data is available. It is estimated that **third-country nationals residing in the EU have a lower than average level of qualifications** – i.e. approximately, 45% of TCN adults are without upper secondary education qualification in comparison with 22% of nationals²¹⁹. A recent OECD study²²⁰ based on projections from the EU Labour Force Survey found that “the foreign-born have had a more significant effect in expanding the less educated parts of the work force”. The study further finds that in countries where immigration flows have been significant, migrants have contributed relatively more to the size of the lower-educated labour force than to the higher educated labour force.

It is estimated that in 2010 the immigration population (foreign-born) in EU-15 aged 15 or above was composed of 41% with low-level of education; 33% with middle-level of education; and only 26% with high-level of education. In comparison, in other OECD countries, the share of highly qualified immigrant is higher, at 36%.²²¹

4. Responses to the issue

EU level responses

The conditions of admission and residence of medium and low-skilled TCNs are not covered by the legal migration Directives, with the exception of seasonal workers covered under Directive 2014/36/EU. However, the **Single Permit Directive** covers the **application procedure** and the **right to equal treatment** for most categories of third-country workers (excluding some groups covered by other EU legislation, as well as workers posted from third countries²²²).

National level responses

While the majority of Member States acknowledge that migration plays a role in addressing labour shortages, only a few use migration as a key tool in filling gaps in the labour market (e.g. Austria, Germany, France, Spain and Ireland)²²³. This is mostly due to concerns about competition with the national workforce. Thus, Member States often prioritise other

²¹⁹ Skills and integration of Migrants, available at: European Commission, Migration and Home Affairs: ‘European Dialogue on skills and Migration’.

²²⁰ OECD and EU, *Recruiting Immigrant Workers: Europe 2016*, (2016).

²²¹ OECD, ‘Database on Immigrants in OECD and non-OECD Countries: DIOC’, 2000/01 and 2010/11.

²²² Article 3(2) of the SPD.

²²³ OECD and EU, *Recruiting Immigrant Workers: Europe 2016*, (2016).

measures, such as labour market activation of the national workforce or education/training policies to stimulate skills development in shortage areas.

Nevertheless, Member States which have established shortage occupation lists tend to have a more favourable regulatory framework, which allows labour migrants to apply to work in professions listed as a shortage occupation. This may include exemptions from labour market tests (AT, BE ES, FR, HR, PL) and from quota regimes (IT, EE, HR, PT) as well as reduced minimum income thresholds (EE)²²⁴. Furthermore, points-based systems have been put in place in some Member States (AT), and/or bilateral agreements for recruitment of workers (FR) have been adopted in specific occupations with third countries in order to facilitate access to the labour market²²⁵.

5. Impact of the gap on the functioning of the EU legal migration policy

The consequences of a lack of harmonised EU admission and residence rules for low and medium skilled TCNs are difficult to assess in light of the different needs Member States face regarding these groups of TCNs. While attracting highly skilled TCNs is predominantly seen as a necessity to gain competitive advantage compared to other destinations (such as the USA or Canada)²²⁶, admitting to the EU low-skilled groups of TCNs is seen as standing in direct competition with native-born workers²²⁷.

6. Conclusions

- Although the Single Permit Directive has introduced certain rights (including equal treatment with nationals) and procedural guarantees, there is no harmonised EU instrument for admission of medium and low-skilled workers.
- Statistics show that there is a current need for medium and low-skilled workers in the EU but the particular occupations and needs vary significantly across Member States.
- Future labour market trends suggest that the demand for low and medium-skilled workers will increase, with expansion in the number of jobs to be expected in the retail and distribution industry²²⁸. While employment is expected to fall in a number of occupational categories, in particular as regards skilled manual labour and clerks, the estimated net job losses will be offset by the need to replace workers reaching retirement age.
- Most Member States adopt labour market activation policies for their population (including (re)training) instead of satisfying labour demand through migration from third countries. However, there are some Member States that use migration channels from third countries to satisfy labour market demand, and some have adopted flexible labour market tests for certain occupations identified as in need.

²²⁴ According to the EMN study on determining labour shortages, 21 MS currently produce shortage occupation lists. European Migration Network (EMN), Synthesis Report for the EMN Focussed Study 2015, *Determining Labour Shortages and the Need for Labour Migration from Third Countries in the EU*.

²²⁵ *ibid.*

²²⁶ *ibid.*

²²⁷ European Commission, DG for Employment, Social affairs and Equal Opportunities, *Employment in Europe 2008*, p. 43-109.

²²⁸ European Centre for the Development of Vocational Training (Cedefop), *Skills Forecast: key EU trends to 2030*, (2018).

5. Self-employed (including entrepreneurs)

1. Issue definition and scale of the issue

The attraction of self-employed third-country nationals to the EU has to be linked with job creation, economic growth and innovation when businesses aim at being active in new markets. More than only addressing labour shortages then, entrepreneurship has also the capacity to create new jobs (foremost for the migrant himself or herself) and to develop new markets. The contribution of migrant business founders to economic growth and the development of innovation has often been highlighted²²⁹, and, while access to self-employment has been for long analysed as linked to the hurdles to market labour integration migrants face, this assertion has been recently challenged as studies have stressed the higher share of migrant founders in the innovative and high-growth or tech businesses in comparison to national-born founders²³⁰.

At policy level, the EU has been working on fostering business creation. Initiatives relate to creating a business-friendly environment, promoting entrepreneurship, improving access to new markets and internationalisation, facilitating access to finance, and support SME competitiveness and innovation. These initiatives are anchored in the context of the Investment Plan, the Capital Markets Union, the Digital Single Market Strategy, and the revamped Single Market Strategy.

The category of "self-employed" is not a homogenous one and covers broadly all persons working outside of an employer-based relationship. The term is used in the present exercise as encompassing all those who have migrated in order to create and own their own business (i.e. having an active participation in). However, this document will also try to reflect recent economic mutations of businesses and will therefore address the specificities of startups and entrepreneurs. "Entrepreneurs"²³¹ will be used as referring to the creation of innovative businesses and startups while "self-employed" will be used to refer to businesses that do not present any innovation-related element. Although this distinction does not rely on any legal element, it appears as the most appropriate in order to display the variations of the migration regulatory landscape covering self-employed.

In 2016, there were about 30.6 million self-employed people in the EU, of which 9.2% were born outside of their country where they lived (Eurostat, EU-LFS). Nearly two thirds of these self-employed people were born outside of the EU. The proportion of self-employed people who were non-nationals varied substantially across Member States, ranging from less than 1% in Poland to approximately 20% in the United Kingdom (21%) and Cyprus (20.5%). In addition, self-employed non-nationals who were born outside the EU were more likely to have employees than those who were born in another EU member States (27.5% vs. 20.3 % for self-employed non-nationals born in another EU Member States).²³²

²²⁹ See for instance Hunt, J., Gauthier-Loiselle, M, *How Much Does Immigration Boost Innovation?*, (2009) which analyses innovation increase by skilled migrants by exploring individual patenting behaviour.

²³⁰ See for instance Anderson, S., *Immigrants and Billion Dollar Startups*, (2016).

²³¹ Shane S. A., in *A General Theory of Entrepreneurship: The Individual–Opportunity Nexus*, (2003) defines entrepreneurship as 'an activity that involves the discovery, evaluation and exploitation of opportunities to introduce new goods and services, ways of organizing, markets, processes, and raw materials through organizing efforts that previously had not existed'.

²³² OECD and EU, *The Missing Entrepreneurs: Policies for Inclusive Entrepreneurship*, (2017.), p. 99 and onwards.

The 2001 Commission proposal envisaged the group of self-employed as it designed the procedures and conditions for the self-employed in parallel to the rules for persons in paid employment. Particular emphasis was put on the need that applicants had to demonstrate that their financial means include own resources, in accordance with a business plan, and that the contemplated activities would have a beneficial effect on employment or economic development of the Member States, according to national provisions.

While sectoral directives were adopted to cover specific socio-professional categories further to the withdrawal of this proposal, no directive was proposed to cover TCNs self-employed. No harmonisation rules at EU level therefore exist regarding this category and rules on the issue are national. Questions that this situation raises therefore relate to the analysis of a potential deficiency for this particular group in comparison with the overall situation of third-country nationals covered by EU directives as well as to the analysis of the existence of other legal channels that these particular group could also use.

However, this does not mean that this group is totally excluded from the scope of the current EU legal framework. The transversal directives (i.e. those not aiming at regulating the entry and residence conditions of a particular socio-professional group) cover self-employed in the following aspects:

- **The Long-Term Residence** de facto includes self-employed as its scope is based on duration of stay in Member States. TCNs self-employed are therefore eligible to the long-term residence status.
- A particular provision lays down an obligation of equal treatment with nationals in access to self-employed activity.
- **The Family Reunification Directive** de facto includes self-employed as the right to family reunification depends on the holding of a residence permit issued by a Member State for a period of validity of one year and on reasonable prospects of obtaining the right of permanent residence.
- A particular provision entitles sponsor's family members to access to self-employed activity in the same way as the sponsor.
- **The Single Permit Directive** excludes self-employed from its scope.

The directives harmonising entry and residence conditions for particular groups cover self-employed in the following way:

- **The Student and Researchers Directive** allows students to exercise self-employed economic activity outside their study time and subject to national rules. After completion of research or studies, TCNs are allowed to stay on the territory of the Member State for a period of at least nine months in order to set up a business.
- **The Blue Card Directive (proposal)** allows Blue Card holders to start a business on the side of their employed activity ("hybrid entrepreneurship").

2. Responses to the issue

The impact of this situation can be analysed under various angles, in particular from the point of view of the objectives of the texts already adopted.

Under the angle of creating a level playing field for the efficient management of migratory flows, the absence of a directive for this category at EU level may have an impact regarding the establishment of fair and transparent applications procedures.

In addition, the impact on the objective of strengthening the EU's competitiveness and economic growth appears particularly relevant for this issue. The absence of regulation of admission and residence conditions at EU level may well have an impact on the EU's ability to attract and retain (highly skilled) third-country nationals willing to create a business. This appears particularly true when considering business opportunities linked with the new economy in view of the network effects it relies on, impacting also the objective of enhancing the knowledge economy, and more broadly that of mitigating the consequences of demographic ageing.

It can also be seen as a hindrance to improve the EU's ability to effectively and promptly respond to existing and arising demands for (highly skilled) third-country nationals and to offset skill shortages, since the creation of business has the potential to create many jobs.

Regarding the objective of ensuring a fair treatment, the absence of harmonisation at EU level on entry and residence conditions entails that this group does not enjoy specific rights linked to their status as it is the case for other categories covered at EU level. This is for instance the case for procedural rights such as the right of appeal, access to information, procedural safeguards and also the right to equal treatment. While these rights can be guaranteed through national law, they are not guaranteed by EU law²³³. The impact is probably the most obvious when considering the rights granted by the Single Permit Directive as this exclusion deprives them of a single application and procedure and of the equal treatment rights provided by this text.

This absence of harmonisation can also be analysed in view of the objective of effective management of migratory flows coupled with fair treatment as self-employed mobility within the EU is framed by Schengen rules. This means that self-employed TCNs are not allowed to reside outside the Member State that issued their residence permit and that the short-term travel possibilities are limited to up to 90 days in any 180-day period in other Schengen States. Working in another Member State, if not allowed at national level, would entail another application for work and residence permits in the second Member State, which has obviously some economic implications. This element might be of particular relevance for startup founders who tend to be more mobile than the average population²³⁴. The efficient allocation of labour force across the EU is also undermined as cross-border mobility of workers is a key element in this respect and helps to absorb asymmetric labour demand shocks and contributing to the deepening of the Single Market.

National responses

The national response to the attraction of self-employed from outside the EU is twofold. If the vast majority of Member States (AT, BE, CY, CZ, DE, EE, ES, FI, FR, HU, IE, IT, LU, LV, NL, PL, PT, SE, SI, SK, UK) identify "immigrant business owners" either in their national law or through the administrative practice of their immigrations authorities²³⁵, the economic development of business creation that accompanied the liberalisation of certain sectors of the economy together with the emergence of the digital revolution has been also reflected in migration terms. Against this background, some Member States have developed specific

²³³ Note that this has consequence on the application of the Charter of Fundamental Rights.

²³⁴ European Startup Initiative (ESI), *Startup Heatmap Europe 2016*.

²³⁵ European Migration Network (EMN), *Study 2015 - Admitting Third-Country National for Business Purposes* p.15.

migration routes for startup founders, which appear as very specific if compared with traditional self-employment permits²³⁶. These are usually called "startup permits or visas".

Self-employed and business owners permits

National legal frameworks show considerable variety with regard to the definition of categories of TCN admitted and incentives available.

Twelve Member States have specific programmes in place to attract and facilitate the admission of immigrant business owners (AT, CY, CZ, EE, ES, FR, IE, IT, NL, PT, SI, UK). Among the remaining Member States, some of them promote economic immigration of third-country nationals who wish to undertake a gainful activity within their general immigration policies (DE, LT, LU, PL, SE), while others do not appear to have specific (BE, SK) or general policies (immigration) in place (EL, FI, HR, HU, LV)²³⁷.

The overall objective of these policies, when put in place, is to generate overall economic benefits, hence the common criteria is to show a contribution to the national economy.

Other admission conditions include evidence of capital, a business plan, evidence of entrepreneurial skills or previous business experience, education, insurance and background checks.

For what concerns the capital required to run a business, some Member States check that it is appropriate and sufficient on a case-by-case basis (BE, CZ, ES, FI, FR, LU, LV, SE). Where a threshold is set, it can range from a minimum of EUR 10,000 (SI) or HUF 3 million (~ EUR 10,000, HU), to EUR 30,000 (LT), EUR 50,000 (IT), EUR 65,000 (EE), EUR 100,000 (AT) or more than EUR 150,000 (UK)²³⁸.

The business plan aims at displaying an analysis and evaluation of the feasibility of the envisaged activity and can include information on the legal aspects of the structure envisaged, a business project, a financing plan, and a marketing strategy.

These requirements are assessed by the national authority responsible for the approval, mainly the immigration authorities, who may consult, in some cases, authorities in charge of the economic development and employment policies.

Startup permits

Following the economic development and the emergence of new economic models, some Member States have recently focused their efforts on the design and implementation of startup permits or visas. This trend, kick-started by Ireland in 2012²³⁹, has now reached 12 Member States²⁴⁰ and it is explained by the expectancy that this category of migrants will bring significant rewards for host countries, both thanks to migrants' propensity to start new businesses, thus creating jobs, and their more recently recognized capacity to expand beyond the ethnic markets into more innovative and high-value and high-growth sectors. Research

²³⁶ The issue of the interaction of the two pathways is also an element to be taken into consideration: while most Member States have kept the first route when they have adopted the most recent one, some have made the choice of repealing the first (DK) and others have envisaged the startup route as a pre-entry route to their self-employment scheme (NL).

²³⁷ European Migration Network (EMN), *Study 2015 - Admitting Third-Country National for Business Purposes*, p. 15.

²³⁸ ibid. p.17.

²³⁹ Ireland was followed in 2014 by Italy and Spain, in 2015 by France, Denmark and the Netherlands.

²⁴⁰ Member States having established a scheme are the following ones: CY, DK, EE, FR, IE, IT, LT, LV, NL, SK, ES, PT. In addition, CZ, FI and HU have announced one.

found that high-growth businesses account for 50% of new jobs created, differentiate themselves from other companies by expanding not just in size but also in number of new locations and encourage subsequent employment growth in their related industries.²⁴¹ At the same time, migrant entrepreneurship is also seen as a potential way to counteract both demographic and economic decline and to contribute to social inclusion as an alternative way to access the labour market, also increasing the attractiveness of the areas and countries where it is fostered, and to capitalize on the expansion of innovative trends of the economy (such as the digital economy, the green economy or social economy).

It is however fair to say that, if migrants' particular abilities to innovate and create is widely acknowledged, it is also commonly recognised that their businesses usually have a higher failure rate than those of nationals, which accounts for the particular relevance of business support services provided for migrant entrepreneurs²⁴². But foremost, a supportive business environment is essential for starting up a business and for boosting entrepreneurship²⁴³. In this context, a startup permit cannot be seen as the instrument ensuring by itself the attraction of people, although the visibility and branding of such initiative appears to play a significant role, but more as an administrative facilitation accompanying a fertile ground for business and growth, key to attracting migrant entrepreneurs. Business support services are also typical of the startup scene, such as accelerators and incubators. As a consequence, in some Member States, the creation of startup permits or visas has been embedded or linked to more general programs aimed at fostering innovation growth and startup development in general, with a direct link on the number of eligible candidates.

Embedded mostly in general competitiveness and job creation objectives, the general aim of such schemes is to attract startups and potential founders to promote the development of innovative entrepreneurial ecosystems, which could foster job creation and innovation and make the country more competitive in the knowledge economy. Specific policy objectives of these measures include increase of tax revenues, skills transference, development of a positive reputation, innovation promotion, raise, knowledge spill-overs, access to foreign markets and trade links fostering.

There are currently 12 Member States with a startup scheme (AT, CY, DK, EE, ES, FR, IE, IT, LV, LT, NL and UK) Out of these, 3 Member States (CY, EE, FR) have also schemes for startup employees. 14 member States have no scheme and 3 Member States are announcing one (FI, HU, PT).

If schemes seem therefore to have proliferated recently, worth stressing is that they cover a wide variety of realities. Spanning from the mere implementation of a fast-track procedure on an already existing traditional self-employed permit in some cases, they can also consist in an exemption or waiver regime to the already established self-employed regime or more drastically be sophisticated and targeted newly created permits coupled with advanced business support programs. And when a dedicated migration route is created, the admission conditions mirror the specific features of the business from an economic perspective.

²⁴¹ [Ewing Marion Kauffman Foundation, *The Economic Impact of High-Growth Startups* \(2016\)](#).

²⁴² European Commission, DG for Internal Market, Industry, Entrepreneurship and SMEs, *Evaluation and Analysis of Good Practices in Promoting and Supporting Migrant Entrepreneurship - Guide Book*, (2016).

²⁴³ Supportive environment conducive to business needs can include a number of aspects, including ease for starting up a business, accessibility to capital and to entrepreneurial capabilities (technology networks/hubs, education, trainings, technological cooperation), low level of administrative burden, favourable labour market regulations and overall attitude towards entrepreneurship, including low levels of fear of risks and failure.

Admission conditions

Minimum capital required vs. provision of funds to selected applicants

The first specificity of the startup permits compared to the traditional self-employed permit is that an investment brought by the applicant can be one of the admission conditions, but does not appear as the most commonly chosen one. An amendment to the scheme adopted only one year before in Ireland and consisting in lowering significantly this minimum capital requirement shows for instance that such a condition appears at odds with the economic approach of startups. Funding brought by the applicant is not a proxy for the success of the startup, especially at seed stage, and the idea itself prevails on the funding capabilities from the perspective of admission, at least before the scale-up phase of the business. This explains for instance the existence of opposite solutions, such as the one adopted in France where money is actually provided to the applicant in the context of the selection of the French Tech Ticket.

Scope, business plans and their economic assessment

The widely-shared admission condition of startup schemes is the business plan presented by applicants, which is aimed at displaying how the business envisaged meets the economic features of a startup. This issue is closely linked with the scope of the schemes as the nature of business determines the scope of this migration route. The main specificity of such schemes is therefore the prospective assessment of the business idea from the part of the relevant authorities who have to assess whether the business idea is fit for a fast-growth development in the market concerned (or envisaged), and therefore could lead to the creation of jobs and growth, assumptions which the permits rely on. In most of cases, it means to assess if the business qualifies as "innovative".

While all startup schemes target innovative businesses, the regulatory approach to this notion differs. Most Member States focus on certain indicators seen as reflecting innovation; one (Italy) has made the choice of defining *ex ante* what is an innovative business²⁴⁴; and two have adopted an *a contrario* approach, excluding certain sectors (DK excludes retail and sectors) of the scope or focusing only in certain sectors (Ireland explicitly focuses on ICT).

The indicators used to assess the innovativeness of the business are the following ones: novelty of the product or service (both in terms of concept but also in terms of processing), involvement of a new technology for production, distribution or marketing, orientation toward (high) growth and scalability in so far as it aims at entering or creating a new market.

The business plan condition includes other elements such as information on the materialisation of the idea, business mission, target market (sometimes with a thorough market analysis), the team/persons involved, and a financing plan.

While the absence of definition of "innovation" makes sense from a conceptual and regulatory perspective and enables a great flexibility from the perspective of the assessors, an obvious counterfactual for applicants is the lack of predictability of the procedure, also reflected

²⁴⁴ According to the Italian legislation, an innovative startup meets at least one of the requirements:

- the expenditure on research and development is at least 15% of the greater of cost and total value of production of the innovative startup;
- at least a third of the total workforce has a PhD or is doing a PhD at an Italian or foreign university; alternatively, at least two thirds of the total workforce hold a Master's degree;
- the startup is the owner or the licensee of at least one industrial patent on an invention of industrial biotechnology, a topography of semiconductor product or a new plant variety directly related to the corporate purpose and the business activity.

during the appeal procedure in case of rejection. This element has also implications on the selectiveness of this migration route, which all Member States claim.

Variations also exist regarding the persons or entities in charge of the assessment from the side of the national authorities. If there is wide-spread consensus on the fact that the prospective economic assessment of the business requires to be carried out by people presenting particular economic skills and background, this economic assessment has been allocated in certain Member States to the economic Ministries, in others to entities gathering persons from Ministries and private bodies or persons from the startup community.

Methodology of assessment

Criteria are given a different importance. While most Member States do not set any priority between criteria, Denmark and Ireland are applying a point-based system where each criterion scores differently. Worth noting in this context the situation of the Netherlands who have deliberately excluded the point-based methodology applicable for the traditional self-employed route in the implementation of the route dedicated to startups.

Team applications

The innovation angle of the issue makes it important to allow team applications (up to 3 or 4 participants). Allowed in most Member States, this element has been highlighted as a necessary amendment for those who have not provided for this possibility initially.

Institutional and organisational aspects

Coordination of services

From an institutional point of view, an important challenge reported by Member States is the coordination necessary to this cross-service file. While immigration services are responsible for the regular migration checks, the strong economic angle of the file requires an important and efficient involvement of services in charge of economy or research and innovation. To address this challenge, some countries have chosen to create a dedicated agency (NL, EE) or unit (ES).

Role of incubators

The specific role incubators and accelerators play in the development of startups has been acknowledged by certain schemes. Their involvement is mandatory in some Member States (NL, FR) or optional in others. Enrolment in an incubator can also have implications in the admission criteria in others (IT). When mandatory, this enrolment raises the question of qualification or certification of incubators.

Added value rights and other incentives

Support Business Programs

These schemes can be linked, mandatorily or not, to a support program aimed at giving the right conditions for the growth of the startup, among an incubator or accelerator which provides business training services, co-working space, networking and access to financing, elements that have a crucial role in the development of startups. Programs can be linked to the duration of the visa or permit, but not necessarily. While some Member States have deliberately made the choice not to include this kind of programs, assuming that a great innovative idea should not need so much support, a soft-landing package can be envisaged, to put foreign entrepreneurs on an equal footing with nationals in terms of registrations of business and other administrative procedural steps.

Schemes directly linked to the granting of capital or mandatory enrolment in an incubator or accelerator programs have an inherent implication on the number of eligible candidates. This limitation can be formal (FR) or implicit (NL or ES).

Business incentives

In addition to provision of business services, some schemes are linked with business incentives such as tax reductions or startup specific tax regimes. Other pool factors exist such as the existence of dynamic ecosystems with easy access to funding opportunities (via business angels, venture capitals or other funding avenues) and to right skills²⁴⁵.

Fast-track procedure and exemption of regulation procedures

A fast-track procedure to obtain the permit or visa is established in all cases. It is also sometimes the only element constitutive of the startup permit. Even if such a procedural facilitation does not seem as substantial as other elements put in place, it appears as an important aspect as a lengthy procedure would stand at odds with a business model established on a rapid growth. In Estonia, no separate regulation has been created but the startup scheme is made up of the exemption of the regular subsistence requirement under the Aliens Act.

Family reunification rights and long-term residence

Schemes usually provide for the right to family reunification, sometimes in an accelerated way, and for the member to have access to the labour market. Long-terms residence can also be an additional right.

Promotion

Promotion of startup schemes appears as a very important element. Member States report that in order to be efficient, this promotion must be targeted to get high-quality applications.

Elements to monitor

Success of startups and renewal

Very little information regarding renewal is available at this stage as these schemes are very recent. Some Member States have deliberately provided for loose conditions in order to keep some leeway in the process. While a general line relies on the idea that the business should be in line and consistent with the original application, some Member States express the will of keeping an open perspective in the development of the business as long as the creation of jobs or profit can be shown.

Relevance between permits and visas

Duration of the envisaged stay is here to be analysed in conjunction with the development phase of the business and it is an element which is envisaged differently across the existing schemes as it also relates to the types of business the schemes aim at attracting. Some target business idea at seed stages (FR, DK, IT, ES), others are opened to already established businesses and some have decided to target both using the different regimes of visas and

²⁴⁵ To be noted that the most recent schemes couple the migration route for startup founders with one dedicated to startup employees, who, even if high-skilled, are generally not in a position to qualify for a highly-skilled scheme in view of their remuneration.

residence permits (ES or EE). However, registration of business in the host country is most of the time a prerequisite, except under the visa regime. The most relevant duration for this type of stay is not obvious.

Implementation challenges

A number of elements appear to be challenging to standardise or to operate. For instance, the evaluation of innovative ideas and business plans may be cost-intensive, difficult to standardise, and left largely to countries' discretion. Similarly, the external evaluation and sponsorship or endorsement that the schemes rely on both add tiers of discretion

3. Conclusions

For the reasons explained above, self-employed appear as partly covered by the current EU legal *acquis*.

Recent trends in the economy have been mirrored from a migratory perspective with the creation in some Member States of a route dedicated to startup founders. Just as economic policies on startup are all new and in experimental mode, this recentness is also reflected in the specific programs for TCN entrepreneurs that Member States have adopted for those willing to come to the EU to create businesses and contribute to economic growth and job creation according to national need by providing incentives and facilitating entry and stay.

The specific policy objectives include setting-up innovative businesses contributing to the development of economy and innovation and attracting talented/high potential entrepreneurs. Traditional schemes, on their side, rely more on the general objectives of generating overall economic benefits.

The recent schemes display four kinds of elements:

- **incentives:** policy measures tailored to attract such a group, from macroeconomic measures dedicated to help startups grow, to favourable tax regime, counselling and training on establishing and registering the business, facilitated access to finance (loans, grants or equity), special economic zones and dedicated information portals and marketing actions that also have their importance.
- **procedural facilitation:** measures to fast-track or ease restrictions of admissions such as shorter examination periods or exemptions, reduced application fees, reduced supporting documentation, proof of education level excluded.
- **qualifying criteria:** entry requirements such as an innovative business idea, impact on growth, certain entrepreneurial skills
- **enhanced rights:** accelerated family reunification, direct granting of long term residence permits

Empirical evidence is too scarce to identify at this stage what elements really are decisive to constitute an efficient startup permit. This concept encompasses a series of measures, some related to the analysis of the substance of the business, other related to migration procedures and others being more linked to the visibility and branding of the concept, which relies heavily on network effects typical of this new business model.

The efficiency of this low-risk route with inherently limitations on the number of eligible candidates is also to be confirmed from an empirical perspective, at least with a close monitoring of the number of jobs created and the turnover of startups. While statistics and other empirical evidence lack, it has to be underlined already now that Member States that

have designed and implemented this route for some years report a positive feedback and what started as pilot projects have in many cases been turned in permanent schemes, with amendments along the way.

Some outstanding issues remain such as the role of the incubators, their qualification and certification. This model needs to be steadier if it were to be formally linked with a migration scheme. The question of their extension to universities is also an interesting direction that some Member States are currently examining.

Worth noting also is that Member States without any specific regulation for startups can also be successful in attracting foreign startup entrepreneurs, especially if they have a reputation of being a tech hub. Measures for attracting and retaining startup founders should in any event be part of broader efforts in fostering innovation and entrepreneurial ecosystems in the EU. This is particularly visible as TCN founders often choose to relocate to places where they think they have the highest likelihood of succeeding. Besides the migration policies, the general business environment also needs to be supportive.

6. Job seekers and working holiday visas

Job-seekers permits exist in a very limited number of EU Member States. They allow applicants to come and reside in a country for a limited period of time (usually 6 to 12 months) in order to look for a job. Once the job is found, the applicant changes status to a work permit. These permits are usually implemented in countries with a low employment rate and are most of the time opened to high-skilled or to those having completed a degree in the Member State.

Working holiday visas allow travellers to undertake employment in the country they are visiting and in some cases to study. They are usually valid for one year and concern people in a specific age range (typically 18-30) from selected countries. They also exist in a very limited number of EU Member States.

The asset of an EU approach on these two matters would be the creation of a pool of mobile candidates that could potentially address specific labour shortages. Such a scheme could therefore be even more efficient if it were directly linked with a pre-identified sector. In addition, mobility could be supported by specific projects or programmes.

Also worth mentioning, an alternative to these permits at EU level could be to impose to Member States an obligation to allow legally residing third-country nationals to submit applications for work permits without having to return to their home country. While this is possible in certain Member States and for students, this is not the case in all and could represent a significant facilitation.

The current limited number of both job seekers and working holiday permits in Member States as well as the limited interest expressed in the public consultation for these two matters do not allow to conclude to the immediate necessity of action at EU level through a legislative approach. Worth analysing at this stage however would be the possibility to develop supporting programs or projects targeting identified sector or countries.

7. Investors

1. Issue definition

Attracting investment by designing specific residence permits for third-country national investors and granting facilities to obtain them has been one of the many responses of some Member States to the economic crisis. While this type of permit is not totally new, they have been remerging against this economic background, as attracting foreign capital can boost growth and employment. They rely on the notion of financial investment, more than entrepreneurial or management skills, and are therefore not to be assimilated to self-employed and entrepreneurs' permits for which an active participation of the permit holder is required in an identified business²⁴⁶.

The entry and residence conditions of investors are not harmonised at EU level and they are, in most Member States but not in all, regulated at national level²⁴⁷. A wide range of schemes exists, and this variety is in particular reflected in the investment requirement as explained below.

The absence of regulation of entry and residence conditions of potential investors at EU level does not mean that this category is totally excluded from the EU legal migration *acquis* as they are covered by the transversal directives that are the Long Term residence and the Family Reunification Directive. If they register as employee of their own business, the Single Permit Directive also applies to them. Therefore the current exercise will focus on assessing the implications of the absence of regulation at EU level of specific entry and residence conditions.

2. Scale of the issue

Most of the time, these schemes have existed for a long time, have very often been subject to considerable change and have even disappeared in some instances, to remerge in the context of the financial crisis. This non-linear change probably reflects the difficulty to design them safely in view of the particular risks they pose and efficiently, and, is used by the most sceptical analysts to question their mere rationale.

The scale of the problem lies in the assessment of the need of this particular migration channel at EU level. A counterfactual analysis both from the perspective of the migrants and from the perspective of governments and institutions implementing it could help to conclude on any evidence of the need of harmonising entry and residence conditions of investors at EU level.

²⁴⁶ Note that the line between these two types of permits is however sometimes very thin as some investors' permits do not exclude as such the participation of the permit holder in the business where appropriate - but it cannot be regarded as the main criteria of the permit, which is the main motive of the migration process (or the intention) by the applicant. Conversely, an entrepreneur may very well invest in his or her business, but will not be admitted on a territory on the ground of investment.

²⁴⁷ To date, they exist in BG, CY, CZ, EE, EL, ES, FR, HR, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SK and the UK. HU suspended their scheme in April 2017. For a comprehensive analysis of these schemes, please see: Milieu Law and Policy Consulting, *Factual Analysis of Member States' Investor Schemes granting citizenship or residence to third-country nationals investing in the said Member State*, Fact finding study, (2018):

- a. Part A available at: https://ec.europa.eu/info/files/part-study-investor-citizenship-and-residence-schemes_en
- b. Part B I available at: https://ec.europa.eu/info/files/part-b-i-study-investor-citizenship-and-residence-schemes_en
- c. Part B II available at: https://ec.europa.eu/info/files/part-b-ii-study-investor-citizenship-and-residence-schemes_en
- d. Part C available at: https://ec.europa.eu/info/files/part-c-study-investor-citizenship-and-residence-schemes_en
- e. Part D available at: https://ec.europa.eu/info/files/part-d-study-investor-citizenship-and-residence-schemes_en

From the migrants' perspective, this question relates to the possibility of justifying entry and residence in the EU on other grounds and therefore using another kind of permit. In addition, the fact that applicants wish to make the investment out of their country of origin throws light on the motivations of this migration channel. The motivations justifying the investment in another country than that of one's country of origin appear necessarily linked with the return on investment expected in that second country (and which is different from the one that could be foreseen in the origin country). Among these benefits, literature focusing on EU Member States schemes reports EU political stability, education prospects, tax benefits, visa-free travel and mobility for the EU, but also EU citizenship.

From the governments' perspective, a first and obvious benefit of these schemes is the capital they bring in, or the investment they make. This assertion needs however to be qualified for the model based on government's bonds, in which the interest rates may vary and in which, ultimately, the government may have to pay back more than what the investor has initially brought in.

While attracting investment may be a legitimate aim, a particular feature of these schemes is that they are not risk-free in terms of (cross-border) corruption, security, influence peddling, money laundering and tax evasion²⁴⁸. They must present the adequate safeguards in order to avoid the reputation or money laundering risks they entail. Tracking the origin of the investment made as well as the profiles of applicants is of primary importance and ensuring that the right safeguards are in place is a sine qua non condition to make sure that the benefits of this channel are not outweighed by their inherent risks.

An additional aspect of these permits is the interaction that may exist between them and the acquisition of citizenship in return for investment as residence can be a first step to the acquisition of citizenship. Within the EU legal system, this feature is not neutral as the Article 20 of the Treaty provides that "Every person holding the nationality of a Member State shall be a citizen of the Union". European citizenship confers a number of rights on persons holding the nationality of a Member State by virtue of their status as EU citizens, the most beneficial one from non-EU citizens' perspective being probably the right to move and reside freely within the EU²⁴⁹. Worth noting in this context that, although these are national schemes, they are deliberately marketed and often explicitly advertised as a means of acquiring Union citizenship, together with all the rights and privileges associated with it, including in particular the right to free movement.

In terms of objectives, harmonisation of entry and residence conditions at EU level could relate to the attraction of investment with the aim of boosting growth and competitiveness, the creation of a level-playing field for admission conditions and the creation of a level playing field in the design of the first step towards EU citizenship acquisition.

²⁴⁸ For a more detailed description of these risks, please see in particular, European Parliamentary Research Service *Citizenship by Investment (CBI) and Residency by Investment (RBI) schemes in the EU: State of play, issues and impacts*, October 2018; Transparency International/Global Witness, *European Getaway – Inside the Murky World of Golden Visas*, October 2018.

²⁴⁹ The rights conferred by the Treaty are the following ones: the right to non-discrimination on the basis of nationality when the Treaty applies, the right to move and reside freely within the EU, the right to vote for and stand as a candidate in European Parliament and municipal elections, the right to be protected by the diplomatic and consular authorities of any other EU country, the right to petition the European Parliament and complain to the European Ombudsman, the right to contact and receive a response from any EU institution in one of the EU's official languages, the right to access European Parliament, European Commission and Council documents under certain conditions and the right to participate to the Citizens' Initiative. Furthermore, under EU law, some rights are reserved for EU citizens, such as the right to operate intra-EU air services, where the EU *acquis* requires the majority of the undertaking to be owned by EU nationals

3. Responses to the problem

National level responses

While some Member States do not seem to attribute any degree of attention to this legal route, policies implemented by the Member States having a scheme show myriad diversities, both in the objectives of the policy, and in their implementation, reflecting their national priorities and needs. They exist to date in 20 Member States: BG, CY, CZ, EE, EL, ES, FR, HR, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SK and the UK. HU operated a scheme until April 2017. They are however referred to in different ways or may not be appositely defined

In terms of policy objectives, while an obvious general aim is to attract investment, this aim is not envisaged under the same perspective in all Member States having a scheme, which has also impact on the design of the schemes and on their implementation. More precisely, while some Member States display a focus on direct capital, others concentrate on real estate development or stimulating markets (PT, ES), attracting high contribution consumers, job creation (BE, ES, FR, IE, LU, NL, PL, PT), promotion of favourable conditions for strategic investments (BE, CY, ES, EL, LU, PL) but also stimulating housing or building sectors (PT, LV, EL, ES), economic port-crisis recovery (LV) and minimisation of negative economic effects of economic downturns (PT).

Admission conditions

These different perspectives account for the variety of options of investment as the main admission condition: two main categories of transactions exist, presenting both two sub-categories, underpinning the policy goals governments want to reach.

The first one involves the investor and the private sector. Under this pattern, the investor either invests directly in a privately-owned company (already existing or not) without usually participating in the management of the business, in a credit or financial institution (direct investment model), or the investor purchases a property (property investment model). A very recent amendment to the Portuguese scheme, under discussion at the time of drafting, proposes to introduce a new investment option based on ecological considerations (“green projects”).

The second category involves the investor and the government granting the entry and residence rights. In that case, the investor provides a certain amount of money to the government (cash model) or he purchases various government bonds for which interest rate may vary (government bonds model).

The size of these investments varies greatly:

- Member States **without a financial threshold**: EL²⁵⁰ (“strategic investment”), PL (“sufficient means to generate income”).
- Member States which require a **very low investment (below EUR 100,000)**: EE, HR, LT, LV.
- Member States which require a **low investment (EUR 100,000 – less than 500,000)**: BG, EL, FR, HU²⁵¹, IE, LT, LV, MT, PT, RO.
- Member States which require a **medium investment (EUR 500.000 – less than 1 million)**: CY, ES, MT, LU.

²⁵⁰ In this case, foreign investors must obtain a decision by the Interministerial Committee of Strategic Investment which characterises the investment as strategic (not defined by law).

²⁵¹ As already said, Hungary suspended their scheme in April 2017.

- Member States which require a **high investment (EUR 1 million – less than 5 million)**: BG, CZ, EE, ES, IE, IT, NL, PT, RO, UK.
- Member States which require a **very high investment (over 5 million)**: SK (permanent residence), LU.

This admission condition, which is the main feature of the scheme, is coupled with others such as an impact on national economy and background checks. Languages requirements are usually not imposed and education or skills are also out of the conditions. Applicants are also exempted from traditional integration requirements, which appears at odds with other residence permits requirements.

Incentives and rights

Incentives aiming at attracting investors include business friendly environment and favourable tax regimes (not linked to residence), pathway to citizenship of the Member State (and hence EU citizenship) and the possibility to travel inside the EU, element which is the most advertised²⁵².

In terms of rights, schemes usually entail favourable possibilities for family reunification, access to labour market to family members, direct granting of long-term residence or permanent, access to social benefits and acceleration to citizenship.

These schemes also offer sometimes specific minimum residence requirements which appear as waivers or exemptions from other schemes (they can be called in this case facilitated investors schemes), in order to enable the investor to be active out of the Member State concerned. In a number of Member States, physical residence of the investor is not expressly required once the individual has obtained the residence permit (CZ, HU, LV, MT, RO, SK, UK). Some Member States explicitly require the presence of the investor for a very limited period of time, such as seven days in a year (PT), one day (IE), or simply the day the application is filed (BG, EL, MT). The concept of residence itself is therefore another one which bears several acceptances in the context of these residence schemes.

Procedural facilitation is also implemented such as fast-track examination of applications and ease to restrictions of admission also exists.

Measures to prevent the misuse of this legal route and its inherent risks

Inherent risks of this legal migration channel should not be underestimated, because it implies the transfer of a substantial amount of money from outside the EU to the EU, the risks related to money laundering are obvious. The fast prospect of income might as well lead to risks of corruption or influence peddling. While third-country nationals may invest in a Member State for legitimate reasons, they may thereafter also be seeking illegitimate benefits, such as evading law enforcement investigation and prosecution in their home country and protecting their assets from the related freezing and confiscation measures, which raises security risks. All these risks are exacerbated by the cross-border rights associated with residence in a Member State.

In addition, from an economic and financial perspective, risks relate to tax evasion and to the economic impact the schemes may have. On the first point, per se, the use of a resident permit by investment does not equal tax evasion, although it may enable individuals to profit from

²⁵² A valid residence permit allows a third-country national to travel freely within the Schengen area for 90 days in any 180-day period. It also allows access for short stays to Bulgaria, Croatia, Cyprus and Romania based on the unilateral recognition of residence permits by these Member State.

existing privileged tax rules. However, there may be room for abuse based on the misuse of the benefits and documentation obtained through the schemes, which varies from scheme to scheme; i.e. some may facilitate and be used as an instrument in aggressive tax planning and evasion. On the second point, reliable information is currently lacking as regards the monitoring and analysis of the performance of the schemes in reaching their stated objectives (e.g. attracting investments and stimulating economic growth). There is very little data available to allow for reliable conclusions as to the schemes' economic performance and real economic benefit as statistics on the number of permits granted are available in a very limited number of Member States. Furthermore, difficulties have been noted in establishing a causal link between such schemes and direct inflow and in estimating the extent to which such inflows would have happened in any case without the schemes²⁵³. Moreover, doubts have been raised about the fiscal sustainability of the short-term economic advantages²⁵⁴ and some concerns have been expressed about the possible social impacts (e.g. the rise in property prices linked to the development of investors' schemes at the expense of access to affordable housing for the local population)²⁵⁵.

For these reasons, this legal migration route requires specific safeguards in order to mitigate as far as possible the risks it entails. Efficient due diligence and background checks and controls of applicants and of the origin of the money invested are of primary importance. This requires a strong coordination between different authorities and institutions involved in the process.

Impact

Measuring the effectiveness and impact of investors' schemes can be challenging in view of the diversity of operating models. While the direct economic or financial benefits these investments make is likely to be assessed, the skills or business experience of the investors, as well as the indirect benefits that may emerge are more difficult to quantify.

Examples of impacts in terms of volume of investments expected or generated are demonstrated for five Member States²⁵⁶.

The investor programme was considered successful in Hungary: the value of generated investments in national bonds represented HUF 250 billion (~ EUR 800 million). The value achieved represented so far one quarter of the potential impact initially foreseen. The scheme was suspended in April 2017.

²⁵³ Xu, X., El-Ashram, A., and Gold, J., *Too Much of a Good Thing? Prudent Management of Inflows under Economic Citizenship Programs*, International Monetary Fund, IMF Working Paper 15/93, May 2015; For similar arguments as regards investor residence schemes, see section III.10 of the accompanying Commission Staff Working Document. See also European Parliamentary Research Service *Citizenship by Investment (CBI) and Residency by Investment (RBI) schemes in the EU: State of play, issues and impacts*, October 2018, p. 36 onwards, citing Sumption M., Hooper K., *Selling Visas and Citizenship: Policy Questions from the Global Boom in Investor Immigration*, Migration Policy Institute, October 2014, Washington DC. As a Brookings-Rockefeller research initiative reported, 'knowledge of the program's true economic impact is elusive at best'. See: Elkind P., Jones M., *The dark, disturbing world of the visa-for-sale program*, Fortune, 2014.

²⁵⁴ European Parliamentary Research Service *Citizenship by Investment (CBI) and Residency by Investment (RBI) schemes in the EU: State of play, issues and impacts*, October 2018 p. 40, citing the 2018 Spring Report of the Cyprus Fiscal Council.

²⁵⁵ Xu, X., El-Ashram, A., and Gold, J., *Too Much of a Good Thing? Prudent Management of Inflows under Economic Citizenship Programs*, International Monetary Fund, IMF Working Paper 15/93, May 2015; European Parliamentary Research Service *Citizenship by Investment (CBI) and Residency by Investment (RBI) schemes in the EU: State of play, issues and impacts*, October 2018,

²⁵⁶ European Migration Network (EMN), *Study 2015 - Admitting Third-country National for Business Purposes*, p. 23.

Latvia reported investment of around EUR 1 billion, with the 82.4% share allocated to real estate, 12.4% to obligation and only 5.2% to equity capital. In addition, contribution to the economic recovery, impacting on other sectors not directly targeted by the policy (i.e. tourism, accommodation, legal services, insurance, building management, interior and design, food and catering and healthcare) was also reported.

Spain estimates at EUR 447 million the amount of investment received (ranging from EUR 370 million in property, to EUR 37.5 million and EUR 39.5 million respectively for moveable capital and business ventures). A total of 1,615 jobs is estimated to be supported. 70% of these investments were coming from Russians and Chinese.

In the UK, evaluation concluded that whilst direct investment has been important, it has been of less benefit to the economy than the indirect consumption by the investor and associated taxation (mainly VAT). It was also concluded that the United Kingdom's offer to migrant investors was sufficiently attractive in respect of other countries, including those that offer citizenship²⁵⁷.

Portugal estimates that the 6962 residence permits granted generated a total investment of EUR 4.249.798.777²⁵⁸.

Measuring impact of the route shows limitation: while the volume of investment can be recorded, indirect impact on the economy is more difficult to accurately quantify, though estimations may be possible.

Worth noting is that negative impact is also reported. This concerns in particular the property investment model which has led to a significant increase of property prices (MT, CY, PT). More generally, the topic has emerged regularly in the press in the past years, particularly in connection with cases of (cross-border) corruption, influence peddling and money laundering, very often in connection with citizenship by acquisition.

Challenges

Comparing the schemes proves to be challenging as they vary widely according to policy objectives and options of investment chosen. Against this background, and taking into consideration the path to EU citizenship they constitute, a study was conducted in 2018 to gain a more accurate state of play of this changing area of migration²⁵⁹.

The difficulty to find the right balance between incentives and rights given and the right definition of admission conditions lined with appropriate effective controls and checks stands out quite clearly.

This difficulty is reflected in the numerous amendments this route has been subject to. Worth noting in this perspective that HU increased the threshold in 2015 to EUR 300 000 before deciding to suspend the scheme in 2017, LV from 81 000 to 250 000 and the UK from £ 1 million to £ 2 million (approx. EUR 1.33 to 2.66 million) in 2014.

In addition, some alleged consequences of these policies in certain Member States have been highlighted. This is the case for low criteria that can attract persons not actually seeking to invest but seek to achieve legal status in the EU (CZ), the design of the role of some

²⁵⁷ Migration Advisory Committee, *Tier 1 (Investor) Route: Investment Thresholds and Economic Benefits*, (2014).

²⁵⁸ Ministry of Foreign Affairs, Trade & Investment Agency, Immigration and Borders Service, 'Golden Residence Permit Programme (ARI): Data from the 8th of October 2012 to the 31st of December 2018'.

²⁵⁹ Milieu Law and Policy Consulting, *Factual Analysis of Member States' Investor Schemes granting citizenship or residence to third-country nationals investing in the said Member State*, Fact finding study, (2018).

intermediaries that could charge a very high commission and be located off shore (HU) and present risks of conflict of interest (MT), or more general impact on some public services (UK²⁶⁰) and impact on raise on housing values for property models (CY, PT)²⁶¹. Corruption scandals have also broke out in some instances.

Another challenge is the coordination between relevant services and authorities in charge of its implementation. This implementation draws on the competences of a wide range of authorities or institutions in Member States²⁶² and a smooth cooperation is crucial to achieve expected goals and implement necessary safeguards.

The renewal of these schemes is also an element that needs further insight and time to be assessed as the vast majority of permits just reach the end of their validity.

4. Main consequences of the gap

The absence of a regulation at EU level on entry and residence conditions of investors has as a consequence not to maximise the presentation the EU has been developing as a destination willing to attract investment. This aim can however be achieved by other means. This particular issue has not been raised in an outstanding manner in the various public consultations, which leads to the conclusion that the gap is not that critical.

The main consequence of the gap at EU level lies in the interaction these schemes may have with the acquisition of EU citizenship and the free-movement rights, in particular, attached to it. Due to the fact that European citizenship confers a number of rights on persons holding the nationality of a Member State by virtue of their status as EU citizens, Member States should use their prerogative to award nationality in the spirit of sincere cooperation with other Member States and the EU, in particular as the right to free movement leads to a mutual interest among Member States.

5. Conclusions

Outstanding elements remain to be analysed to be able to come to a conclusive view. A detailed mapping of the existing schemes, which includes an analysis of the benefits of these schemes as well as the risks they entail (linked to security and reputation risks but also in relation to the acquisition of EU citizenship) is required to decipher elements linked to the efficiency of this legal channel as well as a thorough reflection on how to make it risk-proof. This will not be feasible without publicly available statistics of the number of permits granted by all Member States concerned as well as an economic analysis of the performance of the schemes, these two elements being to date not available.

The Study mentioned above²⁶³ has been the basis of a Report by the Commission adopted on 23 January 2019²⁶⁴. This report covers both investor citizenship and residence schemes and identifies the key areas of concern and risks associated with granting citizenship of the Union

²⁶⁰ For instance, the MAC highlighted the risk that the increasing prevalence of those holding private medical insurance may result in resources being diverted from public healthcare to private and the risk of increase demand on other public services, such as transport and policing.

²⁶¹ European Migration Network (EMN), *Study 2015 - Admitting Third-country National for Business Purposes*, p. 24-25.

²⁶² Authorities concerned are Ministry of Interior, Ministry of Justice, Ministry of Foreign Affairs, Ministry of Economy and Finance, police authorities, Ministry of Employment and/or Social Security.

²⁶³ Milieu Law and Policy Consulting, *Factual Analysis of Member States' Investor Schemes granting citizenship or residence to third-country nationals investing in the said Member State*, Brussels 2018. Fact finding study.

²⁶⁴ COM(2019) 12 final of 23.1.2019. Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Investor Citizenship and Residence Schemes in the European Union" (SWD(2019) 5 final).

or residence rights on the basis of an investment only. In particular, the report identifies the possible security gaps resulting from granting citizenship without prior residence, as well as risks of money laundering, corruption and tax evasion associated with citizenship or residence by investment. It also describes problems connected to the governance and lack of transparency of such schemes, looks at how these might be addressed and provides a framework for delivering this improvement. This Report is accompanied by a Staff Working Document²⁶⁵ which provides for more details on these two issues. In this Report, the Commission shares the concerns raised about the risks inherent in investor citizenship and residence schemes and the fact they may not always be mitigated. As investor schemes may raise issues of compliance with EU law, the Commission has announced to continue to monitor the compliance of such schemes with EU law and take action where necessary.

A recent development also consists in coupling these schemes (with a fairly moderate investment level though) with startup permits, which could balance the controversial nature of these schemes and also has as a consequence to shift target group.

²⁶⁵ SWD(2019) 5 final of 23.1.2019.

8. Trade in services: Temporary stay of natural persons for business services (excluding ICTs that are covered by Directive 2014/66/EU)

1. Issue definition

With the increasing internationalisation of business, the rising importance of exports in services and the changing patterns of professional mobility resulting from trade liberalisation, devising schemes to fulfil trade commitments and facilitating the admission of third-country nationals for business purposes, is high on the European Union's agenda. This trend will continue with the conclusion and entry into force of new ambitious trade and investment agreements.

The EU has offensive interests in the liberalisation of services: it accounts for over 22% of global trade in services, compared to 15 % for the US and 8 % for China, and has a positive services trade balance with the rest of the world of over 150 billion EUR per year²⁶⁶. It therefore pushes for liberalisation of trade in services by its trading partners in the framework of multilateral, regional and bilateral trade and investment agreements.

Trade in services can take various forms, and is divided in four modes for supply. Services can be supplied to a consumer of another party across borders (mode 1), when the consumer is him/herself abroad (mode 2), by a commercial presence in the territory of the other party (mode 3) or by the presence of a natural person in the territory of the other party (mode 4).

Mode 4 requires the presence of a natural person in the territory of the trading partner for business purposes, and hence inevitably interacts with migration policy. This interaction is complex given that EU's GATS commitments contain a blanket reference which specifies that all requirements of EU and Member States' laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements²⁶⁷.

In practice, the measures for admission of third-country nationals may have an impact on the implementation of the EU's commitments entry and temporary stay of natural persons for business purposes and on market access of the EU's partners.

At Member States' level, immigration authorities strive to find a balance between attracting third-country businesspersons and, at the same time, providing for effective border controls and measures to prevent abuse and detect fictitious/bogus or other illegal/criminal activities²⁶⁸.

There are several schemes that regulate the admission of TCN to the EU for business purposes, with only one harmonised scheme at EU level for intra-corporate transferees (Directive 2014/66/EU). All other schemes are national and cover categories such as investors and service providers with no commercial presence in the EU. In these schemes, Member States design their policies to manage the entry and stay of third-country nationals, with

²⁶⁶ European Commission, DG Trade, *European Union Trade in the World: Index*, 6 November 2015. Cited in Annex 11 of the Impact Assessment of the revision of the Blue Card Directive.

²⁶⁷ Tans, S., *The Interaction Between Trade Commitments and Immigration Rules, Admitting Contractual Service Suppliers and Independent Professionals in Germany, the Netherlands and Sweden* (study for the European Commission), (coordination, 2018).

²⁶⁸ European Migration Network (EMN), *Study 2015 - Admitting Third-Country National for Business Purposes*.

measures and criteria they deem will best meet their national interests as well as the needs of businesspersons²⁶⁹. Most Member States do not have specific legislation or programmes to facilitate the entry of third-country service providers, and existing legislation does not reflect neither the terminology nor the specific commitments that results from the implementation of the EU's trade policy.

The lack of comprehensive EU schemes for these categories of third-country nationals implies a number of costs for EU consumers and the EU economy as a whole, as well as for the international service providers. The absence of EU wide schemes also means that there is no intra-EU mobility for these third-country nationals and therefore no possibility for the European Single Market to take full advantage of the business opportunities created by non-EU investors or service providers.

The adoption of an ambitious, EU-wide scheme for admitting intra-corporate transferees has allowed the EU to negotiate more advantageous provisions on Mode 4 in recent trade agreements (notably with Canada and Japan). Conversely, inadequate channels for admitting other categories of service providers reduce the attractiveness of the EU's offer in trade agreements and, as a result, reduce the trading partner's willingness to reciprocate or to commit elsewhere.

2. Legal definitions

There is no specific definition in GATS for the types of service providers to whom Mode 4 can apply. It can cover all international temporary movements to provide services, whether developing to developed countries, developed to developing, or between developed or developing countries. It may cover all levels of qualifications or skills.

However, the EU commitments under GATS and in the existing FTA have defined the categories of professionals that can be covered by Mode 4. The EU commitments are limited to highly skilled professionals.²⁷⁰ These are *intra-corporate transferees*, *business visitors for establishment purposes*, *business sellers*, *contractual service suppliers* and *independent professionals*.

Directive 2014/66/EU on **Intra-corporate transfers** (ICT) covers TCN professionals (managers, specialists) transferred to the EU for work by a business entity with a commercial presence in the EU and trainee employees (persons with a university degree who are being transferred for career development purposes or to obtain training in business techniques or methods).

Third-country service providers who are not intra-corporate transferees are not covered by EU legislation. EU-wide harmonisation for the admission of those persons is limited to the categorisation of Mode 4 of the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) and EU Free Trade Agreements (FTA).

Business sellers (BS) and **business visitors for establishment purposes** (BVEP) are allowed, by GATS and other trade agreements, to enter the EU for service provision for a short period of time, up to 90 days (in any 12 month period).

²⁶⁹ ibid.

²⁷⁰ The FTA between the EU and Cariforum makes an exception for fashion model services, chef de cuisine services, and entertainment services other than audio-visual services.

Contractual service suppliers (CSS) and **Independent professionals** (IP) are allowed to enter the EU for longer periods, i.e. for a cumulative period up to 6 months or, in more ambitious trade agreements, 1 year.

CSSs are engaged in the supply of a service on a temporary basis as employees of a juridical person supplying the service, with no commercial presence in the territory of the Member where the service is to be provided. This employer cannot be a placement agency. CSS receive remuneration from their employer while abroad and may not engage in any other remunerated activities in the territory of the Member where the service is to be provided. IPs also supply services on a temporary basis, based on a contract, but do so as a person who is self-employed in the origin country.

The EU commits to open its market in a limited number of sectors, with specific lists agreed for CSSs and IPs respectively in each of its trade agreements.

For EU Member States in the Schengen Area, short-term Schengen visas can in principle be adequate for the admission of Mode 4 categories of TCN professionals staying less than 90 days. This would cover all BVEPs and BSs, as well as CSS and IPs who wish to enter to fulfil short-term contracts. This would require Member States to consider their trade commitments when issuing such visas.

The admission for longer periods allowed to CSS and IPs is not covered by any harmonised EU rules on visas nor on legal migration.

In sum, the wide variety of Mode 4 categories in the EU's trade agreements does not fully align to existing EU legislation governing the entry and stay of third-country nationals for business persons, and **there appears to be a gap specifically for CSSs and IPs**.

2. Scale of the issue

Measuring the scale of this gap is rather difficult as there are few realistic estimates of Mode 4 transactions. Statistical data that are used to approximate the volume of Mode 4 service supply include those of the Balance of Payment (BOP), foreign affiliates' statistics²⁷¹ (FATS) as well as migration and tourism statistical frameworks.

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

For a more global analysis of services industries or market opportunities, a number of additional useful statistics can be drawn from various statistical frameworks. With respect to Mode 4, the number of persons moving and present abroad can be approximated using tourism or migration statistics. Information on flows and stocks of natural persons could be

²⁷¹ The activities of foreign affiliates – would also include companies with commercial presence in the EU. Magdeleine, J., Maurer, A., *Measuring GATS Mode 4 Trade Flows*, World Trade Organization, (2008).

derived from the definitions used in frameworks such as the International Recommendations on Tourism Statistics²⁷².

Tourism statistics include international visitors travelling in a country other than in the one in which they usually reside and that they must not be employed by an enterprise of the country visited. The number of international visitors can be broken down according to the main purpose of the trip: personal (e.g. holidays, leisure, education, medical care) and business/professional purposes. Although very aggregated, collecting data on the latter is useful to conduct an analysis of flows of Mode 4 persons²⁷³.

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

In 2015, around 14% of all international tourists reported travelling for business and professional purposes (approximately 167 million people)²⁷⁴. The share of Mode 4 in the EU's services exports (worth around 700 billion EUR a year and rising²⁷⁵) is estimated at 4 percent.²⁷⁶

An impact analysis of the legal gap would require a breakdown into relevant categories of businesspersons. Further distinguishing CSS and IP from the wider Mode 4 is not possible at EU level, as these groups are not consistently recognised as such among EU Member States. In addition, statistics based on the issuing of C-type or D-type Visas tend to cover wider groups of TCNs, making it difficult to identify with accuracy the relevant categories analysed²⁷⁷.

These difficulties have been confirmed in the study "The interaction between trade commitments and immigration rules, admitting contractual service suppliers and independent professionals in Germany, the Netherlands and Sweden" (coordination S. Tans, 2017), in what regards the statistics in these three countries.

Given the policy relevance of improved service statistics, Eurostat launched a project to estimate services trade flows by modes of supply, using the UN simplified methodology and using the available BoP and FATS data. In case data was missing in the Eurostat public database due to confidentiality or reliability matters, the national databases were investigated. The Eurostat project only concerns Mode 4 (presence of natural persons) exports from the EU to the rest of the world. The statistics generated by the Eurostat project shows that Mode 4 represents around 5% of all GATS supply modes and that Mode 4 is more linked to construction activities and telecommunication, computer and information services (on average 10% of all supply modes). Again, no breakdown is available for BS, CCS and IP. However,

²⁷² United Nations, Department of Economic and Social Affairs, *International Recommendations for Tourism Statistics*, (2008).

²⁷³ Magdeleine, J., Maurer, A., *Measuring GATS Mode 4 Trade Flows*, World Trade Organization, (2008).

²⁷⁴ UN World Tourism Organisation (UNWTO), 'Tourism Highlights - 2016 Edition'.

²⁷⁵ Eurostat, 'File: International trade in services with non-member countries (extra-EU), EU-28, 2010-2016 (billion EUR).png'.

²⁷⁶ Based on 2013 data, Rueda-Cantuche, J. M., Kerner, R., Cernat, L. and Ritola, V., *Trade in Services by GATS Modes of Supply: Statistical Concepts and First EU Estimates* (2016), Figure 6.

²⁷⁷ European Migration Network (EMN), *Study 2015 - Admitting Third-Country National for Business Purposes*.

the sectors where Mode 4 supplies are higher than average compared to other modes and may provide a good indication of the sectors²⁷⁸ where these types of TCN professionals tend to operate²⁷⁹.

3. Responses to the issue

National level responses

National schemes regulating the admission of CCS and IP remain disparate. For some (e.g. FR, NL) these programmes refer to multilateral and/or bilateral trade agreements with third countries. This is the case for CSSs in the Netherlands, and CSSs and IPs for Spain. In Spain, CSSs and IPs are included in a single national category. There are, however, simplified immigration procedures for some of the categories²⁸⁰.

CSSs qualify as standard seconded employees in Belgium and Poland. In Belgium, a CCS requires a work permit as highly skilled worker or specialised technician. Hungary has no definition but its civil law sets out the elements of certain agreements under which a person may be a CSS²⁸¹.

In Austria, Belgium, Germany, Hungary, Italy, Luxembourg and Sweden, IPs are considered self-employed.²⁸² Slovakia differentiates between IPs providing investment aid and those on a business contract, while in Lithuania there is no definition (as for CSSs) and applications are assessed on a case-by-case basis. In Sweden, IPs may normally enter with a Schengen visa or, for stays longer than three months, a national type-D visa or a temporary residence permit for visits. Though not defined as such, Sweden allows the admission of BS, with Schengen visas or national type-D visas.

The study "the interaction between trade commitments and immigration rules, admitting contractual service suppliers and independent professionals in Germany, the Netherlands and Sweden" (coordination S. Tans, 2017) analysed in detail the relevant legislation and procedures in these three countries.

EU level responses

The Intra-Corporate Transfer Directive of 2014 regulated a large part of the categories of TCN covered by Mode 4 commitments: managers, specialists and trainee employees. However, there is currently no EU-level response to manage the entry and stay in the EU of TCNs under the BVIP, BS, CSS and IP categories, other than general Schengen visa rules.

4. Main consequences of the issue

In the absence of EU-wide legislation, schemes covering the entry of CSSs and IPs vary across the Member States. As mentioned under the problem definition, an important consequence of this fragmented approach is the reduced attractiveness of the EU as a

²⁷⁸ Construction activities are not covered by the EU's trade commitments for CSSs and IPs, but computer services are.

²⁷⁹ Rueda-Cantuche, J. M., Kerner, R., Cernat, L. and Ritola, V., *Trade in Services by GATS Modes of Supply: Statistical Concepts and First EU Estimates*, (2016).

²⁸⁰ European Migration Network (EMN), *Study 2015 - Admitting Third-country National for Business Purposes*.

²⁸¹ *ibid.*

²⁸² "Self-employed" and "independent" service suppliers are terms that are often used interchangeably. Magdeleine, J., Maurer, A., *Measuring GATS Mode 4 Trade Flows*, (2008).

destination for foreign companies to do business. These companies must choose between Member States, rather than having the whole EU market to tap into, and this may lead companies / independent professionals to choose non-EU destinations with larger markets. In addition, inadequate admission schemes also weaken the EU's bargaining position in trade agreements.

Harmonising the entry and stay of service providers at EU-level is politically fraught. However, the absence of EU harmonised legislation has impact in cases where there are preferential agreements with third countries. EU partners signal the risk that admission rules in the EU reduce the market access benefits they achieved in the agreements as regards the movement and temporary stay of natural persons for service provision.

These difficulties have been confirmed in the referred study "The interaction between trade commitments and immigration rules, admitting contractual service suppliers and independent professionals in Germany, the Netherlands and Sweden" (coordination S. Tans, 2017), as regards the situation in these three countries.

The study analysed the implementation measures and entry routes for CSS and IP adopted by the three referred Member States or, if such provisions were not readily available, suitable different entry routes. It investigated if the national provisions adequately reflect the commitments in trade agreements – in this case GATS and the EU-Cariforum agreement,

The study indicates that some national measures make it difficult for some Mode 4 commitments to be implemented in the EU. It refers two specific types of measures implemented by the Member States as examples of such national measures: the need for sponsorship for the entry of specific service providers in some Member States and the refusal of applicants based on very short (with the extreme example of one day) previous criminal convictions. An additional aspect refers to independent professionals that in some cases are treated as self-employed by Member States. The study also reminds that there is no case law at EU or WTO level that can provide clarity on the conformity of the implementation of EU's trade commitments on Mode 4.

The study also provides a detailed analysis of the admission systems in these three countries and suggests a series of recommendations, including the adoption of specific provisions implementing the international commitments addressing CSS and IP.

In fact, the Member States themselves note that this is a challenging area. In the European Migration Network report "Admitting third-country nationals for business purposes" most Member States (AT, BE, DE, ES, FR, HU, IE, LT, LU, LV, NL, PL, SE, SK, UK) reported challenges in the design and implementation of policies to attract and admit TCNs for business purposes generally (i.e. investors/entrepreneurs and service providers). Some Member States raised concerns about the difficulty to counteract the establishment of bogus economic activities set-up by third-country nationals whose main aim is to simply enter and stay in the Member State (AT, CZ, HU, LT, PL) or engage in illicit activities (SE), thus misusing the schemes in place.

According to the EMN study, the existence of disparate national schemes regulating these types of TCN seem to negatively affect the demand for such professional services due to a lack of legal certainty, and issues linked to administrative hurdles and delays. Similarly, linked to this issue is the lack of a uniform system across the Member States for the

recognition of TCN qualifications and certifications to perform certain services. This also adds to the legal uncertainty and administrative burden to this type of categories of TCN, and therefore inhibits the demand for such services where a TCN professional would be best placed to provide it

In the meeting of the Contact Group on Legal Migration of 7 November 2017 all Member States present agreed that this category of TCN is not covered by EU legislation, and one Member State signalled that it would support an initiative in this sense.

5. Conclusions

With regard to TCN service providers (except persons covered by the ICT Directive), the external coherence review showed that posting of service providers from outside the EU to EU Member States is currently not covered by the EU legal migration *acquis*, except in the cases covered by the scope of the ICT Directive. This refers to contractual services suppliers, independent professionals, and short-term visitors such as business sellers and business visitors for establishment purposes.

Subject to the principles of proportionality and subsidiarity, further harmonisation at EU level could – as it is already the case with the ICT Directive – complement and facilitate the application of international commitments under GATS and bilateral trade agreements, as well as strengthen the EU's position in future negotiations.

Additionally, to improve the situation in the short term, initiatives not entailing new legislation could also be envisaged. Some examples of such possible initiatives are the following:

- the discussion of guidelines to consulates to deal with the cases of admission of TCN for provision of services in the EU, in special from partner countries that take part in bilateral or regional free trade agreements with the EU;
- improvement of transparency of information on the EU side (there is an on-going initiative in DG TRADE and DG HOME in this sense); and/or
- promotion of study of cases of the situation with specific partners.

The case of independent professionals, currently treated as self-employed by Member States, deserves special attention.

9. Transport workers and other highly mobile workers

1. Issue definition

Stakeholders have drawn the Commission's attention to potential exploitation of third-country workers in the transport sector, and that certain practices involving third-country workers contribute to downward pressure on salaries and working conditions in the sector²⁸³. One concern seems to be an absence of a work and residence permit, or other authorisation, that is adequate for certain highly mobile third-country workers moving between different EU with shorter stays in each Member State, but an overall duration that exceeds 90 days. Problems related to this category includes lack of clarity on the legal status of the stay in the EU, that can lead to the third-country worker overstaying and transition into irregular stay and problems related to the enforcement of legislation on equal treatment with nationals.

The analysis focusses on certain²⁸⁴ highly mobile transport workers in some modes of transport, but similar problems face other categories, like touring artists and some business travellers.

A third-country national present on the EU territory needs to either be a holder of an authorisation (residence permit or of a visa, unless he/she is from a visa exempt third country), otherwise the person is staying illegally in the EU. Neither EU legal migration Directives nor EU Visa and Border legislation provide an authorisation suitable to highly mobile workers. The main problems are related to identifying if the person is "residing/staying", and if so in which Member State, and thereby which Member State is responsible for issuing a work permits and also therefore responsible for enforcing equal treatment requirements. Another consequence of the absence of an authorisation suitable to highly mobile transport workers is the risk overstaying and transitioning into irregular stay.

The core coherence issue is the lack of an authorisation (work permit or long-stay visa) that adequately regulates the right to work in several Member States. The right of TCN to work and reside are governed at national level, either through the implementation of EU Directives or national permits issued under national law. Intra-EU mobility provisions in the Directives cover those who wish to settle in a second Member States, and EU visas legislation covers stay in more than one Member State during a limited time but not work.

With regard to visas, they can be either issued under the Visa Code (Regulation (EC) No 810/2009) or under national law. The limitation of the different visa options are that neither of these options allow travel and stay in the territory of Member States other than the issuing Member State for a period exceeding 90 days in any 180 days. Certain transport workers need an authorisation to stay for a longer period. As a consequence, the third country worker

²⁸³ In particular trade unions in the aviation sector.

²⁸⁴ The issues raised in this paper are not primarily concerning third-country national transport worker who are legally residing in the EU with a valid residence permit, for instance an EU long-term resident in a Member State and is employed by a transport operator based in that EU Member State. That person shall be employed on the same conditions as nationals of that country, and the legal situation is clear as to which legislation applies, both in terms of immigration law and social security, taxation and working conditions. Likewise, when a third-country worker is recruited for a specific post in a Member State or for a company registered in that country, and he or she changes residence to that specific Member State as the home base (for instance under the Blue Card or possibly the ICT Directives), then the legal situation as far as the migration status is also clear, although this does not exclude problems in certain cases. It is furthermore not considered as problematic when non-EU based and non-EU citizens work on long-haul flights to and from the EU and their country of origin/base of establishment in a third country, and only make rest-related stop overs in an EU Member State. This is common practice and related to safety in terms of language knowledge of passengers and for the purpose of occupational health and safety.

working in transport and staying on the territory of one or more Member States for a longer period, risks at the end of the duration of the 90 days within a period of 180 days, to overstay and enter into irregular stay in the EU.

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

The EU legal migration Directives regulate the issuance of permits that allow both residence and in most cases also work. This concerns the EU Directives that allow for shorter periods of work like the Seasonal workers (SWD) and the Single Permit Directive (SPD). EU legislation also allows Member States to issue national D-visas for the purpose of work (see above on restrictions in terms of duration and intra-EU mobility). The SPD also covers permits issued in accordance with national law, as regards equal treatment covering all workers (see definition) and for procedures (those applying for a permit). Some Member States have in this context specific national work authorisation rules for certain transport workers, but these rules are not harmonised at the EU level nor do confer rights extending beyond the Member State in question.

Permits issued under these Directives, including the national permits issued in accordance with the SPD, therefore only give the authorisation to work for that specific Member State. This does not cover the need for transport workers to carry out work on the territory of different Member States, most often during short time periods in each Member States. This highly mobile nature of the work leads to two different problems in terms of application of the relevant legislation.

- It is difficult to establish which Member State is responsible for issuing a work/residence authorisation (permit or long-stay D visa) if the transport worker does not intent to establish residence in any of the Member State, and thereby, it is difficult to determine which Member State is responsible for the enforcement of the rights linked to the permit, including equal treatment in terms of working conditions and pay.
- If the third-country national wishes to be authorised to work with in each of the Member States in whose territory she/he works, he/she needs to request a D visa or a work/residence permit in each of the Member States concerned.

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

Other relevant legislation concerns the provision of services, either directly from third-countries (trade in services) or through posting of workers from one Member State to another. Whilst the Posted Workers directive (96/71/EC) (PWD) currently applies to the provisions of transport services in between Member States²⁸⁵, covering a third-country national who have

²⁸⁵ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2008 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Text with EEA relevance) does however not apply to maritime transport.

already established residence in a Member State and therefore holds a work and residence permit in an EU Member State, the Directive is limited in the workers' rights that are covered by the equal treatment provisions and has been considered as not sufficient to avoid situations of uncompetitive practices. The Directive does not apply to postings from outside the EU, except in so far as it provides that such transport operators should also not be given more favourable conditions, in this case meaning that minimum wages of host Member States should apply to them as well.

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

In addition:

- Admission of self-employed non-EU nationals that are based either in an EU Member State (other than those enjoying EU Long term residence status) or outside of the EU are not covered by EU migration laws. Self-employment (including bogus self-employment practices) has been found to be used in "new models" of employment in some transport sectors;
- Transport mode specific sectoral legislation or indeed general EU rules that to various extents regulate the right to provide transport services between Member States (further *detail below in section 9.3 EU level response*) or related to the Treaty based right to provide services (*see below*) do not contain the full range of equal treatment guarantees as set out in Legal Migration Directives.

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

Exploitation and Equal treatment

Whilst all persons may be at risk of exploitation in relation to work, whether nationals working in their own Member State or if they are EU citizens from another Member State or indeed third country nationals, the latter are potentially more vulnerable abuse and exploitation due to their legal status related to temporal restrictions and conditions related to the issuance and work and renewal of permits (*See Annex 5.2.8 on exploitation*).

The transport sector presents certain specific challenges in this context:

- the existence of exploitative practices (letter box companies, complex subcontracting chains, bogus self-employment²⁸⁶) designed specifically to hinder the effective enforcement of social security rules and legal certainty, practices driven by high competitiveness on the sector and downwards pressure on salaries
- deliberate setting up of multiple home bases for the operation of transport services, with a vessel/vehicle registered in one country, the employment contracts are issued in a 2nd

²⁸⁶ There is no evidence of such practices in all transport modes studied here, notably aviation.

Member State, the company headquarters established in a 3rd Member State, and the worker, if resident, who pays social security and taxes in a 4th Member State and the worker may spend most of his/her time in a 5th Member State. Different transport related pieces of legislation refer to the 'home base' of the individuals concerned, in order to determine which Member State is responsible²⁸⁷ for social security and working conditions related or for safety related reasons.

- 'Home base'²⁸⁸, can be defined as the place where the employee normally starts or ends the duty periods and where the employer is registered. Whilst there is CJEU case law determining which Member States jurisdiction applies to employment contracts in such cases, based on a hierarchy of criteria such as the "habitual place of work", the place "where the worker receives instructions" or "keeps tools/equipment", and "where the recruitment took place", these concepts may not necessarily apply to third-country workers who are "based and/or recruited in a third country" but nevertheless work an extensive period in the territory of the EU.

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

In conclusion, the range of specific challenges faced by highly-mobile transport workers are not adequately addressed by any current EU or national legislation. Although not all third-country national working in the transport sector are exploited or subject to social dumping practices, the legal framework protecting certain third country nationals does not necessarily covering this category rendering the situation of certain third-country workers more precarious.

2. Scale of the issue

No EU-wide statistics are available on the scale of the problem of mobile transport workers. Some limited data is available on the number of third-country nationals working in the respective transport sector and who could possibly be at risk of exposure to the problems analysed in this paper:

- **Road transport:** Of the approximately 3 million workers in the road transport sector, 2.9 million (97.5 %) are EU nationals and 75,000 (2.5%) non-EU nationals. As a consequences of a shortage of drivers, an increasing number of third-country workers employed as drivers in the EU. As each driver from a non-EU country active on the international road haulage market needs to be equipped with a driver attestation, the Commission has a fairly good overview of their overall numbers. Around 76,000 driver

²⁸⁷ See also pages 20 and following on the practice guide below (Court jurisprudence about "habitual place of work" e.g. Judgment of the Court of Justice (CJEU) of 15 march 2011, *Heiko Koelzsch v. État du Grand-Duché de Luxembourg*, C-29/10 (for the transport sector); and DG JUST / European Judicial Network "Practice Guide Jurisdiction and applicable law in international disputes between the employee and the employer" :http://ec.europa.eu/justice/civil/files/employment_guide_en.pdf –

²⁸⁸ Judgment of the Court of Justice (CJEU) of 14 September 2017, Joined cases *Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company*, C-168/16 and C-169/16.

attestations were in circulation in 2016, 46% more than in 2015. 2.5% of all workers employed in the road haulage sector are estimated to be from a non-EU country. 77% of all driver attestations (end 2016) from outside the EU were issued in Poland, Lithuania, Slovenia and Spain.²⁸⁹ The countries which conduct the highest amount of cross-trade are Poland, Lithuania, Slovakia, Hungary and Czechia with Poland alone responsible for 26.7 % of flows in 2013.²⁹⁰

- **Maritime shipping:** Statistics of certain crew is published by EMSA (masters, officers, engineers,) but such data do not cover all crew, notably less skilled crew.²⁹¹
- **Inland navigation/Inland Waterways Transport:** The share of non-EU workers is relatively low but according to official statistics. The reason for hiring third-country workers is said to be due to ‘friction’ on the labour market²⁹². Examples are :
 - Germany: total share of 22.9% of foreign workers in 2010, of which: 20.6% EU non-nationals (mostly from Poland, Czech Republic and Romania) and 2.3% non-EU foreign (mobile) workers (mostly from Turkey, Ukraine and Philippines). In 2011, this share of foreign workers covered by social security increased to 23.4%.
 - Belgium: the share of foreign IWT workers covered by social security was 9,1% EU-nationals and 1,5% non-EU nationals (2007);
 - Netherlands: in 2008 the register of service for non-nationals recorded a figure of about 6.8% of non-EU (mobile) workers (from a total of 13.6% non-national mobile workers), mainly from the Philippines. The share is now lower. In 2012, the Employee Insurance Agency (UWV) announced that it will become more difficult to obtain working permits for workers from outside the European Economic Area (EEA). The requirement for employers to look first for employees from the Netherlands or other EU countries will be applied more strictly. The employment organisations in the Netherlands reported a share of 1% of non-EU (mobile) workers compared to 26% of (mobile) workers from other EU countries.
- **Aviation:** No reliable quantitative information is available to the Commission on how many third country nationals work on EU based aircraft or EU based airlines.²⁹³ For a conference on social dumping in the civil aviation sector, organised by the European Employment and Social Committee, it was estimated that more than 1 in 6 pilots is atypically employed; the problem is concentrated among young pilots (between 20-30 year olds); 40% of these are estimated to be not directly employed (but most are living in an EU Member State); half of the pilots who work for Low Cost Airlines are not directly employed; and, 4 out of 5 ‘self-employed’ pilots work for Low Cost Airlines.²⁹⁴

3. Responses to the issue

The EU has developed a plethora of employment law instruments to strengthen the protection of transport workers, particularly those whose work involves cross-border operations. This

²⁸⁹ European Commission, DG for Mobility and Transport, *An Overview of the EU Road Transport Market in 2015*, (2017).

²⁹⁰ Broughton, A., Curtarelli, M., Bertram, C., Fohrbeck, A., Hinks, R. and Tassinari, A., *Employment Conditions in the International Road Haulage Sector*, Study requested by the European Parliament's Committee on Employment and Social Affairs, (2015).

²⁹¹ European Maritime Safety Agency, *Seafarers' Statistics in the EU – Statistical review (2014 data STCW-IS)*, (2016).

²⁹² Panteia, *Contribution to the Problem Definition in the Context of the Preparation of the Impact Assessment: Regarding the Recognition of Professional Qualifications and Training Standards in Inland Navigation*, (2014).

²⁹³ Steer Davies Gleave, *Study on Employment and Working Conditions in Air Transport and Airports*, (2015).

²⁹⁴ The figures quoted were based on anecdotal sources of information and therefore the real scale of the problem cannot be indicated. See for example: European Cockpit Association (ECA), *Social Dumping – The Cockpit Perspective*, (2015),

section reviews the main instruments adopted so far in the road haulage and civil aviation sectors, highlighting their limitations particularly in the case of third-country nationals transport workers. It then considers the extent to which the EU legal migration Directives can provide answers to the problems.

Responses in the road transport sector

Difficulty in determining the home base for road transport workers is linked to the amount of time the workers spend away from the ‘home base’ of the employer. Under Regulation (EC) No 1072/2009,²⁹⁵ international traffic by EU hauliers in the EU has been liberalised and some restrictions remain only on cabotage, i.e. national operations by a foreign haulier in a host Member State. Road transport workers often operate in several Member States and often spend several months per year away from their home base and sometimes only rarely return to home base. The time actually spent on the road in each Member State is hard to monitor and enforce; and it is difficult to determine the law applicable to their labour contracts or the applicability of rules on posting.

Drivers from third countries working for EU hauliers have the same status as EU drivers working for EU hauliers. They are only obliged to have a driver attestation issued by the Member State where the haulier is established. As regards foreign hauliers, international traffic between the EU and third countries is regulated by agreements and traffic rights are in general subject to bilateral and/or multilateral quotas (except in the case of Switzerland and EEA Countries). Foreign drivers working for EU hauliers may in some cases spend most of their working time away from home base. Foreign drivers working for third country hauliers on the other hand, will often drive in the EU for a shorter time, as they are mostly involved in international traffic from the EU to the third country and vice-versa.

Road transport workers fall under the Posted Workers Directive 96/71/EC as amended (PWD) if the undertaking takes one of the transnational measures referred to in Article 1(3). The Directive sets out mandatory rules regarding the terms and conditions of employment for workers who are posted from one Member State to another in order to avoid “social dumping”. The application of the PWD to international drivers has however raised difficulties due to the complex contractual relationships within the sector. Increased competitive pressure in the international haulage market, as a result of liberalisation, is giving rise to new business models based on subcontracting. Due to complex contractual relationships involved in subcontracting, local enforcement authorities face difficulties in determining a carrier’s country of establishment and a driver’s main country of operation, and therefore to identify the social and labour legislation which applies in individual cases.²⁹⁶

The Commission’s proposal to amend Directive 96/71/EC on the Posting of Workers included specific provisions to address situations with complex subcontracting chains²⁹⁷, proposing that the same rules on remuneration apply to posted workers that are binding on the main

²⁹⁵ Regulation (EC) 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (recast).

²⁹⁶ Broughton, A., Curtarelli, M., Bertram, C., Fohrbeck, A., Hinks, R. and Tassinari, A., *Employment Conditions in the International Road Haulage Sector*, Study requested by the European Parliament’s Committee on Employment and Social Affairs, (2015), p. 35.

²⁹⁷ COM(2016) 128 final of 8.3.2016. Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

contractor on a proportionate and non-discriminatory basis. The adopted Directive²⁹⁸ did not include these provisions, but is subject to a review in 2023 on the topic of sub-contracting.

The Commission also addressed the issues through its Mobility Package²⁹⁹, adopted on 31 May 2017, proposing a clarification of the conditions under which the rules on posting should apply to international road transport. It further establishes appropriate enforcement measures which do not impose disproportionate administrative burden on the industry. The proposal represents a balance between social protection of workers and the smooth functioning of the internal market.

Responses in the aviation sector

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

The EU has adopted a number of Regulations, implementing Regulations and Directives aimed at securing the safety of the civil aviation industry, among others by providing common rules for the protection of the employment conditions of pilots and other types of air crew. Regulation (EU) No 2018/1139³⁰⁰, for example, lays down common rules in the field of aviation and establishes the European Aviation Safety Agency. This Regulation was followed by several implementing regulations, each of them accompanied by (admittedly non-binding) EASA guidance for employers in the industry. Directive 2000/79/EC contains the working time rules for mobile staff in the civil aviation industry³⁰¹.

The liberalisation of the civil aviation market, combined with increased competition from low-cost airlines, have given rise to point-to point air carriers which operate only for a specific destination and do not necessarily set up hubs or networks. This means transfers can be organised more easily and increase mobility creating more forms of transnational employment. This has led to a further outsourcing of recruiting and HR services, meaning higher use of temporary agencies to employ air cabin crew members and pilots, increased use of temporary contracts, casual work contracts, seasonal work contracts and self-employment. It has also led to highly complex chains of employment relations.³⁰² These new employment models allow businesses to minimise or avoid their tax liabilities, with negative effects for the social protection of the transport workers.

²⁹⁸ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2008 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Text with EEA relevance).

²⁹⁹ COM(2017) 278 final of 31.5.2017. Proposal for a Directive of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector.

³⁰⁰ Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922.

³⁰¹ Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (Text with EEA relevance).

³⁰² See for example: Steer Davies Gleave, *Study on Employment and Working Conditions in Air Transport and Airports*, (2015).

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

To determine if a third-country national requires a work and residence permit in an EU Member State, it needs to be determined where the crew member has his/her home base. The difficulties in determining which EU Member State is competent for social security and working conditions has been long debated at the intra-EU level for civil aviation. The CJEU³⁰³ established that the "home base" shall primarily be the place where the crew begins and ends their journey, and the concept of a "home base" being the country where the aircraft or company is registered (as for security related legislation) would not automatically apply also to determine which Member State's court is competent for issues related to social security and working conditions.

Although the CJEU ruled that the responsible jurisdiction cannot be identified on the basis of another piece of EU legislation, the ruling may give an indication of which Member State would also be considered responsible for issuing the work/residence permit for a third-country worker. Once the Member State whose jurisdiction is responsible for the third-country worker, or "home base", is determined, it may be possible to further determine if EU legislation, including EU migration law applies and if so which laws. If the person is considered residing in a third-country, provisions concerning trade in services could also be relevant (see above). If the person is considered to have an EU Member State as its home base, as specified by the Court, then that Member State's migration law applies, and depending on the category in which the worker falls, it can be determined which EU Directives applies.

Responses in the shipping sector

The legal regime for seafarers stems to a large extent from international law, namely the MLC - maritime labour convention (working conditions) and STCW - International Convention on Standards of Training, Certification and Watchkeeping for Seafarers- (training). Maritime shipping is a global business where shipping companies can outflag in search for lower tax conditions and hire seafarers from low cost labour supplying countries (such as Philippines) for time limited contracts. Under the MLC, a seafarer from a third country who is not covered under the social security scheme of his country has to be covered by the flag's country. The exemptions to the legal migration rules were introduced because the legal regime of the vessel (flag State rules) as well as the rules applicable to the crew vary over time. Regulation (EEC) No 4055/86 applies the principle of freedom to provide services to maritime transport between EU countries and with non-EU countries. The Regulation applies equal treatment with nationals according to Art 8 whereby *"person providing a maritime transport service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals"*. Council Regulation (EC) No 3577/92 furthermore applies the principle of freedom to provide services to maritime sector in national waters, so called "cabotage".

³⁰³ Judgment of the Court of Justice (CJEU) of 14 September 2017, Joined cases *Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company*, C-168/16 and C-169/16.

Responses in the field of International inland waterway navigation

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

The EU legislation however stipulates that it does not affect the rights of third-country operators under the Revised Convention for the Navigation of the Rhine (Mannheim Convention), the Convention on Navigation on the Danube (Belgrade Convention). With respect to personnel, the principle of territoriality applies, meaning that third countries nationals are subject to the same requirements regarding, for instance resting/working time and qualifications. Directive (EU) 2017/2397 on the recognition of professional qualifications³⁰⁴ clearly stipulates that all crew members need to hold a Union certificate of qualification (or a certificate recognised as equivalent).

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

Responses in the field of Legal migration

The work-related legal migration Directives contain equal treatment provisions aimed at ensuring the fair-treatment of third-country nationals, including as regards pay and working conditions, social security and other areas. The Blue Card Directive includes provisions on equal treatment in respect of employment conditions and remuneration of which can benefit highly skilled third-country transport workers (e.g. pilots). The Single Permit Directive extends equal treatment provisions also to low and medium-skilled third-country workers, of which can benefit, in particular, workers in the road transport industry but also among cabin crew. The Directive however explicitly excludes one specific group of transport workers, namely those "*who have applied for admission or have been admitted as seafarers for employment or work in any capacity on board of a ship registered in or sailing under the flag of a Member State*" (Article 3.2.1) Also posted workers (Article 3.2.c), seasonal workers (Article 3.2.e) and self-employed workers (Article 3.2.k) are excluded from its scope. The Directive furthermore allows Member States to exclude from the procedural rules (in chapter II) those who are authorised to work in a Member State for a period not exceeding 6 months. However, it shall be noted that such an exemption does not apply to the right to equal treatment (Chapter III, although some more limited exemptions may be applied in that respect). The ICT Directive may be relevant for specific skilled crew who are transferred by an international airline to an EU Member State for their home base. Even if employment on for instance cruise ships on intra-EU routes is often seasonal in character, the Seasonal

³⁰⁴ Directive (EU) 2017/2397 of the European Parliament and of the Council of 12 December 2017 on the recognition of professional qualifications in inland navigation and repealing Council Directives 91/672/EEC and 96/50/EC (Text with EEA relevance).

Workers Directive is does not apply to staff employed on these ships as it does not allow for intra-EU mobility.

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

It should be noted that, whilst the accumulation of consecutive shorter working and stay times in several Member State may exclude highly-mobile workers from the procedural safeguards (i.e. SPD), the rules on equal treatment should apply whilst the worker is in employment also for a shorter time, with some restrictions.

Responses in the field of visa and border policy

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

The **Schengen Borders Code (Regulation (EU) 2016/399)**, contains specific rules for aircrew transiting or resting in a Schengen country (Annex VII). Specific rules of the Schengen Borders Code (in derogation of Article 6) means that third-country national aircrew, who are holders of a pilot's licence or of a crew member certificate, may based on those documents embark or disembark at the airport. Some Schengen countries wrongly interpret this provision of the Schengen Borders Code as preventing the issuing of a specific work permit to employees of national airline carriers. This is however incorrect as the sense that the Schengen Border Code does not regulate the issue of work permits, so Schengen visas do not include the right to work. It therefore does also not prevent the issuance of work permits.

The **Visa Code (Regulation (EC) No 810/2009)** grant specific entry and exit visa status for certain transport workers. The Visa code does however not apply to flight crew members who are nationals of contracting Party to the Chicago Convention on International Civil Aviation. Specific rules apply for seafarers in transit (Article 36 of the Visa code, Annex IX), covering transit into a Member State to sign onto a vessel, to transfer between vessels and to leave a ship after completed service.

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

National level responses

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

The employment of workers in road transport as well as in aviation is mainly regulated via general employment permits at Member State level. For example in Germany the general Law

on Residence and the Employment Regulation regulate the entry of TCN to the labour market. This includes aviation: as long as crew of German airlines fulfil the necessary preconditions outlined in the Law on Residence, they can be granted a residence permit for employment purposes without a labour market test.³⁰⁵

The main variation at national level concerns social policies, and in particular the different levels of employment protection available to workers in different countries. This may lead to ‘social dumping’ in the road transport and aviation industry as operators can take advantage of market liberalisation of the road haulage and aviation markets to register themselves in the country with the lowest tax liabilities.

Some Member States have developed measures to try to stem this tendency. In France, for example, the main employment law stipulates that a collective agreement that is binding on an employer automatically and immediately binds all relevant employment contracts in a subcontracting chain, unless more favourable conditions apply (*Code du Travail*, article L 135-2).³⁰⁶

4. Consequences of the problem

The rise of new business models in the transport industries that can be based on subcontracting, outsourcing and self-employment contracts, has resulted in lower transport costs for business and hence consumers but may have negative effects for levels of pay and employment conditions in both transport sectors. Difficulties in establishing the home base of transport workers leads to difficulties in determine which social and employment legislation applies in individual cases. In the aviation sector, the internationalisation of airlines and increasing use of subcontracting and temporary work agencies, often based in non-EU countries, means that many workers do not have access to the protections contained in EU employment and migration laws.

Although there is limited data on the scale of the problem, surveys among transport workers conducted by trade unions and academics identify widespread concerns about job security, pay levels and benefits within both the road transport and aviation sectors. In one study focusing on the aviation sector, a minority of respondents regarded their pay and benefits to be sufficient for their current lifestyle and even fewer (typically less than 20 per cent) regarded their pay and benefits as sufficient for their future life plans. The declining quality of employment is according to some stakeholders in turn raising concerns about the safety of transport carriers, particular in the civil aviation industry.³⁰⁷

5. Conclusions

Addressing the problems of third-country national transport workers is highly relevant to the EU legal migration *acquis*. There are shortcomings in how the legal migration Directive objectives can be fulfilled concerning equal treatment of third-country nationals, notably as regards pay and working conditions, social security and other areas, thus avoiding their exploitation and preventing discrimination in the EU.

New employment models proliferating in the transport sector can create exploitative working conditions for all workers, regardless of nationality, but third-country workers may be more

³⁰⁵ This is outlined in the Law of Residence (Section 18, AufenthG) and the Employment regulation (Section 24, BeschV).

³⁰⁶ European Transport Workers' Federation (ETF), *Evolution of the Labour Market in the Airline Industry due to the Development of the Low Fares Airlines (LFAs)*, (2013).

³⁰⁷ *ibid.*

vulnerable due to the lack of clarity on the legality of the stay/residence, including authorisation to work. Although available statistics are showing relatively low proportion of third-country workers, their share is increasing, and some evidence of downward pressure on salaries and working conditions can be found. Further knowledge gathering is needed as regards the extent of the problem and the impact thereof.

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

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

In addition, the potentially relevant SPD, BCD, SWD and ICT Directives exclude certain categories of third-country nationals from their scope, even if they are particularly relevant to the transport sector and are vulnerable to unfair employment practices, namely, self-employed workers, seafarers and other employees on seagoing ships registered with an EU Member State flag, posted workers. In practice workers for whom it is difficult to determine the home base are also excluded. Finally, the SWD does not allow intra-EU mobility.

The way Member States are attempting to address the issues related to exploitative practices is not sufficient. Whilst efforts are underway at the EU level to make sure, for instance, that rules on posting of workers address issues related to exploitative practices, there are still gaps. For instance, posting from third-countries is not covered, such workers are therefore not covered by the kind of rights that applies through EU legislation for third-country workers who work and reside legally in one Member State.

While some Member States are attempting to address the problem through national provisions (e.g. requiring collective agreements that are binding on an employer to extend to all the agreements in a sub-contracting chain), the internationalisation of transport markets makes it difficult for Member States to address the problems on their own.

Other EU legislation addresses only certain aspects of the problem. EU employment legislation attempts to address the problems, including the Posting of Workers Directive and the Temporary Work Agency Directive, by establishing minimum rules concerning the pay and employment conditions of workers in cross-border situations. Whilst these instruments cover workers regardless of nationality, certain third-country nationals, in particular posted workers and the self-employed, excluded from the scope of the EU legal migration Directives, are more vulnerable. They are also not able to assist in situations where posting of third-country nationals takes place by operators or temporary work agencies situated in third countries.

The transnational nature of the problems means there is a gap at the EU level, both concerning the legality of stay and work in a highly mobile context, as well as in relation to the enforcement of both procedural safeguards and the right to equal treatment.

ANNEX 7: EFFECTIVENESS

1 Introduction

As set out in section 2.1 of the main report of this Staff working document, **three overall objectives** have been identified, alongside a number of specific horizontal objectives³⁰⁸:

1. Ensuring **efficient management of migration flows in the EU** through the approximation and harmonisation of Member States' national legislation
2. Ensuring **fair treatment** for categories of third country nationals (TCNs) subject to the EU legal migration *acquis*
3. Strengthening the **EU's competitiveness and economic growth**

Under each overall objective, the relevant specific objectives are analysed one-by one, each section addressing the four evaluation questions related to effectiveness. Each specific objective contributes to the achievement of one or several of the three overall objectives.

This assessment does not cover the more recent Directives³⁰⁹ as information on implementation is not yet available. For the other Directives, this annex contains a specific analysis of the Directive in relation to the most relevant of the objectives, but is not limited to that specific objective.

The different objectives are interrelated and mutually supportive. Introducing a more uniform set of migration rules across EU Member States, through the implementation of the Directives, is expected to increase the EU's attractiveness to migrants as a destination, positively affect the EU economy, improve the efficiency of application and control procedures. It is also expected to ensure fair treatment of the TCNs, prevent their exploitation, facilitate their integration and raise the trust in appropriate and effective migration management amongst the different Member State authorities (as to facilitate the intra-EU migration of third country nationals). The table in figure 3 of the staff working document describes the overall and the specific objectives as stated in the respective Directive's recitals, how they interrelate and how they have been assessed in terms of effectiveness.³¹⁰

The intended personal scope differs per objective. The present analysis takes into account the fact that the different objectives of the Directives result in differences in the personal scope of the provisions of the Directives. For example, provisions on admission procedures are applicable to largest volumes and share of third-country workers, whilst the objectives related to harmonised admission conditions are limited to a smaller share of all third-country nationals covered by the Directives. The statistical analysis in Annex 9.3 provides further detail on the coverage of different provisions.

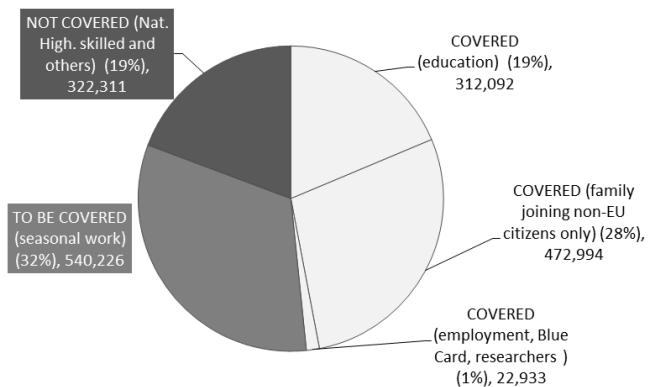
308 Some relevant objectives are only explicitly present in the more recent Directives that have not yet been fully implemented, and can therefore not be subject to an evaluation of their effectiveness. This relates notably to measures to prevent exploitation of third-country nationals through sanction on employers as set out in the SWD and ICT Directives, and the provision of decent living conditions in the SWD. These specific objectives are therefore not included for the purpose of this assessment.

309 Seasonal workers Directive (SWD) Intra-corporate Transferees Directive (ICTD), recast Directive on Students and Researchers (S&RD)

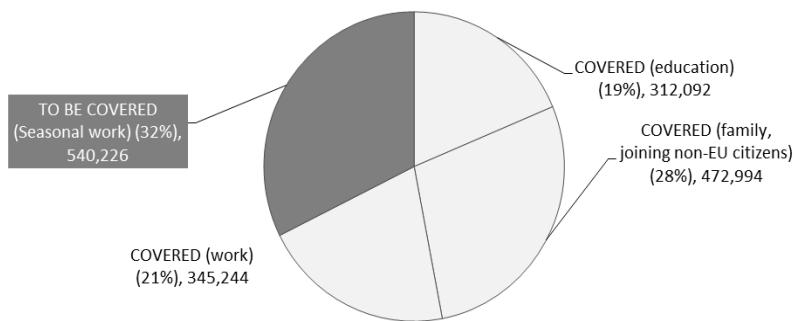
310 The structuring of the objectives differs between the Staff working document and the supporting study, but this analysis takes into account all findings of the supporting study.

Figure 1. Share of (first) residence permits issued in 2017 that are covered (or not covered) by EU legislation (EU-25, all relevant reasons (education, work, family) as regards admission conditions, application procedures and equal treatment

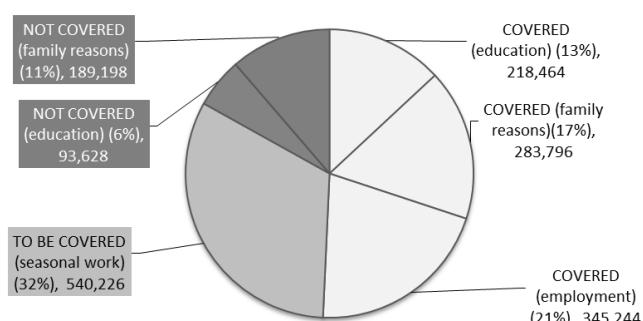
a) Admission conditions



b) Admission procedures



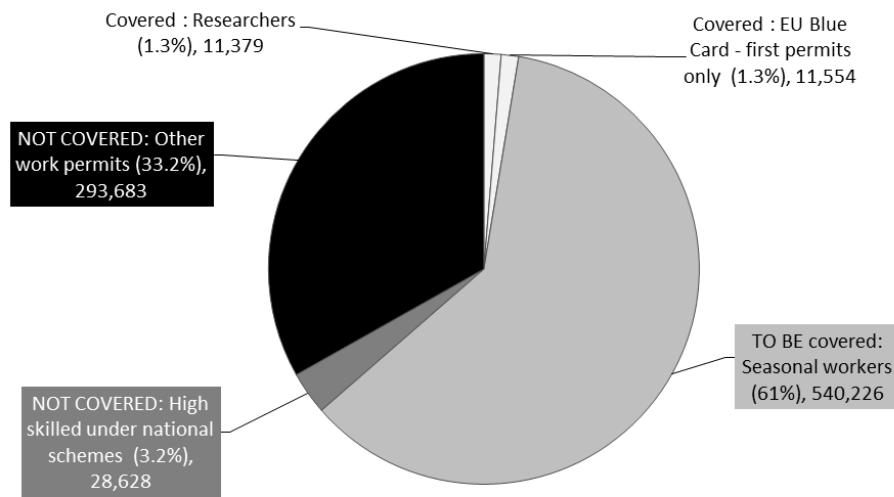
c) Equal treatment



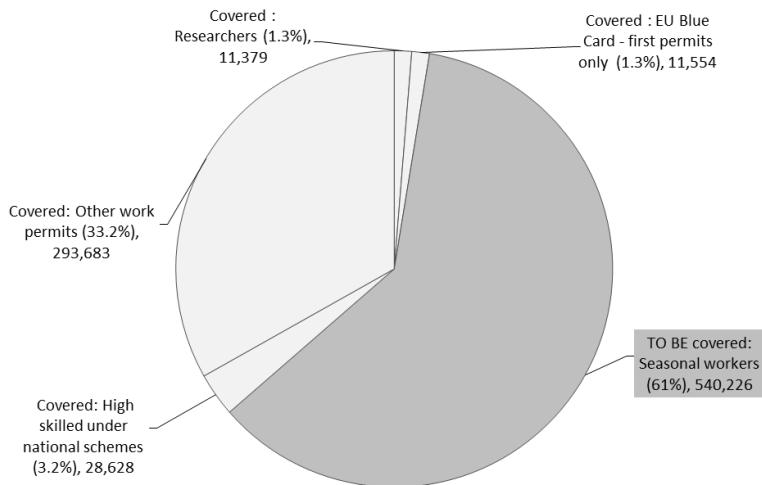
Source: DG HOME estimation based on Eurostat, [migr_resfirst], [migr_resocc] and [migr_resfam] of 25.09.18. Residence permits issued for family reunification with EU citizens are not included, nor are residence permits issued for "other reasons". The shares are estimated on the basis of the SPD statistics [migr_resing] as of 10.12.2018. The share of family and study-related permits covered by equal treatment (graph c) has been estimated based on the share of Single permits issued for each of the respective reason (comparison between table [migr_ressing] and [migr_resfirst]). Given that data on Single permits issued for family/study reasons was not available for all countries bound by the Directive, an average covering only Member States for which Single permits data was available has been used. It assumes that in 2017, overall 60% of family-related permits and 70% of study-related permits were covered by Single permit rules, including equal treatment.

Figure 2. Relative share of TCNs admitted for work 2017

a) Admission conditions



b) Admission procedures and c) Equal treatment



Source: DG HOME estimation based on Eurostat, [migr_resocc] and [migr_resing] of 10.12.2018. The shares are estimated on the basis of the SPD statistics [migr_resing]. For further background, see Annex 9, section 3.

2 Ensuring efficient management of migration flows in the EU through the approximation and harmonisation of Member States' national legislation

This section analyses the provisions related to the **establishment of common admission and residence conditions** and **fair and transparent application procedures**³¹¹, established to achieve an efficient management of migration flows. The management of migration flows covers the instruments used by Member States to structure the management of all aspects of migration.³¹²

The main instrument to achieve the overall objective is the harmonisation and approximation of national legislation for migration management, with the aim of creating a level playing field between and within Member States of admission conditions and rights and thereby avoiding distortions of the internal market caused by different admission rules and unequal treatment of migrants.

A number of factors that are intrinsic to the Directives have an influence in the achievement of a level playing field with regard to admission conditions and application procedures:

- Firstly, the existence of many '**may clauses**' (optional provisions) in the Directives have allowed for different standards across Member States. Many "**shall clauses**" (mandatory provisions) also leave room for interpretation.
- Secondly, the **practical application** of the provisions of the Directives varies across Member States: there is a significant variation in terms of application timeframes, fees, provision of information and proof compliance with conditions.
- Thirdly, **historically** Member States have very **different migration systems** and some of them have 'adapted' and 'fitted' the EU Directives to pre-existing national statuses, which have resulted in discrepancies.
- Finally, the current system at the EU level is to some extent **complex and fragmented** focusing mainly on **some categories of TCNs**.

In addition, when comparing the wording of the Directives, it can be observed that provisions in earlier Directives, such as Family Reunification Directive (FRD), Long-term Residence Directive (LTRD), Students Directive (SR) and Researchers Directive (RD) are less detailed and that some key provisions are either missing or more limited. Later Directives include much more detailed and explicit provisions, which improve the legal certainty, and leave less room for interpretation and discretion, especially when it comes to procedural safeguards. This is partly an effect of the sectoral approach itself but also of the institutional changes that took place in the period between the adoption of the earlier and the later Directives³¹³.

2.1 Establishing common admission and residence conditions, including for initial admission, rejection, withdrawal and renewals of permits

2.1.1 Context

The main **purpose of creating** a level playing field is to make sure TCNs enter and reside in the EU on comparable grounds, regardless of the Member State of destination, and to avoid

³¹¹ The objective of ensuring better controls of the legality of residence and employment though the issuance of a single permit is also analysed in section 3.

³¹² European Migration Network (EMN), *Asylum and Migration Glossary 3.0*, (2014), for further definitions.

³¹³ ICF (2018) Main report, section 6.1.1.2.

unfair competition between Member States. This is particularly important given the rights to short-term or long-term intra-EU mobility provided for in the Directives which require a certain degree of trust between Member States that the migrants have been admitted to the EU on comparable grounds. Harmonised admission conditions also provide TCNs with legal certainty and predictability as to which admission requirements apply.

Seven³¹⁴ Directives establish **harmonised conditions for admission and residence** (FRD, BCD, SWD, ICT, S&RD³¹⁵) whilst the SPD and the LTRD do not include such admission conditions, the latter includes conditions for acquisition of LTR status.

The provisions regulating admission included in the different Directives are:

- the rights related to admission (if conditions are fulfilled then a permit shall be issued, notably for the FRD, SD, RD, BCD, ICT, S&RD, as well as for SPD (in relation to national admission conditions). The LTRD also includes the right to be granted this status depending on fulfilment of the conditions (similar to the general conditions below) and specific conditions (e.g. 5 years continuous and legal residence).
- general admission conditions (proof sufficient resources; proof coverage of sickness insurance; adequate accommodation and proof of address, having a valid travel document, conditions related to public safety, public security and public health; no risk of overstaying /ensuring costs of return are covered, integration conditions and proof of parental authorisation for minor students),
- specific admission conditions (for instance related to employment, such as valid job offer/contract, content of job, recognition of qualifications, compliance with collective agreements, criteria related to the employer; proof of family ties for family reunification; acceptance at an establishment of higher education for study).

The CJEU³¹⁶ has established that Member States do not have the discretion to apply additional admission conditions compared to those included in the Directives.

The conditions for withdrawal of permits are generally similar in the older Directives³¹⁷ in that "*no longer fulfilling the initial conditions for admission*" is a ground for rejection of a renewal or withdrawal of the permit³¹⁸.

These provisions contribute to the overall objectives of **establishing a level playing field for effective management of migration flows** (by harmonising conditions to a large degree), **fair treatment** (in terms of the application procedure and equal treatment rights, see section below). Harmonised admission conditions also contributes to the **EU's competitiveness and economic growth**, aiming at, for instance, attracting skilled work force.

Most admission conditions are **internally coherent**³¹⁹, however, a small number of concerns have been identified that may have an impact on the capacity of the Directives to achieve a level playing field, between Member States as well as between different categories of migrants, notably:

314 Seven referring also to the SD and RD, in addition to the S&RD.

315 SWD, ICT, recast S&RD not analysed below.

316 Judgment of the Court of Justice (CJEU) of 10 September 2014, *Mohamed Ali Ben Alaya v Bundesrepublik Deutschland*, C-491/13.

317 The internal coherence identified more specific and complex requirements in SWD, ICT, S&RD.

318 See internal coherence ICF (2018) Annex 1Ci.

319 Annex 5.1 (Internal Coherence) and ICF (2018) Annex 1Ci.

- Differing legal techniques (general clauses vs detailed enumerations) were used in the Directives to address comparable issues, which may leave a larger room for interpretation for the Directives with more general clauses, compared to the more (recent) detailed Directives (SWD, ICT, S&RD), and therefore with a higher potential to achieve harmonisation.³²⁰
- Some admission conditions are therefore applied by Member States with some variations for instance for proving sufficient resources, sickness insurance, adequate accommodation and address, employment of work contract, etc.
- A number of admission conditions are included as optional (or 'may' conditions), such as proof of accommodation for certain categories (pupils, trainees, volunteers), compliance with integration 'measures' or 'conditions' (LTRD, FDR).

The diverse **national implementation choices** related to the admission conditions and documents required through the 'may' clauses permitted by the Directives and variations in interpretation can create a complex and not optimally transparent system, which can hamper the attainment of the objective of efficiently managing migration flows and creating a level playing field in terms of admission conditions.

The achievement of a level playing field in terms of admission (and residence conditions) is also influenced by the share of the third-country migrants covered by the admission conditions, which determined largely by national policy choices. These choices concern in particular:

- The application of the "right to determine volumes of third-country national seeking work", as well as the application of the "principle of union preference" in terms of recruiting workers, that can be implemented by "labour markets tests". The choice of such practices varies between Member States. It should be recalled that the volumes of (initial) admission **of migrants to seek work** is a Member State competence³²¹.
- The use of national parallel schemes: the LTRD, BCD Directives allow Member States to maintain national parallel schemes, which may have a large impact on the share of migrants of a particular category that are covered by harmonised conditions.

The external coherence³²² analysis identified that in particular the EU Visa legislation³²³ and the legislation on the Recognition of professional qualifications³²⁴ contribute to the achievement of this objective by complementing the legal migration *acquis* with related provisions (holding a visa may be an admission condition, and professional qualifications may need to be recognised as part of admission conditions, BCD).

2.1.2 Baseline

The legal baseline analysis shows that prior to the adoption of the Directives in many cases similar statuses already existed in the Member States³²⁵ in the case of FRD, LTRD, SD and

320 In view of the recent implementation dates of these later Directives, this differentiation between Directives is not further analysed for the purpose of effectiveness.

321 European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, C 115/01, Article 79(5).

322 Annex 5.2 (External coherence) and ICF (2018) Annex 1Cii.

323 Annex 5.2 (External coherence- Visa, border and large IT systems).

324 Annex 5.7 (External coherence- Education, qualification, skills).

325 The FRD, LTRD, SD and RD assessment is primarily based on evidence available for the then EU-15 Member States.

RD and for third country workers and to a lesser extent with regard to the EU Blue Card (i.e. highly skilled workers). The point of comparison differs for each Directive, depending on when the corresponding proposals were adopted.³²⁶

Legal baseline

Directive (baseline year)	FRD (1999) EU-15(EU 25 data if available)	LTR* (2000)	SD(2001)	RD (2004) (EU-12)	BCD (2007) (EU-24)
Specific admission conditions	All had schemes, but no specific legal instrument in EL, CY, MT, RO		12 ³²⁷ EU Member States had relatively open admission policies for third-country nationals for <u>study</u> purposes or vocational training. Two Member States distinguished between paid and unpaid <u>traineeships</u> for the purpose of their immigration laws. Two of the EU-12 Member States had not defined this category in their statutory law prior to the adoption of the Students Directive. In four of EU-12 MS <u>au pairs</u> were not required to have a work permit.	6 did not have specific schemes, 4 had no specific legislation	All had schemes in place for admitting TCNs for purpose of work, 14 did not have specific schemes for highly skills
Similarities	Entry conditions similar, i.e. required proof of sufficient resources to cover living costs and the vast majority required (with the exception of BE, FI and SE)	Similar on proving stable and regular resources, public security.	Admission requirements were quite consistent throughout the Member States. States proof of contract with hosting family, specifying rights and obligations including compensation.		All MS (apart from FR) required a job contract/offer.
Differences	Proof required for sufficient resources and accommodation differed significantly One MS applied quotas for admission of family members of students, trainees and au pairs, ³²⁸	Time needed to qualify for the status ³²⁹	Thresholds varied. Most Member Language knowledge and age limits were sometimes introduced. Permits were time-limited in 8 of the EU-12.	one (FR) had introduced specific residence permits for third-country national researchers	6 had minimum salary threshold.

*Source: Proposals and explanatory memorandum. * Concerns conditions for being granted EU LTR status, not initial admission conditions.*

In terms of quantitative baseline, none of the proposals for these Directives includes complete or accurate estimation of the number of third-country migrants expected to be covered. Migration data from Eurostat show the overall volumes of non-EU nationals residing in the EU at the different baseline dates, but prior to 2008 information is not available on the reason for migration.

326 Set out in the impact assessments (where available) or in the explanatory memoranda (See Annex A.3.2.4).

327 EU-12 refers to the 15 EU Member States at the time, excluding DK, IE and UK.

328 International Centre for Migration Policy Development (ICMPD), *Admission of Third Country Nationals to an EU Member State for the Purposes of Study or Vocational Training and Admission of Persons not Gainfully Employed*, Study commissioned by the European Commission DG Justice and Home Affairs, (2000).

329 Of EU-12, AT, BE, DE, IT, LU, NL, ES had 5 years, SE, FI had shorter period requirement and PT, EL longer.

2.1.3 Observed effects (EQ 7)

Admission and residence conditions

According to the latest implementation reports of the relevant Directives³³⁰, the mandatory admission conditions have been correctly transposed. Some concerns identified in the conformity assessments have been addressed with the Member States. Many Member States already had rules on admission conditions for specific categories of migrants in place, therefore, the transposition did not lead to major changes in all Member States. However, the overall effect is now that all Member States have such admission conditions in place.

One main purpose of the Directives is to ensure legal certainty by introducing the respective statuses and common standards for each Directive in all Member States. Member States are thus obliged to issue a permit to applicants who meet the criteria spelt out in the Directives and are not allowed to add additional conditions. With regard to students, the CJEU ruled in 2014 that Member States could not deny a student visa if the conditions in the Directive were exhaustively met, even when they were unconvinced that the applicant was a bona fide student.³³¹ Thus, the Directives have contributed to increased legal certainty for applicants, and reduced the discretion for Member States³³².

Evidence from complaints, infringements and preliminary rulings, show that the admission conditions raising more application concerns are the proof of stable and regular resources (e.g. income from spouse from third country not considered) and the integration conditions. In addition, the proof of identity and the recognition of family ties is an issue of concern in a number of complaints.³³³ Some cases of additional admission conditions applied by Member States (or conditions for acquiring LTR status) have been raised in relation to the LTRD and the SD, and have been addressed with the Member States concerned resulting in changes in laws and practices.

The open public consultation (OPC) showed that most non-EU citizens looking to migrate to the EU (11 out of 14 respondents) believed that the **current conditions for entry/residence/work constituted a disincentive to migrate**. The main obstacles identified concern the visa requirements, finding an employment from outside the EU, the recognition of qualifications and the complexity and length of the procedures for admission. The greatest obstacles in relation to admission conditions (from the perspective of TCNs), are the difficulties in securing a job offer or contract prior to admission, and ensuring the recognition of qualifications.

330 Implementation reports: COM (2014) 287 final of 22.5.2014. Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment. (First implementation report); Second implementation reports for the LTRD and FRD, COM (2019)161 and COM(2019)162, Report from the Commission to the European Parliament and the Council on the application of Directive 2004/114/EC on the conditions of admissions of third-country nationals for the purpose of studies, pupil exchange, unremunerated training or voluntary service. (First implementation report). COM (2011) 587 final of 28.9.2011.

331 Judgment of the Court of Justice (CJEU) of 10 September 2014, *Mohamed Ali Ben Alaya v Bundesrepublik Deutschland*, C-491/13.

332 ICF (2018) Main report, section 6.1.1.2.

333 MS need to find the right balance regarding actively attempting to detect sham marriages, whilst safeguarding right to family reunifications, European Migration Network (EMN), Synthesis Report - Intra-EU mobility of third-country nationals, (2013).

In targeted consultation, many Member States reiterated that they do not want admission conditions to be harmonised for other workers than those regulated in the BCD, SWD, ICT since it gives them a degree flexibility to adapt economic migration to their economic needs. Business representatives on the other hand stated that harmonised admission conditions facilitate their process of recruiting highly skilled workers from third countries because of the transparency and predictability of the rules.

Some stakeholders, including civil society and organisations representing small and medium sized enterprises, raised concerns about the absence of EU level "schemes" for low and medium skilled workers. The first group raised concerns related to the protection against exploitation and vulnerability of low and medium skilled workers, for instance in the domestic care sector. The latter pointed to the need to attract workers from these skills groups to address labour shortages. Whilst the Single Permit Directive (SPD) does cover admission procedures and equal treatment rights, these groups felt that a specific "scheme" with harmonised admission conditions would raise the visibility and attractiveness of EU legislation for these categories.

Variations of admission conditions as allowed by the Directives

As identified in internal coherence analysis, there are some differences between Directives in how admission conditions are worded. The Directives provide certain discretion on how to apply some admission conditions, and therefore there are variations between how Member States apply these.

In practice similar conditions are applied differently for different categories of third country nationals. There are also differences in terms of the type of evidence/documentation required. Among the general admission conditions³³⁴, the greatest variations relate to the threshold for sufficient resources and adequate accommodation. Among the specific admission conditions³³⁵, proof of family ties can vary substantially.

This was confirmed by the practical application study³³⁶, which found the following variations in the application of the admission conditions for family reunification:

- With regard to **accommodation** for family reunification, in practice, the requirements on the size of accommodation vary significantly from 6 m² of living space per family member in Hungary to 12 m² of living space for each family member aged 6+ years old (or 10 m² otherwise) in Germany and 12 m² for the first occupant and 9 m² per additional occupant in Luxembourg. Other Member States (LV, SE) do not appear to have set specific criteria for assessing the suitability of the size of the accommodation for sponsors to exercise the right to family reunification.
- Some Member States (ES, HU) can sometimes require DNA tests to **prove family bonds**.
- Similarly, the **threshold on sufficient resources** varies significantly across Member States. In many Member States this sum is equivalent to (AT,BG, DE, FR, IE, LT, LU,

334 Proof sufficient resources; proof coverage of sickness insurance; adequate accommodation and proof of address, having a valid travel document, conditions related to public safety, public security and public health; no risk of overstaying /ensuring costs of return are covered, integration conditions.

335 Conditions for instance related to employment, such as valid job offer/contract, content of job, recognition of qualifications, compliance with collective agreements, criteria related to the employer. For family reunification, proof of family ties.

336 ICF (2018) Annex 2A.

LV, NL, SI, SK) or (contrary to the *Chakroun* judgment, paragraph 49) higher than (BE, MT, PL) the basic minimum monthly income or minimum subsistence amount per month of that country. In other Member States this is set at a specific amount (FI), albeit the amount may vary.

The impact assessment for the revision of the BCD³³⁷ states that some admission conditions have been fully harmonised, in the sense that neither more lenient nor more stringent conditions are allowed in the Member States. This is the case for the requirement to have a **valid work contract** or, if applicable, a binding job offer for at least 1 year and to hold necessary **qualifications** for regulated professions. There is more leeway for unregulated professions, where also 5 years professional experience can be accepted, but only half of the Member States transposed this³³⁸. There were also significant variations in how Member States implemented the admission condition related to the **salary threshold** (Article 5(3)). The Commission attempted to address the shortcomings in the proposal for a revised EU Blue Card.³³⁹

Preparing the proof of compliance with the conditions

The Directives establish different documentation requirements which primarily serve to prove that the applicant fulfils the admissions conditions (hosting agreements, work contracts/job offers, proof of family relations, etc.), as well as provide evidence that the applicant and/or his/her family members will not become a burden to Member States' social and health systems (proof of sufficient resources, health insurance, proof of accommodation, etc.).

The main concerns identified in relation to the type of documentation required to prove compliance with the admission conditions are the following:

- Translation and certification requirements overall pose a heavy burden on TCN.
- Proof of not being a threat to national security is also a common requirement, attested mostly by criminal records (some Member States require a clean criminal record (i.e. even petty crime is considered a threat to public security). An additional requirement that exists in some Member States is that the TCN applicant should not be a threat to the country's international relations.
- Specifically with regard to the FRD, Spain requires proof of family relations for both the permit and the visa to enter the Member State. Some Member States require DNA testing, which can be costly for the applicant others birth certificates that are not easily available in all third-countries³⁴⁰.
- Recognition of diplomas is a widely posed requirement but the application analysis shows that the process to obtain recognition is costly, burdensome and lengthy.³⁴¹ Most

337 SWD (2016) 193 final of 7.6.2016. Commission Staff Working Document. Impact assessment. Accompanying the document: Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing the Directive 2009/50/EC, Annex 5, Section 2.2.

338 DE, EE, EL, ES, FR, LT, LU, MT, PL, PT, SE and SK.

339 COM(2016) 378 final of 7.6.2016 Proposal for a Directive of the European parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment.

340 Fragomen, ICF expert workshop; ICF (2018) Annex 3C.

341 See also the impact assessment for the revision of the BCD, SWD (2016) 193 final of 7.6.2016. Commission Staff Working Document. Impact assessment. Accompanying the document: Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-

of the application forms and related guidance in the Member States do not contain information on recognition of qualification and the related process.

In the OPC, TCNs residing or having resided in the EU were asked to list the documents requested in the application process. The most common documents that respondents (n=191) had to provide were: a valid travel document (82% of respondents), proof of educational qualifications (77%), proof of sufficient resources (75%), health insurance (73%), documents from the school/higher education institution they were to attend (66%), proof of accommodation (59%), job offer / work contract (55%) and bank guarantee (48%).

The time spent on preparing an application varied for each applicant, depending on the personal circumstances, the reason for migration; and some are dependent on the country of origin. Preparation of the documentation that proves the eligibility to apply for a specific permit is a core part of the preparation for the application. The average time required to obtain the supporting documents which have to be provided together with the application was estimated³⁴² around 3-5 business days, however for the work-related permits under the BCD and the SPD it increased to 10 business days, probably due to the detailed data to be supplied on the employer, the post, and the preparation of work contracts/binding job offers, etc. When translation, authentication and apostille are required, the time needed could go up to one month.

The internal and external coherence assessment found that there is a gap in EU legislation concerning the right to equal treatment with nationals as regards of the recognition of qualifications in the initial admission process as well as in the intra-EU mobility phase, which affects qualifications attained in third-countries. In the BCD revision impact assessment, the procedures for the recognition of qualification were identified as a potential time consuming procedural obstacle, among other things based on the findings of the OPC linked to the evaluation³⁴³.

The information provided by Member States and the degree of user-friendliness of application forms, play a role in facilitating this part of the migration process, and contributes to the overall objective of efficient management of migration flows. On the basis of the application study³⁴⁴, the provision of complete and user friendly information by the competent authorities on documentary requirements is found not to be optimal.

The evidence gathered in the application study show a number of practical problems, for example, application forms which are considered difficult to fill in and insufficiently user-friendly; application forms available only in national languages (in six Member States)³⁴⁵ and ‘document-heavy’ application processes. Migration agencies reported that applicants are commonly required to present numerous documents, including originals of birth certificates and diplomas (incl. apostilles). In some cases, the document-heavy application can slow down

country nationals for the purposes of highly skilled employment and repealing the Directive 2009/50/EC, Annex 5, Section 2.2.

342 ICF (2018) Annex 2A.

343 SWD(2016) 193 final of 7.6.2016. Commission Staff Working Document. Impact assessment. Accompanying the document: Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing the Directive 2009/50/EC. Annex 5, section 2.2.

344 ICF (2018) Annex 2A.

345 AT, BG, ES, IT, LU, MT.

the application process or present a real obstacle for the applicant³⁴⁶. This has resulted in a wide variation of practices on documentation across Member States, which in practice counteract the objective of ensuring a level playing field in terms of effective management of migration flows, with the different costs mainly falling on the third-country nationals.

In conclusion, the diverse implementation of the admission conditions and documents required through the 'may' clauses permitted by the Directives can hamper the attainment of a level playing field for the categories covered by common admission conditions.

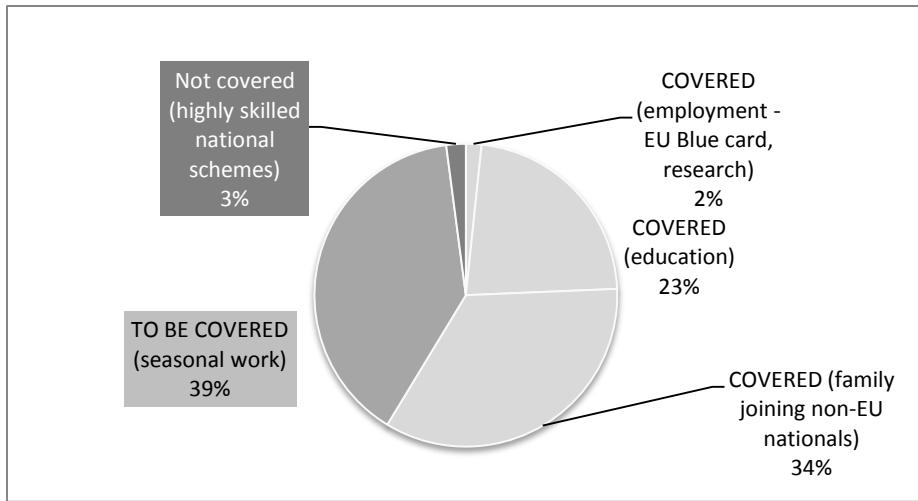
Volumes/share of third-country nationals covered by the admission conditions

The personal scope of the provisions on admission conditions in the Directives covers the vast majority (59%) of third-country nationals who were intended to be covered, since those arriving for the purpose of family reunification with a third-country national (FRD), studies and other educational reasons (SD), research (RD) are covered by such admission conditions, as for these categories parallel schemes are in principle not allowed.

In addition, whilst those admitted in accordance with the EU Blue Card are covered by admission conditions, the share is lower for highly skilled workers as a whole, due the existence of national parallel schemes for admitting highly skilled workers. Although nationally highly skilled workers are partly covered by the SPD, that Directive does not include admission conditions. Once the SWD is fully implemented, the share of third-country nationals covered by admission conditions compared to those intended to be covered (assuming the EU Blue Card intended to cover all highly skilled) could rise to 97%.

346 ICF (2018) Main report, section 6.3.2.

Figure 3. Share of (first) residence permits issued for all reasons³⁴⁷ covered by EU legislation in terms of admission conditions (of those that were intended to be covered), 2017, in EU-25



Source: DG HOME calculation based on Eurostat, [migr_resfirst], [migr_resocc] and [migr_resfam], Data extracted: 27.09.2018.

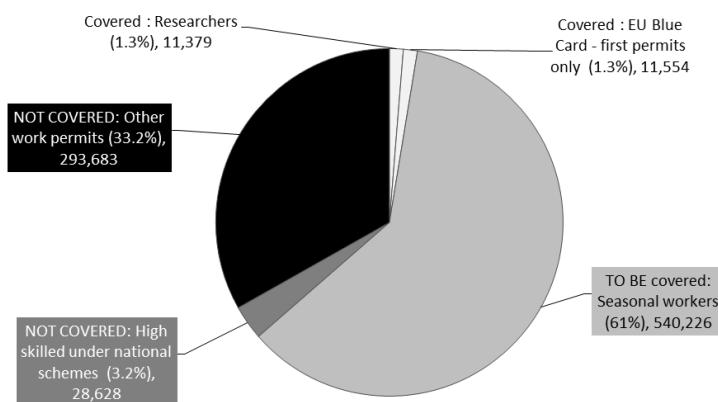
According to the estimation as presented in figure 1(a), these harmonised admission conditions therefore covered 48% of all migrants admitted (first permits issued) in 2017, and the number could increase to as much as 80% when the SWD³⁴⁸ will be fully implemented. For the categories of TCN covered, the level playing field in term of admission conditions has been achieved to a large extent in terms of share of the intended migrant group.

However, for all third-country nationals admitted for work (remunerated activities) (see figure 5), the coverage of the admission conditions is more limited, and this is mainly due to the limited personal scope of the Directives, covering less than 3% of third-country workers admitted in 2017 (first permits issued). Of the Directives assessed for effectiveness, only the Blue Card Directive (BCD) and RD include admission conditions for remunerated activities. For the reference period the newer Directives, SWD and ICTD, which also include admission conditions had not yet been fully implemented and their effectiveness cannot be measured as no compliant statistics are yet available. The Directive covering a vast majority of permits issued for the purpose of remunerated activities, the SPD, does not include admission conditions. That Directive however also applies to third-country workers for which Member States set their own non-harmonised admission conditions in national law.

³⁴⁷ In the chart residence permits issued for family reunification/formation with EU citizens are not included as well as residence permits issued for "other reasons" (including "residence only", "other permits" and those granted for international protection or protection under national status). Moreover, a small share of permits issued for education reasons may in fact be granted under national schemes and therefore not covered by admission conditions regulated by the EU *acquis* as such– it is nevertheless not possible to isolate them based on data as currently reported to Eurostat by MS.

³⁴⁸ Caution against the reliability of the SWD data reported in 2017 is necessary, as this data is not yet necessarily conform with requirements of the SWD for all Member States.

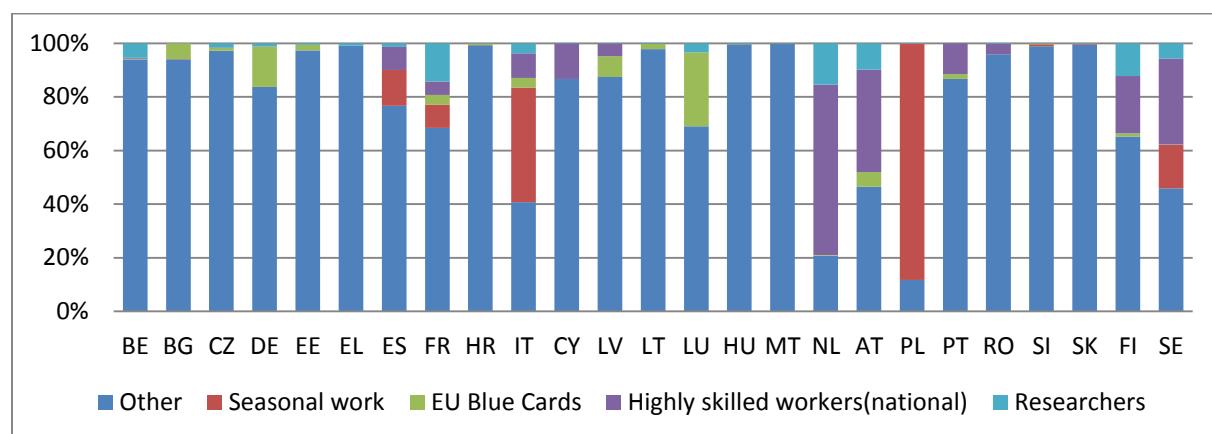
Figure 4. Share of remunerated activities (first) residence permits issued that are covered³⁴⁹ (or not covered) by EU legislation in terms of admission conditions, 2017, in EU-25



Source: DG HOME calculations based on Eurostat, [migr_resocc]. Data extracted: 27.09.2018.

Most Member States issue predominantly "other" work permit category, which is the most frequently used category in all Member States apart from the Netherlands and Poland. In the latter, a large number of seasonal workers permits are issued, but these are not necessarily compliant with the new SWD Directive.

Figure 5. Share of first permits issued in 2017 for different types of remunerated activities.



Source: Eurostat [migr_resocc]. Data extracted 18.01.209

This low coverage of highly skilled workers is also partly due to the possibility to maintain national schemes under the BCD, whereby several Member States favour national schemes, and the fact that the SWD was not yet fully implemented in 2017 (nor taken into consideration in this analysis). This is further analysed below in section 4.1.

349 The data presented above related to seasonal workers is based on statistics reported prior to the entry into effect of the reporting requirement related to the SWD, and data is only provided by eight MS, out of which 97% are reported by one MS (Poland). The data for 2017 may therefore not yet present an accurate picture of how the share of permits will be distributed between seasonal workers permits and other work permits when all Member States will report accurate data (most probably from the reference year 2018 on).

As also identified in the internal coherence³⁵⁰ and relevance analysis³⁵¹ some categories are deliberately excluded (e.g. self-employed), and some that are not explicitly excluded nevertheless fall outside the scope and application, for instance due to their high mobility.

As mentioned above, concerns were expressed in the targeted consultation that the EU legislative framework assessed does not include admission conditions for certain categories of third-country nationals, notably low and medium skilled workers. This is seen as a gap by some stakeholders representing interests of small and medium sized business and of undocumented migrants, stating there is an absence of a mechanism at EU level for effective management of migration flows of these categories.

Finally, Article 79(5) TFEU which allows Member States to control of the volumes of admission of third-country migrants admitted for the purpose of seeking employment and self-employment, has been implemented in different ways by Member States³⁵². Some Member States apply general or sector specific quotas of admission, often with a differentiation depending on the demand for labour or skills in a specific sector. Likewise the possibility to apply Labour Market tests or the "Union first principle" differs. Only in some Member States have such quotas been strictly applied, and the number of permits issued for the purpose of remunerated activities appears to be severely restricted (examples are CY, EE, HR and IT). This further negatively affects the extent to which the level playing field is achieved. This is further analysed in section 1.4.1.

Finally, for the LTRD, there were possibilities for Member States to keep national schemes, provided that these were more favourable than the LTR scheme, but not including intra-EU mobility. The approach taken differs significantly between Member States (see Annex 9.2) and the EU harmonised scheme therefore covers a lower share than expected. The EU LTR status is used in a few Member States only³⁵³. National parallel schemes dominate in 14 Member States³⁵⁴ whereas 4 Member States apply both types of schemes. Of the Member States that have most permanent residence permits, IT issues 73 % of all LTR permits in the EU³⁵⁵. This is further analysed below in section 3.3.

2.1.4 Degree of achievements of the objectives (EQ 5)

Taking into account the targeted personal scope of the admission conditions of certain Directives (FRD, SD, RD and BCD), as well as the eligibility criteria for long-term residence status, the implementation of the harmonised admission conditions by Member States has effectively contributed to efficient management of migration flows, by achieving a level playing field at EU level for the categories covered by such admission conditions.

350 ICF (2018) Annex 1Ci.

351 Staff working document, section 5.1.

352 This analysis only concerns employed status, as the relevant Directives do not include initial admission for self-employed activities and the LTR does not include initial admission. See also BCD evaluation SWD(2016) 193 final of 7.6.2016. Commission Staff Working Document. Impact assessment. Accompanying the document: Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing the Directive 2009/50/EC, Annex 5, Section 2.2.

353 EE, IT, AT, RO, SK, FI. NB: FI does not report on the number of national permanent residence permits are issued.

354 BE, BG, DE, EL, ES, FR, HR, CY, LV, HU, NL, PL, PT and SE.

355 See annex 9 and Annex 3.3.

In particular for family reunification, education and research, the Directives have significantly contributed to establishing a level playing field for effective management of migration flows. The relevant Directives related to economic migration only contribute in a limited way to this overall objective of establishing a level playing field in terms of admission conditions due to the limited personal coverage (researchers, highly skilled workers) for harmonised admission conditions for work, since the Directive (SPD) covering the largest share of third-country nationals admitted for the purpose of work does not include admission conditions. The maintained national parallel schemes for the BCD and LTRD, with a lower uptake than intended of those Directives in certain Member States, has further weakened the effect of the legal migration Directives to achieve this objective.

For all categories that are covered, the harmonised admission conditions support the **fair treatment** of applicants providing for legal certainty in terms of which conditions apply, transparency and comparable conditions across the EU. There is still however some variation between Member States in terms of proof of documentation and on how some conditions are applied.

The absence of harmonised admission conditions for the relatively large group of low-and medium skilled workers³⁵⁶ lessens the contribution of the existing Directives to the achievement of EU's **competitiveness and economic growth**, although Member States³⁵⁷ maintained the view that the absence of admission conditions is beneficial to their economies as they have a greater degree of flexibility in attracting and recruiting the labour force needed. In consultation, some other stakeholders³⁵⁸ supported the introduction of a "scheme" for medium and low skilled workers as a mean to recruit more needed labour in this category of workers. The partial coverage of this category by SPD is not always visible due to the lack of harmonised admission conditions.

As established in the analysis of gaps in personal scope³⁵⁹, there are a number of categories of third country workers admitted to, or wishing to be admitted to, the EU for work, who are relevant in terms of the overall objectives of the legal migration *acquis*, but who are excluded by law or in practice due to shortcomings of the Directives for different reasons. These categories are not analysed here in relation to harmonisation of admission conditions, as they are not covered by the specific admission conditions set in the Directives. However, lack of EU legislation effectively covering these categories further weaken the contribution of the legal migration framework to the overall achievement of harmonised admission conditions in terms of the share of third-country migrants covered.

2.1.5 What can be attributed to the Directive (EQ6) & what can be attributed to other factors (EQ8)

The Directives have partly contributed to creating a level playing field in terms of admission conditions given that for several categories specific admission conditions were already in

356 Unless they are seasonal workers and au-pairs that are explicitly excluded by SPD, but covered by SWD and au-pairs optionally by S&RD.

357 Contact Group on Legal Migration, (E02904), (March 2018). The 2001 Economic migration proposal was withdrawn in 2005 mainly due to lack of support of the MS due to the proposed harmonised admission conditions.

358 Expert Group Economic Migration (E03253), representatives of small and medium sized enterprises.

359 Chapter 5.1 of Staff Working Document.

place³⁶⁰; however, the overall effect is that the admission conditions have been harmonised as a result of the Directives for other migration reasons than remunerated activities.

As regards those admitted for remunerated activities, and as stated above, the national choices that are possible in accordance with the Directives such as the application of controls of volumes of initial admission, labour market tests, Union preference principle as well as the national parallel schemes (BCD, LTRD) have limited the impact of the Directives on the relative share of the intended target groups (permanent residents for LTRD, highly skilled workers for BCD).

The way the admission conditions have been implemented is also affected by the many options provided by the Directives themselves and the extent to which Member State have chosen to apply them. A certain lack of clarity related to terminology in the provisions of the Directives has further reduced the practical harmonisation of the admission conditions. Therefore, whilst the Directives have contributed significantly to the achievement of harmonised rules and a level playing field, this effect is somewhat limited due to the flexibility built into the legal framework.

In terms of **external factors** influencing the degree to which harmonised admission conditions, there is other EU legislation that have a direct or indirect effect on the possibility of the applicant to fulfil admission conditions:

- Some Member States require that the applicant hold a visa for initial entry, or for an initial temporary stay for third-country nationals from countries not subject to visa waivers as part of the admission conditions. The visa requirements differ depending on whether the Member State is a Schengen member or not³⁶¹. Practical application evidence and complaints have shown that there are cases where not obtaining such a visa leads to rejection of the application, or becomes an obstacle to making use of a permit issued, and that there may be a certain lack of awareness of legal migration legislation on the part of authorities dealing with visa applications.
- Having a job offer, or an employment contract, is a specific admission condition in the BCD, and is a condition for intra-EU mobility to a second Member State for LTRD for the purpose of work. Difficulties to find a job whilst still living outside the EU was cited in the OPC as an obstacle by 80% of the respondents among third-country nationals seeking to migrate to the EU. EURES is set up to facilitate free movement of EU workers but explicitly excludes third-country workers from its complete set of mechanisms³⁶².
- In addition, recognition of academic or professional qualifications is a specific requirement in the BCD (for regulated and non-regulated professions), and indirectly for other types of remunerated activities. The recognition of qualifications can be an obstacle, and significant gaps have been identified in relation to the recognition of qualification for third-country nationals applying for permits, in particular in relation to qualifications obtained in third countries.³⁶³

360 The information available on the baseline differs depending on when it was proposed, and four of the Directives were proposed prior to the enlargements of the EU in 2004, 2007 and 2013, so baseline information is only available for EU-15, here above referred to as EU-12, by excluding DK, IE, UK from the data presented. IA are only available for SPD, BCD, but also for the SPD, the detailed information therein is not covering all MS due to the incomplete response rate to the questionnaire upon which it was based.

361 Annex 5 External coherence, section 2.2 (Visa, border management and large IT systems).

362 Annex 5 External coherence, section 2.6.5 (Job matching).

363 Annex 5 External coherence, section 2.7 (Education, qualifications and skills).

- The coherence analysis of trade policies and the legal migration Directives, shows there is a gap in EU legislation in relation to the admission conditions of some service providers³⁶⁴ covered by EU trade agreements.

In addition, external drivers such as the relative strength of the economy, and thereby demand for labour, the skills and the demographic characteristics of the domestic labour force, has an impact on how Member States control the volumes of admission of workers for seeking employment³⁶⁵.

2.2 Establishing fair and transparent application procedures for the issuing of residence permits and ensuring easier controls of the legality of residence and employment through a combined permit, thereby preventing overstaying.

2.2.1 Context

All Directives include **procedural rules and safeguards for the application** for a first permit and for renewals of permits. The SDP introduced a single application procedure leading to a single permit giving the right to both work and residence based on one single decision, which also applies to the 2009 BCD (also proposed in 2007) and later Directives. The same procedures and underlying principles apply also for renewals of permits, with the difference that the TCN is most often already legally present in the Member State³⁶⁶

The specific means developed to attain fair and transparent application procedures, here presented by relevant migration phase³⁶⁷ are:

- obligations to provide information by authorities and the applicants and permit holders right to be informed of possibility for migration, including which conditions apply and which documents are needed (*information phase*) NB. The right to be informed if documentation is missing is dealt with under procedural safeguards.
- documentation required to prove compliance with the admission conditions (*pre-application phase*),
- who submits the application (third-country nationals, and/or employers or educational institutions), where from (in the Member State or from abroad) and by when (waiting period for family reunification, and in case of renewals in relation to the expiry of the permit) (*application phase, residency phase*)
- existence of a single application procedure, that is a single application for both residence and work, submitted to one authority, delivered by one authority, resulting in a single permit authorising both, based on a single administrative decision (*application phase*) (SPD, BCD, ICT, SWD, S&RD)
- the option to charge a fee for the application that is no disproportionate (*application phase*), including CJEU case law establishing criteria for proportionality assessment.
- procedural safeguards for applicants (TCN, employers, educational institutions) such as the deadlines for authorities to take a decision, and clear consequences if no decision is taken, the right to seek redress, the right to be informed in writing of

364 Annex 6, Detailed relevance analysis, section 8 (Trade in services); ICF (2018) Annex 4B, section 6.

365 ICF (2018) Annex 1Biii Contextual analysis: Drivers for legal migration - past developments and future outlook.

366 Notably the ICT and SWD that are not assessed here.

367 Annex 8 (Assessment of practical application by migration phase) and Annex 5.2 (Internal coherence). ICF (2018) Annex 2A. (Evidence base for the practical implementation of the legal migration Directives).

reasons for a rejection, and consequences of no decision having been taken within the deadline (*application phase, residency phase*)

- issuance of a single permit, combining the authorisation to reside and to work (*SPD, BCD extended by SPD to FRD, SD and RD*). Relevant output is the granting the authorisation to work and reside in the Member State to a third-country national; and the issuance of the physical permit, providing evidence of the legal status of the third-country national, that can facilitate inspections of the workplace.

The provisions related to the application procedures contribute to the overall objective of **establishing a level playing field for efficient management of migration flows** (comparable procedures across the Member States) **and** by ensuring **simplified and efficient procedures** ('one-stop-shop', fixed deadlines, transparency). **These also contribute to the fair treatment** of the TCN (procedural safeguards contributing to legal certainty for the applicant TCN, employer, host organisations, issuing a permit that facilitates control of legality of stay).

The provisions relating to the issuing of combined permits also contributes to **facilitated controls of the legality of residence and employment**, and thereby to the overall objective of a **level playing field in terms of effective and transparent management of migration flows**. They provide legal certainty, but also contribute to the **overall objective of ensuring equal treatment** and thereby to avoiding exploitation.

A number of **internal coherence concerns** related to application procedures and safeguards have been identified³⁶⁸, notably as regards significant gaps and inconsistencies between the Directives that may have an impact on the effectiveness of the measures:

- general transparency obligation to for authorities to provide information on rights and obligations are not present in the earlier Directives than the SPD;
- some Directives do not include the safeguard of a right to be informed if a document is missing in the application and a right to complete the application;
- different deadlines apply for authorities to take decisions on applications (from 90 days to 9 months) and a fast-track procedures exist in some Directives only;
- There are also differences between the Directives regarding from where the application can be submitted;
- some Directives lack the obligation for authorities to provide written and reasoned notification of a rejection of an application and do not mention the right for the application to appeal the decision;
- provisions on what the consequences of administrative silence should be are ambiguous and slightly different between Directives;
- the requirement in relation to fees charged differs between Directives, as some Directives do not include the requirement of proportionality of the fees charged or do not include any provisions on fees (LTRD, FRD).

The effectiveness of the application procedures and safeguards established by the Directives are affected by **national implementation** policies and choices made, the diverse implementation of the application procedures and safeguards through the 'may' clauses permitted by the Directives and variations in interpretation of obligatory clauses. In addition, there are other national procedures and policies outside of the direct material scope of the Directives that can have an impact on the effectiveness of the application procedures such as

368 Annex 5.1 (section 5.1.4) and more extensively in ICF (2018) Annex 1Ci (section 1.4).

national registration procedures for residence, national visa and integration requirements and social security requirements.

A number of key **external coherence factors**³⁶⁹ and other EU policies furthermore have an impact on the effectiveness of the EU legal migration framework:

- Visa, border management, including visa waivers and the issuance of national visa as well as different set of rules guiding the initial entry and an asymmetrical application of short-term mobility provisions;
- Format of the permit is guided by the (revised) Regulation 1030/2002 and has an impact on how the Single Permit is issued.
- This reinforced control function enabled by the combined permit was furthermore proposed as a complement to the Employers Sanctions Directive³⁷⁰, which was proposed at the same time³⁷¹.

2.2.2 Baseline³⁷²

All Directives introduced procedural rules and safeguards for the application for a first permit and for renewals of permits. However, the information on the legal baseline is very limited in the preparatory documents of the proposals for the Directives. Partial information is available for the SPD.

Prior to the adoption of the SPD Directive, a number of Member States already had a range of relevant legal instruments and domestic procedures applicable to the admission of third-country nationals for the purpose of paid employment. Of 21 Member States for which information is available,³⁷³ 10 countries already had in place a form of single application procedure for a joint resident and work permit. 11 other Member States had in place two separate titles and procedures for both work and residence permits. Thus, the Directive introduced important simplification in procedures for third-country nationals that was not in place in most of the Member States.

By the time of adoption of the SP Directive, a very limited number of third-country workers were covered by EU wide measures on permits, notably only those covered by the LTRD, whereas FRD, SD, RD did not necessarily have single permits.

In 2000, all (then) EU Member States (EU-15) already had study permits for international students in place and most were broadly in line with the Directive. Most of EU-15 Member States had to make few adjustments and only modified certain provisions in their existing legislation without any substantial changes. Procedures for admission of students varied, and in some Member States unpaid trainees were required to obtain a work permit in addition to the residence permit.

369 Annex 5.2 (section 5.2) and more extensively in ICF (2018) Annex 1Cii (section 1.1).

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

371 COM(2007)249 final of 16.5.2007 Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals.

372 ICF (2018) Main report, section 3.3.

373 ICF (2018) Main report, section 3.3.

Figure 6. Existence of a single application procedure for a combined permit or separate permits for work and residence

MS	A T	BE	B G	C Y	CZ	D E	E E	E L	E S	FI	F R	HR	H U	IT	LT	LU	L V	M T	N L	P L	P T	R O	SE	SI	SK
Single procedur e	M	M	M	S	M	S	S	S	S	S	S	N	M	S	M	N	P	NI	S	S	S	P	N I	M	N I

Source: SPD IA(SEC(2007)1408 Notes: S = single application procedure in place (or planned) M= More than one procedure required P = Planned NI = No information available

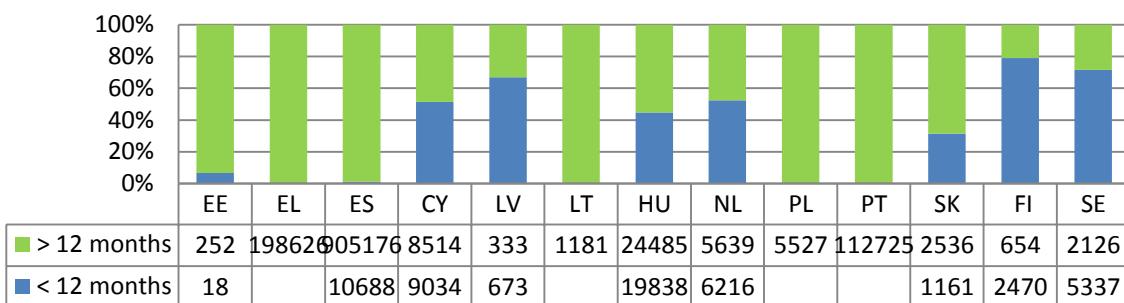
At the moment of the adoption of the proposals for the Directives, procedural guarantees were mainly included in the general administrative laws of the Member States. The SPD and BC Directives brought common deadlines for the adoption of the decisions, obligations to appoint competent authorities, notification of decisions in writing, right of legal redress for a decision on rejection, non-renewal or withdrawal. Under the Students Directive however, 13 Member States required the student to apply for an additional permit authorising them to work³⁷⁴.

For students and researchers at the time of the Recast proposal only few Member States had set explicit time limits, leaving (potential) applicants in the majority of cases in an unclear situation as to when they can expect a decision.³⁷⁵

For other procedural provisions, the relevant point of comparison is therefore what the situation should be today.

As regards the quantitative baseline, data is scarce on the number of permits issued for different purposes prior to 2008, and thereby the absolute numbers and relative share of TCNs intended to be covered by the provisions. The proposal for the SPD included some, non-harmonised data, also indicating the duration of the permit.

Figure 7. Share and absolute numbers of permits issued for work purposes, by duration of the permit (2005).



Source: Eurostat, LFS. Extracted from SPD IA (SEC(2007)1408, Volume II, Annex 7, Table 11).

Further baseline data related to the specific Directives is included in the sections below.

³⁷⁴ AT, BE, BG, CY, CZ, EE, EL, ES, LT, MT, NL, RO, SI. COM(2011) 587 final of 28.9.2011. Report from the Commission to the European Parliament and the Council on the application of Directive 2004/114/EC on the conditions of admissions of third-country nationals for the purpose of studies, pupil exchange, unremunerated training or voluntary service. (First implementation report).

³⁷⁵ SWD(2013) 77 final of 25.3.2013. Commission Staff Working Document. Impact Assessment Accompanying the document: Proposal for a Directive of the European Parliament and of the Council on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Research, Studies, Pupil Exchange, Remunerated and Unremunerated Training, Voluntary Service and Au Pairing. Recasting and amending Directives 2004/114/EC and 2005/71/EC.

2.2.3 Observed effects (EQ 7)

Legal implementation

The relevant provisions have largely been transposed for the FRD, LTRD, SD, RD, BCD and SPD. A few of issues have been identified as problematic in particular in relation to the FRD, LTRD and SPD, but key concern initially identified have been addressed with the Member State concerned, in some cases through formal infringements (LTRD, FRD, SPD). All Member States³⁷⁶, have established a single procedure related to the permission for both work and residence, in accordance with the SPD. All Member States have introduced the legal requirement for a combined permit for workers and residence for those admitted for work and also provide that, for those admitted for other reasons than work, the right to employment shall be indicated on the card.

In relation to procedural guarantees, the legal implementation has showed that some provisions have been correctly transposed, notably the right to be notified in writing of decisions, and reasons for rejection, the right to seek appeal/redress, the right complement application and the deadlines for the authorities to take a decision. However, the provisions on administrative silence are more varied among Member States. Whilst the deadline for the authorities to take a decision is generally well transposed, in practice there are delays in some Member States. Evidence from complaints received, also reveal concerns related to situations when Member States did not take a decision within the deadline coupled with situation where no effective redress could be sought (administrative silence with no consequences).

Several complaints also concerned disproportionate fees charged for the issuance of residence permit. Some cases of erroneous format of permits were also identified. The Commission raised these issues with the Member States concerned and were subsequently resolved.

A key concern raised in consultation in relation to transposition is the fragmentation of the procedural requirements in the Directives³⁷⁷. In consultation, some Member States³⁷⁸ underlined that the differences, albeit small, between the different procedural provisions in the directives makes it difficult to transpose and implement the legal migration framework. In the targeted consultation companies advising migrants with applications (ex. Fragomen) state that the differences between procedures (and admission conditions), and in consequence their considerable complexity, are the main questions for which their advice services are required. A number of individual contributions also highlighted that procedures related to the renewal of permits in one Member State in particular, whereby verification of how the conditions for which the permit were issued, were disproportionately stringently applied.

Statistical evidence of coverage of the application procedure

Compared to the admission conditions, the application procedures cover a much larger share of first permits issued every year. This is primarily due to the personal scope of the SPD that covers a large share of those admitted for the purpose of employment. In 2017, it was

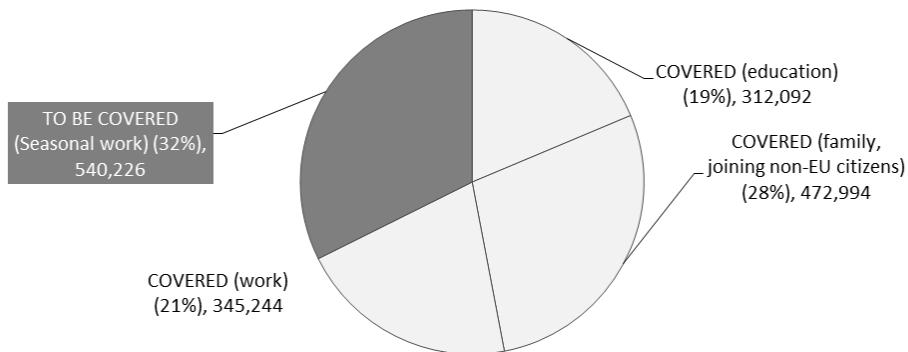
³⁷⁶ C-564/17, *European Commission v Kingdom of Belgium*, (non-communication of Directive 2011/98/EU) (pending). BE completed transposition late 2018, not yet verified for conformity.

³⁷⁷ ICF (2018) Annex1Ci (Internal coherence), Annex 5.1.

³⁷⁸ Contact Group Legal Migration.

estimated that about 68% of first permits issued were covered by the admission procedures of the Directives, the remaining expected to be covered by the SWD³⁷⁹.

Figure 8. Share of (first) residence permits issued for all reasons that are covered (or not covered) by EU legislation in terms of application procedures, 2017, in EU-25



Source: DG HOME calculations based on Eurostat, [migr_resfirst], [migr_resocc] and [migr_resfam], Data extracted: 06.12.2018. See Annex 9.3 for more details.

However, the "single application procedure" established by the SPD, whereby the applicants submit one application that results in one permit that authorises both residence and work, does not cover all TCNs. The FRD, SD and RD do not include such single procedure as such, and the SPD does not extend that single application procedures to those admitted for other purposes than work. This means that in 2017, 21% of migrants were covered by the single application procedure, which will increase when the newer Directives are fully applied. The SPD³⁸⁰ does however extend the requirement of the single permit (authorising both work and residence) to those admitted for other purposes, which means approximately 73% coverage for the permit.

Information and transparency

Transparency and provision of user-friendly information procedures, admission conditions and rights are important for ensuring effective implementation of the Directives. Information is however not evenly provided, and for some Directives, some Member States do not inform about certain permits and procedures at all.

The Directives contain few requirements on information provision and only in the more recent Directives (SPD, SWD, ICT and S&RD). The SPD conformity assessment found that such rules are often included in general administrative laws about the requirement to ensure transparency, or indeed in specific transparency legislation. The obligation to inform applicants of missing documents is assessed below (under procedural safeguards).

Evidence from the practical application study³⁸¹ and from the consultation, show shortcomings among the Member States on the degree to which they provide information

379 Caution needed concerning the 2017 data on seasonal workers permit, mainly issued in Poland as these may not necessarily be covered by the SWD once fully implemented.

380 Eurostat :[migr_resing].

381 ICF (2018) Main report, section 6.3.1.

about the different migration options/schemes, including those regulated under the Directives. The main concerns identified, are that the information is often only available in national languages; information is scarce or scattered across multiple web sites; insufficient hotlines or information desks; the information provided upon request is not always satisfactory or is too general and the information is overly legalistic or difficult to understand.

Some Member States furthermore do not at all provide information on the possibility to apply for certain permits, for instance for EU Long-term residency³⁸². For the categories where no parallel schemes are permitted, this is less problematic (FRD, SD and RD), and to some degree for the SPD. Clear information on procedures, documents required and migration options is essential to ensure the application procedures are efficient and to ensure the applicant can make informed choices.

Some consulted stakeholders³⁸³ complained about the lack of clear and practical information coming from official sources on procedural aspects (i.e. types of visa, expected processing times, mandatory insurance, the types of documents that need to be provided and notarised, etc.) or other relevant aspects such as the procedures for intra-EU mobility. Information only provided in the national language and not in other languages was also cited as a problem. The difficulties in accessing information, and the absence of relevant information was found to have significant cost implications related to the amount of time that applicants have to spend on finding the information which they need, as well as restricting their rights to have access to such information.³⁸⁴

To address the information gap, the Commission has set up the EU immigration portal³⁸⁵ linking Member States webpages to a central "one-stop-shop" for information for third-country nationals. The evidence gathered in the practical application study found that the portal has several limitations and it is not sufficiently known.

The absence of information obligations in all Directives concerning all categories of migrants, reduces the legal enforceability of such requirements.

Application phase: Single application procedure leading to a single permit

The purpose of introducing a single application procedure was to simplify the application process for the applicant and for the Member States' authorities, thereby contributing to render the management of migration flows more effective and efficient.

As identified in the internal coherence analysis,³⁸⁶ the single application procedure is not established in the earlier Directives, but from 2011 onwards the underlying principles of the single application procedure ("one-stop-shop") applies to the Directives adopted. The SPD contains a number of requirements that constitute the basis of the single application procedure, which should be a "one-stop-shop" for the applicant:

- Submission of one application by the applicant

382 ICF (2018) Annex 2Bii.

383 OPC responded (%), and participants European Migration Forum and members of the European Economic and Social Committee process.

384 ICF (2018) Main report, section 6.3.1.

385 European Commission, 'EU Immigration Portal – Practical information on moving to the European Union'.

386 Annex 5.1, ICF (2018) Annex 1Ci.

- Designation of one competent authority for the reception of the application
- One administrative decision to be issued
- Issuance of one single permit that authorises both work and residence

The provisions in the SPD that establish these requirements allow Member States a certain margin of interpretation and some aspects lack of precision leading to diverging interpretations. For example, the SPD provides for the option for Member States to determine if the employer and/or the third-country national shall submit the application. This in practice can also affects the ‘singularity’ of the procedure in some Member States. In some cases, the employer submits a first "application" for an authorisation to employ the third-country national and after the third country national submits the formal SPD application. The SPD also states that the Directive is "*without prejudice to the Member States powers concerning the admission of third-country nationals to their labour markets*". This is differently applied by the Member States (see Annex 5.3 on volumes of admission, labour market tests and implementation of the Union preference principle). Some Member States carry out such a test within the 4 month timeframe allowed for the procedure, others apply a general labour market test before the single application procedures is launched which may result in delays in the granting of the permit.

The ‘singularity’ of the procedure is also affected by other implementation choices, notably:

- The Directive allows Member States to determine from where the application shall be submitted: either from the country where the person resides, or only in the country of destination. This can lead to additional steps: notably the need to apply for a visa for initial entry or an initial short-stay visa that enables the applicant to complete the application and be issued the permit. A few Member States³⁸⁷ issue permits to the applicants whilst they are still abroad (via embassies and consulates).
- Member States can require a visa for initial entry in order to obtain a permit. The FRD, RD and BCD all require Member States to “grant such persons every facility for obtaining the requisite visas”. The time required to obtain a visa should not be included in the period of time required to obtain the permit. In practice obtaining a visa can potentially delay the process.
- The SPD also provides an option for Member States to determine if the employer and/or the third-country national shall submit the application. In a few Member States³⁸⁸, the employer submits a first "application" for an authorisation to employ the third-country national and after the third country national submits the formal SPD application.
- The SPD also states that the Directive is "*without prejudice to the Member States powers concerning the admission of third-country nationals to their labour markets*"³⁸⁹. This is applied differently by the Member States. Some Member States carry out such a test within the 4 month timeframe allowed for the procedure, others apply a general labour market test before the single application procedures is launched.
- The SPD establishes that one permit authorising both work and residence shall be issued as the only document. Member States are allowed to provide for an additional document giving further information on the conditions for employment. This option has however

³⁸⁷ FI, SE. The choice of MS is often linked to the lack of facilities to take biometrical data at the embassy/consulate.

³⁸⁸ COM (2019) 160.

³⁸⁹ European Union, Consolidated version of the Treaty of the Functioning of the European Union (TFEU), 13 December 2007, 79(5).

only been applied by a few Member States (ES, NL, SK, FR, CY, MT and HU)³⁹⁰. The format of the permit itself is laid down by Regulation (EC) No 1030/2002, as amended by Regulation (EU) 2017/1954, and is largely complied with by the Member States.

- The SPD requires Member States to "*designate the competent authority to receive the application and to issue the single permit*" (Art 5.1). This is a fundamental component of the "one-stop-shop" but does not prevent other authorities to be involved in the procedure. Nevertheless, the Schengen *acquis* requires registration with the local authorities within a certain timeframe from arrival, therefore in some Member States the residence permit is physically delivered by another authority.

It should be noted also that the single application procedure does not cover all holders of permits or visas. According to the SPD, those third-country workers who "work on the basis of a visa" (specified as *uniform* or *long-stay visas*) are excluded from Chapter II, which establishes the application procedure although they are covered by the equal treatment provisions in Chapter III.

This, together with the provisions on the "visa for initial entry" being "without prejudice to the single application procedure", means that some Member States maintain a procedure whereby, during the first period (up to one year), the third-country worker works and resides on the basis of a long-stay (type D-visa). After that a residence permit is issued. The duration of this initial residence differ between Member States, some apply a shorter initial stay to allow the permit to be delivered or a full application to be submitted (3 months).

Despite the shortcomings identified above, the introduction of single application procedure has led to procedural simplification and more efficient management of applications.

In consultation, several Member States³⁹¹ stated that the introduction of the SPD had simplified the national procedures. During the focus group with social partners, it was stated that, despite of achieved streamlining of procedures between different Ministries, **national administrative complexity** remains in that many authorities have overlapping mandates.³⁹² Evidence gathered on practical application³⁹³ also shows that when multiple authorities and/or multiple steps are involved in the application process, the necessary steps and authorities which need to be contacted are not very well explained and third-country nationals do not have enough clarity as to what concrete steps to take.

In addition, in the RD, 14 Member States have transposed a more permissive may clause enabling applicants to submit an application when the TCN is already on the territory of the Member State to attract researchers who are already legally present in the Member State for other purposes.

Application phase: Fees charged for the application

Charging of a fee for the application is an optional clause in the Directives, and all Member States apply this option. Whilst the right to charge a fee is not contested, the disproportionately high fees charged by some Member States have been found to be an

390 Tipik (2017), Conformity study on Directive 2011/98/EU.

391 Contact Group on Legal Migration, E02904, (May 2017).

392 ICF (2018) Main report 6.1.1.2.

393 ICF (2018) Annex 2A.

obstacle to the effective implementation of the Directives according to the CJEU³⁹⁴. Whilst nominal fees vary greatly between the Member States, proportionally should, according to CJEU, be judged on the basis of relevant criteria (for instance, charges for ID cards for nationals and residence cards for mobile EU citizens, the average and minimum monthly incomes and the duration of the permit which has an impact on how often it needs renewed fees to be charged). Following the CJEU rulings and complaints received, the Commission carried out an investigation of charges in all Member States for all permits, which led to the identification of Member States where charges were found disproportionately high³⁹⁵. The charges for renewals or replacement of permits are often lower. The Commission has raised these concerns with a number of Member States, also through infringement procedures against 5 Member States³⁹⁶ on multiple Directives, which has led to a reduction of fees in these Member States.

Fees may also be charged to the applicant, such as fees for the visa application (long-stay visa fees may differ but Schengen visa fees are fixed at 60€) and D-visas costs vary. Other costs such as certification of documentation, translations, recognition of qualifications also add to the overall costs of the application.

Evidence on practical application found that in some Member States, the excessive fees could constitute an obstacle in the application procedures³⁹⁷. 57% of the respondents to the OPC identified the high costs of the application procedures and the document required as the main problem in the application process. Disproportionately high charges may have a dissuasive effect on migration flows. Lack of proportionality must however be assessed in relation to certain criteria at national level.

Application phase: Procedural safeguards to ensure legal certainty³⁹⁸

The Directives introduce a number of procedural safeguards designed to ensure legal certainty for the applicant, whether the applicant is the third-country national or the employer. The procedural safeguards have been correctly transposed in most cases. Provisions on the notification of reasoned rejections with information about how to appeal and the right to seek redress are fundamental to ensure legal certainty. Whilst the deadline for the authorities to take a decision is generally well transposed, in practice there are delays in some Member States. For some safeguards, the variation of how the Member States implement is more pronounced for example, in relation to the consequences of administrative silence.

Consultation also revealed that the very introduction of an EU permit scheme, where such scheme had not previously existed, partly due to the stability related to the time required for legislative change, generated legal certainty in itself. This was stated to be the case specifically for the LTR status in Italy (according to civil society organisations). Similarly, in Italy the FRD has fostered the consolidation of values and the protection of migrants' rights in court.³⁹⁹

394 Judgment of the Court of Justice (CJEU) of 26 April 2012, *European Commission v Kingdom of the Netherlands*, C-508/10 (LTR).

395 EMN Ad-hoc query [Nº 544/14](#)

396 BG, EL, IT, NL, PT.

397 ICF (2018) Main report, section 6.3.3.

398 ICF (2018) Main report, section 6.3.3.

399 ICF (2018) Main report, section 6.1.1.2.

The internal coherence analysis found that there are differences between the Directives that may have an impact on how the objective of establishing a level playing field in terms of efficient application procedures can be achieved. According to some Member States⁴⁰⁰, these differences in procedural requirements are the reason for the administrative complexity.

In terms of implementation of the procedural guarantees, Member States use different approaches. The safeguards are introduced in the specific laws on foreigners or general administrative law stipulating such provisions applies⁴⁰¹.

Main procedural guarantees and key observed effects are:

- Right to be informed of whether documents are missing in the application, and a reasonable time given to complete the application: All Directives apart from LTRD and FRD includes this. It is relatively well transposed, nevertheless some shortcomings have been identified and addressed.
- The right to be notified in writing of the decision, and the right to receive a reasoning for rejection in writing: for the SPD, the majority of the Member States have transposed this correctly. In one Member State the national legislation does not explicitly foresee the notification ‘in writing’ to an applicant of a positive administrative decision. Notification in writing is provided only in cases of negative administrative decisions.
- Right to appeal/seek redress: All Member States have appeal procedures in place⁴⁰², however practical application problems have been reported in some Member States. For example, in Finland, the majority of rejected applicants do not consider an appeal as a viable option, as the delivery of a court decision can take years. Lengthy and ineffective appeals are reported also in Belgium⁴⁰³. Complaints and the conformity studies have revealed that some Member States did not have effective means of redress (SE) whereby redress could only be sought on procedural grounds, and not substantive, and that effective redress not was in place⁴⁰⁴. This has since been addressed by a revision of the General Administrative Law.
- Legally applicable deadlines: The Directives apply different deadlines (FRD 9 months, LTRD 6 months, SPD 4 months and others 3 months). Whilst most Member States⁴⁰⁵ have put in place a legally applicable deadlines to process applications under all relevant Directives, this deadline is not always adhered to in practice. Only Germany has no such deadline in place but a rule according to which a remedial legal action can be taken after three months have passed. Six others Member States only have deadlines for certain Directives.⁴⁰⁶ The consultation revealed concerns with the deadlines. 83% of the respondents of the OPC had problems with the length of the procedures. Several complaints also give evidence of exceeded processing times⁴⁰⁷. In addition, the OPC as well as consulted NGOs and diaspora groups, revealed problems with accessibility to the

400 Contact Group on Legal Migration, E02904, (May 2017).

401 COM(2019) 161.

402 COM(2019) 160, 161 and 162, COM(2014)287.

403 ICF (2018) Main report, section 6.1.1.2.

404 COM (2019)162 Second FRD implementation report.

405 AT, BG, CZ, EE, FR, HR, HU, IT, LT, LU, LV, NL, PL, PT, RO, SI, SK.

406 BE has set time deadline for BCD, FRD and LTR; CY has set time deadline for BCD, FRD, LTR and SPD; EL for all Directives except SPD; FI has set time deadline for BCD, FRD, LTR and SPD; MT has set time deadline for BCD, FRD, LTR and SPD; SE for BCD and SPD. ICF Main report, section 6.1.1.2.

407 Most frequently concerning SE.

application procedure, when the applicant has to appear more than once in person as part of the application process in third countries and deadlines are short.

- Consequences of no decision taken within the deadline (administrative silence): FRD, LTRD, BCD and SPD contain a provision, with slight different wording, which requires Member States to set out in their legislation what the consequences are in such a situation. The conformity studies found that there are differences in how this is applied by Member States. Some Member States consider a passed deadline as a tacit rejection, some as a tacit acceptance, and for some the exceeded deadlines triggers the right to appeal. Concerns may arise when the deadline passes and a tacit rejection is triggered but there is no notification in writing explaining the reasons for the rejection or how to appeal.

Entry and Travel phase

The entry and travel phase addresses the requirements that third-country nationals need to fulfil in order to enter and re-enter the country of destination, as well as to travel to other Member States, including when a permit is issued in a Schengen state. The Directives were developed to complement the Schengen rules existing at the time of adoption, and therefore do not duplicate legal provisions related to this phase. The combination of different options provided in the Directives, implemented by Member States in a variety of ways, and the interaction with the Schengen *acquis*, intended to be complementary but which entails some inconsistencies, have contributed to the administrative complexities related to the management of migration flows.⁴⁰⁸

Practical difficulties encountered by TCNs relate to complex procedures for airport transit visas (e.g. the fact that a visa has to be requested and picked up in person), long processing times for transit visas, border guards in transit countries not always easily accepting the fact that the person of a certain nationality is travelling to a country for which a visa is not required for him/her⁴⁰⁹.

Complaints and CJEU case law have also revealed that sometimes the permit can be issued, but the stay is denied as the required visa is not issued. One reason for this was according to some stakeholders that those handling visa applications may not be aware of the legal migration requirements; in other cases the visa application is verified on different grounds, whereby the Member States can block an applicant in the visa procedures on the basis of for instance security reasons (C-544/15).

Post-application phase⁴¹⁰

The post-application phase includes a number of aspects related to timeframe for delivering the residence permit and any corresponding additional charges, authorities involved in delivering the permit, and duration of first permits. Some additional steps are necessary after the arrival to the country of destination (need to register with local authority within a short time after arrival and provide address, registration with other authorities such tax or social security, etc.), which differ between Member States but are not necessarily different for third-

408 Annex 5 (External Coherence) section 2.2 (Visa, border management and large IT systems).

409 ICF (2018) Main report, section 6.3.4.

410 ICF (2018) Main report, section 6.3.5.

country nationals compared to nationals or EU citizens. These procedures may add to the time required to settle and fully enjoy the rights⁴¹¹, and in some cases adds to the costs.

One problem identified in the practical application study is the time required to deliver the actual physical permit following the adoption of the decision. Most Member States do not have a set timeframe, but where there is a set timeframe, the deadlines are generally respected. One example is Italy, for which the time needed to deliver the permit after the notification can range between 90 and 290 days.

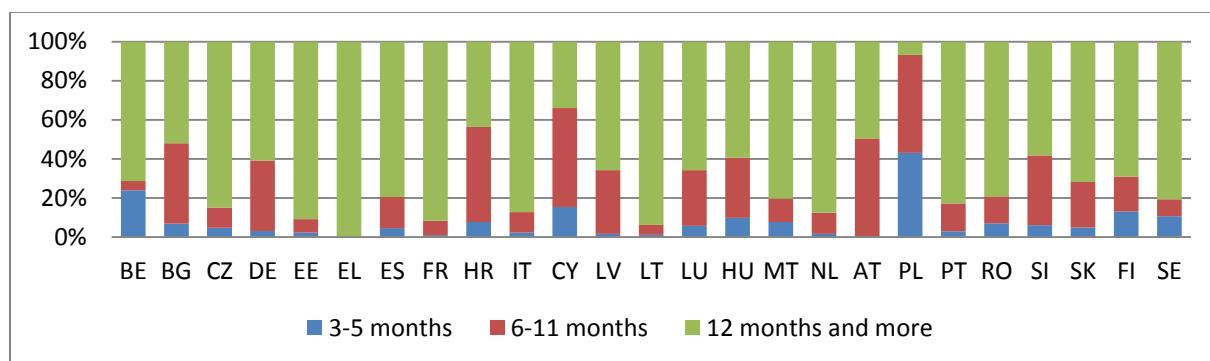
Residence phase⁴¹²

The procedural aspects of the residence phase includes a number of aspects related to the management of the migration flows, although not necessarily related to the initial admission and entry such as use and renewal of residence permits, partly dependent on the duration of the permits issued, changes of status.

Renewals of residency permits

- The frequency of renewal of the residency permits depends on the duration of the permits. The duration of the permits are to some extent harmonised by the Directives, The LTR permit must be valid for 5 years and for BCD permits the standard period of validity must be between 1 and 4 years (but max 2 years renewable twice). The family reunification permit must have the same duration as the duration of the person the TCN is joining (the "sponsor") and for study and research the duration for the permits are often linked to the academic year/semesters. For economic migration Directives, duration is often linked to the duration of the employment contract plus three months (BCD). The SPD does not regulate the duration of the permits.
- All Member States apply a maximum duration of the first permit for the BCD. Regarding the FRD, in eight cases⁴¹³, problems were detected with the transposition of the provision requiring a validity of residence permits of at least one year.

Figure 9. Share of permits issued with different durations (2017) (a) All first permits issued , (b) All first single permits (EU-25)

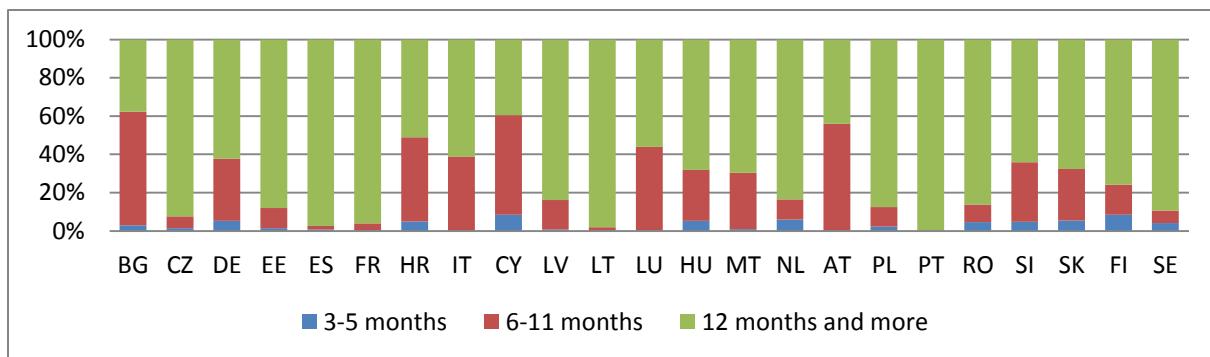


A. Source: Eurostat [migr_resfirst] as on 18.01.2019

411 See also the impacts of this step on the enjoyment of equal treatment rights.

412 ICF (2018) Main report, section 6.3.6.

413 BG, EL, ES, HU, PL, RO, SE, SI.



B. Source: Eurostat [migr_resing] as on 18.01.2019. BE and EL do not report durations.

As regards all first permits issued in 2017 for all reasons, 56% had a validity of more than 12 months, and 29% a validity between 6-11 months. Although the duration and specific reasons of the single permits are not reported by all Member States, more than 81 % of all single permits issued (and reported) have a duration of more than 12 months, and 71% of those issued for work. 78% of all first single permits issued for work have duration of 12 or more months. There are some differences between Member States, for example, BG, CY, AT mostly issue permits shorter than one year. Of single permits for all reasons and durations issued in 2017, 61% were issued as renewals and 32% as first permits. Of the renewed single permits, 84% were issued with a duration of 12 months or more⁴¹⁴

The frequency of renewal determines the overall cost to the TCN, although renewal fees often differ from the fees charged for the first permit. In the NL, for instance, the fact that a relatively high proportion of permits are issued for a duration of less than 12 months contributes to the disproportion of the charges. On the other hand, the Member State that issued the most number of SPD in 2016 (FR, IT, ES, DE, SE) also issued a large majority of them for longer durations.

As regards the procedure of renewal, the single application procedure applies in most cases, although with the difference that the TCN is then legally present on the territory and may apply from the Member State itself, and more often the application is submitted by the TCN him/herself rather than the employer⁴¹⁵. Third-country nationals are required to renew their residence documents within a specified timeframe prior to expiry of the permit, ranging from 3-6 months prior to expiry to 60 days after the expiration of the permit. In some Member States, failure to renew and/or provide information and documents on time or after a request by the authorities will result in refusal for the permit to be renewed and the applicant will be obliged to leave the Member State. A possible application issue has been identified in Malta in particular with SPD holders who are not allowed to apply for a new permit in case they change employer.

Most commonly, failure to comply with renewal deadline results in illegal stay. In five Member States⁴¹⁶, there is an administrative sanction and in five other Member States⁴¹⁷,

414 Eurostat [migr_resfirst] and [migr_resing] as of 1.3.2019. See also Annex 9.2 and COM(2019) 160 on which Member States report partial data.

415 In the majority of Member States the relevant application may be submitted only by the third country national (CZ, DE, EE, EL, FI, HU, LU, MT, PL, RO, SE and SK), in some Member States only by the employer (BG and IT) and in some others by either the third country national or the employer (AT, CY, ES, FR, HR, LT, LV, NL, PT and SI).

416 AT, DE, HU, NL, MT.

failure to renew the permit leads, in addition to the situation of irregularity, a return decision and financial sanctions⁴¹⁸.

The criteria applied for renewal also differ between Member States and Directives, although in most cases the continued fulfilment of the admission conditions is the key criteria. The SPD refers to conditions established in national law, such receiving a specific salary and certain working conditions. Some Member States have opted for a narrow right to employment based on a specific permit, which means that the third-country worker must renew the permit every time the employment changes. Views expressed in consultation (individual submissions OPC) drew attention to some conditions for renewals that are implemented in a way that is considered disproportionately stringent such as labour market tests incorrectly required or the requirement that seemingly minor errors made by the employer can lead to non-renewal of permits (and expulsion). This type of condition may be counterproductive to the objective of attracting and retaining highly qualified workers.

The more closely the permit is linked to a specific employer, job, pay and working conditions, the less flexible the system is. The procedural implications of re-verification of the compliance with initial conditions (e.g. pay and working conditions) needs to be counterbalanced with the need for controlling the legality of work to avoid exploitation.

Change of status

A relatively small number of third-country nationals changes between different types of permits every year (approximately 3 %⁴¹⁹). The most common changes are from "remunerated activities" and "family" to "other", which includes permanent status. No specific procedure has been detected for change of status, apart from changing from temporary to permanent residence (e.g. LTR status). The practical application study revealed an absence of information about relevant procedures.

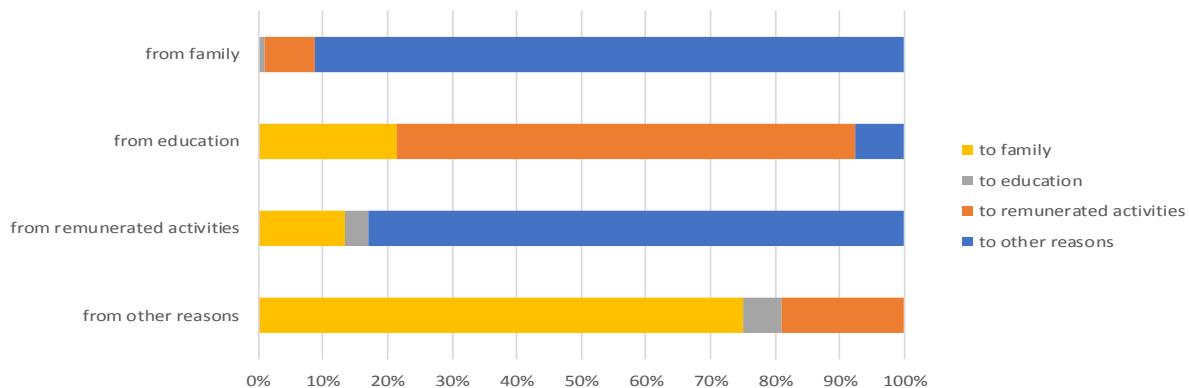
The majority of non-EU citizens responding to the OPC were aware of the possibility of changing their status, and more than half of respondents (64%) agreed that obtaining a change of status was easy. However, 60% said that they encountered problems in the procedures when applying for a change of status. The five most common problems encountered were the length of the procedure, insecurity due to delays in receiving the new permit after the first one had expired, the number of documents required, the high costs of the permit and difficulties getting their qualifications recognised. The experience of obtaining long-term residence in the EU was positive according to respondents, with 74% of those who applied obtaining the long-term resident status. Among the reasons for rejection, respondents mentioned the difficulty to prove five years of continuous and legal residence, the documents required, the lack of uniformity in the rules applied across Member States, the non-recognition of the years spent in another EU Member States and the lack of clear information about the procedures to follow.

417 FI, LT, PL, PT, SI.

418 Annex 5 (External coherence) section 2.2 (Irregular migration and return).

419 DG HOME estimations based on Eurostat, 2016, tables [migr_reschange]/[Migr_resvas]. NB not all MS report this data: [Migr_resval], not by NL, FI, DE, [Migr_reschange] not by CY.

Figure 10. Transition from an immigration status permit to another one in EU-25 (%), 2016



Source: ICF (2018) Annex 1Bii, figure 14. Eurostat [migr_reschange]. Data extracted on 09/04/2018. Changes of immigration status permits are recorded when the period between the expiry of the old permit and the start of validation of the new permit is less than 6 months since such changes imply some degree of continuity of residence. Otherwise this permit will be recorded as a new permit. The EU-25 aggregate excludes Cyprus due to the lack of data. Data for Portugal are incomplete concerning the changes from family reasons.

Issuance of a combined permit for work and residence (Single permit), including format

All Member States have introduced the single permit in the correct format, by complying with Regulation (EC) No 1030/2002 and indicate the right to employment thereon⁴²⁰. The purpose of a single permit is to provide transparency of the right to work and residence of a specific third-country national, and thereby facilitate controls for instance through workplace inspections that aim at preventing exploitation. The legal migration Directives cover this obligation for 68% of first permits issued (see figure 1.b) and specify the information to be provided on the card. Whilst the Directives do not cover all third country workers (e.g. self-employed workers, investors, persons subject to national protection), Member States must still comply with Regulation (EC) No 1030/2002 for the format when issuing permits.

As identified in the relevance assessment, certain other categories of workers may also in practice be excluded. One such category are certain highly mobile workers who stay and work short-term in several Member States, such as touring artists, certain business travellers and some transport workers. This exclusion may have the effect that measures to prevent exploitation are more difficult to enforce. The categories for which no permits are issued may also be excluded from the rights to equal treatment.

In consultation, problems of downward pressure on salaries in the transport sector have been mentioned, linked to the employment of workers from third-countries that do not establish a base in one single Member State. Although the extent of the problem is not known, as often is the case in case of exploitation, concern has nevertheless been expressed about third-country lorry drivers or crew on crew-ships⁴²¹ that contribute to a downward push of salaries and working conditions. Trade unions from the aviation sector have expressed concerns about downwards pressure on salaries for all cabin crews due to the recruitment of third-country

420 SPD implementation report (COM (2019)161). Some related concerns remain in 5 MS (EL, FR, IT, LT, HR). (BE not assessed).

421 Whilst sea-farers on EU flagged ships are excluded from the SPD, such sea-farers still risk overstaying if they stay in Schengen territorial waters and EU territory if they enter on Schengen visa permit and exceed the time limit.

nationals for which equal treatment in terms of working conditions and pay cannot be enforced⁴²². Whilst in the case of touring artists, concerns about exploitation have not been specifically raised, the wish to ensure legality of their stay and work in the EU is a key concern expressed in the now withdrawn EU legislative proposal for a touring visa⁴²³.

The conformity studies for the SPD revealed that some Member States have national exemptions for certain transport workers who remain on their territory for short durations. This does not resolve the problems caused when the overall duration of stay exceeds the Schengen rules of 90 days in any 180 days, thus leading to the illegal status of overstaying in the case these persons have entered the EU on a Schengen visa.

In addition, as reported by migration agencies, compliance with immigration legislation is important for businesses, being also a reputational issue for the company⁴²⁴. Stakeholders in the transport sector (notably aviation) raise concerns that the EU legal migration does not effectively protect the EU workforce against undue competition from third-country workers, and mention as one reason the lack of effective EU legislation ensuring such protection.

The fact that no permits can be issued under the EU legal framework for the type of workers described above can partly contribute to problems identified in relation to the control of the legality of work and stay. EU schemes could also serve as a safeguard against unfair competition between third-country workers and nationals, resulting from a possible exploitation of the former.

2.2.4 Degree of achievements of the objectives (EQ 5)

The degree to which efficient, fair and transparent application procedures have been achieved, depends on a number of factors.

The level of compliance with the provisions on procedures and issuance of the permits established by the Directives is high. It is however more difficult to measure how efficiency of the procedures for the management of migration flows have increased in the reference period. Some Member States stated that it is difficult to distinguish the impact of the implementation of the Directives from what was in place previously. None of the Member States has carried out an ex-ante assessment of the introduction of the Directives. It is therefore not possible to measure the exact impacts of the introduction of the legal migration Directives on the application procedures.

When comparing the baseline situation with the current situation, several Member States that had dual or multiple step procedures prior to the adoption of the SPD have introduced a single application procedure⁴²⁵. In consultation, some Member States stated that the introduction of a single application procedure led to simplifications and savings.

422 One illustrative example is in Finland, national airliner Finnair, required Finnish nationals to accept reduced wages otherwise third-country crew will be recruited instead on long-haul flights. This situation is beyond the applicability of the legal migration Directives as long as the third-country workers do not take up residency in Finland. Yle, ‘Finnair Outsources Cabin Crew on Some Asian Routes’, 2004-09-01.

423 COM (2018) 251 of 14.3.2018.

424 ICF (2018) Main report, section 6.1.1.2.

425 Only 11 MS were listed as already having a single application procedure leading to a single permit on 2007. NB, this excludes HR (prior to EU membership) and BE had not yet transposed the Directive (August 2018).

The assessment indicates that the single application procedure is well transposed and has in general simplified procedures.

However, simplification has not been fully achieved due to the application by Member States of different options in relation to admission procedures as well as a complex interaction with other legislation (*e.g.* visa legislation).

In terms of the issuance of one combined title authorising work and residence – a single permit – this has been well achieved, and a change from the base line can be measured whereby Member States that did not have this before now have introduced single permits.

Whilst the majority of the procedural safeguards have been correctly transposed, some internal coherence issues contribute to a fragmented approach between the Directives.

In addition, application procedures vary between first applications and renewal which can be submitted in the Member States of residence. In some Member States this means that fewer documents are required to prove compliance with the initial conditions whilst in others the renewal procedure is also complex.

The duration of the permits influences the frequency of renewal, and if short durations are coupled with high fees and complex procedures, this may entail less effective management of migration.

As mentioned above, the more closely the permit is linked to specific employment the less flexible the system is. This needs to be counterbalanced with the need for controlling the legality of work to avoid exploitation (see below).

The assessment also shows that full transparency of information about immigration options, conditions and procedures, is still not fully achieved in some Member States.

The operational objective of issuing combined (single) permits has been well achieved. This contributes to the achievement of the objective of better control of the legality of the stay/residence and work of third country nationals in terms of share of legally residing third country nationals who receive such permits. However, for certain categories of third-country workers, this objective has not necessarily been achieved, notably certain categories of highly-mobile workers. The relevance analysis concluded there is a gap in the EU legislation for this category⁴²⁶. Such workers also risk overstaying if they have entered on the basis of a visa, and are more at risk of exploitation, since the rights and protection of such workers cannot be effectively enforced. Such gap can have a negative impact on the achievement of the objective of preventing exploitation.

In terms of **establishing a level playing field** between Member States, and indeed between different categories of migrants within the Member State, the Directives offer many implementation options to the Member States on specific aspects of the procedure.

It can therefore not be concluded that a complete harmonisation of procedures was the intention of the legislator taking into account the many legal options provided by the Directives. The Fitness Check evaluation has found varied and complex procedures still applicable at national level. Nevertheless, the degree to which third-country nationals benefit

426 Annex 6.9 (Detailed relevance analysis).

from procedural safeguards generally in the EU has increased with the introduction of the Directives.

2.2.5 What can be attributed to the Directive (EQ6) & what can be attributed to other factors (EQ8)

Key changes directly attributed to the Directives include the introduction of the single permits, strengthening of the single application procedure and improved legal certainty with the introduction of procedural safeguards. Nevertheless, several Member States still have multiple step procedures (visa application, work authorisation separate from permit application) partly due to the interaction with other EU legislation (e.g. visa) and partly due to how the Directives were drafted (e.g. lack of clear definitions related to visas).

Other factors that are external to the legal migration Directives, but intrinsic to the migration management systems in the Member States influence the achievement of the objectives. Examples are pre-existing national procedures and structures, other national policies and procedures that did not need change with the introduction of the Directives (such as the availability of diplomatic missions in third countries, requirements to register in tax registers), and also different models in place to ensure access to the labour market for migrants (for instance labour market tests, quotas, "Union first principle").

A number of other EU policies, most importantly the Schengen *acquis*, including the visa policy and the format for residence permits, but also rules related to free movement such as coordination of social security have influenced the different migration phases.

The need to effectively control the legality of stay and in the case of renewals, the procedures related to verification that the conditions were complied with, are driven by external factors like competition in certain sectors and increasing exploitation of workers in general, not just of third-country national, although these may be more vulnerable.

Other factors affecting some Member States more than others, relate to the volume of migration beyond the scope of the legal migration directives, for instance the volumes of migrants seeking protection.

There is a gap in the current EU legislation in relation to the possibility of issuing permits that allow third-country workers whose work requires high mobility to work and stay legally in several Member States in a short-to-medium term duration.

3 Ensure fair treatment for categories of TCNs subject to the EU legal migration *acquis*

Fair treatment of third country nationals covers both **establishing fair and transparent procedures** (*see section 2*) and granting them certain rights, notably **equal treatment with nationals** of the Member State where they reside. The Directives also grant **specific rights** to the permit holder, for instance, in relation to access to employment. These provisions also contribute to fulfilling the obligations of **ensuring that fundamental rights** are respected.

The specific objectives related to **integration** as well as **ensuring right to family life** are linked to fair treatment (supporting integration into society by access to the labour market) and the rights to family reunification. Other rights such as the right to intra-EU mobility also contribute to the attainment of fair treatment (*see section 4*)⁴²⁷.

3.1 Granting rights comparable, or as close as possible, to those of the citizens of the European Union, through equal treatment and other rights based on the permit

3.1.1 Context

Fair treatment comprehends the **right to equal treatment with nationals of the Member State of residence** (included in all Directives, apart from SD and FRD⁴²⁸), **rights related to access to employment** (in all Directives but with wide variations) and **other rights** such as the right to enter the territory and the right to move freely on the territory of the Member State.

The **internal coherence** analysis⁴²⁹ identified some key issues related to the provisions on fair treatment that may have an impact on the effectiveness:

Equal treatment rights:

- Working conditions, including pay and dismissal, and health and safety: whilst wording differs slightly there are no significant difference among the Directives. However, LTRD and RD do not explicitly include equal treatment with respect of health and safety.
- Freedom of association and affiliation of trade unions, and to benefits of such membership: the same wording is found in all Directives, but SWD in addition includes the right to strike and take industrial action.
- Education and vocational training: SPD, BCD, LTRD, SWD include the same rights. The LTRD specifically includes the right to study grants, whilst the SPD provides the possibility to restrict equal treatment as regards study grants. FRD grants the same rights to the family member than the sponsor, as well as initial training and retraining.

427 ICF (2018), Main report, section 6.1.1.1.

428 Seven Directives (LTR, RD, BCD, SPD, SWD, ICT, S&RD) include provisions on equal treatment of third-country nationals with respect to nationals of the Member States. The ICT also foresees such equal treatment but with regard to the terms and conditions of employment it guarantees at least equal treatment with posted workers under Directive 96/71/EC. The FRD and SD do not include provisions on equal treatment. However, equality is ensured by the SPD if third-country nationals falling within the scope of the FRD and SD are authorised to work. The SPD also regulates equal treatment for migrant workers under national migration schemes.

429 Annex 5.1 (Internal coherence) and ICF (2018) Annex 1Bi in-depth analysis on internal coherence of equal treatment provisions.

SPD includes optional restrictions on language proficiency and fulfilment of educational pre-requisites.

- Recognition of diplomas and qualifications: There are identical provisions in LTRD, SPD, BCD, RD, SWD, and ICT. This applies only when the TCN has already been admitted and holds a permit and therefore neither in the application phase nor in the intra-EU mobility phase (where most relevant).
- Social security branches, and export to third-countries of statutory pensions (old-age pensions, death grants, invalidity and survivor benefits): the wording differs slightly as some Directives refer to national law, some to Regulation (EC) N° 883/2004 or its predecessor. The main differences are that the LTRD extends the right to social assistance and social protection (but it can be limited to core benefits), the SPD includes optional restrictions in relation to family benefits for stays of less than 6 months (also SWD), for students and for those working on the basis of a visa. Under the SPD unemployment benefits cannot be restricted for those who have been in employment for at least 6 months and are registered as unemployed.
- Tax benefits: there are identical provisions in LTRD, SPD, RD, but SPD introduces an optional restriction as regards family benefits if the family member resides outside of the Member State. Under the SWD equal treatment applies only if the TCN is considered resident for tax purposes.
- Goods and services: Generally, the wording on goods and services is identical but there are some differences related to housing. SPD, BCD and SWD include an optional restriction related to housing.
- Access public employment services: included in SPD and SWD, but not in the LTRD.

Right related to access the labour market:

- Equal treatment with nationals in terms of employment, with some restrictions for sensitive positions applies for LTRs only, both in employed as well as in self-employed occupations.
- Access to employment restricted to the conditions for which the third-country national has been admitted is established in the SPD, BCD, SWD, RD. For FRD, the family member has the same rights as the sponsor, but the right to access the labour market may be restricted during the first year. For BCD, third-country nationals may, after two years, be granted equal treatment with nationals as regard access to highly skilled employment. ICTs are not considered as having entered the labour market. SD have the optional (confirmed in the S&RD) right to work a limited number of days per week.

Other rights:

- No internal coherence issues were identified in relation to the access to the territory, the right to enter and leave the territory on the basis of the permit.

The purpose of equal treatment was to create conditions as close as possible to that of nationals, and at the time of proposing the Directives the approach was that such rights should be more extensive the longer the (intended) duration of stay was⁴³⁰. Some differences are therefore justifiable (in particular in the area of equal treatment on access to study grants,

430 See for instance COM(2001) 386 final of 11.7.2001. Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities.

family benefits, social protections and social assistance). However, differences in the level of equal treatment are not always linked to the intended duration of stay but to other aspects of the work or stay. For instance, seasonal workers may be more vulnerable on the labour market and therefore SWD includes more explicit rights on striking⁴³¹.

The **relevance analysis** identified gaps in terms of categories of third-country national not benefitting from equal treatment, notably 'inactive' family members falling under the scope of FRD⁴³².

The **external coherence** analysis furthermore identified other EU policies and legislation with relevance for the achievement of the objectives, such as coordination of social security, recognition of qualifications, fundamental rights but also employer sanctions and other provisions that require monitoring by Member State.⁴³³

3.1.2 Baseline

There are two distinctive baselines. Equal treatment was introduced for the first time in the legal migration *acquis* by the LTRD (proposed in 2001, adopted 2003). Secondly, in 2007 when the SPD (adopted 2011) and the BCD (adopted 2009) were proposed, equal treatment rights were extended to a significant proportion of third-country workers.

The qualitative or legal baseline for the LTRD, RD, BCD and SPD⁴³⁴, prior to the adoption of the Directives indicates that the right to equal treatment was guaranteed in several areas, however, there were some notable exceptions and variations across Member States.

As the SPD is a horizontal Directive, it introduced equal treatment rights for a large number of third country nationals. The analysis of the baseline will focus on the situation at the time of the proposal for the SPD Directive.

The impact assessment⁴³⁵ for the SPD Directive concluded that:

- Equal treatment with nationals in terms of working conditions and education – with some exception for education (Germany, Czechia) - was generally granted to third-country workers.
- Some social security benefits (more details in table below) were granted to third-country workers, depending on their migration status but only few Member States allowed third-country workers to transfer these benefits outside the EU.
- Rights which relate to the access of third-country workers to employment were frequently subject to limitations. These restrictions mainly involved limited rights to seek a new employment in case of job loss and/or to change job/employer. The same consideration is valid for the freedom to choose an occupation/employer recognized to third-country workers. Work permits were frequently linked to a specific work position and employer, and the validity depended on the work contract/agreement.

431 Not further assessed in this evaluation.

432 Not further analysed here in relation to effectiveness, given that it was the intention of the legislator to exclude these categories. See also Annex 5.1 (internal coherence) and Annex 6 (Detailed relevance analysis). See also ICF (2018) Main report, section 6.

433 Annex 5.2 on external coherence.

434 No provisions on equal treatment in FRD, SD.

435 SEC(2007) 1408 final Impact assessment of the SPD.

- Access to public services was limited for third-country workers in most Member States. EL, FR and IT appeared to be the only Member States where the access to public service (such as services of general economic interest, placement services) was quite widespread.

Many Member States had not yet granted equal treatment in the area of social security for third country workers at the time of the SPD proposal⁴³⁶.

As regards the quantitative baseline, it is not possible to estimate what proportion of third-country nationals enjoyed equal treatment prior to the introduction of the Directives, as the Impact assessments accompanying the Commission's proposals do not include estimates at that level of detail.

3.1.3 Observed effects (EQ 7)

The qualitative or legal baseline for the LTRD (2000), RD(2004), BCD and SPD(2007)⁴³⁷, prior to the adoption of the Directives, indicated that the right to equal treatment was guaranteed in several areas, however, there were some notable exceptions and variations across Member States. The legal implementation analysis shows that these gaps have largely been addressed, and in general, a good level of legal implementation of equal treatment provisions has been observed.

A number of remaining concerns have been identified which have undermined the full attainment of the overarching objective to ensure fair treatment for the TCNs covered by the EU legal migration *acquis*⁴³⁸:

- Some Member States narrowly apply equal treatment rights to certain categories only (e.g. national permanent residents and LTRs) and therefore exclude the wide range of categories that should be covered by the SPD. The conformity assessment of the SPD shows that some Member States have incorrectly implemented certain equal treatment provisions. The most serious problems identified relate to access to social security benefits, the export of pensions to countries of origin and access to goods and services. Some Member States limit the access to social security benefits to those who are permanent residents or those in employment.
- Some Member States transpose the provisions on equal treatment with general non-discrimination clauses, and problems may occur when such clauses do not refer to nationality as a ground for non-discrimination, or when the provision is not explicit enough.
- Some Member States do not grant full equal treatment in the first year, for instance due to other legislation than that specifically transposing the SPD, such as the rules on inclusion in the population register only if the intended stay is more than 12 months.
- Equal treatment in relation to the portability of pension benefits outside the EU is also regulated under the same conditions and rates that national citizens. Some Member States however reduce the rates at which pensions are exported for TCN or limit the possibility of export pensions to cases where bilateral agreements exist with the third country concerned.

436 Impact assessment of the SPD proposal for a Directive (SEC(2007) 1408).

437 No provisions on equal treatment in FRD, SD.

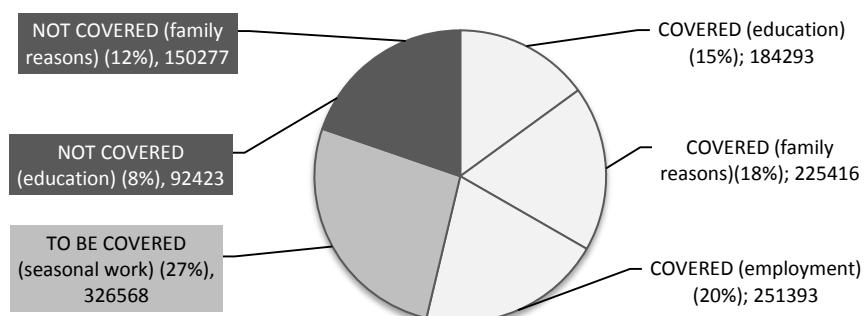
438 See implementation reports SPD (COM(2019) 160, LTR(COM(2019) 161), BCD(COM(2014) 287).

Among the optional restrictions, there are also some differences in the way they have been applied by Member States. Article 12 of the SPD, establishing equal treatment rights, is generally reflected in the other Directives under examination. The Directives allow Member States to limit the right to equal treatment in certain situations, namely they are allowed to deny grants and loans for education and vocational training; family and unemployment benefits may not be granted to third-country nationals authorised to work for a period of six months or less, or to students or third-country nationals entitled to work on the basis of a visa. Access to housing and tax benefits may be restricted as well. With regard to the SPD, only CY has chosen to adopt all optional restrictions, whereas BG, CZ, ES, HR, LU, RO and SK did not apply any of the options. This shows that the optional restrictions have not been widely used, which has positively contributed to the achievement of the objective of fair treatment.

The legal analysis therefore concluded that in some Member States equal treatment provisions exclude some categories that should be covered according to the Directives (such as those with temporary permits, those working on the basis of a visa). These practices are however limited to a few Member States only and the Commission have addressed these concerns with the respective Member State. A positive finding is that possible restrictions permitted in the Directives have not always been applied. CJEU case law has furthermore confirmed the right to certain social security benefits on the basis of the SPD⁴³⁹.

The statistical analysis shows that the actual coverage of the equal treatment provisions is relatively large. 53 % of third country nationals admitted to the EU (data from 2017) are covered, and another 27 % is expected to be covered when the SWD will be fully implemented. Those not covered include family members who are not considered workers, such as children, and students not permitted to work.⁴⁴⁰.

Figure 11. Share of (first) residence permits issued for all reason that are covered (or not covered) by EU legislation in terms of equal treatment, average over 2017, in EU-25



Source: DG HOME estimation based on Eurostat, [migr_resfirst], [migr_resocc] and [migr_resfam]. Data extracted: 27.11.2018). For further background, see Annex 9, section 3. Further details available in Annex 9. This data does not include SPD permits issued for other reasons, notably national permanent residence permits

439 See Judgment of the Court of Justice (CJEU) of 21 June 2017, *Kerly Del Rosario Martinez Silva v Istituto nazionale della previdenza sociale (INPS), Comune di Genova*, C-449/16.

440 This reason is an assumption by the author. Improved data collection could clarify the situation. It can furthermore not be excluded that there are reporting errors in relation to SPD data and therefore the share may be higher. 11 MS do not report SPD data for permits issued for education reasons (AT, BE, BG, CZ, EL, ES, HU, IT, LT, LU, MT), 6 do not report SPD permits issued for family reasons (BE, BG, CZ, EL, LT, NL), Eurostat, migr_resing].

As explained above, although the internal coherence identified some differences in the equal treatment provisions among the Directives, differences mostly reflect the duration of the stay which corresponds to the initial intention of the legislators. As observed above, the legal analysis furthermore shows that the optional restrictions have not been widely used by Member States.

A comparative analysis between equal treatment provisions for the lower skilled seasonal workers (SWD compared to the BCD) shows that the differences relate mainly to family benefits, and that in fact the more recent SWD includes additional rights in relation to rights to back salary payments and right to strike. The equal treatment rights established by the SPD, covering most of the remaining categories of workers including low and medium skilled workers as well as highly skilled workers under national schemes, do not differ substantially from the BCD.

The personal scope of the Directives has however resulted in the exclusion of certain categories of TCN from harmonised equal treatment rights at EU level, for example the self-employed and certain highly mobile workers.⁴⁴¹

Nevertheless, as highlighted by the practical application study, the Directives have had an overall positive impact on the level of rights for TCNs and no clear effect of their "sectoral approach" on the access to equal treatment has been identified.

The right to employment and access to the labour market differs significantly among the Directives, with equal treatment only being granted in the LTRD. Different practices have been observed among Member States in relation to how closely the permit is linked to a specific job, which means that should the employment change, a new permit is needed. In all Member States under examination, except for Greece and Portugal, permits authorising work are in general linked to a certain employer or jobs only. Moreover, in all Member States, except for Cyprus and Germany, third-country nationals need to change the permit if they lose their job or want to change employment. In Germany, if the person loses his/her job he/she remains in possession of the existing residence permit, but the immigration authority can decide to limit its duration.

All Member States ensure equal treatment to employment for LTR holders in the first Member State and a vast majority of Member States have implemented the limitation of the exercise of public authority. In terms of rights in the second Member State, some Member States restrict the access to employed and self-employed activities for those who hold a permit for other reasons (study for instance).⁴⁴²

Findings from consultation on equal treatment show that civil society representatives have **criticised the sectoral approach** adopted by the European Union in the field of migration, as they found that the differences in the rights attributed by each Directive has led to a fragmentation of rights according to the level of skills of third-country nationals. It was highlighted⁴⁴³ that this has led to a lower level of protection of the rights of low-skilled workers. This view is not supported by the internal coherence and relevance analysis. It should be stressed that the SPD covers most of the third country migrants in terms of equal

441 Annex 6 (Detailed relevance analysis).

442 COM(2019) 161.

443 analysis) Low and medium skilled workers.

See also Annex 6.4 (Detailed relevance

treatment rights. Equal treatment provisions of the SPD apply as well to permits issued under national schemes and those who were not initially admitted for the purpose of work, for example family members of TCNs, students and those working on the basis of a visa. Nevertheless, this perception may indicate a lack of knowledge of the relevant legal framework, which in itself could hamper the achievement of the objective.

The majority of TCN respondents to the OPC seem to agree that **TCNs generally enjoy equal treatment** as compared to nationals of the EU country in which they reside, especially with regard to tax benefits, freedom to join organisations representing workers or employers, advice services provided by employment services, access to education and vocational training, and access to goods and services. A lower share of non-EU citizens residing or having resided in the EU reported to never have been treated differently when it comes to social security benefits and working conditions. On the other hand, respondents under the category "Other respondents" seem to believe that non-EU workers are treated differently regarding recognition of qualifications.⁴⁴⁴ For example:

- Over 70% of respondents indicated that they had never been treated differently when it came to: tax benefits, if resident for tax purposes in the EU country, freedom to join organisations representing workers or employers, including benefits conferred by these organisations or advice services provided by employment offices.
- More than 60% of respondents also said that they had never been treated differently as regards access to education and vocational training, access to goods and services or recognition of qualifications.
- A lower share of respondents said the same about access to social security benefits (e.g. family benefit, healthcare, old-age pension, invalidity, etc.) (56%) and working conditions (pay and dismissal, health and safety at the workplace, etc.) (51%).

Some academic articles have also criticised the current provisions in the EU legal migration Directives on equal treatment between third country nationals and nationals of the Member States they reside in⁴⁴⁵. According to the authors, the different provisions on equal treatment across Directives and the multiple "may clauses" allowing for certain restrictions result in a preferential treatment for some categories of TCNs. They consider that this contravenes the principle of equal treatment based on administrative statuses as set forth in international and European human rights law and in international labour law and results in fragmentation of the right to equal treatment.

However, it can be concluded that third country nationals currently enjoy largely harmonised equal treatment rights. This has had an impact on the attractiveness of the EU as a work destination. In addition, these rights contribute to improve social cohesion and the integration of migrant workers in the host communities. There is no reliable data that allows for quantification of these impacts.

3.1.4 Degree of achievements of the objectives (EQ 5)

⁴⁴⁴ ICF(2018) Main report, section 6.1.2.5. The category "Other Stakeholders" represents members of academia, NGOs, individuals with personal interest, immigration lawyers, EU-level organisations, and associations.

⁴⁴⁵ Fridiksdottir, B., *Equal Treatment Rights in EU Law on Labour Migration: A Human Rights Principle Applied as a Policy Tool*, (2017).

The degree of transposition of the equal treatment right is very high, bringing uniformity across Member States. Some concerns have arisen with regard to access to social security benefits, access to goods and services and export of pensions and some Member States interpreting the personal scope of the provisions too narrowly.

Some shortcomings are also due to the limited personal scope of the Directives, excluding certain categories of TCN from equal treatment rights as for example the self-employed, and certain highly mobile workers.

Despite the existence of equal treatment rights in the Directives, there is some evidence of exploitation (*see section 3.2*).

The provisions related to the **access to employment** however differ substantially among the Directives, with the LTRD providing more ample rights in terms of equal treatment. For other categories of third country nationals, access to employment is limited to the purpose of stay (a specific contract).

The cumulative effects of restricted access to employment (permit is linked to one particular job, and the need to renew the permit when the job changes), as well as a choice of some Member States to issue permits with shorter duration, may have a negative impact for instance on **integration**.

3.1.5 What can be attributed to the Directive (EQ6) & what can be attributed to other factors (EQ8)

When comparing the qualitative (legal) baseline with the current situation, it can be concluded that, as a result of the implementation of the Directives, there has been a significant improvement in the enjoyment of equal treatment rights by TCN. In particular, this is the case for those who were not initially admitted for the purpose of work, for example family members of TCNs, students and those with time-limited permits for work.

Several factors⁴⁴⁶ related to the interaction with the following EU policies and legislation influence the level of achievement of the objective related to equal treatment:

- Recognition of professional qualifications: There are some potential gaps in legal migration legislation in particular as regards, access to recognition/validation procedures in the application phase. Whilst the legal migration Directives refer to all qualifications, regardless of whether acquired in an EU Member States or in a third-country, the provisions of Directive 2005/36/EC (as amended) apply regardless of the nationality but relate mainly to qualifications acquired in the EU. There is little or no comparable information about whether Member States apply a differential access to validation measures for third-country nationals compared to nationals. Nevertheless, evidence show that the over qualification rate among tertiary qualified TCNs is higher for the foreign born and foreign trained (41.6%) compared to the foreign-born trained in the host country, who were only slightly more likely to be over-qualified (22.7%) than native-born (19.1%).⁴⁴⁷ This may be partly due to problems related to the uncertainty (for

446 See Annex 5.2 (External coherence) for further analysis.

447 Eurostat, Labour force survey (2011-12 data).

- several actors) about the value of non-EU qualifications – as well as the lack of information and the cost and uncertainty of the process for the migrant him/herself.
- **Social security:** Some inconsistencies exist related to the link with security coordination rules which apply in cross-border situations and the legal migration framework. The latter regulates primarily situations limited to one Member State and the former relates to coordination between two legal regimes. In practice the distinction between the classification of what is a social security benefits and what is social assistance or a social benefits (an issue of high relevance for migrants) is drawn will be fixed in cases which are unrelated to migration law and focused primarily on coordination of social security.
 - **Working conditions, including pay and health and safety:** employment law at the EU and national level, including enforcement mechanisms thereof provide important synergies for the enforcement of equal treatment in this area.
 - **Export of pensions:** Bilateral agreements between Member States and third-countries that contain export of pension clauses for nationals also determine the extent of the rights for third-country nationals.

Important positive synergies are found, notably in transposition, with the non-discrimination Directives (2000/78/EC and 2000/43/EC), contributing to the achievements of the objective of equal treatment. Although the personal scope is different many Member States have however chosen to add nationality as one ground for which discrimination is prohibited, thereby transposing those Directives in a way that lays down the principles of equal treatment also for third-country nationals⁴⁴⁸.

3.2 Reducing unfair competition between a Member State's own nationals and third-country nationals through equal treatment and specific measure preventing exploitation of third-country nationals

3.2.1 Context

The **objective of reducing unfair competition** between nationals and third-country workers among and within Member States due to possible exploitation of the latter, must be ensured through **equal treatment**⁴⁴⁹ between third-country nationals, in particular third-country workers, with nationals of the Member State in which they reside. Furthermore, the **issuance of combined permits ('single permits')**, contributes to the specific objective of **facilitating control of the legality of stay and work** and to help **detecting overstaying**⁴⁵⁰. These where important objectives for the SPD⁴⁵¹ but also for the other Directives (BC, SWD and ICTs) containing equal treatment clauses and permit requirements. The more recently adopted SWD

448 COM(2019) 160.

449 See Section 3.1.

450 See Section 2.2 on the application procedure and permits.

451 The 2007 SPD proposal addressed a "rights gap" in that the absence of equal treatment for third-country workers creates "*unfair competition for EU nationals and long-term residents*", because "*it could become a competitive disadvantage for EU nationals and long-term residents to exercise rights that third-country workers do not have and that impose a burden on employers. Under current conditions, third-country workers are more likely to work below accepted or regulated minimum wage levels and in occupations that are below their level of educational attainment. The market will tend to exploit the underprivileged position of third-country workers that is created by their inexperience with working and living in the EU, their inadequate command of the languages of the host country, and the rights gap.*" (SEC(2007) 1708).

includes specific provisions aimed at preventing exploitation, such as sanctions on employers and monitoring obligations, however these are not evaluated here.⁴⁵²

The provisions of the Directives relevant for this purpose are:

- Establishing enforceable equal treatment rights in relation to working conditions (including pay and health and safety conditions), the right to trade union affiliation and social security.
- Issuance of a combined permit authorising both work and residence, which facilitates the control of the legality of stay and work.

No specific enforcement measures are foreseen in the earlier Directives evaluated here, such as inspections, and reporting thereof, or sanctions against non-compliant employers⁴⁵³. Member States may monitor compliance with terms of employment upon renewal of the permits.

The aim of the measures included in the legal migration Directives is to **contribute to** the prevention of exploitation. The focus of this analysis is to assess if the legal provisions of the Directives, alongside other relevant EU instruments and national policies, are sufficient to effectively enforce these rights and thereby prevent exploitation.

Issues related to different forms of exploitation are further analysed in the **external coherence**⁴⁵⁴. Key conclusions of particular relevance for the effectiveness analysis are:

- There is no universally agreed definition of labour exploitation⁴⁵⁵.
- Any worker in the EU, regardless of his/her nationality, can fall victim of one of the many forms of labour exploitation. The equal treatment provisions of the Directives only apply to situations where third-country nationals are treated differently from nationals, but are not designed to prevent situations in which also nationals are exploited.
- Third-country nationals may be more vulnerable due to the inherent dependency on the employer in situations whereby only the employer can submit the applications for the first permits as well as for the renewals. Third country nationals being exploited may be afraid of reporting the unfair practices as this may lead to a loss of work permit and other repressive (and possibly illegal) measures by the employer.
- Measures to prevent some forms of exploitation included in the legal migration Directives are mainly the requirements to ensure equal treatment for TCNs with nationals on working conditions, such as equal pay and working time as well as social security.

The analysis of exploitation in the **external coherence**⁴⁵⁶ also found that a number of policies are relevant for the effective enforcement of these provisions, in particular the Employers Sanctions Directive⁴⁵⁷, employment law, and policies to combat trafficking and non-discrimination legislation, including monitoring of compliance with labour law,

452 NB, the SWD specific measures are not evaluated in relation to effectiveness due to the recent implementation of this Directives. See also ICF (2018) Main report, section 6.1.2.6.

453 SWD introduce sanctions against employers of seasonal workers.

454 ICF (2018) Main report, section 6.1, Annex 1C I (External coherence) and 4B (Analysis of gaps and key issues).

455 European Union Agency for Fundamental Rights (FRA), *Severe Labour Exploitation, Workers Moving within or into the European Union – States' obligations and victims' rights*, (2015), p. 36.

456 See Annex 5.2.8 (External coherence).

457 Directive (2009)52.

including inspections. For the issuance of the single permit, Regulation (EC) No 1030/2002 on the format of the permit⁴⁵⁸ is particularly relevant. This analysis also found that there are significant gaps in the EU legal framework for the prevention of exploitation of legally residing third-country nationals.

3.2.2 Baseline

The legal baseline in relation to the equal treatment objective itself is presented in section 3.1 above and in terms of number of combined permits issued in section 2.2.

Given the hidden nature of irregular migration, any estimates of its scale are approximate. Globally, the IOM estimated in 2010 that 10-15% of migrants had an irregular status. No baseline has been identified on the extent of exploitation of legally residing third-country nationals.

3.2.3 Observed effects (EQ 7)

As concluded above, the provisions on equal treatment are relatively well transposed and the overall implementation shows that the Directives have had a positive effect on achieving the objective of fair treatment. Although some evidence of exploitation of third-country workers have surfaced,⁴⁵⁹ the extent of such exploitation is inherently difficult to measure, as is often the case in relation to illicit activities. Evidence on downward pressure on salaries and working conditions is likewise difficult to obtain. Challenges in estimating the size of the problem of labour exploitation is further analysed in Annex 5⁴⁶⁰. For instance, an ILO study⁴⁶¹ as updated in 2017, reached a cautious estimate of 684 000 victims of ‘modern slavery’ in the EU in 2016. This data does not differentiate between different types of exploitation (e.g. sex exploitation vs. forced labour exploitation), nor does it enable a distinction between the degree of exploitation of third country nationals that are staying illegally or legally residing. Certain sectors are found to be particularly vulnerable to exploitation, notably; the construction sector, transport sector, restaurant and domestic care/cleaning sectors, seasonal workers⁴⁶².

Evidence from practical application⁴⁶³ showed that Member States have adopted different measures for the prevention, identification and sanctions of employers for exploitation of third-country national workers, including:

- Retrospective verification as part of the assessment of fulfilment of the **condition for renewal** of the permit.

458 Regulation (EU) No 2017/1954 of the European Parliament and of the Council of 25 October 2017 amending Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals. OJ L 286, 1.11.2017, p. 9.

459 Example from Sweden. Dagens Nyheter series of articles on exploitation of foreign workers: Tove Nandorf, *Razzior avslöjar hänsynslöst utnyttjande av papperslösa*, Dagens Nyheter, 9 April 2018.

460 Annex 5.2 (External coherence) section 2.8 (Exploitation).

461 International Labour Organization (ILO), Walk Free Foundation and International Organization for Migration (IOM), *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, (2017); Walk Free Foundation, *The Global Slavery Index* (2016), p. 58-66. The data does not include Malta.

462 For instance activities by Swedish Work Environment Authority (Arbetsmiljöverket), Osund konkurrens, <https://www.av.se/om-oss/vart-uppdrag/osund-konkurrens/>

463 Annex 8 (Evidence practical application, ICF (2018) Annex 2A, p.88.

- Identification of exploitative situations due to monitoring of other EU legislation; notably the Employers Sanctions Directive and EU labour law inspections⁴⁶⁴.
- Monitoring by parties with legitimate interest (such as trade unions, organisations of migrant workers) that may act on behalf or in support of third-country nationals.
- Complaints mechanisms for third-country workers. Third-country nationals however seldom file complaints about their working conditions.
- Mechanisms to redress the labour situation in place in at least two Member States, such as facilities of out-of-court settlement of labour disputes, including through enforceable decisions of payment of correct remuneration.

In consultation, stakeholders made the following comments on the need for better protection of vulnerable third-country nationals against labour exploitation:

- It is necessary to ensure a better level of protection of rights of low-skilled workers and it is recommended to implement better practices to match the skills of third-country nations with a job available and a better identification of the demand for low and medium-skilled workers be implemented⁴⁶⁵.
- An effective system to assess and monitor exploitation, training, labour inspection and prosecution is needed.
- The EU provisions on equal treatment have contributed to the prevention of exploitation of third-country nationals. Italy states that 1000 joint inspections in 2016 lead to the identification of 1000 undeclared workers out of which 74 illegally residing migrants⁴⁶⁶.
- The temporary nature of the stay also contributes to the vulnerable situation of seasonal workers, including also overstays and falling into irregularity.⁴⁶⁷

In addition, some stakeholders considered that the conditions for renewal of work permits in relation to maintaining salary levels were too strictly applied by some Member States. Some Member States apply the rule that the applicant cannot work for the employer for whom the permit should be issued while the application is ongoing. Moreover, individuals who lose their job are only granted one month to find another one. As a result, migrants are locked in their jobs and they become vulnerable to inadequate pay, harassment or exploitation. Consultations with trade unions in the field of transport also provided an example where EU employees of a national airline based in an EU Member State were directly asked to lower their salaries, otherwise they would be replaced by lower cost third-country staff on international routes⁴⁶⁸. Although trade unions have flagged concerns about the absence of enforceable rights for instance equal treatment for transport workers, that they claim systematically leads to such downward pressures, no further evidence has been submitted in the context of consultation for this Fitness Check⁴⁶⁹.

The OPC further revealed the following in relation to various aspects of exploitation:

464 See Annex 5.2 (External coherence) for more details.

465 European Economic and Social Committee, Final report on the 3rd meeting of the European Migration Forum 2-3 March 2017, ACCESS – Migrants’ Access to the EU, to Rights, and to Services: Challenges and Way Forward.

466 Representatives from the Senior Labour Inspectors Committee in both Italy and Portugal.

467 ICF (2018) Main report, section 6.1.2.6.

468 European Transport workers Federation (ETF), meeting March 2018, concerning Finnair crew. See also press release : <https://www.etf-europe.org/finnair-agreement-no-more-outsourcing-and-redundancies/>

469 Annex 6 (Detailed relevance assessment), chapter 9 (Transport workers and other highly mobile workers).

- When TCNs residing in the EU now or in the past were asked if they had been treated differently from nationals as regards working conditions (pay and dismissal, health and safety) only 51 % (n: 191) replied that they had never been treated differently, which is significant lower than for the other provisions of equal treatment such as freedom of association (74%) and access to tax benefits (75%). 13 % stated they had often faced different treatment, 24 % on more than one occasion and 13% on one occasion.
- When asked if "*Current EU legislation on equal treatment is adequate to prevent discrimination against non-EU nationals and avoid labour exploitation*", only 13% of national authorities (N=30) agreed to a large extent and 40% to a large extent. Among the employers (N=76) 22% agree to a very large extent and 21% to a large extent. TCNs residing in the EU now or in the past 12.5% (N=194) agreed to a very large extent and 21% to large extent. 21% of this category strongly disagreed, and of the other respondents (N=506) 26% disagree to a large extent.
- When asked if they agree with the statement "*Protecting the rights of non-EU citizens living in the EU is a way of avoiding wage degradation in the EU*", 71 % of third country nationals residing now or in the past in the EU (N=191) and 80% of Member State authorities (N=30) agreed to a large or very large extent; whilst among the employers (N= 76) only 31 % answered in this way.

The issuance of combined work and residence permits also contribute to detecting irregular stay, including overstaying⁴⁷⁰, which is when a third country national's presence extends beyond the approved duration of the authorisation (permit or visa). Regular migrants may transition into overstay⁴⁷¹ or irregular stay if they are unable to renew their residence permit for various reasons, sometimes due to bureaucratic delays beyond their control. The loss of legal status may lead to destitution, social problems and exploitation in the labour market. A recent complaint submitted to the Commission showed an example of a third-country national losing social security rights due to delays in the renewal of a permit.

Gaps identified in the current EU legislation in relation to the possibility of issuing permits that allow legitimate third-country workers whose work requires high mobility across the EU, may lead to such workers overstaying if they have entered on the basis of a visa, and render them more at risk of exploitation, since the rights and protection of such workers cannot be effectively enforced.

3.2.4 Degree of achievements of the objectives (EQ 5)

Despite correct implementation of the provisions on the issuance of a combined permit (single permit) authorising work and stay (enabling easier control of the legality of stay) and good transposition rates of the provisions on equal treatment into national law, (in particular for working conditions) there is some evidence of exploitation⁴⁷², which would include also legally residing third-country workers. However, the extent of the problem is, as for any other illicit activity, difficult to measure.

470 See also Annex 5.2 (External coherence), Chapter 6 (Irregular migration and return).

471 By definition over stayers enter the EU legally on visitor, tourist or student visas, or as asylum seekers, as opposed to those enter the EU illegally.

472 European Union Agency for Fundamental Rights (FRA), *Severe Labour Exploitation, Workers Moving within or into the European Union – States' obligations and victims' rights*', (2015), International Labour Organization (ILO), *Forced Labour: an EU Problem*, Press Release 10 July 2012.

It can therefore be concluded that the objective of preventing exploitation of third-country workers has not been fully achieved.

3.2.5 What can be attributed to the Directive (EQ6) & what can be attributed to other factors (EQ8)

The intended aim of the legal migration Directives was to complement other measures in order to combat exploitation. The Directives provide on the one hand the basic enforceable rights to equal treatment with nationals primarily in terms of working conditions. On the other hand they provide a mechanism that helps monitor the legality of stay of third country workers (the combined work and residence permit).

Different mechanisms are used by Member States to enforce compliance with the relevant provisions of the Directives, for instance admission conditions (salary levels) and equal treatment provisions, notably in terms of working conditions. Some mechanisms are intrinsic to the Directives but not specifically prescribed therein, such as a retrospective verification of whether conditions were fulfilled upon renewal of the permit.

Inspection of workplaces is required by other EU policies, such as those relating to the Employers Sanctions Directive (inspection and reporting on the result of such inspections to the Commission) of employers suspected of employing illegally staying migrants⁴⁷³. Such inspections also help uncover cases of exploitation of legally residing migrants. Likewise, other labour inspections designed to monitor and enforce EU and national labour law policies (coordination at EU level via SLIC⁴⁷⁴) can uncover such cases. Work undertaken in the context of the Platform on undeclared work, although not all undeclared work is exploitation.

The mechanisms provided by the legal migration Directives are only **complementary to other measures** in their contribution to the achievement of the **objective of preventing exploitation**⁴⁷⁵.

There are other external factors that drive exploitation notably within certain highly competitive sectors of the economy.

3.3 Promoting integration and socio-economic cohesion, and protecting family life

3.3.1 Context

One key objective of the Legal migration *acquis* is to **promote integration of the third-country nationals and thereby promote economic and social cohesion** in the host society by giving third-country nationals rights comparable to or as close as possible to that of nationals of that Member State (access to employment, equal treatment, etc.). Integration and stability in society is also promoted by establishing the right to reunite with TCN family

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

474 Senior Labour Inspectors Committee,

<https://ec.europa.eu/social/main.jsp?catId=148&intPageId=685&langId=en>

475 Annex 5 (External coherence) on "Exploitation" and "Irregular migration and return".

members⁴⁷⁶. This specific objective is therefore part of the evaluation of the objective of **fair treatment of third country nationals**.

The LTRD has integration as a specific objective, and the recitals state that "*integration of TCNs who are long-term residents in the Member States is a key element in promoting economic and social cohesion*"⁴⁷⁷. The FRD states that family reunification "*helps to create sociocultural stability facilitating the integration of third country nationals in the Member State*" (Recital 4). Other Directives (RD, BCD, ICT, SWD, S&RD, and SPD which applies to SD and FRD) also include equal treatment rights similar to those of the LTRD.

The Directives do not elaborate on the ways integration should be achieved, but include specific provisions related to "integration" in the form of:

- (pre-departure) conditions for family reunification: the FRD states that Article 7(2), states that "*Member States may require third country nationals to comply with integration measures, in accordance with national law*" as part of the conditions for family reunification, but the same article also state that for refugees and their families, such measures "*may only be applied once persons concerned have been granted family reunification*".
- Conditions for acquiring EU long-term resident status are set out in Article 5(2) and establish that "*Member States may require third-country nationals to comply with integration conditions, in accordance with national law*" to qualify for LTR status. In relation to intra-EU mobility, Member States may require third-country nationals to comply with integration measures also in the second Member State, in accordance with national law, unless they had to comply with this in the first Member State. The persons concerned may be required to attend language courses in the second Member State.

These conditions are optional for the Member State to apply, and for non-refugee family reunification the condition can be applied as a pre-departure measure.

The LTRD grants the right to acquire a permanent status to third-country migrants who have resided continuously and legally in the Member State for 5 years. Such status is close to that of mobile EU citizens and includes extensive equal treatment rights, including access to the labour market, protection against expulsion and intra-EU mobility. Member States can maintain more favourable national permanent residence statuses. National schemes do however not provide intra-EU mobility rights.

The FRD aims at **protecting the family and respecting family life**, by establishing or preserving family unity, also with the purpose to support integration. It serves to guarantee family unity and family life through providing a harmonised framework for residence permits based on family reunification in line with international human rights law. By establishing a common set of conditions, the Directive also abolished the discretionary interpretation of admission conditions, which was in place in some Member States⁴⁷⁸. Complementary

476 SWD Annex 5.1.3 (internal coherence) and SWD Annex 5.2.1 (external coherence), and ICF (2018) Main report, section 6.1.2.9.

477 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, recital 4.

478 According to the 2014 Commission communication sets out guidance on the implementation of the Directive (COM(2014) 210), the Directive shall interpreted and applied in accordance with fundamental

measures to the FRD are included in the BCD, RD, ICT and S&RD. Due to the temporary nature of the stay of seasonal workers, no family reunification rights are provided for these categories of workers.

Whilst the specific provisions covering integration of the legal migration Directives are limited in terms of active mechanisms to promote it and the competence for policies to address integration lies with the Member States⁴⁷⁹, other provisions of the legal migration Directives also contribute to efficient integration:

- enabling migrants to bring their family to the country of work and residence (FRD, specific provisions BCD),
- giving the migrants prospect of long-term stay (LTRD, specific provisions RD, BCD),
- providing access to employment, in some cases on equal treatment basis (LTR),
- providing equal treatment in relation to working condition, access to education and vocational training, goods and services and contributing to and benefitting from social security (LTRD, RD, BCD, SPD).

The **internal⁴⁸⁰ coherence** analysis found a number of other issues that may have an impact on the effectiveness of the Directives, notably that:

- the Directive allows for different types of family members who may join the "sponsor" residing in the Member States. Many Member States extend the scope of family reunification beyond the nuclear family, which consist of core members such as spouses and their minor unmarried children.
- Other Directives complement the FRD with more favourable provisions on family reunification that can lead to differences in treatment depending on who the sponsor is, for instance as regards the right to access the labour market (may be restricted the first year for spouses under FRD) and the rights to intra-EU mobility (as following the mobile sponsor).

The **external⁴⁸¹ coherence analysis**, as well as **the gap analysis⁴⁸²**, identified a number of issues that may have an impact on the effectiveness of the Directives, notably that:

- Integration is supported by provisions on fundamental rights and non-discrimination, soft-law and policies such as funding and policy coordination (e.g. the European Integration Network), and other measures referred to in the Commission Communication on "Action Plan on the integration of third country nationals"⁴⁸³.

rights and, in particular, the right to respect of private and family life, the principle of non-discrimination, the rights of the child and the right to an effective remedy, as enshrined in the European Convention of Human Rights ('ECHR') and the EU Charter of Fundamental Rights ('the Charter').

479 Annex 5.2.1 (external coherence) for an analysis of the division of competences as set out in the Treaty.

480 Annex 5.1. (internal coherence).

481 Annex 5.2. (external coherence).

482 Annex 6. (detailed relevance analysis).

483 COM(2016) 377 final of 7.6.2018. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Action Plan on the integration of third country nationals.

- Other EU and national policies and legislation in the field of employment and education contribute to a larger extent to integration than the legal migration Directives.
- There is a gap in the legislation at EU level in terms of family reunification of third-country nationals joining EU nationals that have not made use of their free movement rights. Family reunification for this category is covered by national law, however the SPD covers their rights to equal treatment if they are considered workers.

3.3.2 Baseline

Integration: The baseline information related to the specific measures is limited. The point of comparison provided here is to compare the current status to where we should have been today. No quantitative or legal baseline is therefore presented for integration as such.

LTR baseline: The LTRD proposal was presented in 2001⁴⁸⁴ and needs to be seen in the context of the 2001 proposal for the recast of the different rules on free movement on EU citizens, later to become the Free Movement Directive (2004/38/EC).

All Member States (at that time EU-15) had some scheme for permanent residence in place. Whilst rules were similar on proving stable and regular resources, and not being a threat to public security, the time needed to qualify for the status varied (*see section 2*). The period of residence required varied from two to fifteen years; eight Member States granted long-term resident status after five years' continuous legal residence.⁴⁸⁵

FRD baseline: By the time of the proposal, all the EU Member States at the time (EU-15)⁴⁸⁶ had recognised the right to family reunification in their national law, or the discretionary possibility of allowing family reunification. The categories of family members covered, in all Member States, spouses and children. The eligibility and conditions for additional categories of family members (such as recognised partners, parents or dependent relatives) differed significantly. The age limit of children was also not regulated at EU level but depended on the national definition of minority age. Many Member States extend the scope of family reunification beyond the nuclear family⁴⁸⁷.

Baseline for pre-integration measures and conditions: There is no information in the proposals about the integration conditions in place prior to the adoption of the two Directives. The FRD proposal refers to rules being in place for family members of mobile EU citizens, but states

484 COM(2001) 127 final of 13.3.2001. Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents.

485 *ibid.*

486 COM(1999) 638 final of 1.12.1999. Proposal for a Council Directive on the right to family reunification. Information for the remaining EU-12 is not available.

487 Parents: all Member States except BE, HU and NL unless it applies to UAMs. Adult children for exceptional reasons: BE, BG, CZ, EE, ES, HU, IT, LU, SE, SI, SK Same-sex partners: AT, BE, CY, CZ, DE, ES, FI, FR, HU, LU, NL, SE, SI. Non-married partners: AT, BG, CZ, DE, EE, HU, IT, LV, PL, SE.

that there are no rules at Community level for family members of TCNs, including refugees and those benefitting from subsidiary protection, as well as non-mobile EU citizens⁴⁸⁸.

Quantitative baseline: Data is scarce for the period 1999 to 2008. Figure 7 of the part 1 of the Commission Staff Working Document⁴⁸⁹ shows that in 1999 approximately 10 669 000 non-EU-28 nationals resided in the countries that today make up the EU-25. Data is however not available on the reasons for initial admission (i.e. family reasons) or if they were temporary or permanent residents.

Neither the 2001 proposal for the LTRD nor the principal support study⁴⁹⁰ provides complete data on the number of long-term residents. It is reported that at the time⁴⁹¹, 9 339 000 TCNs resided in the EU but that it was not known how many had temporary status and how many had permanent status. Some non-comparable data is presented for AT, DE, NL and SE. No long term residents were reported in EL and a few in IT.

The 1999 FRD proposal contained no indication of volumes of migrants arriving for family reasons.

Harmonised Eurostat data is first available from 2008 and shows that about 1,2 million persons held LTR status in current EU-25 Member States at the end of 2008 (no national permanent resident permits were reported for that year). In the same year 4 191 253 persons held permits for family reasons (both joining EU citizens and non-EU citizens)⁴⁹². In the same year, 214 280 first permits were issued to family members of EU citizens, and 345 763 permits were issued to family members joining third-country nationals⁴⁹³.

3.3.3 Observed effects (EQ 7)

Observed effects on integration:

It is difficult to establish a cause-effect link between the Directives and the degree of successful integration of TCNs within the EU, in view of the limited provisions in the Directives. Integration into the Member States' society is a key aspect of migration management but the main competence for measures to ensure effective integration lies with Member States.

Statistics show that non-EU citizens have lower level of integration compared to EU citizens in terms of a number of integration indicators, notably employment⁴⁹⁴, education, and social inclusion outcomes⁴⁹⁵ across the EU.

According to Eurostat, in 2017, the employment rate of third-country nationals (aged 20-64) in the EU-28 was 57.4%, 15.4 points below the rate for host-country nationals (72.8%).

488 COM(1999) 638 final of 1.12.1999. Proposal for a Council Directive on the right to family reunification.

489 SWD, chapter 2.2.2.

490 Groenendijk, K., Guild, E. and Barzilay, R., *The Legal Status of Third Country Nationals who are Long-Term Residents in a Member State of the European Union*, (2000).

491 Eurostat, *Eurostat Yearbook 1997: A Statistical Eye on Europe 1985-1995*, (1998).

492 See also Annex 9. Eurostat, migr_reslong and migr_resvalid. Data missing from LU, AT and PL

493 Eurostat, migr_resfam. Data missing from LU.

494 See also Annex 9.4 and ICF (2018) Annex 1Bii, section 2.1.5.

495 Eurostat, Statistics Explained, 'Migrant integration statistics'.

Furthermore, during 2008-2016, third-country nationals systematically recorded lower activity rates than the host-country citizens, with these differences increasing over time though mainly due to the economic crisis in 2008-10. In 2016, around 38.8% of third-country nationals (aged 18 and over) were at-risk of (monetary) poverty compared to 15.5% among host-country nationals. Finally, third-country nationals (aged 25-54) were in 2017 much more likely to have achieved at most a lower secondary level of education (42.7%) than host-country citizens (18.4%).⁴⁹⁶

Ensuring equal treatment and access to employment contributes to socio-economic cohesion and integration of third-country nationals. Giving third-country migrants the right to reunite with their third-country family members is also a mean to provide stability and to encourage their integration into the receiving society.

Integration is largely a Member State competence. Through the Action plan on Integration the COM supports information exchange on best practices and other actions, and funding is made available through AMIF and ESF. The specific measures in the legal migration Directives (LTRD, FRD) on pre-departure integration conditions or measures are however only intending to complement other measures in order to achieve integration.

Observed effects of the pre-integration measures:

The evidence from the transposition analysis show that only a few Member States apply pre-integration measures or conditions (AT, DE, and NL). Although the number of migrants currently residing in the EU covered by the FRD, and to a less extent by the LTRD, is significant (see Annex 9), the number of third country nationals covered by such measures is rather limited.

The types of pre-integration conditions found to be in use are:

- Language proficiency tests for family members to prove basic language skills as a condition for family reunification (AT, DE, NL)
- Civic integration exams for family reunification and to be granted LTR status (NL)

Other Member States offer language courses and education about history and values society and part of integration programmes (AT, BE, DE, EE, NL, LV, SE) and or civic integration exams after admission (NL) or an integration contract prescribing civic training (FR).⁴⁹⁷

Evidence on the effectiveness of integration conditions are mixed but some suggests that language and civic integration requirements have a positive effect on abilities in the host-country language and on labour market outcomes⁴⁹⁸:

- Those arriving after the introduction of a pre-arrival language requirement in 2007 had considerably stronger German language abilities than those arriving before.⁴⁹⁹ About one-third of all family migrants considered the language requirement to be a heavy burden, but most considered it useful.
- Passing the Dutch civic integration exam (which entails a post-arrival language requirement) had a significant positive effect on the probability for recent migrants to

496 See Eurostat specific portal on integration: Eurostat, Database: Migrant Integration.

497 ICF (2018) Annex 3.

498 See also Annex 5.2.1 (external coherence – chapter integration).

499 Büttner, T., Stichs, A., *Die Integration von Zugewanderten Ehegattinnen und Ehegatten in Deutschland*, (2014).

find employment in the Netherlands. This effect is stronger for migrants with a lower level of education. No significant effect on integration was identified for migrants who are already long-standing residents⁵⁰⁰.

- Restrictive measures (such as integration requirement or age limits) impact negatively on integration, resulting in experiences of stress and frustration due to long periods of separation in cases of family reunification.
- Well-designed measures⁵⁰¹ that are proposed to migrants have in any case “voluntary” take-up rates of above 90% (e.g. former integration contract in France; pre-school programmes in Germany⁵⁰²).

Complaints received as regards pre-departure integration conditions for family members, have raised concerns related to problems of attending the designated languages school for required courses when the family member does not live in the capital, lack of consideration of specific circumstances for persons with particular difficulties that are an obstacle to language training (certain disabilities, illiteracy, illness etc.), costs of attending/ following courses and passing test. In 2008 the CJEU⁵⁰³ ruled that such pre-departure measures could be applied, but that the application of integration tests as pre-conditions to being granted a permit should be proportionate and the situation had to be assessed on a case-by-case basis.

The consultation asked migrants residing in or having resided in the EU of their experience of integration measures, and revealed that⁵⁰⁴:

- 25% of respondents (n=190) indicated that they had to comply with certain integration conditions while living in the EU, which could affect their residence status or the renewal/extension of their permits. 52% (n=46) said that it was easy to find information on the pre-integration measures. Of these respondents, 73% had to attend language courses, 27% had to take an integration test, 17% had to participate in an integration programme, 12% had to attend civic education courses and 20% indicated that they had to comply with other types of conditions/measures. 45% of those who had to undertake an integration programme mentioned that it was easy to find information on it. 62% of those who had to attend required courses said it was easy to do so, and 58% mentioned that they had to pay for the courses themselves.
- Only 2% of respondents (n=188) indicated that they had to take part in a pre-departure integration activity (before entering the host country) as a prerequisite for a successful application. Three of them said that it was not easy to find information on the pre-integration activities and conditions nor on the integration test. These respondents also mentioned that it was not easy to attend the required courses and all four respondents indicated that they had to pay for the courses themselves. Respondents explained that the pre-integration measures they had to take were: participation in integration programme (3 respondents); language courses (2), civic education courses (1) and take an integration tests (1).

500 Witvliet et al. (2013).

501 See Box 1 in Liebig, T., *The Labour Market Integration of Immigrants in Denmark*, (2007).

502 Liebig, T., *The Labour Market Integration of Immigrants in Germany*, (2007).

503 Judgment of the Court of Justice (CJEU) of 4 March 2010, *Rhimou Chakroun v Minister van Buitenlandse Zaken*, C-578/08. See also COM (2014) 210 final of 3.4.2014. Communication from the Commission to the European Parliament and the Council on Guidance for the Application of Directive 2003/86/EC on the Right to Family Reunification.

504 ICF (2018) Annex 3A.iii "Summary of open public consultation", section 4.4.2.

This confirms that the pre-integration conditions are not widely used, but that integration conditions and measures during residence are more common.

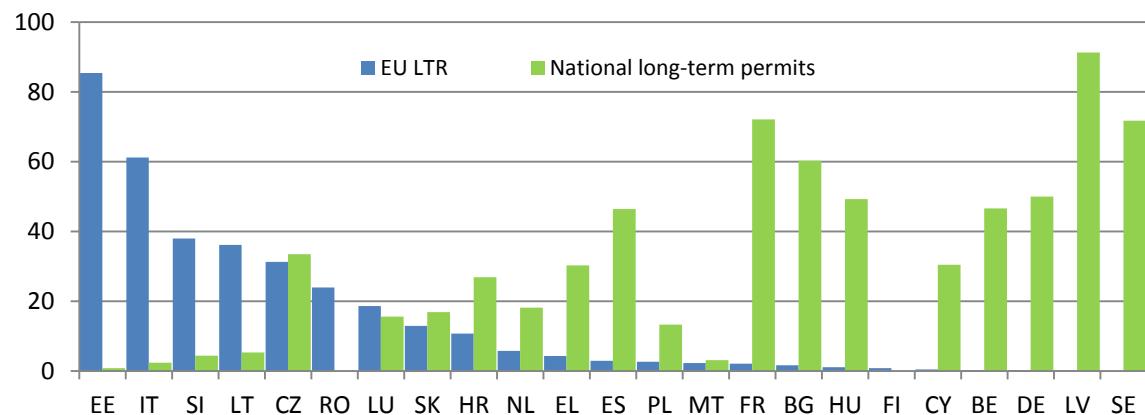
Observed effects of the LTR Directive⁵⁰⁵

The implementation of the LTRD into national law has been completed, after 20 non-communication cases were launched in 2006. Although some Member States had some form of similar national permit prior to the adoption, the Directive brought greater legal certainty for third-country nationals as well as harmonisation across the EU⁵⁰⁶. Although most Member States had equal treatment with nationals in place prior to the adoption, some aspects of equal treatment that were not covered before the introduction of the Directive, have now been guaranteed. The LTRD has therefore increased the uniformity across Member States in ensuring the right to equal treatment.⁵⁰⁷

Key concerns raised in complaints, subsequently addressed with Member States, related to the disproportionality of fees charged, application of additional conditions⁵⁰⁸, obstacles to intra-EU mobility and, in one Member State related to restrictions in access to employment, whereas LTR holders should have equal treatment compared to nationals with some restrictions as regards the exercise of public authority⁵⁰⁹

Statistical evidence: The number of EU LTR permits issued has increased from 1.2 million in 2008 to over 3 million in 2016⁵¹⁰. The statistics show a very varied picture across the EU Member States in terms of uptake of the LTR permit scheme. In 2017, of the 10 228 325 third-country nationals with a long-term status, around 70% held national permanent residents, and 30% held EU LTR status (just below 3 million) in the EU-25⁵¹¹.

Figure 12. Share of total population of TCNs residing in the EU-25 Member States that are EU-LTR or national long-term/permanent residents (2017)



Source Eurostat [migr_reshape, data extracted 28.09.2018]

505 This evaluation relates (primarily) to the initial LTRD, and does not necessarily reflect the 2011 amendment extending the scope of the Directive to beneficiaries of international protection.

506 Groenendijk, K., Guild, E. and Barzilay, R., *The Legal Status of Third Country Nationals who are Long-Term Residents in a Member State of the European Union*, (2000). The study included analysis of the then-EU Member States (15 MS) – AT, BE, DK, FI, FR, DE, EL, IE, IT, LU, NL, PT, ES, SE, UK.

507 ICF (2018), Main report, section 6.2.2.

508 SE.

509 IT.

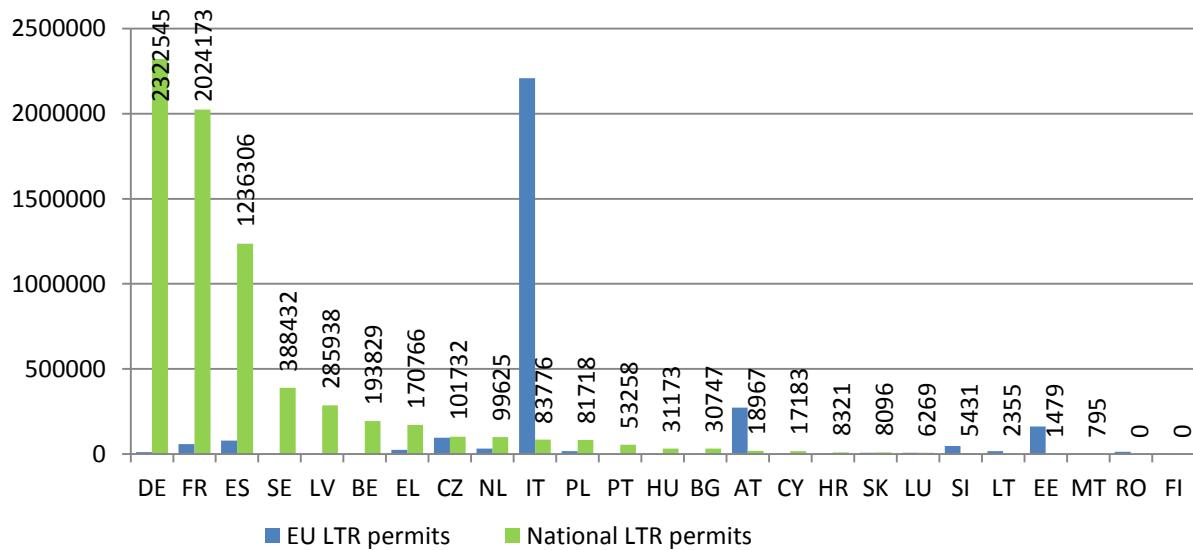
510 Annex 9.2 (Statistics).

511 Eurostat, [migr_reslong] of 2019.03.01.

The share of all TCNs with long-term status (national or EU long-term residence) of all TCNs residing in a Member States also varied greatly, from more than 85% in EE and LV, to less than 10% in MT and FI, although the lower figures may be the result of reporting problems⁵¹². This shows that a large share of third-country nationals hold some form of long-term residence status, whether EU LTR status or national permanent residence status, but that the majority of these fall under the national schemes. Whilst the national permanent schemes are not covered by the LTR, the SPD covers this category in terms of the right to equal treatment and the single permit. National schemes do however not give the rights to facilitate intra-EU mobility granted by the EU LTR permit.

The largest volumes of permanent residents are to be found in the largest Member States: IT, FR, DE and ES. Out of these countries, only IT issues the EU LTR permit as the main option. Whilst some Member States primarily issue EU LTR permits (AT, EE, IT as only option, LT, RO, SK, FI as main option), a majority of Member States continue to favour the national permanent residence permits.

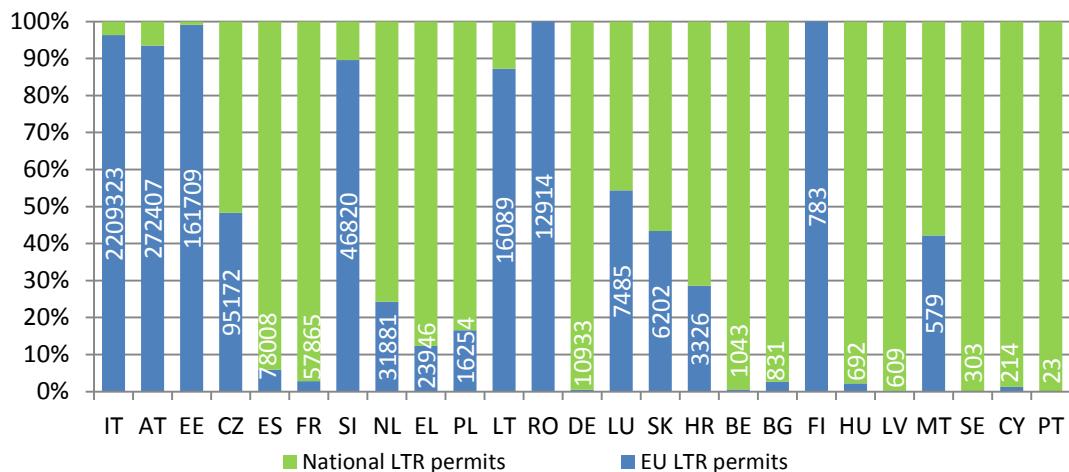
Figure 13. EU Long term resident permit vs. National long term/permanent resident status issued in 2017 by EU-25 Member States. (Numbers of national long term/permanent residence permits specified).



Source: Eurostat: [migr_reslong, data extracted 28.09.2018]

512 Annex 9.2.

Figure 14. EU Relative share of long term resident permit vs. National permanent resident status issued in 2017 by EU-25 Member States. Numbers of EU LTR permits specified.



Source: Eurostat: [migr_reslong, data extracted 28.09.2018]

The 21 Member States that have parallel scheme(s) in place reported the different main reasons for maintaining such permits⁵¹³. The range of categories eligible and the conditions to issue national residence permits are wider/different than the LTR Directive (CZ, DE, ES, HU, LT, LV, PT, SK). It may also be issued to promote national economic growth, business and favour foreign capital investments in the country (CY, HR, and MT). Beneficiaries of international protection were not included in the scope of the LTR Directive originally (FI, NL). For Historical reasons (BE, DE, PL), Belgium maintained national schemes following the initial development and structure; Germany maintained its “Settlement Permit” to give the holders of such permit the possibility to keep their legal status; Poland opted for the possibility of keeping its national scheme at the time of accession to the EU. Some Member States also grant permanent residence to individuals who have a specific link with the Member State and who would not otherwise qualify for the EU LTR permit (FR, LV, and SI).

Many national schemes require **fewer years of accumulated residence**. Most Member States require a minimum number of years of previous residence: from 2 years (ES, PL, SE), 3 years (BE, CZ, ES, FR, HR, HU) 4 years (ES, FI, SE, SK), but some national schemes also require the same duration (5 years - BE, BG, CZ, HR, LV, NL, PL, PT, SI) or more (10 years - EL), depending on the scheme. There are no requirements of previous residence in Cyprus, Estonia, Lithuania, and in some Member States for certain categories (CZ, DE, HU, and SE). For instance, in Germany the permit is immediately issued to highly qualified workers, while shorter residence periods are required for Blue Card holders and self-employed.

Other factors that influences the uptake of the EU LTR permits, are **the national rules for acquiring citizenship**, where in some Member States the required residence period for this is less than the 5 years required for the EU LTR. In 10 Member States, third-country nationals are eligible for citizenship after 5 years or less of legal residence⁵¹⁴, which decreases the

513 European Migration Network (EMN), Ad-Hoc Query on COM AHQ on National Residence Permits of Permanent or Unlimited Validity, (2016).

514 Annex 9.2 (Statistics) and ICF (2018) Annex 2A, table 12. PT, MT, NL, BE, EL, FI, HR, LU, LV, SE.

added value of applying for EU LTR status. However, some Member States do not allow dual citizenship, and in such countries there may be a bigger incentive to acquire EU LTR status.

Mostly positive views were expressed in consultation about the LTR Directive:

- Some Member States expressed satisfaction with the Directive, while others complained that the Directive did not align with the pre-existent national schemes, that few individuals had ever applied, and that more procedural time was needed. Intra-EU mobility was considered the main added value.
- This has also been confirmed by the OPC whereby the experience to obtain long-term residence in the EU seems to be positively assessed by respondents, with 74% of those who applied having obtained the long-term resident status. Among the reasons for rejection, respondents mentioned the difficulty to prove five years of continuous and legal residence, the documents required, the lack of uniformity in the rules applied across Member States, the non-recognition of the years spent in another EU Member State, and the lack of clear information about the procedures to follow.⁵¹⁵

Observed effects of the implementation of the FRD

Evidence from the legal implementation of the Directive show that the Directive has been fully transposed after 19 non-communication cases were launched in 2005 (and 2007 for newer Member States). Key conformity concerns were identified in the first and second implementation reports, and the Commission has addressed concerns with a number of Member States. The Directive has however ensured a certain uniformity of the rules regarding family reunification across EU-25.

The legal implementation analysis show that the FRD has been well implemented in national law. Four Member States, which did not have pre-existing admission rules, now have such rules in place. In view of the pre-existing situation, the Directive did not bring a significant direct change for all Member States, given that many existing admission conditions were already similar to those of the Directive (sufficient resources, proof of adequate housing). The degree to which the admission conditions vary and the documentary evidence required is analysed above (*section 2.1*). Complementary (more favourable) rules for reunification have been introduced in for specific categories RD, BCD, ICT, S&RD. The core family members and traditional family ties are recognised by all Member States, but some allow other family members (adult children, parents) to join, and some allow non-married partners and same-sex relationships as sponsors or family members.⁵¹⁶

Based on evidence gathered from complaints received, the key concerns relate to long processing times, lack of recognition of or difficulties to prove family ties, high fees charged for family reunification permits and application, as well as concerns about pre-integration conditions (mainly language tests, high costs and difficulties to attend language courses, and the need to take personal circumstances into account such as illiteracy, illness, disability). A number of complaints relates to the exclusion of family reunification of third-country

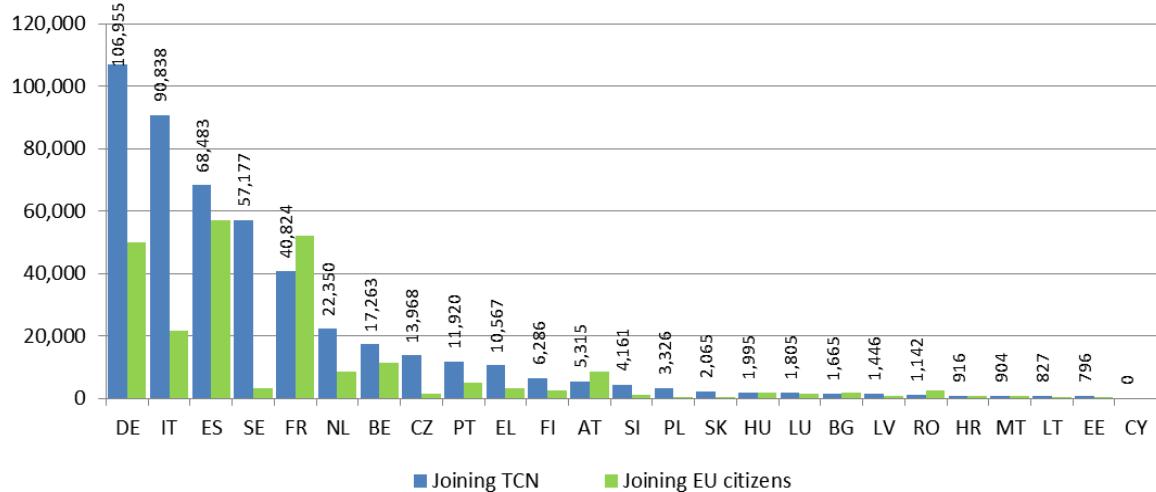
515 ICF (2018) Main report, section 6.1.1.2.

516 COM(2019) 162.

nationals who wish to join non-mobile EU citizens, confirming that the gap in EU legislation is relevant⁵¹⁷.

Statistical evidence shows that quantitatively, family reunification is one of the main avenues for legal migration to the EU and accounts for approximately a third of all first permits issued to third-country nationals. Eurostat data show that, in 2017, 472 994 first permits for family reasons were issued to TCNs (reuniting with a TCN sponsor) in the 25 EU Member States implementing the Directive. Data on valid permits held by third-country nationals at the end of 2017 shows that about 7 million had the right to reside for the purpose of family reasons (both with EU citizens and with TCNs), representing almost 40% of the overall stock of third-country holding permits in EU-25⁵¹⁸.

Figure 15. First permits issued for family reunification (2017) for third-country national family members joining EU citizens vs. TCNs joining TCNs.



Comment: The proportion of TCNs joining non-mobile EU citizens cannot be distinguished. Numbers of family members joining TCNs indicated. *Source:* Eurostat: [migr_resfam], data extracted 27.09.2018

The number of first residence permits issued each year for family reasons (reunification with non-EU citizens) has been rather stable over the 2008-2015 period, around 340-360,000 before increasing more rapidly in 2016 (400,000) and 2017 (470,000), largely due to increase in family reunification with refugees⁵¹⁹.

No counter-factual analysis has been attempted – i.e. whether in the absence of the Directive the same level of flows would have been in place - but it is clear that the volumes of third

517 Annex 6.3 (Detailed relevance analysis).

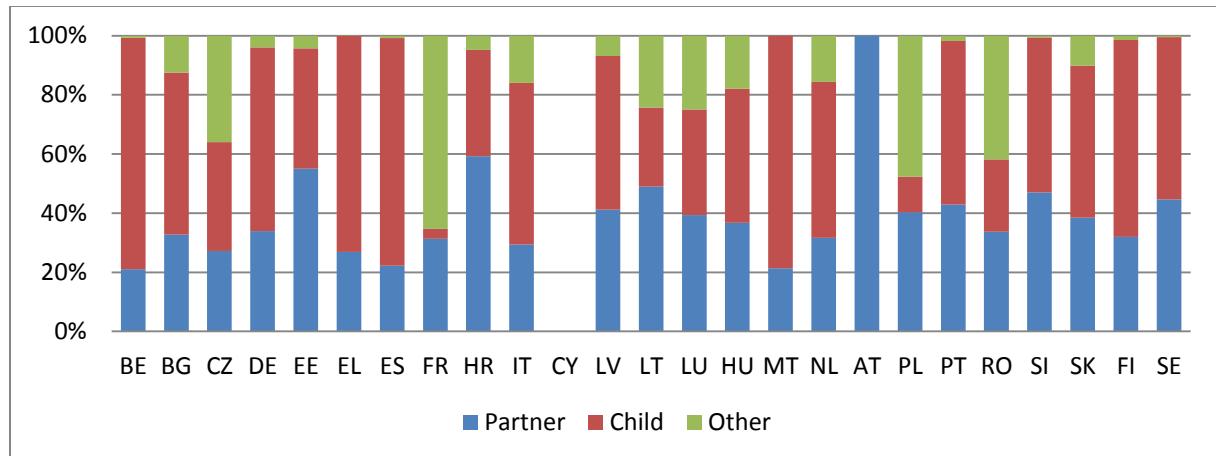
518 Annex 9.2 (Statistics). Eurostat [migr_resvalid] as of 27.9.2018.

519 While the new specific data reported to Eurostat about family reunification with refugees (table migr_resfrps1) only covers a limited number of Member States, it is possible to estimate the share of family reunification related to asylum by breaking down the family-related permits (joining non-EU sponsors) by country of citizenship of the family members. Among the +105 000 overall increase in family-related permits (joining non-EU sponsors) between 2015 and 2017, around +44.000 (or 41%) were for third-country nationals originating only from 5 countries (Syria, Iraq, Afghanistan, Eritrea and Somalia) from where most citizens in the EU have been issued refugee-related residence permits (rather than other types of permits). This share in the overall increase reaches 60% if also considering other third countries affected by crisis over the last few years or from which a certain share of residents are beneficiaries of protection in Europe (Palestine, Nigeria, Egypt, Pakistan, stateless).

country nationals admitted for other reasons influences the number of family members admitted.

Statistical evidence shows that the majority of family members admitted are children, followed by spouses and other.

Figure 16. Share of first permits issued for family reunification by type of family member in 2017 to TCNs joining TCNs (EU-25)



Source: Eurostat: [migr_resfam] data extracted 18.01.2019

In terms of options applied, evidence from practical application revealed concerns about high income thresholds, variations and difficulties in ensuring evidence of admission condition fulfilment (DNA test for instance).

Evidence points to the need to give more weight to personal circumstances. A recent EMN study⁵²⁰ also found that the exceedingly high income level requirement can be an obstacle to family reunification in some Member States. More weight should be given to individual circumstances in the process of examining family reunification applications.

In consultation, most Member States had positive comments on the FRD, while a few considered it without major impact in the national system. Participants of the European Migration Forum (2017) stated that the personal scope of those who can benefit from the FRD is too limited, and highlighting that there are gaps for beneficiaries of subsidiary protection. Views were also expressed stating that obstacles to accessing this legal channel persist, which may in turn lead migrants to resort to irregular means.

3.3.4 Degree of achievements of the objectives (EQ 5)

The continued existence of an integration deficit shows that the objective of integration of third-country nationals has not been fully achieved. However, the intention of the legislator was that the contribution of the legal migration Directives was to complement other measures, and therefore the Directives include relatively limited provisions on integration conditions or measures.

520 European Migration Network (EMN), Synthesis Report for the EMN Focussed Study 2016 - *Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices*, (2016).

There are difficulties in proving the causality between the introduction of the Directives and the integration outcome. There is some evidence that where language requirements are introduced, this has positive effect, but data available cannot distinguish if it is due to pre-departure conditions established by the Directives or to measures provided after admission.

The degree to which the objectives of the LTRD has been achieved is mixed. Whilst the legal implementation of the Directive is good, many Member State are not prioritising this Directive and instead issue national permanent residence permits. The conditions vary greatly among Member States. In addition, national schemes do not provide the facilitation of intra-EU mobility as set out in the Directive. The diverse implementation of the LTRD means that the objective of achieving a level playing field in terms of conditions for acquiring LTRD status has not been fully attained. Also the Directive contributes less than intended to the objective of promoting integration due to the limited uptake. In the Member States that use the Directive extensively, it has brought legal certainty and stability of residence for third-country nationals.

The Family Reunification Directive has brought a uniform status for family reunification and uniform conditions increased the legal certainty in the process as Member States can apply fewer discretionary admission conditions. The FRD contributes to the objective of ensuring family unity and to the fundamental right to family life, and as such also to socio-economic cohesion. A steady increase in the number of family members joining TCNs in the EU may be attributed to the strengthened rights the Directive included.

The FRD does not allow a parallel national scheme and it has been effective in ensuring that a specific harmonised framework is in place in order to observe the right to family reunification in line with international human rights law. However, as pointed out in the relevance analysis, not all third-country family members are covered by EU law (notably those joining non-mobile EU citizens).

3.3.5 What can be attributed to the Directive (EQ6) & what can be attributed to other factors (EQ8)

Key external factors influencing integration are many, varied, and primarily depend on the national situation (including economic situation, availability of job opportunities, as well as the overall volumes of TCN that reside in the specific Member State), but also on the strength and role played by the diaspora. National policy choices (such as active integration policies, support to language training, support integration on the labour market, housing policies etc.) are therefore crucial. A full analysis of such national policies is beyond the scope of this Fitness Check⁵²¹.

Limited impact on integration can be attributed to the Directive since only a few Member States have chosen to implement the integration conditions. Whilst language and civil integration courses are thought to have a positive effect, there is no clear evidence that introducing them as pre-conditions have a positive effect. There is also concern that they are obstacles to integration, by making family reunification more difficult.

521 For more information see follow-up of the Action Plan on Integration. COM(2016) 377 of 7.6.2016.

Equal treatment provisions in the Directives, which cover a very high proportion of third-country nationals, have an important impact on integration, however measuring the impact is difficult.

Access to the labour market varies among the Directives and is thought to contribute to the achievement of the objective on integration, however many other factors also play an important role in terms of labour market integration.

National policy choices to prioritise national schemes continue to play a large role, as do national rules on the acquisition of citizenship, which in some Member States require less than 5 years of residence and may make the LTR status less attractive. Therefore, the uptake of the LTRD and its effects are hampered by the possibility provided by Article 13 to maintain national schemes.

Whilst all Member States (apart from the four that joined in 2004) had pre-existing rules for admitting family members, the introduction of the FRD contributed to harmonised conditions and thereby a level playing field for family reunification, although direct legislative changes were not needed in all Member States.

The volume of family members joining third-country nationals has increased since the Directive was introduced. The volume of family reunification is not primarily decided by the FRD itself, rather it is determined by the number of TCN (sponsors) that are admitted to the EU for other reasons or who establish families with other TCNs whilst residing in the EU. However, the strengthened right to family reunification, increased legal certainty of the process, harmonisation and increased predictability can be attributed to the Directive. One direct effect of the Directive is that Member States can apply fewer discretionary requirements. Even if the Directive may have had an impact on the volumes of family reunification, reliable evidence to measure the relative impact of the introduction of the Directive has not been found.

The **internal and external coherence analysis**, as well as **the gap analysis⁵²²**, identified a number of issues that have an impact on the effectiveness of the Directives to achieve the objectives of integration.

Factors external to the Directives also influence the degree to which the objectives of integration is achieved:

- Member States have the legal competence related to integration and national policies contribute to a large extent to the achievement of the objectives on integration.
- Integration at EU level is supported by soft-law measures and policies, such as funding and policy coordination (e.g. the European Integration Network). The Commission adopted a communication on "Action Plan on the integration of third country nationals"⁵²³, complementing national action and also setting out how different EU policies contribute to the achieve objective.
- Other EU policies such as non-discrimination, employment law, policies on recognition of qualifications and education policies are also important for integration,

522 Annex 5.1 (internal coherence), Annex 5.2 (External coherence), Annex 6 (Detailed relevance analysis).

523 COM(2016) 377 final of 7.6.2018. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Action Plan on the integration of third country nationals.

- There are other important external factors such as the general strength of the economy of a Member State which influences the job opportunities available to third-country nationals, and hence the potential for economic integration of the migrants.

Options allowed by the Directives influence the extent to which they contribute to integration and therefore their application varies significantly between Member States in terms of the volume and the share of third-country nationals who are covered by the measures:

- The FRD Directive allows for different types of family members to join the "sponsor" residing in a Member State. Many Member States extend the scope of family reunification beyond the nuclear family, which consists of core members, such as spouses and their minor unmarried children.
- The FRD provides for a number of optional admission conditions (*also analysed in section 2.2*), including the possibility to apply pre-departure integration conditions (to minors of 12 years and above) and integration measures.
- Other Directives (BCD, ICT, RD, (S&RD) complement the FRD with more favourable provisions, and this leads to different rules for family reunification for different categories of migrants, for instance as regards the right to access the labour market and the rights to intra-EU mobility.
- There are gaps at EU level in the personal scope of the family reunification legislation as no provisions exist on family reunification of third-country nationals joining EU nationals who have not made use of their free movement rights. This category is however covered by the SPD in terms of rights to equal treatment, if they are considered workers. Likewise, whilst refugees are entitled to family reunification FRD, beneficiaries of subsidiary protection and explicitly excluded from the FRD.
- The LTR Directive allows national schemes to co-exist and there is a preference for national schemes, whether due to information bias or whether due to the preferential conditions to qualify for national permanent status. The effect of the LTR Directive on the attainment of the intended objectives is limited and uneven, due the limited uptake in some Member States.

4 Strengthen the EU's competitiveness and economic growth⁵²⁴

The Directives aim at contributing to EU's competitiveness and growth with the following specific objectives:

- managing economic migration flows by attracting and retaining skilled workforce by introducing admission conditions (BCD, RD) and application procedures for different categories of workers (BCD, SPD, RD, ICT, SWD, although the latter two are not analysed here),
- contributing to a knowledge economy (RD) and promoting Europe as a centre of excellence for study and vocational training(SD)

⁵²⁴ As regards this objective, it needs to be acknowledged that certain aspects remain largely a national competence, including the possibility to apply volumes of admission for economic migrants, and of carrying out labour market tests (relevant for the Directives regulating admission for the purposes of economic migration).

- contributing to adequate distribution of the non-European workforce across the EU by intra EU mobility (LTR, BCD, RD, also ICT not analysed here)

The objectives analysed earlier relating to admission conditions, application procedures and fair treatment also contribute to this overall objective. In addition the migration flows related to economic migration is analysed below.

This overall objective is different from the other overall objectives analysed in this Fitness Check in that the causal effect is less direct and the Directives only contribute partly to the overall strategy for the strengthening of EU's competitiveness and economic growth – that is to help optimise the skills level and labour supply on the EU labour market by enabling third-country workers to reside and work legally in the EU Member States, and to make that admission procedure as efficient as possible.

The attractiveness as a destination of the EU as a whole and specific Member States is determined by different factors, some governed by the legal migration Directives, for example, the prospect of acquiring permanent resident status, the possibility to bring one's family, but also other factors such as the general attitude to migrants (absence of xenophobia) and absence of discrimination.

A crucial factor influencing the degree of effectiveness of the legal migration Directives to achieve this overall objective is that key aspects of the management of migration flows remain largely a national competence, notably the possibility to control the volumes of admission for economic migrants.

Although findings related to the wider economic effects of migration cannot necessarily be directly linked to the implementation of the Directives, the observed effects of the benefits of migration are also presented below for the sake of completion.

4.1 Addressing labour and skills shortages within the EU labour market, attracting and retaining certain categories of TCN, including talents and highly-skilled workers from third-countries

4.1.1 Context

Boosting competitiveness, economic growth and the knowledge economy is a specific objective for BCD, ICT and SRD⁵²⁵. The SPD also specifically covers economic migration. The overall objective is therefore to support EU competitiveness and growth, through the specific objectives of managing economic migration flows, addressing labour and skills shortages (BCD, SWD and ICT) and attracting and retaining certain categories of TCN including highly skilled workers (BCD, ICT, RD, SRD).⁵²⁶

The means to achieve these objectives are:

- **managing migration flows**, by establishing harmonised admission conditions (BCD) and efficient procedures for the admission of third-country workers (BCD, SPD).
- specific measures to **attract and retain highly skilled migrants(BCD)**, including more favourable family reunification rights, facilitated visa handling, intra-EU mobility rights

525 ICT and S&RD not evaluated here.

526 ICF (2018) Main report, section 6.1.2.1.

and access to LTR status, more favourable access to the labour market (after two years) and more protective rights in relation to the right to remain in the Member State for temporary unemployment and circular migration rights.

- specific admission conditions for certain categories of third-country workers to **address labour and skill shortages** (BCD, SWD and ICT), including measures related to sector specific salary thresholds, contribute to addressing specific labour shortages (BCD).

The purpose of these measures is to boost economic growth, competitiveness and the knowledge economy not only by attracting and retaining third country workers in EU workforce, but also by gaining human capital and benefit from multiplier effects stemming from by the influx of highly skilled workers. The Directives support actions to address labour shortages through migration when labour market needs cannot be satisfied by the domestic labour supply in a reasonable timeframe (e.g. by re-training domestic workforce) without adversely affecting the domestic labour market and development prospects in vulnerable countries of origin. The Directives also contribute to competitiveness and economic growth by ensuring fair and efficient application procedures and equal treatment.

The capacity of the EU as a whole to attract and retain third country migrants, as well as of specific Member States, is influenced by many different factors, some of which fall within the scope of the Directives, but many are outside⁵²⁷. Determining the volumes of admission of economic migrants is a national competence in accordance with the TFEU. The application of the principle of Union preference means that third-country nationals may only accede to the EU labour market if a post cannot be filled by a worker already forming part of the EU-labour market. These are the reasons for the application of a labour market tests (SD, RD, BCD, SWD, SPD, and mobile LTR) and quotas for third country workers.

The **internal coherence assessment**⁵²⁸, identified the following key issues that may have an impact on the effectiveness of the Directives, notably:

- the existence of parallel national schemes (BCD)
- application of labour market tests, for which procedures are set at national level.
- gaps in the personal scope of the Directives in relation to admission conditions.
- some Directives have fast track procedures and recognised host entities (ICT, SD, RD)
- different rules for intra-EU mobility(*see section 4.3*)

A number of **external policies** were identified as particularly important for the achievement of the objectives, mainly:

- employment policies, including job matching,
- education and skills policies, such as recognition of qualifications,
- international policies related to migration, including on circular migration.

Other **key external factors** include the relative attractiveness of the EU as a destination compared to other macro regions such as North America and the general economic development influencing the need for specific skilled labour.

The effectiveness of the BCD and the SPD to contribute to these objectives is evaluated below, whilst the ICT, SWD and SRD cannot yet be evaluated in view of their recent application dates. SD and RD are however evaluated below in relation to the knowledge economy.

527 ICF (2018) Main report, section 6.1.2.2.

528 Annex 5.1 (Internal coherence).

4.1.2 Baseline

The baseline year for both Directives evaluated here (BCD and SPD) is the year of adoption of the proposals. The proposals were put forward in the wake of the withdrawal of the 2001 proposal for a Directive on economic migration⁵²⁹ which contained specific provisions for categories like highly skilled workers, ICTs and seasonal workers. The BCD (2009) includes specific rules for highly skilled workers. The SPD (adopted in 2011), as a framework Directive, partly replaces the 2001 proposal by introducing the single application procedure for a combined permit and equal treatment for third-country workers. The ICTD and the SWD were later proposed in 2011.

Prior to the adoption of the Directives, a number of Member States already had a range of diverse and relevant legal instruments and domestic procedures applicable to the admission of third-country nationals for the purpose of paid employment. Of 21 Member States for which information is available⁵³⁰, 10 countries already had a form of single application procedure for a joint resident and work permit in place⁵³¹. 11 other Member States had a system and procedures in place whereby two separate permits for both work and residence permits were required⁵³².

According to the Blue Card Directive Impact Assessment⁵³³, 10 Member States had specific regulations relating to the admission of highly skilled third-country nationals. For example, in Germany, Luxembourg, Portugal and Belgium there were similar national schemes.

Before the transposition of the BCD, 9 out of the 10 Member States with specific schemes for highly-qualified third-country nationals (all except Belgium) granted the third-country nationals concerned more favourable arrangements in terms of social rights. Only a small number of Member States recognised more favourable treatment for high-skilled third-country national workers in acquiring permanent residence. Moreover, 6 Member States with specific schemes included a minimum salary level as an admission condition for the highly skilled third-country nationals. The salary thresholds varied significantly across the Member States concerned.

Quantitative baseline: As indicated in the table below, the 2005 Communication from the Commission on a "Policy Plan on Legal Migration"⁵³⁴ presents population projections for 25 Member States at the time, plus Bulgaria and age distribution in the population structure, as

529 COM(2001) 386 final of 11.7.2001 for a Council Directive on the conditions of entry and residence of third country nationals for the purpose of paid employment and self-employed economic activities.

530 The Impact Assessment looked at 21 Member States for the context of the document, though there were at the time 27 EU Member States.

531 CY, DE, EE, EL, ES, FI, FR, IT, NL, PT.

532 AT, BG, BE, CZ, IE, LT, LV, RO, SI, SK, UK.

533 COM(2007) 637 final of 23.10.2007. Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

534 COM(2005) 699 final of 21.12.2005. Communication from the Commission – Policy Plan on Legal Migration.

well as net migration. It also provides data on the "Estimates of Annual Inflows of Work Permit Holders in 16 EU Countries".

Figure 17. Data on economic migration from 13 of current EU-25 Member States in 2002 and 2003

MS	All Work Permit Holders	Professionals with Work Permits *	Comment
DE	165000.	3300	2003 Figures relate to non-EU persons arriving in Germany. The total includes multiple entries, the vast majority of whom are unskilled. Professional category relates only to "Green Card" scheme for IT specialists
ES	65000		Approximate net estimate for 2002/2003 for the rise in the numbers in the SI system (excluding EU nationals)
FR	31200	12400	Professionals covers the inflows of those with Autorisations Provisoire de Travail (APTs) and qualified "travailleurs permanents" in 2003.
IT	78800	500	Visas issued to non EU nationals in 2003 for self-employment and contract work. Professional figure is reserved quota for highly skilled.
LV	2800		2002
LT	500	160	2003
HU	40300	3800	No. of non-EU workers holding valid WPs on 31/12/03. Professionals have "college" or "university" education.
NL	38000	10900	2003
PL	5600	1700	Estimated new permits (i.e. excluding renewals) for non-EU persons in 2002. Professionals are those classed as "experts and consultants"
SK	1000		Total non-EU in-flow for 2002
FI	13100	1700	2003. Covers non-EU WP holders.
SE	6700	4300	2002. Covers non-EU WP holders.
Total	448000	38760	Of current EU-25 that implement the Directives
DK	1600	500	2003. Professionals relate to occupations requiring special skills which are in demand
IE	16100	2000	2003 data. Professionals include WP holders with occupations defined as in ISCO88 and the highly skilled on Working Visas. New member States (EU10) are excluded.
UK	89200	15800	2003 data. Persons who entered the UK from abroad on WPs in 2003. Excludes renewals and "first permissions" for those already resident in the UK. Professions defined as in ISCO 88. Includes small number of EU10 citizens.
Total	106900	18300	(EU-3 as of 2018)

*Source: Data extracted from table 4, COM (2005)669 referred to a "Study on assessing the question of applying numerical ceilings to the temporary movement of contract service suppliers (Mode 4) in the context of the GATS negotiations on trade in services." Prepared by Prof. J.J. Sexton for the European Commission (DG TRADE), April 2005 * in most cases equated to "highly skilled". Thus, the table above gives an indication of the minimum number of people (estimation of 74,300 for EU25) who could be covered by a scheme for the admission of highly skilled workers. NB. In this table EU-25 refers to all current EU-28 Member States, minus BG, RO, HR.*

Based on this data it was estimated that for the 25 EU Member States at the time, about 633.200 third country workers would be admitted each year under the SPD and that about 74.300 "highly skilled" third-country workers would be admitted. The 2007 proposal for the BCD⁵³⁵ uses the same estimation, but states that "*the scale of the problem is difficult to quantify, as presently only ten Member States have specific schemes for admitting highly qualified workers and, as these schemes differ, data are not comparable. For the other Member States, specific statistics do not exist or are partial.*" The Impact Assessment also present another estimation of (mixed sources) on the number of permits issued to highly skilled workers in 14 Member States, which differs from the data above, and is more partial and non-comparable.

535 COM(2007) 637 final of 23.10.2007. Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

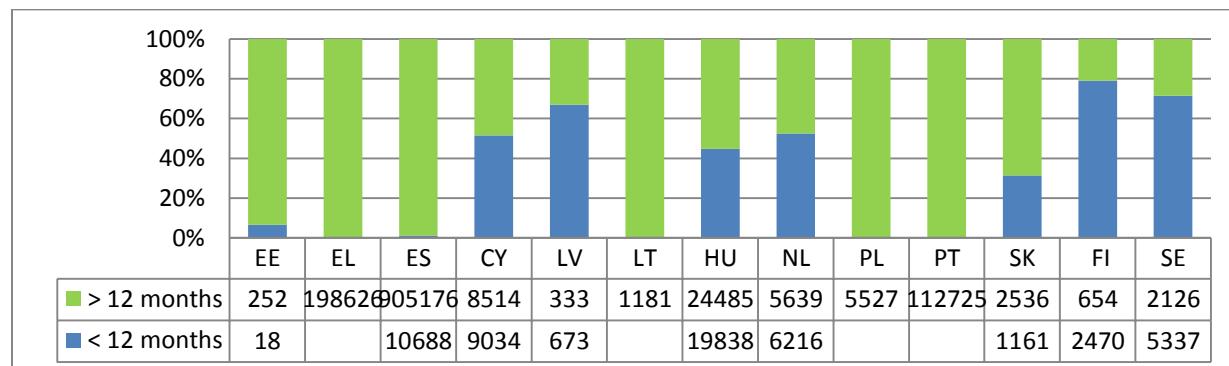
Figure 18. Estimate annual inflow of highly skilled workers in the BCD proposal

MS	AT	BE	CZ	EE	FR	DE	LV	NL	PL	SK	ES	Total
Estimate highly skilled workers	663	5885	50	161	500	279	39	2124	4723	524	9947	24895

Source: BCD proposal, IA. SEC(2007)1403. Annex I: Statistical appendix, Table 4, various sources and years (2002-2005)

The proposal for the SPD refers to poor data availability and does not estimate the number of third-country workers that would be affected by the Directive but provides some partial data for 2005.

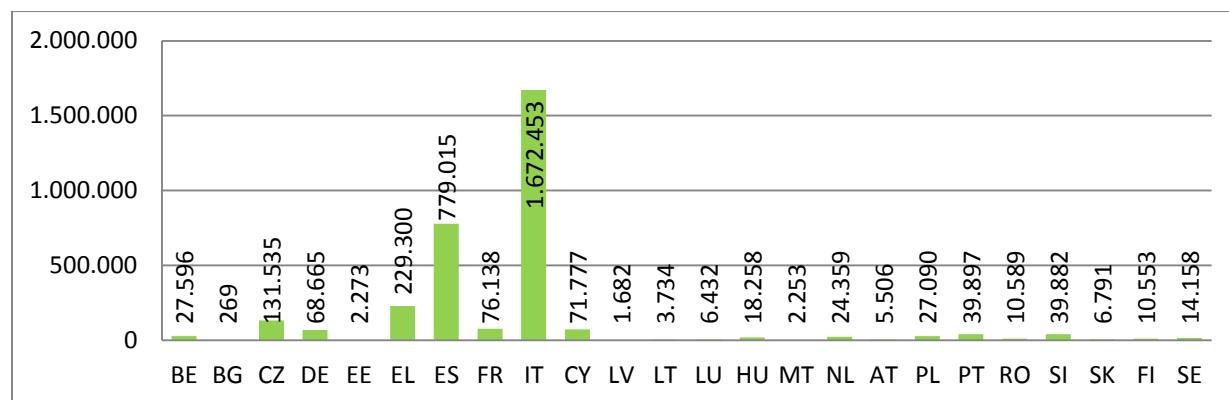
Figure 19. Number of permits issued to non-EU citizens in 2005 for employment purposes, and share of the permits of less than 12 months duration.



Source: SPD IA, SEC(2007)1408, Annex 7, Table 11. Cited source Annual Report on Asylum and Migration 2005.

Harmonised Eurostat data is available on the number of third-country nationals having the right to reside in the EU from the year 2008 (on 31.12 each year) for the purpose of remunerated activities, and in total 3.110.961 persons resided in the EU 24 at that time. These were unevenly distributed among the Member States and not all EU-24 Member States provided data for 2008, notably BE, LU, AT and PL that did not report any such permit holders.

Figure 20. Average annual number of resident permits held for remunerated activities, all durations, 2008-2010 of EU-24 implementing the Directive (prior to HR EU membership).



Source: Eurostat [migr_resvalid] data extracted 2018.06.04. Due to the absence of data reported by BE, AT, PL, LU in 2008 and 2009 an average over 2008-2010 related to number of years reported.

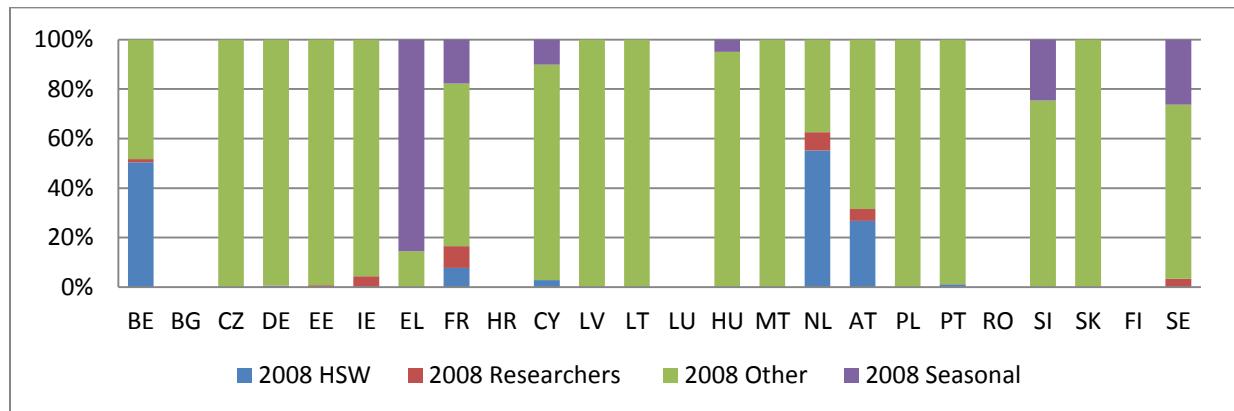
Figure 21. The number of first permits issued in 2008 (all duration) per type of category reported.

MS	Total	HSW	Researchers	Other	Seasonal
BE	7,097	3,577	96	3,424	0
BG	776	0	0	0	0
CZ	43,282	0	45	43,237	0
DE	20,297	96	39	20,162	0
EE	967	0	7	960	0
IE			169	(3,714)	
EL	15,609	0	16	2,248	13,345
ES	96,319	2,884	501	74,680	18,254
FR	21,784	1,681	1,925	14,318	3,860
HR	0				
IT	272,791	0	35	264,333	8,423
CY	13,884	393	0	12,079	1,412
LV	1,823	0	3	1,820	0
LT	4,140	0	1	4,139	0
LU	0				
HU	17,759	0	33	16,842	884
MT	797	0	0	797	0
NL	11,613	6,411	864	4,338	0
AT	3,096	827	151	2,118	0
PL	18,653	0	11	18,642	0
PT	25,286	288	0	24,998	0
RO	9,039	0	0	0	0
SI	24,954	0	5	18,824	6,125
SK	3,984	0	10	3,974	0
FI	5,722	0	0	0	0
SE	14,259	0	478	10,042	3,739
Total EU-26	633,931	16,157	4,389	545,689	56,042

Source: Eurostat [migr_resocc] 4.6.2018. LU start reporting 20029, HR start reporting 2013. No Blue Cards were first reported in 2011. IE applies the RD.

This data shows that the most prominent category is that of "other" later covered by the SPD, alongside seasonal work (as reported prior to proposal of the Directive).

Figure 22. Shares of first permits issued per Member States and per type of occupation in 2008, excluding Spain and Italy.



Source: Eurostat [migr_resocc] 4.6.2018. LU start reporting 20029, HR start reporting 2013. HSW (Highly skilled workers national permits), Other (other permits mostly now covered by the Single permit), BG, LU, RO, FI only reported total.

4.1.3 Observed effects (EQ 7)

Overall economic migration trends

Statistical evidence on the overall trends in the management of economic migration flows since 2008 shows that economic migration is the second most common reason, after family reunification, for granting residence permits to third-country nationals in the EU-25. The number of economic migrants granted a permit has, after a slow down, been rising since 2012, again reaching the similar levels to 2008, possibly reflecting the recovery of the economy after the 2008 financial crisis⁵³⁶. Third-country nationals holding permits are to larger extent younger and of working age compared to the population in general, for both women and men⁵³⁷. Of the overall stock of migrants in EU-25, about 16% held permits for the purpose of remunerated activities in 2017⁵³⁸. Many persons who initially arrived for the purpose of work are likely to now be among the category "other" (35 %) which includes those that have acquired permanent residents and who are part of the workforce, as well as those residing for other reasons (family, refugee, etc.) that are allowed to work.

The national competence for managing the volumes of admission of economic migrants is an important factor determining the flows of economic migrants. The share of residence permits issued for economic reasons linked to the different EU Directives in force in 2017 differs significantly among Member States. In addition, as concluded above, the Directives only cover a relatively small proportion of third country nationals in relation to the management of flows in terms of common admission conditions, whilst a larger share of economic migrants are covered by EU provisions on application procedures, procedural safeguards and equal treatment (see figure 2)⁵³⁹.

Since 2008 the strong increase in the overall number of work permits issued (total) is mainly driven by the increase in seasonal work permits, that are in turn strongly influenced by the

536 ICF (2018), Main report, section 6.1.2.1.

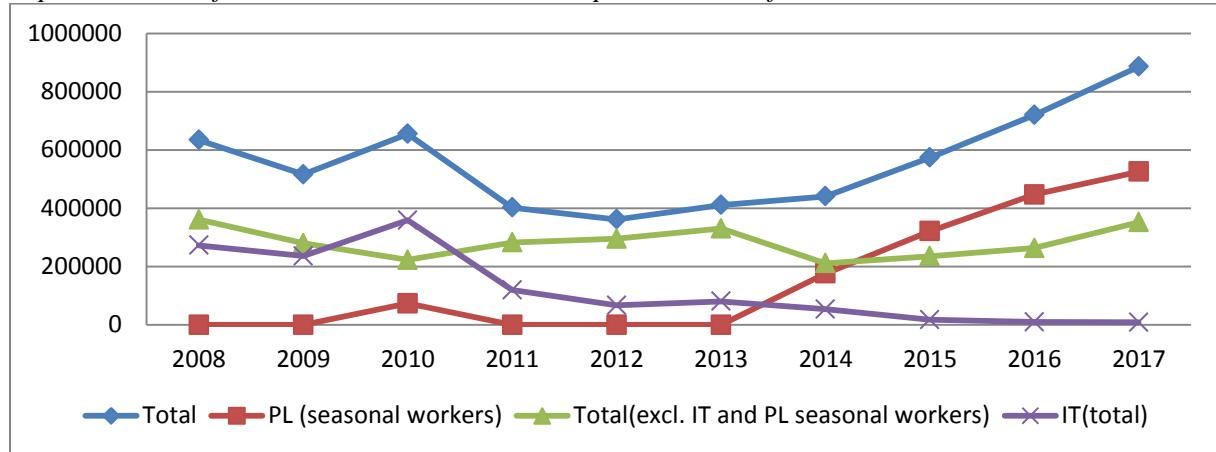
537 ICF (2018), Annex 1Bii, p. 9, figure 4.

538 Eurostat: [migr_resvalid] as of 11.12.2018.

539 See also Annex 9.2 and 9.3 on the relative share of the flow of migrants covered by the Directive.

sharp rise of seasonal work permits issued by Poland from 2014 onwards (mostly to short-term workers from Ukraine). Another outlier is Italy, where the number of permits issued for work has dropped significantly from 2008 to 2017 (270,000 to 8,400 in 2017).

Figure 23. Evolution of first permits issued for remunerated activities since 2008 – 'Total' compared to permits issued for seasonal work in PL and all permits issued for work in IT.



Source: Eurostat [migr_ressoc] Extracted 2018.12.06.

The overall drop from 2008 and 2010 (663 931 in 2008 and 657 714 in 2010) to 361 816 in 2012 is more significant. This drop is apparent from the start of the reporting period (2008) and coincides with the aftermath of the 2008 economic crisis. The rate of decrease slowed down after 2011 and has only started to increase again from 2012.

Disregarding the outlying seasonal workers data from Poland and Italy, total number of permits issued for work dropped significantly, by more than 1/3 (from 361 140 in 2008 to 211 072 in 2015 partial recovery 2012-2014), although from 2015 the number of permits issued has increased. Overall the numbers are more stable and there has been an increase since 2014.

Some stakeholders have linked this phenomenon to the high number of asylum seekers and irregular migrants arriving to the EU in the recent years and, according to stakeholders, the subsequent access of such asylum seekers and irregular migrants to undeclared labour, stating this has crowded out regular labour migration and thereby affected the enforcement of equal treatment requirements through the legal migration Directives⁵⁴⁰. Statistics show that, particularly in some southern Member States, this has coincided with fewer labour migrants being admitted. Statistical evidence however shows that on aggregate in the EU-25 the number of migrants admitted for work has increased since 2014, also when the two outliers (IT and PL seasonal workers) are disregarded.

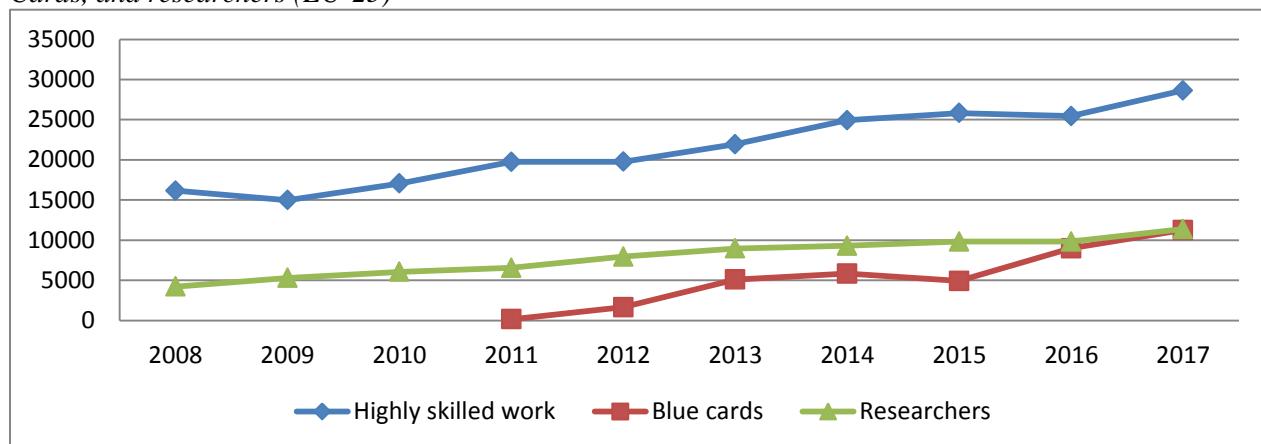
The Single Permit data for permits issued for work partly overlaps with the other general data on permits issued for work (Figure 34), as it intends to cover most of the "other" category of workers as well as, for instance, highly skilled workers with national permits. The SPD coverage includes also low and medium skilled workers, other than seasonal workers. The convergence noted from 2015 with the "other category" shows that the SPD covers a vast majority of the intended target group (89% in 2017) and has therefore had the desired effect in terms of coverage.

540 European Economic and Social Committee (2017) Report on the implementation of the legal migration Directives.

EU Blue Cards, national highly skilled workers and researchers

The number of permits issued for highly skilled work, EU Blue Card and researchers, has steadily increased since 2008. The number of first EU Blue cards issued have increased more rapidly than the number of permits issued under national schemes for highly skilled work. Still more than twice as many permits are issued for national highly skilled workers compared to EU Blue Cards, even if not all Member States issue permits under the EU scheme⁵⁴¹.

Figure 24. Evolution of first permits issued since 2008 for highly skilled workers (national), EU Blue Cards, and researchers (EU-25)



Source: Eurostat [migr_ressoc] Extracted 2018.12.06.

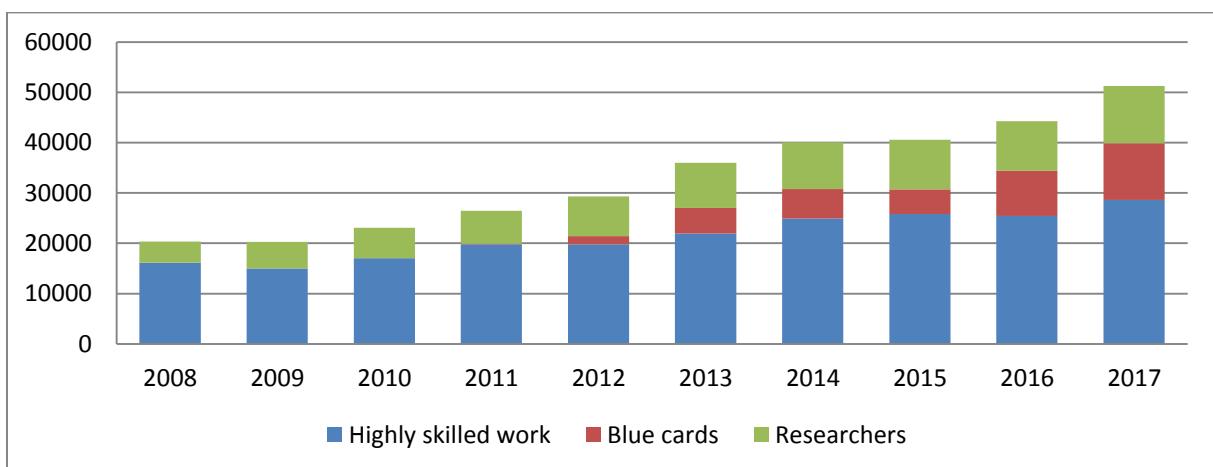
Compared to the intended coverage of the EU Blue Card (according to the baseline at about 56 000 permits issued per year for highly skilled work for EU 24, not including HR), the BCD Directive has been less effective than expected. The actual number of permits issued in 2017 is significant less than projected; 39 877 first permits issued for highly skilled work (out of which 11 249 are EU Blue Cards). This comparison is however weak since it is not clear whether the baseline data refers only to 1st permits issued or also renewed permits. On the positive side, the number of permits issued for highly skilled work (both national and EU Blue Cards) has gradually increased in the time period.

Only 1.3% of all permits for economic reasons are covered by the BCD in 2017⁵⁴². Figure 25 shows the development for each category of highly skilled workers (national permits and EU Blue Cards) as well as researchers and the increase for these permits since 2008. Figure 26 also shows the steady cumulative increase, indicating an overall positive trend in terms of attracting highly skilled workers and researchers. The number of first permits issued as BCD continues to grow faster than the national highly skilled permits.

541 BG, EE, EL, HR, LT, LU, HU, MT, SI, SK report 0 permits issued for highly skilled work in 2017.

542 However, with the full application of the SWD, this share of those admitted for the purpose of remunerated activities that are covered by EU Directives that include admission conditions is expected to increase significantly. Although Member States were to report statistics for ICTD and SWD for the year 2017 and onwards, few Member States had reported 2017 data at the time of finalisation of this Fitness Check.

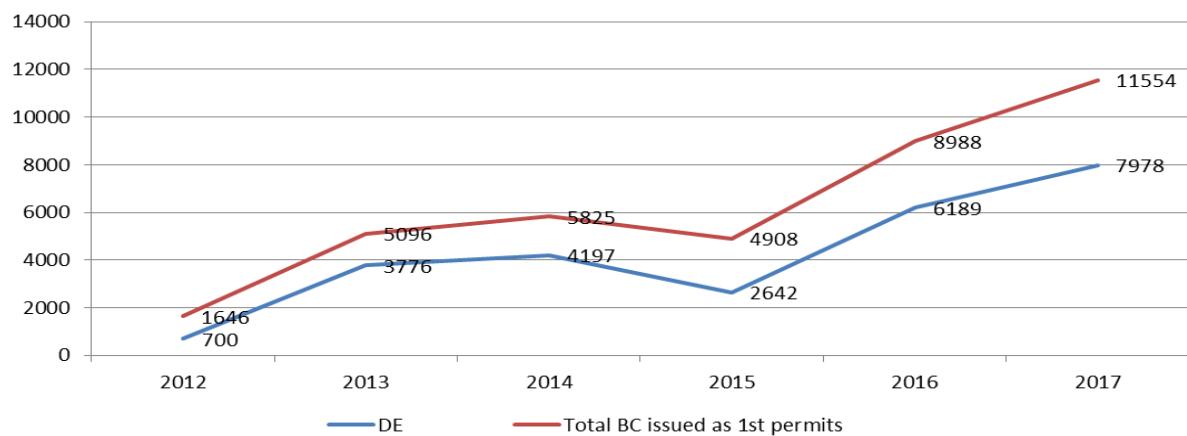
Figure 25. Number of first permits issued for highly skilled work (National highly skilled, Total HSW), BCD and researchers in EU-25 countries.



Source: Eurostat, [migr_resocc], Data extracted 06.12.2018

The majority of EU Blue cards are issued by one Member State (Germany), which issued between 43 and 74 % of the BCD first permits since 2012. Of the other Member States, France, Luxembourg, Poland and Italy issue the most EU Blue Cards. In 15 of the 22 Member States issuing Blue cards there was an increase in the number of permits issued⁵⁴³.

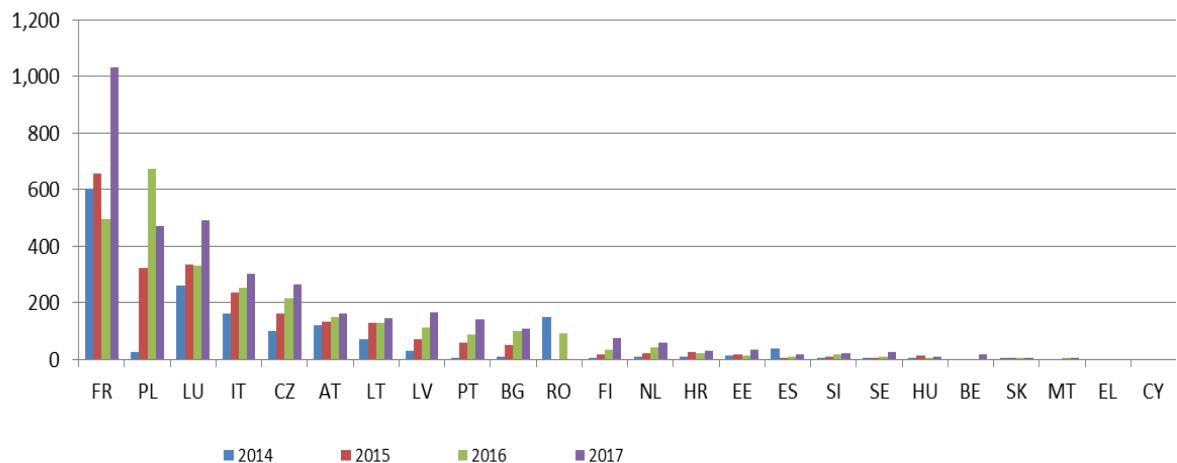
Figure 26. Number of EU Blue Cards issued as first permits in EU-25 and in Germany each year 2012-2017



Source: Eurostat [migr_resocc] Data extracted 27.09.2018

543 Annex 9.2 on a Directive specific analysis of permits issued, table 11.

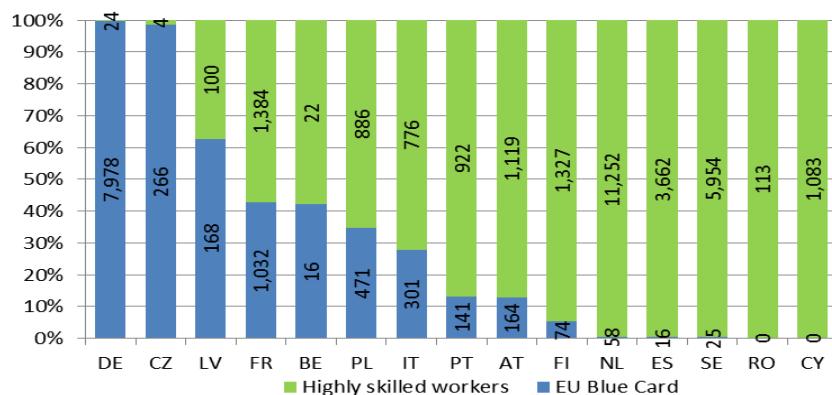
Figure 27. Number of EU Blue Cards issued as first permits in 2014-2017 (excluding Germany)



Source: Eurostat [migr_resocc] Data extracted 27.09.2018. Notes: BE, EL, CY reports no BCD permits, and EE, HU, MT, SI, SK and SE never exceeding 20 first BCD permits issued per year.

There is also a large variation between Member States in terms of issuing EU Blue Cards and many issue none or very few permits. The choice to retain and primarily promote the use of national parallel schemes for highly skilled workers has a large impact on the effectiveness of the BCD.

Figure 28. Share and number of EU Blue Cards versus national permits for highly skilled workers reported in 2017 in the Member States that do report specific permits for highly skilled workers*.



Source: Eurostat [migr_resocc] Data extracted 27.09.2018. Notes: * EL reports no data or 0 permits issued for both categories. BE, BG, EE, HR, LT, LU, HU, MT, RO, SI, SK only report EU BCD and no permits for national highly skilled schemes.

Due to the low numbers and share of Blue Cards issued outside Germany, the scheme was found not to have been as successful as intended⁵⁴⁴.

Although the number of BCD permits (and national skilled workers) has increased since the introduction of the BCD - and despite the increase of the number of single permits issued for

544 SWD(2016) 193 final of 7.6.2016. Commission Staff Working Document. Impact assessment. Accompanying the document: Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing the Directive 2009/50/EC.

work since the introduction of the SPD in 2013 as analysed below - it is difficult to clearly discern a strict positive causality between the introduction of the Directives and the increase in the volume of the flows. The economic climate is therefore deemed to have had a larger impact on the volume of migrants admitted.

Single Permit Directive

There has been a steady increase in the number of permits issued under the Single Permit Directive, although the trend is different depending on the Member States. The reporting of permits issued under this Directive is partly linked to when Member States started to fully apply the Directive, and an initial peak when all existing permits were first reported as SPD can be seen in some Member States.

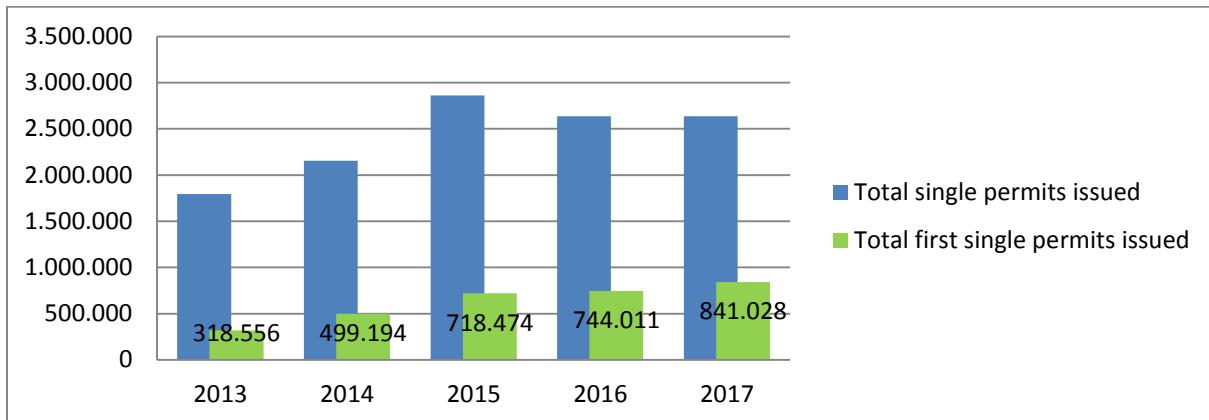
In 2017, 841 028 first SPD permits were issued for all reasons, out of which 261 534 permits, or 31%) were issued for work. Compared to the baseline assumption that all permits issued for work should equate to 633.200 per year, the actual number of permits issued for work is significantly lower. The comparability between the baseline estimation and the harmonised Eurostat data is not solid. The volume of permits issued in the period is furthermore likely to be strongly influenced by the economic crisis in 2008, whilst the predictions in the proposal were based on pre-crisis trends in the demand for foreign labour. There is no EU wide data available that would enable a sound comparison of the volumes of permits issued for the purpose of work pre- and post- 2008.

The share of first permits issued for the purpose of work compared to all permits issued has remained stable over the years of reporting, around 20-31 %. BE and EL do not report any permits issued for the SPD, and AT report only the total number, without breaking down for reasons , duration or type of decision. The situation differs for other Member States, and some Member States report 0 permits issued. Some Member States only report Single Permit data for remunerated activities (BG, CZ, LT, HU, MT, and few other reasons for LU, SI). The lack of data reported for other reasons than work may have different reasons, but in cases where permits according to other datasets issued for certain reasons it may indicate a misperception of the scope of the SP Directive. The Commission is addressing with the Member States concerned.

Data is also reported on the duration of permits and the type of decision taken⁵⁴⁵. This shows that the vast majority of permits are issued with a duration of more than 12 months, but that shorter permits dominate in a few Member States (BG, CY, AT). Compared to the more limited baseline data, the situation is similar now. It also shows that most decisions taken concern renewals rather than first permits. The data reported does not distinguish between 12 month and longer permits. It is not possible to clearly analyse the implication that the duration of the permit has on the annual renewal rate, nevertheless shorter durations are likely to lead to higher renewal rates. This has implications on the proportionality for the fees charged and for the administrative burden. For the purpose of evaluating the impact of the Directives on migration flows in this section, only first permits are considered.

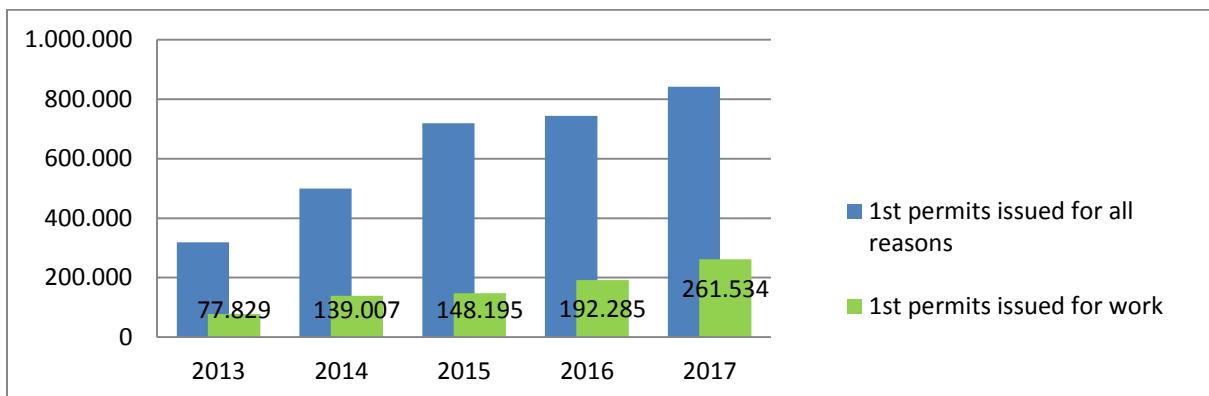
545 Annex 9.2.

Figure 29. Single permits issued for all decisions compared to first single permits per year.



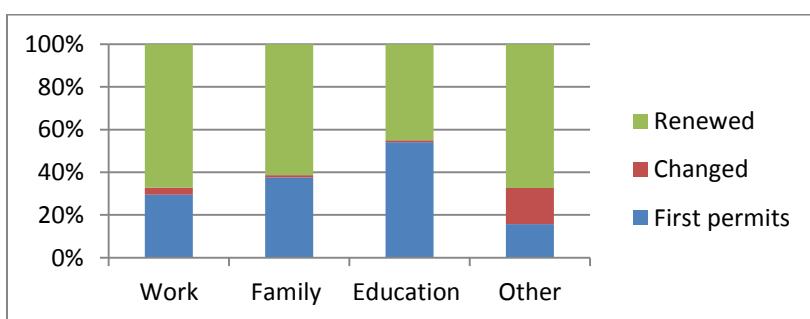
Eurostat [migr_ressing] as of 15.1.2019. Comment: BE, EL, AT do not report any data, AT does not report by type of decision. Only HR, LV, PL, PT, SK, SE report full data on types of decision and reason.

Figure 30. Share of Single Permits issued for all reasons compared to those issued for work.



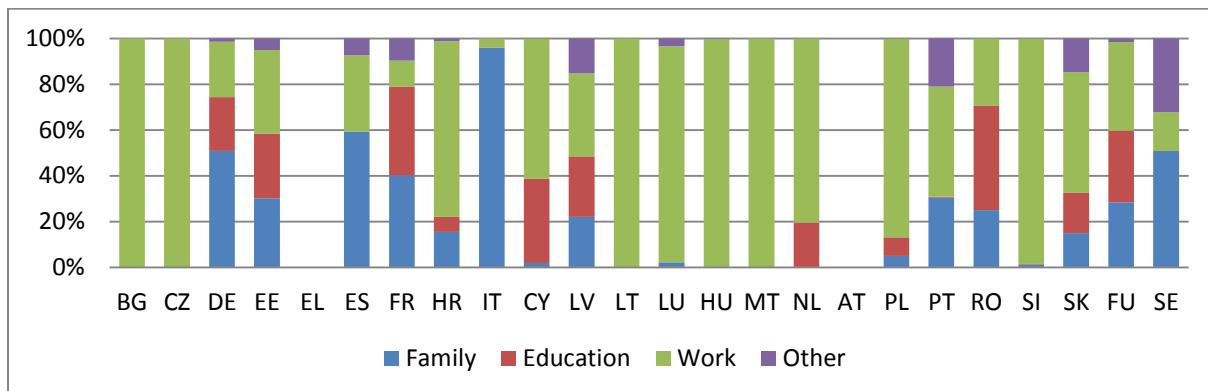
Eurostat [migr_ressing] as of 15.1.2019 Comment: BE and EL report no data or 0 permits, AT does not report by type of decision. Only HR, LV, PL, PT, SK, SE report full data on types of decision and reason.

Figure 31. Share of Single Permits issued by type of decision (as first permits, changed or renewed) by reasons in 2017



Eurostat [migr_ressing] as of 15.1.2019. Comment: BE and EL report no data, or 0 permits, AT does not report by type of decision.

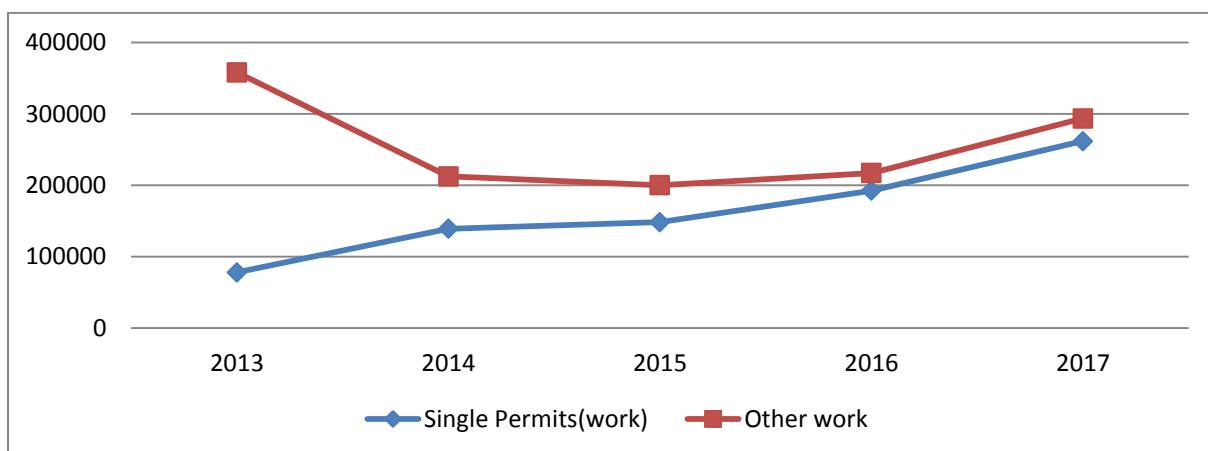
Figure 32. Share of single permits issued for different reasons as first permits in 2017.



Eurostat [migr_resessing] as of 15.1.2019. BE, EL reports no data, AT report no data for specific reason or types of decisions. BG, CZ, LT only report first permits for work. NL, SI report 0 permits are reported for family (NL, SI), education (ES, FR, IT, CY, LU, HU, MT and other (NL, IT, MT, RO)).

As stated above the key measurement for the extent to which the Single Permit covers the intended target group is the comparison of how many Single Permits are issued for work compared to the overall number of permits issued for the work category "other". The increase of reported single permits, combined with a drop of other permits in the period, shows a convergence of the two trends. The share of SPD permits to the permits issued as "other" is approximately 89%, a difference which can possibly be explained by reporting errors, but more likely by the fact that the Single Permit excludes a number of categories of workers that will be reported as "other", notably some transport workers (seafarers), some ICTs, au-pairs. The overall conclusion is therefore that the SPD reaches its intended target group to a large extent.

Figure 33. First Single Permits issued for the purpose of work compared to first permits issued in the category "other" in EU-25, 2013-2017



Eurostat [migr_resessing] [migr_resocc] as of 16.1.2019

Evidence from legal implementation

Evidence from the legal implementation of the BCD and the SPD show that both Directives have, after a number of non-communication cases⁵⁴⁶, been fully transposed by all Member States. In Belgium there were severe delays in the transposition of SPD⁵⁴⁷ and transposition was only completed end 2018.

The first implementation report for the BCD⁵⁴⁸ shows variation of approaches related to different implementation choices for the determination of volumes of admission, ethical recruitment, derogations allowing professional experience as alternative qualification (only transposed by 12 Member States), and different approaches to minimum salaries. Some of these aspects are addressed in the proposed revision of the BCD presented by the Commission in 2016.

The first implementation report on the SPD⁵⁴⁹ indicates that there are some concerns in relation to the personal scope of the application for the Directive, lack of procedural safeguards and deadlines. Furthermore, some concerns remain on multiple-step procedures and lack of equal treatment in certain areas and for certain categories of migrants, notably those with shorter permits, mainly related to social security and export of pensions. These concerns are being addressed with the Member States concerned. A preliminary ruling related to access to childbirth allowances in Italy, confirmed that single permit holders are entitled to such benefits⁵⁵⁰.

Since the adoption of the Directives in 2009 and 2011 respectively, very few specific complaints were received relating to the BCD, whilst for the SPD the number of complaints was slightly higher. The complaints related to the SPD concerned recognition of qualifications, format of the permit, exceeded deadlines for decisions, equal treatment, export of pensions and concerns regarding procedural safeguards. There are also complaints related to categories excluded from the SPD, such as a stateless person under temporary protection, having paid social security for a number of years but denied benefits once unemployed.

The implementation of the BCD introduced some advantages for third-country nationals compared to the standard work permit or prior equivalent national schemes, such as longer duration of the validity of the permit, more favourable conditions for accompanying family members, more favourable access to permanent residence and permission to stay in the Member State in the event of unemployment without losing the status. As shown by the recent EU Blue Card evaluation⁵⁵¹ and subsequent review proposal, due to the varied use of

546 20 non communication cases were launched for the BCD following the expiry of the deadline for transposition in 2011, the last two were closed in 2013(LT, SE). 14 non-communication cases were launched in 2014 for the SPD following the expiry of the transposition deadline on 25.12.2013, BE transposed end 2018, and prior to that the last cases closed were EL, ES, LT and SI in 2015.

547 C-564/17, *European Commission v Kingdom of Belgium*, (non-communication of Directive 2011/98/EU).

548 COM(2014) 287 final of 22.5.2014. Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment.

549 COM (2019) 160.

550 Judgment of the Court of Justice (CJEU) of 21 June 2017, *Kerly Del Rosario Martinez Silva v Istituto nazionale della previdenza sociale (INPS), Comune di Genova*, C-449/16.

551 SWD(2016), 193 final of 7.6.2016. Commission Staff Working Document. Impact assessment. Accompanying the document: Proposal for a Directive of the European Parliament and the Council on the

numerous ‘may’ clauses and the existence of parallel national schemes in many Member States, the effects of the Blue Card as a legal instrument has been weakened. For example, as Member States are permitted to apply quotas for the admission of this category, in Cyprus, such a quota is set at 0 Blue Cards which de facto means that the instrument is not applied at national level.

Some Member States however praised the effectiveness of the Blue Card Directive. In consultation, others claimed that only few applications had been received so far due to the more complex requirements of the Directive compared to the national schemes (such as the salary threshold condition which was considered too high).⁵⁵²

With the implementation of the Single Permit Directive,⁵⁵³ a simplified application procedure and the single permit was introduced for third-country nationals, which was not in place in all Member States before. The Directive also introduced equal treatment rights for some categories of workers. For instance, prior to the adoption of the SPD, third-country workers could be excluded from a range of social security rights for different eligibility criteria related for instance related to temporary status, although some problems remain.

In consultation, several Member States considered it as one of the most effective Directives in the field of legal migration, e.g. with reduced time for admission decision and better monitoring, even though in some cases difficulties were experienced for the application of the Directive and others considered it neutral, given the effectiveness of pre-existing rules.

The role of the legal migration Directives in terms of addressing labour and skills shortages
A further analysis of the effect of the Directives in terms of addressing labour shortages shows that the effect of the Directives so far are mixed. The EU currently faces labour shortages and this is likely to increase over time. It is anticipated that the projected increase in life expectancy, and low fertility rates in EU⁵⁵⁴, and the corresponding ageing of the EU population will inevitably lead to labour shortages⁵⁵⁵, for which there will be a demand for a younger working population. Between 2023 and 2060, the EU labour supply is expected to decrease by 8.2 %⁵⁵⁶: this will represent a population deficit of approximately 19 million. The steepest declines in the size of the labour force will take place, if a ‘zero migration’ scenario is played out – from around 245 million to 190 million in 2060.⁵⁵⁷

Labour migration can positively impact the size of the labour force, and hence the dependency ratio, the working age-population (15-65) and the population not in the labour force (0-15 and 65+), however in the long-term, the “overarching consensus is that international migration

conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing the Directive 2009/50/EC., Annex 5, Section 2.2.

552 ICF (2018) Main report, section 6.2.5.

553 ICF (2018) Main report, section 6.2.6.

554 European Commission, *The 2015 Ageing Report: Underlying Assumptions and Projection Methodologies*, (2015). A EUROPOP2013 projection suggests an increase of 7.1 years and 6.0 years for men and women respectively, from 2013 to 2060.

555 ibid.

556 European Commission, *The 2015 Ageing Report: Underlying Assumptions and Projection Methodologies*, (2015).

557 European Commission, Joint Research Centre, *Demographic and Human Capital Scenarios for the 21st Century: 2018 Assessment for 201 Countries*, Lutz W., Goujon, A., KC, S., Stonawski, M. and Stilianakis, N., (Eds.), (2018), p. 47.

cannot offset the negative effects of population and labour force aging".⁵⁵⁸ Nevertheless, the impact of third-country migrants on labour markets across the EU varies significantly between countries and between different occupations. The impact on net employment growth by third country nationals has been most pronounced in highly qualified professions (ICT, science, business and legal occupations) as well as in low-qualified occupation, such as cleaners and personal services workers – in all cases contributing to less than 2 percentage points of the net changes.⁵⁵⁹

Identifying and addressing labour shortages entails a complex and challenging process which involves on one hand identifying current and evolving labour market needs, and on the other hand identifying the workforce that can fill the labour shortage needs⁵⁶⁰. Most Member States view migration as part of a wider strategy to address labour shortages, which also includes market activation of the current resident population and reforming education and training opportunities. Labour shortages have become a major policy challenge affecting European competitiveness in the context of rapid technological change and Europe's declining population and ageing workforce⁵⁶¹. Studies show that the EU also faces structural skills shortages and mismatches in certain sectors that cannot be filled by the existing EU workforce despite high unemployment in some Member States⁵⁶². The sectors which have experienced the most labour shortages include healthcare, IT, and engineering⁵⁶³. However, the demand on certain professions and occupations differs significantly across Member States. The shortages also concern medium-skilled and low-skilled occupations, including home-based personal care workers, cooks, waiters and cleaners⁵⁶⁴.

Due to the rather limited number of EU Blue Cards issued, the BCD has had a relatively limited contribution to address shortages in highly skilled professions, at least outside of Germany. The third-country migrants admitted under the SPD have had a larger impact on addressing labour shortages related to all skill levels. According to some Member States, EU schemes like the BCD have been less effective whereas national instruments have according to some Member States proven to be more flexible or more favourable.⁵⁶⁵

Quantitative studies and data on labour matching and satisfying shortages are not readily available. As identified in the external coherence analysis there are gaps related to third-country nationals regarding the applicability of, for instance, the EURES system, which is established to help matching the qualifications of mobile EU nationals with the right skills

558 Spielvogel, G. and M. Meghnagi, *The contribution of migration to the dynamics of the labour force in OECD countries: 2005-2015*, (2018), p. 9-10.

559 Spielvogel, G. and M. Meghnagi, *The contribution of migration to the dynamics of the labour force in OECD countries: 2005-2015*, (2018).

560 Annex 5.2.6.5 (External coherence, Employment policies, Job matching).

561 European Migration Network (EMN), Synthesis Report for the EMN Focussed Study 2015, *Determining Labour Shortages and the Need for Labour Migration from Third Countries in the EU EMN Study*, (2015).

562 SWD(2016) 193 final of 7.6.2016. Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing Directive 2009/50/EC.

563 European Commission, EU Skills Panorama 2014, *Analytical Highlight - Focus on Skills Challenges in Europe*.

564 European Migration Network (EMN), Synthesis Report for the EMN Focussed Study 2015, *Determining Labour Shortages and the Need for Labour Migration from Third Countries in the EU*, (2015).

565 Contact Group Legal Migration, 2017.

and qualifications for a specific job.⁵⁶⁶ Unlike countries like Australia, Canada and New Zealand, no EU Member State has adopted an expression of interest system that aims at pre-selecting candidates which would be accessible to employers should a shortage arise.⁵⁶⁷ Academic research shows that economies of scale can be in play when creating a larger pool of talent, especially with niche and specialised skills. Most Member States continue to admit labour migrants without attempting to link their entry to particular shortage occupations.

Systems to manage labour migration flows

The evaluation also found that historically the systems to manage labour migration flows differ significantly. This includes how the volume of admission is managed. Research has identified two different approaches. One approach is ‘demand-driven’⁵⁶⁸, with accelerated or simplified admission for recruitment of third-country nationals to shortage sectors. In purely demand-driven systems, this decision is often delegated to employers. This approach normally requires third-country nationals to have a specific job offer by a national employer before their application for a residence permit will be considered. This approach is the most prevalent in the EU Member States. A second approach is oriented toward a ‘human capital’ or ‘labour supply’ models where admission frameworks are adjusted in order to attract migrants with characteristics that will place them in a favourable position for labour market insertion, but efforts are not made to link these migrants to pre-defined shortage occupations.

In some Member States admission systems for work are more regulated than others – i.e. for example Austria has a points-based admission system (Red-White-Red card), while in other Member States have a market-based approach (e.g. Sweden). In Sweden, since 2008, labour migration policy has been demand-driven, whereby employers have the right to recruit third-country nationals to fill vacancies if they cannot find suitable Swedish or European Union (EU) workers and there are no quotas.⁵⁶⁹

Both BDC and SPD refer to, and respect, the TFEU based principle that Member States can control the volumes of admission of third-country migrants admitted for the purpose of seeking employment or self-employment (Article 79(5) TFEU). This has been implemented in different ways by Member States⁵⁷⁰:

- Third-country nationals are admitted to work if the labour market situation allows this, and if the position could not be filled by a national nor an EU citizen.(AT, BG, CZ, FI, FR, HU, LU, PL, PT and SK)
- The economic situation is decisive for admitting economic migrants (DE).
- Specific quotas applied (CY, EE, HR and IT).
- Annual decision on the admission is taken by the competent authority (EL, MT).
- The legislation provides for a variety of different permits for the purposes of work in Spain for which the concrete labour market requirements differ (ES).

566 Annex 5.2.6.5 (External coherence, Employment policies, Job matching).

567 *Report on labour migration policies and the role of ‘expression of interest’ models and matching mechanisms*, OECD (2019).

568 AT, BE, DE, EE, EL, ES, FI, FR, HR, IT, MT, PT.

569 European Migration Network (EMN), Synthesis Report for the EMN Focussed Study 2015, *Determining Labour Shortages and the Need for Labour Migration from Third Countries in the EU*, (2015).

570 Tipik, conformity study carried out for the European Commission services on Directive 2011/98/EU (SPD), (2016). This analysis only concerns employed status, as the relevant Directives do not include initial admission for self-employed activities and the LTRD does not include initial admission.

- The employment market is open to third-country nationals and no limitations based on nationality are applicable however, the employer must register the vacancy at least 1 month prior to the submission of the application for a permit. (LV)
- An annual contingent is issued for each type of new third-country worker admitted to the labour market.(RO)
- No regulations on the access of third-country nationals to the labour market or quotas, but labour market test required (publication of vacancy) (LT and SE).

In a few Member States quotas are strictly applied and the number of permits issued for the purpose of remunerated activities appears to be severely restricted (as stated above a zero permit quota in CY for the BCD).

Other findings based on the legal implementation analysis of the SPD⁵⁷¹ shows that some Member States have large number of different categories of work permits for very specific occupations, including specific rules for short duration work of up to 3 months. Other Member States have one or two types of work permits (AT, SE) with common rules for all workers, such as minimum salaries. Some also have categories of residence permits, for which "no work permit is required", nevertheless, despite that formulation these categories are also in most cases covered by SPD.

Attracting and retaining skilled migrants

The capacity to attract and retain skilled migrants depends on a variety of factors including "the overall package". Aspects regulated by the Directives such as admission schemes, family reunification possibilities, equal treatment rights, intra-EU mobility possibilities, access to the labour market play an important role but also other factors such as the absence of discrimination and xenophobia. The attractiveness of EU Member States as a destination also varies between Member States. Cultural and language are important, for example, Spain and France appeal to largely non-European migrants, while Austria and Germany have high shares of migrants from European countries that include Russia, southeast Europe and Turkey.⁵⁷²

Attracting talent and highly skilled third-country national should also be seen in the context of the 'global competition' for talent. EU Member States have been less successful at attracting and retaining migrants than the United States, Canada and New Zealand. Having access to the entire EU labour market has been recognised as a potential pull factor for highly skilled TCNs as opposed to having access to labour markets of individual EU Member States. There are however significant weaknesses in the intra-EU mobility provisions as implemented by the Member States, with no substantial difference to those moving to the Member State for the first time (see below).

According to OECD research⁵⁷³, migrants residing in the EU-15 were generally lower educated than those living in other OECD destinations and EU-15 remained persistently below those in other OECD countries, suggesting that the difference is structural and not cyclical. However, a positive trend was observed between 2000 and 2010 as the EU narrowed the gap with the United States in terms of the share of educated migrants, which rose from 21% to 34% in the EU and from 21% to 33% in the United States. A larger share of migrants

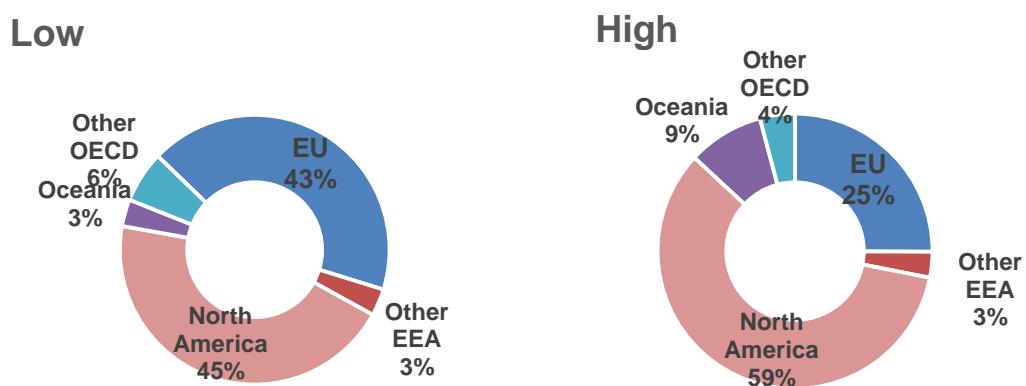
571 ibid.

572 ICF (2018), Annex 1Bii.

573 OECD and EU, *Recruiting Immigrant Workers: Europe 2016*, (2016).

in the United States than in the European Union have medium-education levels, including among recent migrants (36% compared with 27%). The longer-term resident population in the EU (those living there for over ten years) has lower educational composition of past migration, with 44% of long-term residents in 2010 lower educated. Around 2015-2016, only 25% of highly educated migrant residing in OECD+EU countries had chosen the EU as a destination compared to 59% for North America. Among lower educated migrants around 43% had chosen the EU⁵⁷⁴.

Figure 34. Distribution of foreign-born residents with low versus high level of education, by OECD destination countries, 2015-16, in %



Source: Database on immigrants in the OECD countries (DIOC), 2015-2016. Note / EU refers to EU-28 without Croatia due to missing data. For Iceland, Japan, New Zealand and Turkey, data are from DIOC 2010-11. For the EU, only non-EU immigrants are included.

Economic impacts of the Directives

The qualitative assessment of the economic impact of the Directives in terms of boosting competitiveness, economic growth and the knowledge economy, shows that there is potential for positive impacts. Attracting highly qualified workers is widely believed to contribute to boosting economic growth, competitiveness and knowledge economy, not only through an increase in the pool of highly qualified workers within the workforce and gain in human capital, but also through spill over effects⁵⁷⁵ and an income multiplier effect.⁵⁷⁶ An increase in the pool of highly skilled workers would furthermore have a positive impact on the capacity of European companies to undertake R&D and would benefit the EU's overall performance on research and innovation.⁵⁷⁷.

574 See also COM(2018) 635 final of 12.9.2018. Communication from the Commission to the European Parliament and the Council - Enhancing Legal Pathway to Europe: An Indispensable Part of a Balanced and Comprehensive Migration Policy.

575 Local workforce may learn from the highly qualified TCNs filling that skills-gap, which in turn, may lead to an increased need for complementary mid- and low-skilled labour.

576 For instance, if a TCN earns 50,000 euros, s/he will spend a large portion of that money on good and services such as housing, transport, food, utilities etc. Those places will then re-spend that money on inventory, utilities and more workers. Those workers will then spend a portion of their income and so on. By increasing aggregate demand, TCNs thus, also contribute to an expansion of economic output. Constant, A., *Do Migrants Take the Jobs of Native Workers?* (2014).

577 It would be easier for companies in highly innovative sectors, to recruit HSWs especially in STEM (science, technology, engineering and mathematics) fields, which in turn would increase their capacity for innovation and

Evidence suggests that highly skilled migrants have a small yet positive net effect on innovation in host countries by increasing workforce diversity⁵⁷⁸. Various studies suggest a positive impact on (a) technological development measured through patent indicators in host countries⁵⁷⁹, exceptional scientific contributions⁵⁸⁰, and (b) the innovation performance of European regions⁵⁸¹.

The Legal migration Directives also provide a number of direct regulatory benefits (such as cost saving for more efficient procedures, wider range of labour supply) and indirect regulatory benefits (such as increased capacity for business in innovative sectors when recruiting highly skilled workers) for economic operators like employers and business.

Wider indirect regulatory benefits for society as a whole include positive fiscal benefits, labour market benefits, increase in the available workforce, positive impact on local wages and positive impacts on productivity. Positive spill-over effects have been identified on the local workforce as the skills of highly qualified TCNs is shared with native populations, and in turn an increased need for complementary low and mid qualified jobs. Intra-EU mobility, including has a potential positive impact on labour market functioning when facing asymmetric shocks within the Eurozone.

A number of main conclusions on the wider economic impact of the Directives can be drawn from the available evidence on the impact of migration in general. Overall, the literature available suggests that the macroeconomic impact of migration is positive⁵⁸² and that the gains are broadly shared throughout the population, even though there may be some negative local, short-term impacts⁵⁸³.

There is evidence that migration can have positive occupational changes for low-educated native workers, even when the arrivals are of low-skilled immigrants⁵⁸⁴, while there is limited evidence of a possible displacement impact of local workers⁵⁸⁵. Considering that Member States may manage economic migration flows by applying volumes of initial admission, and in view of the Union preference principle and labour market tests, it is reasonable to assume that the Directives bring net benefits to the labour market and any possible costs would be marginal.

The literature also suggests that the net fiscal impact of migration (including all reasons for migration) is marginal, possibly slightly positive on average (but small) and it can be slightly

entrepreneurship. Kerr, W. R., *U.S. High-Skilled Immigration, Innovation, and Entrepreneurship: Empirical Approaches and Evidence*, (2013).

578 Nathan, M., [The Wider Economic Impacts of High-Skilled Migrants: A Survey of the Literature](#), (2013).

579 Hunt, J., [Are Immigrants the Best and Brightest U.S. Engineers?](#) (2013); Breschi, S., Lissoni, F., Tarasconi, G., ['WIPO Experts Meeting on Intellectual Property, the International Mobility of Knowledge Workers and the Brain Drain'](#), (2013).

580 Stephan, P.E., Levin, S.G., [Exceptional Contributions to US Science by the Foreign-Born and Foreign-Educated.](#), (2001); Hunt, J., [Are Immigrants the Best and Brightest U.S. Engineers?](#) (2013).

581 Ozgen, C., Nijkamp, P., Poot, J., [Immigration and Innovation in European Regions](#), (2011); Niebuhr, A. [Migration and Innovation: Does Cultural Diversity Matter for Regional R&D Activity?](#) (2010).

582 See review of literature in ICF (2018) and OECD Working Paper - *Is Migration good for the economy?* (2014).

583 OECD, *International Migration Outlook 2016 – Chapter 3 The Economic Impact of Migration: Why the Local Level Matters*, (2016).

584 See for instance Foged, M., and Peri, G., *Immigrants and Native Workers: New Analysis on Longitudinal Data*, (2013).

585 Meta-analysis in Constant, A., *Do Migrants Take the Jobs of Native Workers?* (2014).

negative in some countries, also depending on the methodology used to assess the net fiscal impact⁵⁸⁶.

Finally, with specific regard to the impact of family reunification, there are very few quantitative results on the effect of family presence on integration in the literature, except for a few studies with very limited sample sizes.⁵⁸⁷ Olwig (2011) reports that family relations significantly help new migrants and refugees to establish themselves and similar findings are provided by the literature on the role of migrant networks. The evidence available on the short and long-term costs of family separation⁵⁸⁸ can further inform the identification of benefits of family reunification. Indeed, research consistently documents negative and persistent effects of separation from immediate family members on the health and well-being of immigrant adults and their children and therefore their overall integration outcomes.

4.1.4 Degree of achievements of the objectives (EQ 5)

The extent to which the observed effects correspond to the objectives is difficult to measure, given the limited relative contribution expected from the Directives, compared to other policies and external factors. The causality between the Directives and the objectives is also difficult to prove.

The effect of the implementation of the BCD has not fully met the overall intended objectives, due the unsatisfying uptake of the scheme in many Member States. Given the low number of Blue Cards issued it is unlikely that the BCD has contributed to a significant extent to boosting of competitiveness, economic growth and enhancing the knowledge economy. According to the Impact Assessment for the proposal to revise the BCD⁵⁸⁹, the EU Blue Card has not been effective in its primary objective of attracting and retaining TCNs and it lacks the ambition to equip the EU sufficiently for the challenges ahead⁵⁹⁰. Although the number of Blue Cards issued each year rises, the number of Blue Cards remains relatively low compared to national schemes. Furthermore, the EU attracts a relatively low number of highly skilled TCN compared to other OECD countries. Alternative national schemes have also diminished the impact of the Blue Card as an instrument to boost competitiveness, economic growth and the knowledge economy⁵⁹¹.

The SPD has to a large extent been effective in achieving its objectives, in terms of both the absolute and relative number of migrants covered by the Directive, and thereby the coverage

586 OECD, *International Migration Outlook 2013 – Chapter 3 The Fiscal Impact of Immigration in OECD Countries*, (2013).

587 OECD, Working Party on Migration, *Integration Effects from Family Presence*, Scoping paper, 25-26 June 2018, DELSA/ELSA/WP2(2018)7. Family life itself can also broaden migrants' networks and Facchini, Patacchini and Steinhardt (2015) find that the birth of a child increases the likelihood that the migrant parent has a native-born friend, also reported in OECD (2018).

588 Gubernskaya, Z., Dreby, J., *US Immigration Policy and the Case for Family Unity*, (2017), Abrego, L. J., *Sacrificing Families – Navigating Laws, Labor, and Love Across Borders*, (2014); Dreby, J., *Divided by Borders – Mexican Migrants and Their Children*, (2010); Suarez-Orozco, C., Todorova, IL., and Louie, J., *Making Up For Lost Time: The Experience of Separation and Reunification Among Immigrant Families*, (2002).

589 SWD(2016) 193 final of 7.6.2016. Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing Directive 2009/50/EC.

590 ibid. p. 5.

591 ICF (2018) Main report, section 6.1.2.3.

of the provisions on establishment of a single application procedure for third country nationals to acquire work and residence permits, with the purpose of simplifying the administrative burdens associated with such admission procedures, and on the granting of equal treatment (as analysed above). The observed effects show that the implementation of the SPD contributes to these objectives by covering a majority of migrants admitted for work also under national law, but the gaps in coverage signals some shortcomings of the Member States in implementation and reporting of statistics.

In summary, it can be concluded that the relevant EU Directives have not contributed to a significant extent (yet) to boost economic growth, by addressing labour shortages and to attracting and retaining highly skilled migrants, but that they have the potential to make a contribution.⁵⁹² The Directives (SPD and BCD) have however contributed to a larger extent to the management of migration flows, in terms of more streamlined application procedures and safeguards for third-country workers and employers, as well as by ensuring equal treatment to a larger extent.

4.1.4 What can be attributed to the Directive (EQ6) & what can be attributed to other factors (EQ8)

Due to the limited personal scope of the Directives in terms of regulating admission conditions for economic migration covered by this effectiveness analysis (BCD, SPD); coupled with the relatively low uptake of the BDC in most Member States, the effect of the Directives on the **harmonisation of admission conditions** is limited. Other components of the Directives that also contribute to the management of migration flows, notably the **efficient application procedure and the equal treatment provisions** that are regulated by the SPD, cover a larger share of economic migration flows.

The attractiveness of the EU Member States as destinations is impacted by available job opportunities, economic climate and social-cultural links.⁵⁹³ The attractiveness of the EU as a destination, in particular the capacity **attract and retain highly skilled migrants**, also depends on many factors regulated by the legal migration Directives:⁵⁹⁴

- family reunification rights(including more favourable provisions in BCD),
- facilitated visa handling,
- intra-EU mobility facilitation,
- prospect of acquiring permanent status, notably LTR status,
- more favourable access to the labour market (after two years) and more protective rights in relation to the right to remain in the Member States for temporary unemployment (BCD)
- circular migration rights (acceptable periods of absence from the territory without leaving the territory).

The effects of the measures implemented have been positive, with the exception of the intra-EU mobility facilitation (see below). This weakens the positive impact of the EU Blue Card.

The Single Permit Directive (SPD) introduced equal treatment provisions not only to holders of a single permit, but to all third-country nationals allowed to work such as family members, national long term residents and students (with some exceptions). In view of the significant

592 ICF (2018) Main report, section 6.1.2.4.

593 ICF (2018) Main report, section 6.

594 OECD (2016).

share of the intended target group that the SPD covers, the simplified procedure and, the safeguards and the equal treatment, have contributed significantly to the achievement of the objectives.

The contribution of the Directives to the **address labour and skill shortages** (BCD, SWD and ICT), depends to a large extent on the Member States decisions in relation to the control of the volumes of third-country nationals admitted for work, and on policies related to labour market tests and the application of the "Union first" principle. Measures related to differentiated **salary thresholds**, with special provisions for sectors of specific labour shortages, which contribute to addressing specific labour shortages (BCD), can play a role. Other external policies related to job and skills matching play a role, but no such tool is yet available at the EU level as the full EURES toolbox is not available to third-country workers⁵⁹⁵.

The changing socio-economic context both at EU level and globally has influenced, mostly in a positive way, the achievement some of the specific objectives (such as the objectives of attracting and retaining certain categories of TCNs, enhancing the knowledge economy of the European Union, boosting competitiveness and economic growth and addressing labour shortages). External factors at macro-economic and micro-economic level, which influence the uptake of the BCD are the business environment, job opportunities and cultural ties. The economic trends in the period for which comparable data exist (from 2008) have however also shown a strong decreased in the number of permits issued to the category of "other" workers, which is the category covering low and medium skilled workers (other than seasonal workers). This is likely to be linked to the economic crisis in the time period.

Finally, with regard to ICT, SWD and SRD, given the recent adoption of these Directives, it is too early to include them in this analysis, but each are expected to contribute further to the achievement of these objectives. The SRD includes the possibility for Member States to allow students to look for work on their territory which may help to address shortages and which was not provided for in the previous Directives.

4.2 Enhancing the knowledge economy in the European Union

4.2.1 Context

Promoting Europe as a whole as a world "centre" of excellence for studies and vocational training⁵⁹⁶, making "the Community more attractive to researchers from around the world and boost its position as an international centre for research" are objectives of the SD, RD and subsequently the SRD that aim at enhancing the knowledge economy.

595 Annex 6.

596 Mutual enrichment and promoting better cultural exchange is a specific objective of the SD and SRD. According to SRD – "*This Directive should also aim at fostering people-to-people contacts and mobility, as important elements of the Union's external policy, notably vis-à-vis the countries of the European Neighbourhood Policy or the Union's strategic partners. It should allow for a better contribution to the Global Approach to Migration and Mobility and its Mobility Partnerships which offer a concrete framework for dialogue and cooperation between the Member States and third countries, including in facilitating and organising legal migration.*" However, in view of the recent implementation of this Directive (to be transposed by May 2018) it is not possible to analyse this objective in this Fitness Check. The original objective is instead analysed.

The provisions related to these objectives are:

- to determine admission conditions and admission procedures for third-country nationals for the purpose of study, pupil exchange, as well as researchers; whilst for unremunerated training or volunteers these are optional for Member States
- to establish equal treatment with nationals for researchers,
- to give students limited right to work, alongside studies;
- facilitating intra-EU mobility of students and researchers,
- facilitating family reunification for researchers

Due to the recent adoption of the recast Students and Researchers Directive⁵⁹⁷ (transposition deadline May 2018), the analysis below refers only to the 2004 Students Directive and the 2005 Researchers Directives. The analysis furthermore focuses on students and researchers, but not the other optional categories of migrants covered by the earlier Directives.

The **external coherence** analysis found that the purpose of the Directives - to ensure access to educational opportunities for international students - is also facilitated by international cooperation, including bilateral and multilateral agreements. Measures related to equal treatment, access to employment, intra-EU mobility and family reunification for researchers also contribute to the objective of ensuring the attractiveness of Europe as a destination.

The recast SRD addressed a number of shortcomings related partly to internal and external coherence⁵⁹⁸ such as coherence and consistency with the SPD⁵⁹⁹, including insufficiently clear admission procedures including visas, rights (such as equal treatment) and procedural safeguards and brought further legal clarity and certainty, including measures related to categories that were not mandatorily covered under SD.

4.2.2 Baseline

At the time of the adoption of the proposal for the Students Directive⁶⁰⁰ the 12 EU Member States⁶⁰¹ had relatively open policies for third-country nationals admitted for the purpose of study or vocational training. Admission requirements were relatively consistent throughout the Member States, however certain thresholds varied, for instance concerning resources required and the mechanism to prove this. Two Member States (AT, NL) distinguished between paid and unpaid traineeships. Language knowledge and age limit requirements were sometimes introduced. In relation to the right to work for trainees, the requirements of whether a separate work permit was needed differed between Member States⁶⁰².

597 Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast).

598 COM (2013) 151 and SWD (2013) 77 and 78 final of 25.3.2013. Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing (recast) and SWD(2013) 77 and 78 final impact assessment recast S&RD.

599 ICF (2018) Main report, section 6.2.3.

600 COM (2002) 548 final of 7.10.2002. Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of studies, vocational training or voluntary service.

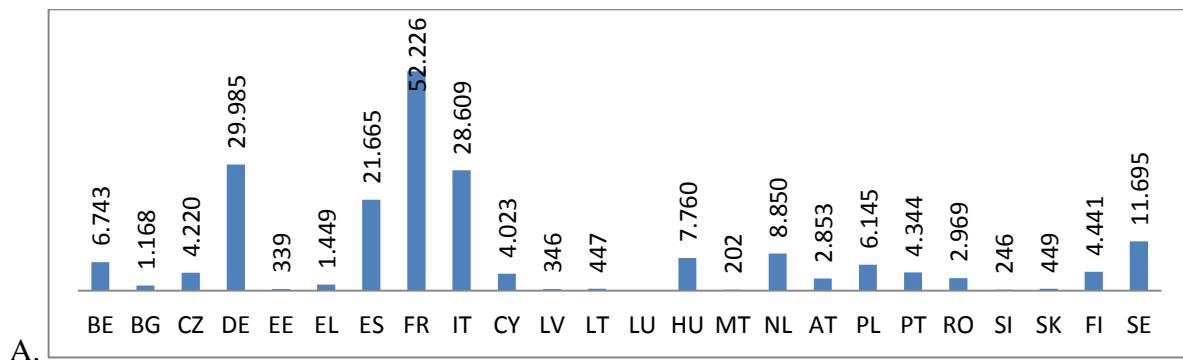
601 EU-12 refers to the 15 EU Member States at the time, excluding DK, IE and UK.

602 Work permit were not needed for unpaid trainees, only for paid trainees (FI, FR, IT, ES) Work permits were needed in both cases (BE, DE, LU, NL). Both paid and unpaid trainees were exempted (AT, PT).

At the time of the adoption of the proposal for the Researchers Directive⁶⁰³, some Member States had already introduced permits to host researchers. Nine Member States had adopted measures to facilitate the admission of third-country researchers, however, only two (FR, UK) had introduced specific residence permits for third-country national researchers. Nine Member States had not adopted particular legislation on this category of third-country nationals⁶⁰⁴. Prior to the adoption of the EU legal migration Directives, the admission conditions in most cases included approval by the hosting educational institution before entry, and proof of sufficient means. The Member State should approve and register officially the research organisation wishing to host a researcher. At the time of the adoption of the Directive there was no a specific uniformity but most of the countries created new registers (for example BE, IT, SE, PO, RO).

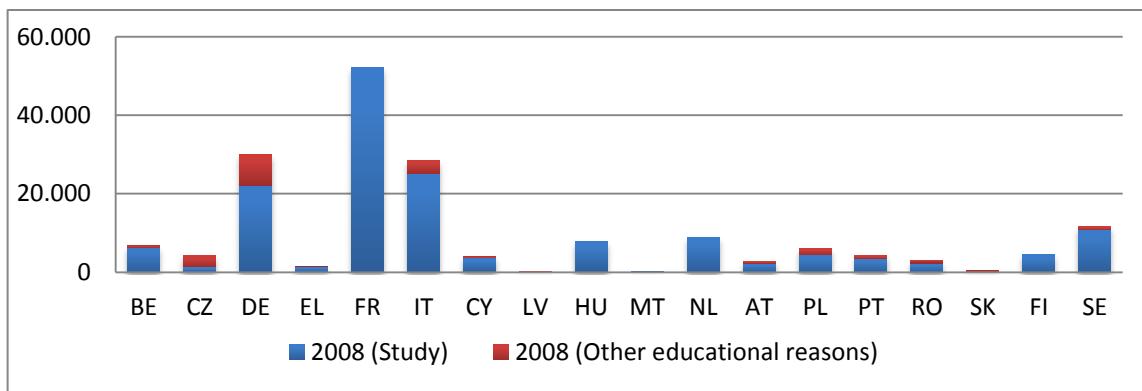
Quantitative baseline: Neither proposal (SD and RD), include estimations of how many permits were issued or expected to be issued for each category. Harmonised Eurostat statistics are available from 2008 on the number of first permits issued for the purpose of research and for study. Although the statistics are not explicitly related to permits issued for the respective Directive, the numbers of migrants admitted for study and for research are assumed to correspond to the permits issued per respective Directive since the Directives do not allow parallel schemes. As regards the other categories covered by the SD, those admitted for the optional purposes (unremunerated traineeship, volunteers and school pupils) are not specifically reported as such, but an "other educational reasons" category is reported. In 2008, 4.839 third-country researchers were issued first permits in the EU25, as well as Ireland that also implements the RD. In the same year 201.174 first permits were issued for educational reasons, out of which 157.677 for study reasons, and 19.632 for other educational reasons, but not all Member States reported the breakdown of the data for "study" or "other" in 2008.

Figure 35. A. Number of 1st permits issued for all educational reason, and B. for those Member States that report a breakdown into study and other educational reasons.



603 COM (2004)178.

604 EL, IT, IE, LT, NL, PL, PT, RO, SE.



Source: Eurostat. [migres_edu] of 4.6.2018 Comment: Some Member States only report total.

4.2.3 Observed effects (EQ 7)

The evidence from legal transposition analysis shows that the Directives have been fully transposed, following 14 non-communication cases that were opened in 2007 for the SD and 17 for the RD.

The first implementation report of the SD⁶⁰⁵ found that 9 Member States only transposed the provisions for students, 10 Member States transposed the provisions for the 3 optional categories and 5 applied one of the three categories.⁶⁰⁶ Only a few Member States explicitly transposed the option to require language knowledge of the course (EE, DE, IT, MT). All Member States grant students the right to employment outside study time, but only 12 Member States grant the right to self-employment⁶⁰⁷, and for 13 Member States the student had to apply for a separate authorisation (permit) for work⁶⁰⁸. Only 5 Member States did not limit the number of hours worked per week (ranges from 10h to 30h) as in the Directive but applied general requirement that it should not interfere with studies. The report also identified a number of shortcomings in the transposition, notably: parental authorisation for the stay of a minor not clear (BG, IT, NL); facilitation of admission to students participating in EU programmes that facilitate mobility within the Union; transparency of minimum monthly resources. Practical problems identified concerned additional rules on visa, both as regards initial admission and intra-EU mobility.

The first implementation report for the RD⁶⁰⁹ found that there were many variations between Member States as regards how research organisation were approved and how hosting agreements were managed. Concerns were identified in relation to the definition of

605 COM (2011) 587 final of 28.9.2011. Report from the Commission to the European Parliament and the Council on the application of Directive 2004/114/EC on the conditions of admissions of third-country nationals for the purpose of studies, pupil exchange, unremunerated training or voluntary service. (First implementation report).

606 All (CY, CZ, EE, ES, IT, LU, PT, RO, SI, SK), only transposed provisions for students (AT, BE, DE, FI, LT, MT, NL, PL, SE). Pupils (BG, LV), unremunerated trainees (BG, FR), volunteers (EL, HU).

607 AT, BE, CZ, DE, EE, ES, HU, IT, LT, PL, SE).

608 AT, BE, BG, CY, CZ, EE, EL, ES, LT, MT, NL, RO, SI.

609 COM (2011) 901 final of 20.12.2011. Report from the Commission to the Council and the European Parliament on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research. (First implementation report).

researchers covered, equal treatment, and in some Member States⁶¹⁰ the intra-EU mobility provisions were not specifically transposed.

The proposal for the recast Directive for R&S, and its Impact Assessment⁶¹¹ aimed at addressing weaknesses in terms of visas, rights, intra-EU mobility and preventing exploitation of certain categories (au pairs, unremunerated trainees). The proposal also highlighted that circumstances and the policy context was different in 2013 compared to when the Directives were initially proposed. In the context of the Europe 2020 strategy and the need to ensure smart, sustainable and inclusive growth, human capital has grown in importance. At the same time the EU was considered to face an 'innovation emergency', with lower Research & Development spending than for instance the US and Japan. It also found that thousands of the best researchers and innovators were leaving the EU for countries where conditions are more favourable. The proposal highlighted the need for a change of the EU policy due to important structural challenges facing the EU economy. The consultation carried for the proposal also found that the key issues faced by both researchers and students related to the visa procedures, the permit application procedures and intra-EU mobility obstacles.

Compared to the legal baseline the adoption of the SD did not bring a significant change, as most of the EU Member States already had similar schemes in place, nor did they modify previously existing legislation to a great extent. The Directive however contributed to establishing greater harmonisation and legal certainty – i.e. as per the European Court of Justice ruling⁶¹²- Member States cannot not deny a student a visa if the conditions in the Directive have been exhaustively met. Students' right to work has in practice been applied differently across Member States with regard to the number of hours allowed to work, separate work permit requirements (subsequently addressed by SPD and the recast Directive) and the application of labour market tests, meaning that the discretion left to Member States in certain areas has however hampered full harmonisation.

Compared to the legal baseline, it can be argued that the RD did not bring a significant change to the EU Member States' legislation since Member States hosted researchers even before transposing this Directive. However, not all of them had researcher-specific residence permits and in this way TNC researchers' access to the EU has been improved. An important element of this Directive is the reinforced role of the research organisations in the approval of TCN researchers to the European Union in contrast to the traditional role of the migration authorities in the years prior to the adoption of the Directive.⁶¹³

Statistical evidence⁶¹⁴ shows that for those residing for educational reasons, the number of valid permits have been on the increase from about 474.000 in 2008 reaching a total number of 616,000 in 2017⁶¹⁵. The vast majority of Member States have experienced progressive

610 AT, BE, EE, IE, LV, NL, PT, SE.

611 COM (2013) 151 and SWD(2013) 77 and 78 final of 25.3.2013. Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing (recast) and SWD(2013) 77 and 78 final impact assessment recast S&RD.

612 Judgment of the Court of Justice (CJEU) of 10 September 2014, *Mohamed Ali Ben Alaya v Bundesrepublik Deutschland*, C-491/13.

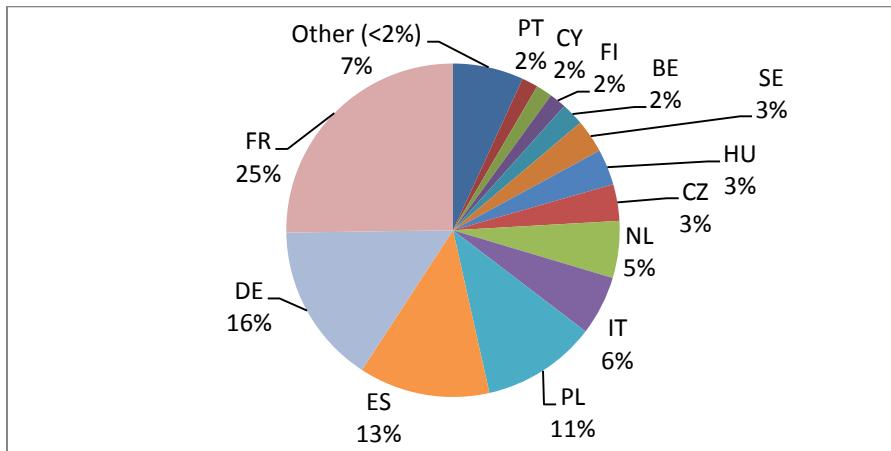
613 ICF (2018) Main report, section 6.2.4.

614 See also Annex 9.3.

615 Eurostat [migr_resval] as of 11.9.2018. Almost half of the permits held for study in EU-28 are issued by the UK since 2012 when they started reporting such permit. However as the UK is not bound by the Directive data for the UK is not analysed further here. Some OECD data may include UK data though.

increase of the number of all valid residence permits. The Member States in which there has been a decline include CY, IT and SE, while in BE, LU and SI, with some fluctuations, a similar number has been observed. 41% of all permits held for education in 2017 were issued by Germany and France.

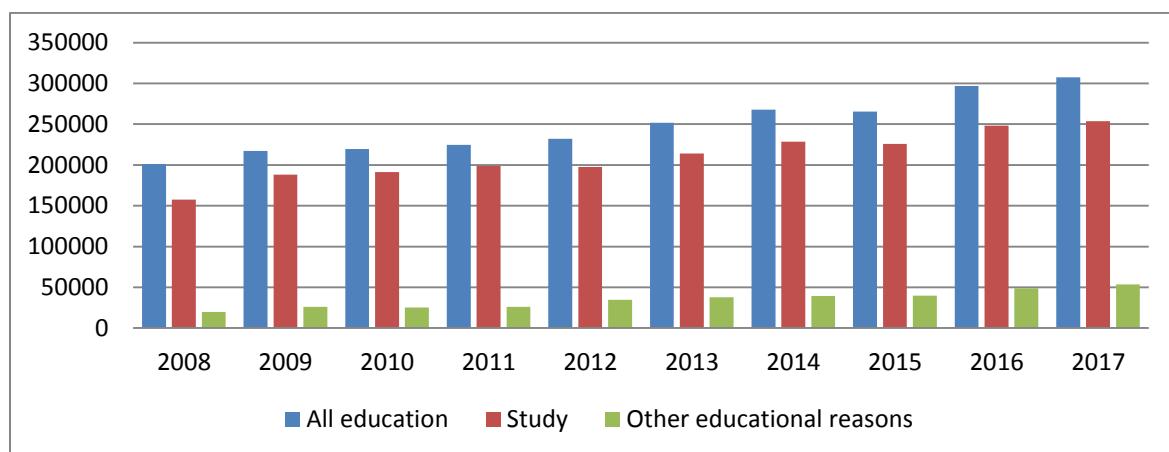
Figure 36. Geographical breakdown of all permits issued in EU-25 for the purpose of study, by Member States (2017)



Source: Eurostat [migr_reseduc] as extracted on 11.9.2018.

The trend of a steady increase for first permits issued for educational reasons in EU-25 is confirmed, ranging from 201.000 in 2008 to 307.000 in 2017, with the large Member States France, Germany, Poland, Spain and Italy issuing most permits for education.

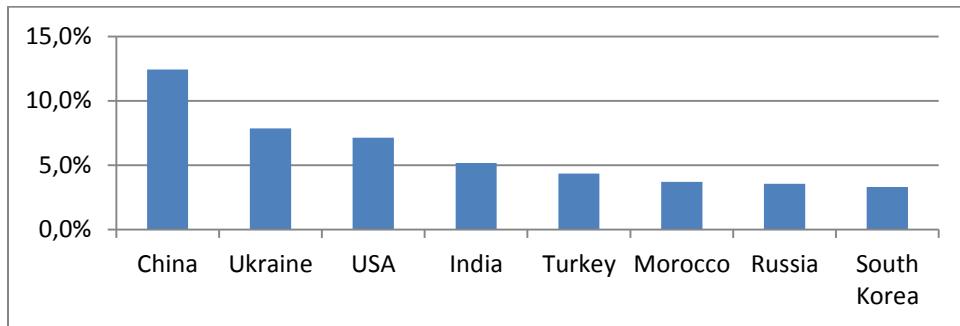
Figure 37. First permits issued for education reasons in EU-25, 2008-2017



Source: Eurostat [migr_resedu] Extracted on 11.9.2018. Missing data: Croatia from 2008-2012; Luxembourg for 2008. Some Member States only reported the category "all education".

The third country sending most in students in 2016 was China, followed by Ukraine and the USA.

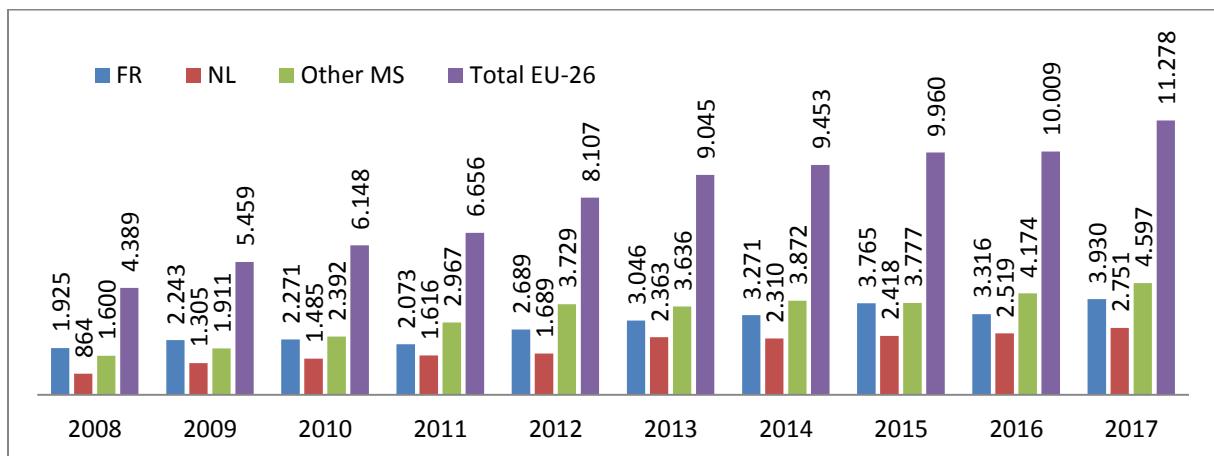
Figure 38. Most common country of origin of students in 2016



Source: Eurostat [migr_resedu] As of 11.9.2018

With regard to the Researcher Directive (RD), the number of residence permits issued to researchers has more than doubled from 2008 to 2016 (from 4220 in 2008 to 9672 in 2016). However, direct causality with the introduction of the RD permit is difficult to prove. France (33%) and the Netherlands (25%) issued the largest shares of permits for researchers in 2016, followed by Sweden (8%) and Finland (6%).

Figure 39. Number of permits issued for research as remunerated activities, 2008-2017, EU-26



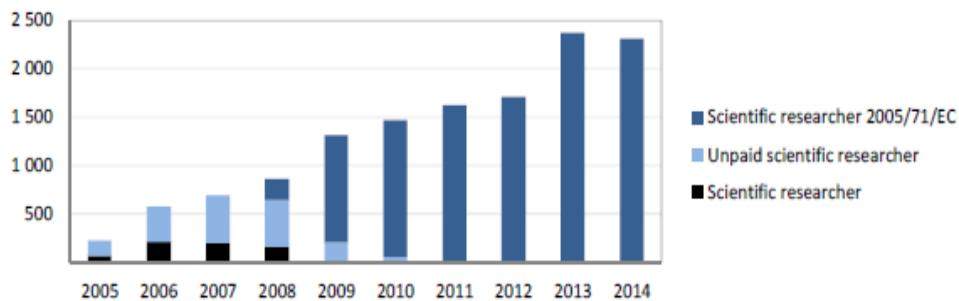
Source: Eurostat [migr_resocc] as of 12.9.2018. Includes EU-25 and IE that implements the RD. Data for 2017 not complete (AT, PT missing). MT, PT report 0 permits issued, and BG, CY, LV never more than 10 permits issued per year.

The available data since 2008 does not allow to make any comparison of the situation prior to the adoption of proposal with the situation after the adoption of the RD in 2005, but since 2008 when EU-wide data are available there has been a significant increase of permits issued for the purpose of research (from 4 389 in 2008 to about more than 11 000 in 2017). The increase is partly due to increases in NL (191%) and FR (72%), but also due to significantly increased (by 187%) number of researchers admitted to other Member States.

Despite difficulties in identifying direct causality between the statistical increase of the number of permits issued and the introduction of the permit, data from the NL illustrates of the impact over time. In the NL, no national parallel schemes are permitted and the gradual shift towards applying the Directive can be shown in the data. After the transposition of the researcher permit, higher inflows occurred while at the same time researchers under the EU

Directive replaced the unpaid-research permit category. The Netherlands has also seen a sharp increase in the uptake of the researcher permit, especially by non-university bodies.⁶¹⁶

Figure 40. Number of research permits issued in the Netherlands (2005-2014)



Source: ICF (2018)

Attracting, but also retaining, students contributes to the development of the knowledge economy. International students, who remain in the Member State (or in the EU) after graduation, contribute to marginal supply shift of tertiary educated labour.

International student retention rates are low in the European Union. Depending on the method used for calculating those who stay on, the rates are estimated to be in the range of 16% to 30%⁶¹⁷ and vary significantly from one EU Member State to another. The rate at which such tertiary educated migrants remain in the EU depends largely on the labour market demand for them⁶¹⁸. An OECD study, showed that in 2012 there was little demand for staying international students. Only a minority of them pursued studies in STEM (science, technology, engineering, and mathematics), for which there is a growing demand in the EU.⁶¹⁹ After 2012, though, continuously falling unemployment rates in the EU contributed to higher demand for labour, and the stay rates are likely to have increased. The long-term benefit to the EU economy is however not certain. Some studies have shown that some students take-up a first post-graduation job to gain some work experience before returning to their home countries.⁶²⁰

One reliable proxy indicator is the change of status from education to remunerated reasons. Although the number of such changes is small compared to all status changes (approximately 7%) the number of such status changes increased in EU-25 from 2008 -2017 from 9.426 in 2008 to 41.794 in 2017⁶²¹. The Member State where the largest number of such changes took place was France, followed by Germany, Spain and the Netherlands where positive trends can also be seen.

616 OECD (2016) The Dutch list of registered research institutes includes at least 30 private enterprises among the 110 registered sponsors. Universities, foundations and firms can use the researcher permit as an alternative to the national permit scheme for skilled migrants when the work is project-related – even when the salary paid to the researcher is below the requirement for other highly qualified schemes.

617 Weisser, R., ‘Internationally Mobile Students and their Post-graduation Migratory Behaviour: An Analysis of Determinants of Student Mobility and Retention Rates in the EU’, OECD Social, Employment and Migration Working Papers, No. 186, OECD Publishing: Paris, 2016, <https://www.oecd-ilibrary.org/docserver/5jlwxvmb5zt-en.pdf>

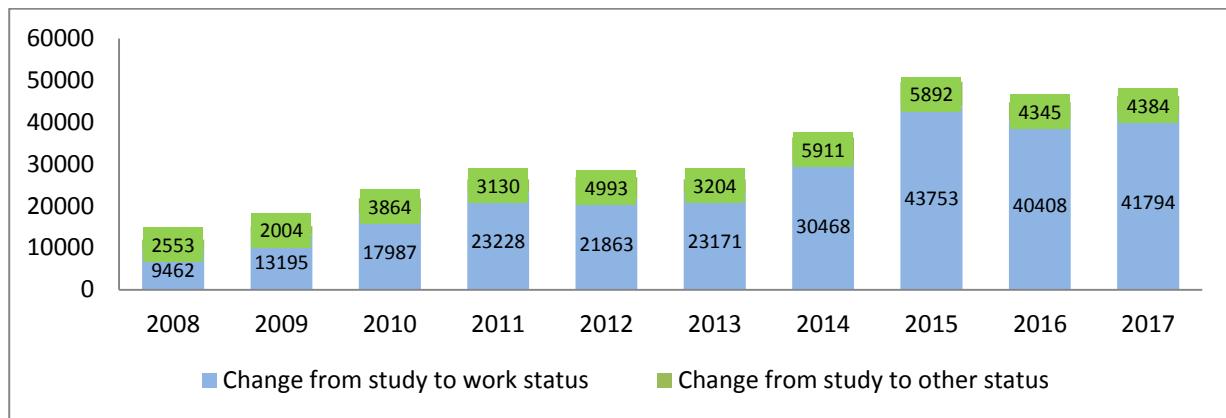
618 ibid.

619 ibid. p. 24-25.

620 ibid. p. 50.

621 Eurostat data [migr_reschange] as extracted on 11.9.2018. See also ICF (2018) Annex 1Bii, section 3.3.2 for detailed country breakdown for 2016.

Figure 41. Number of changes of status from education to occupation and other status in 2008-2017



Source: Eurostat [migr_reschange] extracted 11.9.2018.

Consulted stakeholders confirm that attracting and retaining third-country nationals is primarily linked to economic conditions and climate, business growth and job opportunities as well as cultural ties and socio-economic factors rather than being the result of the statuses based on EU and national legislation. However, admission criteria and rights attached to the permit may still influence both the individual decision as to choice of destination country, as well as the decisions of businesses with a global outreach on where to recruit foreigners.

A 2016 OECD study found that the EU as a whole is a very attractive destination for international students - it has more than doubled the number of international students over the 12 years between 2000 and 2012, overtaking the USA and outstripped only by Australia and New Zealand. In 2016, in absolute numbers the top countries issuing first permits for education purposes are France (72 853), Germany (35 339) and Spain (33 788)⁶²². In relative terms, France (31%), Hungary (34%), and Romania (33%) are the countries where new student permits represent largest share of all first-time permits. The top nationality of international students admitted to EU-28 is Chinese (approx. 25%) followed by India, Turkey, Russia and Ukraine⁶²³, whilst the top countries of origin for EU-25 is China, Ukraine and the USA (in 2016). A positive trend can be observed as students from Asia and Latin America choose the EU as a destination much more frequently than 10 years ago. This mirrors the growing importance of these countries in the global context. The preferred field of study is social sciences, business and law.⁶²⁴

OECD research shows that geographical proximity, historical ties and language similarities seem to contribute in a substantial way to international students' country of destination preferences.⁶²⁵ From a language perspective, over the recent years, universities and higher education institutions in the EU have begun to provide academic courses in English as well as

622 The Member State that admits the highest number of students (since their reporting began in 2012) is the UK, that is not bound by this Directive, and hence not analysed in this Fitness Check but UK data are included in the OECD studies.

623 OECD and EU, *Recruiting Immigrant Workers: Europe 2016*, (2016). This however includes data for the UK.

624 Weisser, R., 'Internationally Mobile Students and their Post-graduation Migratory Behaviour: An Analysis of Determinants of Student Mobility and Retention Rates in the EU', OECD Social, Employment and Migration Working Papers, No. 186, OECD Publishing: Paris, 2016, <https://www.oecd-ilibrary.org/docserver/5jlwxvmb5zt-en.pdf>

625 ibid.

in their own national language. By offering courses in English, it is hoped to attract international students and this is particularly the case for those Member States wishing for students to remain on their territory following graduation. Though speaking the national language may not be a prerequisite for studying in the Member State, it is considered vital for successful integration in the national workforce and in society.⁶²⁶

4.2.4 Degree of achievements of the objectives (EQ 5)

Both Directives have been well implemented and cover all, or a very large proportion of the third-country nationals admitted for the purpose of study and research. Some optional categories (pupils, unremunerated trainees, volunteers) under the SD have however been covered to a lesser extent. The Commission identified a number of shortcomings and lack of clarity in the application of the Directives, for instance coherence with the SPD, and therefore proposed a recast and streamlining of the two Directives, which was adopted as the S&RD in 2016.

The number of researchers and students admitted to the EU has increased significantly since the adoption of the Directives in 2004 and 2005, which corresponds well to the objective of attracting talent to the EU. Retention rates of students after studies are however relatively low.

Both EU and national level, efforts have been undertaken to attract international students and EU is performing well as an attractive destination although this varies across Member States. It is very difficult to establish the extent to which "mutual enrichment" has been achieved. Numerous programmes and initiatives have been put in place to facilitate cultural exchange, including through bilateral agreements and mobility programmes. Important factors to facilitate cultural exchange include language knowledge, intensity of exchange between the international students and fellow students and local population and to a lesser extent duration of stay.

EU mobility programmes have been effective in opening up opportunities to students from third countries, not only to study in a single EU Member State, but to move to other Member States to access further programmes of study. In addition, Member States operate a range of national programmes that encourage mobility of international students who wish to continue or complement their studies in different Member States, in line with national objectives.⁶²⁷

4.2.5 What can be attributed to the Directive (EQ6) & what can be attributed to other factors (EQ8)

It is difficult to establish a causal link between the adoption of the SD and the quantitative increase of students to the EU. The increase over time observed above may be due to some external factors – such as the image and quality of education in the EU Member States - and is consistent with the increase of number of students studying abroad worldwide. The growing economic strength of sending countries such as China has contributed to the increase of the number of students admitted. Historical and cultural ties, notably language, between sending and hosting country play a role.

626 European Migration Network (EMN), Study 2012, Synthesis report - Immigration of International Students to the EU EMN, (2012).

627 ibid.

Most Member States had already admission schemes in place which did not significantly differ from the EU status. The SD did not add additional substantial benefits that could have served as an attraction factor. Whilst the numbers of permits issued has increased steadily since 2008, it is not clear that the SD alone has contributed to the quantitative increases in the numbers of permits issued.

Also for RD there has been a gradual increase in the number of researchers admitted to EU Member States since the adoption of the Directive, but also the causality link between the Directive and the trend cannot be clearly proven.

Both Directives have however been well implemented and admission conditions and rights have contributed to harmonisation of the admission schemes, improved equal treatment and procedural rights.

External factors that influence the achievement of the objective of admitting third-country students and researchers with the aim of enhancing the knowledge economy and creating a centre for excellence of studies depend also on external factors like strength of the economy, and possibility to remain and seek employment. The latter factor was addressed by the recast S&RD.

4.3 Facilitating and promoting intra-EU mobility

4.3.1 Context

Provisions on long-term intra EU-mobility (moving to settle in a second Member State) exist in the LTR, the BCD, the SD and the RD. They also exist in the more recent ICT and the S&RD, however these are not subject to this evaluation as the effects cannot yet be measured.

Intra-EU mobility measures contribute to the overall objectives of **EU's competitiveness and economic growth** (by enabling an adequate distribution of the foreign workforce in the single market though the mobility of third-country workers and TCNs moving for other purposes like study). The rules for intra EU mobility also contribute to and are supported by the overall objectives of **establishing a level playing field for effective management of migration flows** (for intra-EU flows) and also **fair treatment** (in the application procedure and rights related to residence, stay and work).

The relevant provisions related to **long-term** are:

- rights for the TCN (right to reside in the 2 Member States for the purpose of work, vocational training, study and other reasons).
- accumulation of residence time for being granted LTR status (BCD),
- specific rights for family to move, including right to employment (LTR, BCD),
- defining the role of the second Member State (the new Member States where the TCN seeks residence, procedures, conditions to grant right to residence and work) as well as the role of the first Member State (in case of expulsion, from the second Member State).

In relation to **short-term mobility** (the right to temporary stay in other Member States) this is partly regulated via the Directive in the sense that if the TCN holds a permit issued in a Schengen Member State, the TCN can move freely between other Schengen Member States if the stay does not exceed 90 days in any 180 days, without needing a visa for that other

Member States. This is further analysed in the sections related to coherence with the Schengen and Visa *acquis*⁶²⁸ and the situation of highly mobile workers⁶²⁹.

A number of concerns were noted regarding intra-EU mobility, mainly linked to issues of internal coherence⁶³⁰ among the Directives whereby it is found that only the newer Directives (ICT, SRD) include real facilitation, whilst the older Directives (LTR, BCD) provisions are still rather administratively heavy, that some optional conditions differ (e.g. sufficient resources) and that notification mechanisms differ. The external coherence analysis found that relevant external policies relate to cross border coordination of social security, exchange programmes for study, and coherence with visa and border policy.

4.3.2 Baseline

At the time of proposal and adoption of the first Directive introducing intra-EU mobility measures (LTR), there were no specific provisions to facilitate intra-EU mobility. Third-country nationals wishing to move to other EU Member States had to apply based on the same conditions and procedures as if applying from outside the EU.

There are no quantitative information on volumes of intra-EU mobility at the time of the proposal, but in the proposal it is stated that "*third-country nationals holding a residence permit do not currently have the right of residence in another Member State. The Schengen acquis merely gives them the right to move for up to three months in the Member States where the Schengen acquis applies. [...]Consequently, third-country nationals wishing to settle in another Member State will have to go through all the formalities imposed on first-time immigrants and will not be eligible for favourable treatment, even if they are long-term residents in a Member State.*"

The 2001 proposal for the LTR Directive furthermore stated that it intended to complement other proposals then under negotiation on extending coordination of social security between Member States also for third-country nationals, on providing cross-border services and on the posted workers, as well as the proposal to recast Free movement Directives for of EU citizens. Intra-EU mobility was therefore and important context for the instrument⁶³¹.

Data available on the flows of TCNs between EU Member States at the time of adoption is not available. In theory data on intra-EU mobility should have been reported for the BCD since 2012, but very limited data has been recorded (by DE only and in very low numbers).

4.3.3 Observed effects (EQ7)

The legal implementation analysis showed that few Member States have provided for additional facilitations to the procedures and documentation requirements for mobile third country nationals. When applied these include, for example, shorter application processing times, an exemption from need to provide proof of sickness insurance, as well as exemptions from integration measures, proof of accommodation and labour market tests.

628 Annex 5.2.2 (External coherence, Visa, border management and large IT-systems).

629 Annex 6.9 (Detailed relevance analysis, Transport workers and other highly mobile workers).

630 Annex 5.1.6 (Internal coherence, Intra-EU mobility).

631 COM (2001) 127 final of 13.3.2001. Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents.

As regards the extent of the effective uptake of the provisions on intra-EU mobility, data is very still limited. The reporting of the previous Member State of residence should in principle be reported for the BCD, but very limited data has been reported since 2012.

A 2013 EMN study found that reliable statistics are very limited on the number of third-country nationals holding BCD, LTR, RD or SD permits that have made use of the provisions on intra-EU mobility as foreseen in the relevant Directives, since the data on the previous country of residence was not systematically collected for Eurostat reporting in relation to residence permits. According to (partial) data from EMN⁶³², the intra-EU mobility rights provided by the Directive seem to continue being underused. It is therefore difficult to assess the extent of the use of these provisions. The study however revealed that between 1.2 % and 3.7 % of all mobile persons are third-country nationals, i.e. less than the share of third-country nationals in the entire population (4 %). Third-country nationals furthermore mainly move to neighbouring Member States. This pattern would be consistent with intra-EU movements of EU citizens, such as service providers. Where statistics are available, it appears a large share of mobile TCN is highly-qualified (France: 30 %) and/or moves for the purposes of highly-qualified work (The Netherlands: 44 %). Calculations by the OECD using EU Labour Force Survey data (Eurostat) confirm that intra-EU mobility of tertiary-educated third-country nationals is significantly higher (2.5 to 4 times over the period 2008-2012) than mobility of third-country nationals as a whole.⁶³³

Other studies find that in several Member States, migrants are more likely to move in response to labour market opportunities than natives, which implies that mobile TCN could help meet specific labour market needs and respond to labour market changes. Research found a positive causal effect between long-term resident TCN (and naturalised TCN) statuses, which confer greater opportunities for mobility within the EU, and TCN mobility, with third country long-term residents being 5% more likely to be mobile than TCNs without the status. The study suggested that the fewer the legal and the practical constraints faced by other migrants living in the EU, the higher the likelihood that they will engage in intra-EU mobility⁶³⁴. This implies that mobility is only facilitated if it does not lead to a reduction of the rights they acquire in the second Member State.⁶³⁵

The legal implementation analysis of relevant Directives, found that the facilitation mechanisms were in general transposed for the different Directives, however, the following concerns were raised:

- SD: The 2011 implementation report⁶³⁶,⁶³⁷ show that Member States applied the same general conditions and procedures as for initial admission, without the specific

632 European Migration Network (EMN), Study 2013, Synthesis Report - Intra-EU mobility of third-country nationals.

633 DELSA/ELSA/MI (2015)5, *Mobility of Third-Country Nationals in the EU: the Role of Long-Term Residence and Naturalisation*. Figure 1 — Mobility rates of third-country nationals and EU citizens, 2008-2012. Jonathan Chaloff and Friedrich Poeschel.

634 Poeschel, F. *Raising the Mobility of Third-Country Nationals in the EU. Effects from Naturalisation and Long-Term Resident Status*, (2016).

635 ICF (2018) Annex 4C: Economic analysis.

636 COM(2011) 587 final of 28.9.2011. Report from the Commission to the European Parliament and the Council on the application of Directive 2004/114/EC on the conditions of admissions of third-country nationals for the purpose of studies, pupil exchange, unremunerated training or voluntary service. (First implementation report).

provisions on student mobility therein. Queries to the Commission also revealed that additional rules on visa often made it difficult for third country students to effectively exercise their right to mobility. The obligation for the first Member State to provide the second Member State with information was not transposed in all Member States and such information was rarely requested.

- RD: The 2011 implementation report found that the mobility requirements had been incorporated into the national laws in 17 Member States. In other Member States the implementation was found to be not explicit, in that no new permit is needed in the second Member States if the researcher holds a permit in the first Member State. The report found that this could lead to legal uncertainty.⁶³⁸
- LTR: The 2011 implementation report⁶³⁹ showed that many Member States apply labour market tests and quotas to LTRs arriving from other Member States and that other conditions are applied to the extent that intra-EU mobility facilitation is limited compared first admissions. The 2018 implementation report shows that 13 Member States still apply the optional labour market tests, all apply the option to require stable and regular resources, a few Member States require additional documentation for family member and 11 have extended the kind of family members who may join beyond the spouse and minor children⁶⁴⁰. In some cases the exercise of this right is subject to as many conditions as the ones for a new application for a residence permit. The competent national administrations do not have enough knowledge of the procedures, or they find difficult to cooperate with their counterparts in other Member States.
- BCD: The first implementation report⁶⁴¹ found that an EU Blue Card holder who wants to move to another Member State after 18 months of legal residence in a first Member State must apply for another EU Blue Card in the second Member State. In practical terms, this means that in many cases a full new assessment of whether the Blue Card holder meets the conditions is carried out in the second Member State. Salary thresholds and admission conditions vary across Member States, but it was also found to be too early to evaluate mobility, since it requires 18 months of residence in the first Member State.

A number of complaints submitted to the Commission, has also highlighted that the acquisition of the right is not automatic but subject to a number of detailed conditions; those conditions and the strict implementation from most of the Member States often make the exercise of this intra-EU mobility right very difficult in practice. Evidence from complaints also showed that there were problems in relation to incorrect formats, whereby a second Member State refused to recognise EU LTR permit and therefore refusing intra EU mobility,

637 COM(2011) 901 final of 20.12.2011. Report from the Commission to the Council and the European Parliament on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research. (First implementation report).

638 The issue of intra-EU mobility has been improved and clarified in the recast SRD, which at the time of writing is subject to legal analysis by the Commission.

639 COM(2011) 585 final of 28.9.2011. Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents. (First implementation report); second implementation report COM(2019) 161.

640 COM(2019) 162.

641 COM(2014) 287 final of 22.5.2017. Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment. (First implementation report).

due to first Member States not using correct texts, and subsequent investigation led to a resolution of the situation.

The Impact Assessment for the revised BCD found that intra-EU mobility, both longer term but also shorter term, is very important for business operating at the EU level. Compliance issues (with visa and permit regimes) are important, processing times for approval of visas and permits can be substantial, and that all companies use external or internal legal expertise to manage the process. Examples of views expressed by business are that "the lack of harmonised processes and set of documents recognised all over the EU Member States, as well as the lack of mutual recognition of documentation, increases the administrative burden for companies". A survey among EU Blue Card holders by the German BAMF showed that 87.4 % of respondents consider visa-free travel and the possibility of moving to another Member State important. 66.6 % would consider an extension of the possibility for easy "short-term" mobility to 12 months useful, another 27 % simply do not know if this could prove useful, but very few oppose this.⁶⁴²

In terms of practical application, the study found that the envisaged facilitation of the procedure, compared to the first entry, that the Directives introduce, has not always materialised. With regard to permits for work, the majority of Member States apply the same procedure for intra-EU mobility as for first time applicants, although less so for BCD and LTRD⁶⁴³. In terms of the documents needed, again, in the majority of Member States there is no difference between first time applicants and mobile third-country nationals. Regarding the LTRD, mobile third-country long-term residents in some Member States are required to submit additional documents compared to the Directive's requirements concerning initial admission.

The optional clauses in the respective Directive have been applied by Member States to a varying degree:

- RD: 19 Member States have transposed more restrictive may clauses under Article 13(3) requiring the TCN to have a new hosting agreement for a researcher staying in another Member State for more than three months, which might restrict the ability of researchers to stay longer in another Member State and impact the relevance of the Directive to meet the objective of enhancing intra-EU mobility.
- BCD: 14 Member States have transposed more permissive may clauses enabling the TCN to launch an application for another Blue Card while still residing in the first Member State (Art.18(3)), and 17 have transposed the may clause on issuing a temporary permit in cases the BCD expires during the procedure (Art.18(5) thus providing conditions for easier intra-EU mobility. However, 14 Member States have transposed the more restrictive may clause in Article 18(6) holding the applicant and/or the employer responsible for the costs of return, if necessary. These might inhibit the ability of the Directive to respond to needs of stakeholders for facilitated intra-EU mobility.
- LTRD: 12 Member States have transposed Article 14(3) enabling Member States to give preference to EU citizens in their labour markets, as well as to third-country nationals

642 SWD(2016) 193 final of 7.6.2016. Commission Staff Working Document. Impact assessment. Accompanying the document: Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing the Directive 2009/50/EC, Annex 9.

643 Annex 8, table 7. ICF (2018), Annex 2A and 2B.

already residing in a Member State compared to third-country nationals entering the Member State, de facto having a negative impact on the intra-EU mobility and the ability of the LTRD to meet this objective.

All Member States, and for most of the permits, allow family members to accompany the permit holder as first time applicants in order to obtain residence or work permit. The BCD includes positive derogations from the FRD in terms of the spouse's right to accompany the BCD holder and his/her right to work. This should have a positive impact on the attractiveness of the EU scheme, compared to the national schemes for highly qualified workers, nevertheless the relative share of BCD compared to national highly qualified schemes remains low.

In consultation⁶⁴⁴, different views were expressed on the effects of the intra-EU mobility provisions. Some Member States considered the current measures adequate, others expressed the view that there is insufficient support to effectively communicate between administrations. In the OPC and according to civil society, it appears that third-country nationals who are seeking to move to a second Member State – especially those who wish to move permanently – face a number of challenges in doing so, ranging from the lack of information provided from official sources to the lack of transferability of their social security benefits. For instance, when it comes to students, the non-uniform regulation across the Member States results in different time thresholds as to how much time TCNs can spend abroad for exchange programmes. Other obstacles identified according to the main study are challenges to find a job in the second Member State, problems in getting qualifications recognised, the duration of the procedure to get a new permit and uncertainty in that process, and high costs.

The consultation for the proposed recast SRD also highlighted the importance of intra-EU mobility for both students and researchers and the need to improve the compatibility with the intra-EU schemes like Erasmus and Marie-Curie Fellowship. It furthermore found that acquisition for a visa to enable moving between Member States was a major issue related to intra-EU mobility, in cases where such a visa was needed.

4.3.4 Degree of achievement of the objectives (EQ5)

The objective of facilitating and promoting intra EU mobility has partly been met. Procedures and rights have largely been introduced, but some implementation choices made by Member States such as labour market tests before the TCN is granted the right to reside for employment purposes, and restrictions in the right to work for family members during the first 12 months make the intra-EU mobility less attractive. The practical effects show that the procedures do not differ much between the first entry into the Member States and when moving from one Member State to another.

Key problems are lack of information about intra-EU mobility possibilities, lack of communication between Member States, additional documentation required in comparison to the requirements. Third country nationals also refer to difficulties in finding a job in the second Member State, recognition of qualifications and high costs as obstacles to intra-EU mobility.

644 Annex 2. ICF (2018) Annex 3A and B.

There is insufficient data to measure the actual uptake by third-country nationals of the possibility to use long-term intra-EU mobility, due to the lack of reporting to Eurostat of comparable EU wide data in terms of residence permits issued showing previous country of residence⁶⁴⁵.

The specific objective to facilitate and promote intra-EU mobility for the purpose of supporting the economy with better distribution of the labour force across the EU has therefore not been fully achieved.

4.3.5 What can be attributed to the Directive (EQ6) & what can be attributed to other factors (EQ8)?

The right to long-term intra-EU mobility did not exist prior to the introduction of the Directives, nor did the facilitated procedures, and have been introduced by the relevant Directives. The Directives however allowed a number of options to be applied that have made intra-EU mobility less attractive, such as lack of access to the labour market for family members the first 12 months, the application of a labour market test before right to residence for the purpose of work is granted, stringent requirements on resources.

Some practical obstacles to effective intra-EU mobility derive from the Directives due to some implementation choices made by Member States such as requiring similar documentation, conditions and similar procedures for application in a second Member State as compared to first admission. Intra-EU mobility is also hampered by a lack of information about possibilities for TCNs, knowledge and information exchange in and between Member State authorities.

There are other **external factors** also influence intra-EU mobility, some that are linked to other EU policies and developed further in other parts of this assessment, notably:

- Difficulties in finding employment in a second Member State. Instruments like EURES that facilitates cross-border EU job seeking have been introduced to facilitate free movement for EU citizens, but this instrument is not fully available for third-country nationals⁶⁴⁶.
- Well-functioning transfer of social security benefits between Member States makes intra-EU mobility more attractive. This is regulated by Regulation 883/2004 that has been extended to also cover third-country nationals.
- There are gaps in terms of regulation at the EU level of the recognition of qualifications obtained outside the EU and gaps in relation to equal treatment with nationals in this context in the application phase.

Other **external factors** that influence the effectiveness of the measures are the overall economic situation and the situation on the different national labour markets, and the degree to which Member State have recovered from the economic crisis in the reference period impacts the degree to which intra-EU mobility takes place.

645 Note that other potential Eurostat datasets do not allow to solve this data gap: immigration and emigration data by next/previous country of residence is not broken down by group of citizenship (and vice-versa) and EU-LFS data indicating country of residence one year before does not cover all EU countries and is biased (i.e. largely under-estimates mobility) due to small chance of recent (i.e. <12 months) movers to be part of the LFS sample.

646 Annex 5.2 (external coherence).

ANNEX 8: ASSESSMENT OF PRACTICAL IMPLEMENTATION BY MIGRATION PHASE

The present Annex is based on national research carried out by national researchers commissioned for the purpose of Task II by the Commission's contractor ICF International. The national research has been undertaken on the basis of literature review and desk research as well as interviews with national authorities and other stakeholders involved in the legal migration process, complemented with information from conformity assessments studies⁶⁴⁷, citizens' complaints and other relevant sources made available to the Commission. Tables setting out how Member States have implemented the optional provisions of the Directives are included at the end of the relevant sections.

1. Phase 1. Pre-application (information) phase

The “Pre-application: Information phase” is the first ‘preparatory’ phase during which the third-country nationals and their family members seek information on the application procedure before subsequently launching their application. It examines the availability and usefulness of information about migration procedures and conditions.

There are different provisions on the information obligations in the legal migration Directives but most of the Directives require that the Member States ensure access to adequate information upon request to the third-country national and the future employer on the documents required for making a complete application. In addition the Directives require that Member States make available regularly updated information on the conditions for admission and residence to the general public.

ICF researchers examined the easiness of finding the information, the information channels and actors, the availability of information upon request, and the content of the information provided.

1.1 Easiness of finding the information

All Member States have websites providing information on legal migration channels to third-country nationals. Some of the websites, like in the Czechia and Romania, are considered very easy to navigate and obtain required information from. However the websites of some Member States⁶⁴⁸ are more complicated in terms of structure, which requires a certain level of computer knowledge and command of the Member State language and/or English, since most of the sites have also an English version. In others, like Belgium, the multitude of information makes navigation more difficult. In this regard, in Estonia and Luxembourg, difficulties are encountered with keeping the websites, or their English parts, up to date.

The websites usually contain information about most types of legal migration statuses contained in the Directives and their national equivalents. In Spain and Romania significant recent improvements have been noted regarding the provision of online information.

⁶⁴⁷ Conformity assessment studies were commissioned by the Commission for BCD, LTR, FRU, and SPD in 2010-2013. Earlier less detailed studies are available for SD, RD. These studies are not made available to the public, but MS specific summaries (ICF Annex 2B) provide references to key national legislation, and are also available via Eur-lex.eu.

⁶⁴⁸ BG, CY, LU, MT, PT.

All Member States, with the exception of seven⁶⁴⁹, also operate hotlines and half⁶⁵⁰ have information desks to provide information on the application procedures and requirements. In a number of those Member States⁶⁵¹, however, no dedicated hotlines are available, but rather options to contact authorities by phone via general numbers. This, as proven by the experiential questions below, may suggest that information given is potentially different or even contradictory, depending on which authority one contacts.

Information also can be obtained from NGOs active in the field of migration: NGOs are specifically mentioned as important sources of information in at least eleven Member States⁶⁵², with a varying balance between the numbers of foreigners served by NGOs and the State. In some Member States⁶⁵³ they also provide free-of-charge consultations in their offices, via phone or email.

In most Member States, it is easy to find websites and other information channels and to identify the required pieces of information. Many websites have good search engines and/or are clearly structured, although they are often limited to the Member State language and English. Finding information in Greece, Italy, Bulgaria (application forms on the Migration Directorate website, which is a sub-site of the Ministry of the Interior) and Malta (RD status) was considered more complicated. The difficulty of obtaining information in Bulgaria was confirmed by a Bulgarian-based migrant agency. Information is only available upon request (via email or phone), with an average response time of two weeks.

With regard to the level of detail of the information, in most Member States receive slightly less positive scores⁶⁵⁴, with information channels (and in particular websites) not being considered user friendly and/or easy to navigate. Specific complications have been identified with finding information in Member States like Greece, Italy, Bulgaria and Malta.

Access to information (it was measured by ICF researchers by whether a specific piece of information can be accessed in less than four clicks) is considered relatively good, although in Member States such as Bulgaria, Cyprus, Finland and Spain, more than four clicks where needed.

Respondents to the Open Public Consultation (OPC) were asked to provide their opinion on getting information about legal migration (including the availability of information about legal migration to the EU and about the rights and obligations related to legal migration). With regard to information provision, 46% (n=191) of respondents agree (to a very) large extent that it was easy to find websites/other sources with useful information about legal migration to the EU, while 52% agree to a small extent or not at all. The targeted consultations showed that third country nationals used for the information and applications the assistance of NGOs and law firms. Overall, the NGO websites which provide information about legal migration are relatively easy to find. In Austria, the guides for international students and researchers are cited as constituting a good practice.

⁶⁴⁹ CY, EL, FR, HU, PL, RO, SE.

⁶⁵⁰ BG, CY, DE, ES, FI, HU, IT, NL, PT, RO, SI, SK.

⁶⁵¹ EE, LV, SI.

⁶⁵² LV, PL, AT, BE, CY, DE, ES, FR, LT, HU, MT.

⁶⁵³ LT, LV, PL.

⁶⁵⁴ ICF researchers asked respondents experiential questions to mark their level of agreement with a certain statement on the migration process by providing a score from 1 to 5, with 1 meaning strong agreement and 5 meaning strong disagreement with the statement. (See Methodology of Task II Annex 2A of ICF Report).

A number of migrant agencies (from Belgium, France, and Poland) identified the lack of having a standardised system in place which provides information on the application procedure as one of the main problems which should be addressed by Member State authorities. The vast amount of information provided by authorities online is often too technical, incomplete, outdated or misleading (and/or not available in English). While clients (i.e. employers) of these respective migrant agencies may in some cases conduct initial web searches themselves, they tend to refer back to professional services for clarifications in order to understand for which route there prospective employee qualifies and avoid applying for the wrong category. Among the countries which provided information in a compact and easily accessible manner were primarily Scandinavian countries.

1.2 Information channels and actors providing the information

The bulk of information on the legal migration acquis throughout Member States is provided online, via the websites of relevant institutions (ministries, migration offices, employment agencies, etc.) but also by relevant NGOs and business associations. Hotlines and information desks are also available, but seem to be affected by understaffing and administrative capacity of authorities. In their countries of origin, third-country nationals mainly have access to online information, as well as information provided by embassies and consulates, but the quality and availability of these services vary substantially, depending on the number of representations, their capacity and their powers by law.

In most Member States, the main actors providing information on legal migration are the Ministries of Interior or their equivalents, as well as government agencies working in the field of migration (migration agencies / offices, educational cooperation agencies, employment agencies, integration centres, etc.). Embassies and consulates in the countries of origin of the third-country nationals play a significant role in providing information as well. Universities constitute a specialised source of information for students and researchers.

There are also a number of NGOs, which provide information on the migration acquis. At least in half of the Member States there are active NGOs, which can be contacted by the third-country nationals, since most of them provide free-of-charge consultation onsite, via phone or email.

1.3 Availability of the information upon request

For all Member States, except for France, information upon request is provided in the diplomatic or consular offices in the third countries, via telephone or email.

Problems reported regarding the general availability of information upon request/consultations, mainly cover overall administrative hurdles like long queues at information centres (Finland), linguistic barriers and limited opening hours (Belgium), delays in receiving of e-mail answers (Cyprus). Malta is the only Member State which does not operate an information desk at the relevant institutions (Identity Malta or Ministry of Foreign Affairs), although applicants can obtain basic information from the clerks at these institutions.

As regards the quality of information upon request, ICF researchers carried out a practical exercise by sending a request for information to the responsible authority in their Member State. It was reported that in 21 Member States the responsible authority sent a response, while in Greece, France, Malta and the Netherlands they failed to do so.

Concerning the time taken to receive the response, it took on average 3.5 days. However, in in Croatia, Italy and Spain the response was received after more than 10 days. Ten Member States provided the fastest responses, within one day.

With regard to the extent to which the responses were considered satisfactory, in just over half of the Member States which provided a response, the researchers considered this to adequately answer the question posed. The responses in nine Member States were considered either partially or entirely unsatisfactory. In Spain and Portugal, institutions redirected the researchers to another authority for information. In Poland the quality of responses varied depending on the authorities contacted, with some being exactly to the point, while another official asked for a call instead of answering the question. In Finland and Romania the information provided lacked comprehensiveness. In Finland, many aspects of the specific question were not covered, while in Romania the answers only referred to relevant legislative provisions.

As to the process for obtaining information, this was considered generally as user friendly.

Only 34% (n=190) of respondents to the OPC agree to a (very) large extent that it was easy to find websites/other sources with information on the rights and obligations related to legal migration and 61% agree to a small extent or not at all.

National languages and English prevail as languages in which information is given.

Little information on the distinction between EU and national schemes, when national schemes are in place.

1.4 Content of information provided

In all Member States the information regarding the application procedure is provided online. On some websites the information is presented in an overly legalistic way, or otherwise difficult to follow for third-country nationals.

In most cases, the procedure is reasonably well explained, but the websites do not contain sufficient additional information on important aspects such as supporting documents and recognition of qualifications (see Phase 2 below). Information on the application procedure can be obtained both in the Member States and from the diplomatic missions or consulate offices in third countries via e-mail, phone or in person.

All Member State institutional websites provide information on the **conditions for admission** of the different EU statuses, although missing on a few specific statuses in some Member States. For example, Malta provides no application form or any specific guidance on the RD.

Information on visa requirements can be mainly found on websites of foreign ministries, embassies and consulates.

Most of the websites have information about the **cost of the application (fee)**, or whether the application is free of charge. However, Belgium, Cyprus, Greece, Croatia and Malta form the considerable group of Member States not providing any information on the application fees for the BCD. Information is not provided on the costs for translations and certification of the required documents.

In sixteen Member States, the websites⁶⁵⁵ have information about all **applicable deadlines**, except where, like in Germany, there are no legally set timeframes. In France, only information on applicable deadlines related to the RD and the LTRD is available.

In twenty Member States⁶⁵⁶, the websites have information about the **rights upon admission**. The information on rights upon admission is sometimes also handed over with the residence document.

2. Phase 2. Pre-application (documentation) phase

This phase takes place when the third country national gathers the necessary information and documents required to prepare the application for a permit. The present section examines the time required to prepare the application and examines the information and documentation requirements on admissions conditions.

The rules on admission conditions vary across the Directives depending on the categories of third-country nationals covered by each Directive. Admission conditions that are common to all Directives include: proof of sufficient resources, sickness insurance, adequate accommodation and proof of address, proof of a valid travel document as well as conditions related to public policy, public security and public health and ensuring that there is no risk of overstaying and the costs of return are covered. Some of these provisions leave a significant level of discretion to Member States through the many 'may clauses' included in the Directives.

Two of the Directives examined (FRD, SD) require proof of accommodation, while the LTRD, and the BCD allow Member States to require the provision of an address in the territory of the Member State concerned. The FRD specifies that the accommodation should meet certain standards to ensure an adequate standard of living to the third-country national and the family members in the case of FRD. The FRD includes a further specification as to the type of crime and the level of danger emanating from the person. The LTRD specifies further when public health can be used as a ground for rejection.

Documents required for the application are harmonised in the SD, RD, BCD, and FRD but with 'may clauses' which allow Member States to add evidence/documents. Therefore the documentation required in Member States varies substantially. There are many different ways of proving sufficient resources and not being a threat to public policy or public security. Spain can sometimes require DNA tests to prove family links.

Two Directives (FRD and LTRD) stipulate that Member States may require compliance with integration 'measures' or 'conditions'.

2.1 Time required to prepare the application

The average estimated time required to complete the forms for Member States is between 1 hours and 3 hours, depending on the Member State and the type of application.

The average time required to obtain the supporting documents which have to be provided together with the application is around 3-5 business days, however for the work-related permits under the BCD and the SPD it is around 10 business days, probably due to the detailed data to be supplied on the employer, the post, and the preparation of work contracts/binding job offers, etc.

⁶⁵⁵ BG, CZ, DE, EE, ES, HR, HU, IT, LT, LU, LV, NL, PL, RO, SI, SK.

⁶⁵⁶ AT, BE, BG, CZ, DE, EL, ES, FI, HR, HU, IT, LT, LU, NL, PL, PT, RO, SE, SI, SK.

When translation, authentication and apostille are required, the time needed may be up to one month.

2.2 Information requirements

As regards extensiveness of the information required to be filled in in the application form, in most Member States, the information that applicants need to complete is not considered as overly extensive. In some Member States, problems were identified with regard to specific Directives. For example, the BCD, RD and SPD in Bulgaria, requires extensive information about employers/research institutions, and the FRD, RD and LTR in Finland, includes extensive tax and employer information for the LTR and extensive information on previous marriages for the FRD. Among the national equivalent statuses, SD and RD equivalents receive relatively worse scores.

As to the relevance of the information required, Poland and Finland score negatively, as a considerable amount of the information they requires is considered as not relevant. National equivalent statuses score relatively more negatively.

With regard to the ease for applicants to complete application, issues were identified in the Czechia, Spain, Finland, Lithuania and Luxembourg. In the Czechia, the questions in the application were not considered clear by the researchers and the format of the application does not seem adequate, because most fields are not long enough to fit in the required information. In Lithuania, no guidance is available on how to complete the form and the required additional information. In Luxembourg, the application form is only available in French. In Finland, the questions were again considered unclear and potentially misleading. National equivalents score overall worse than EU statuses.

As to the user-friendliness of the application forms, the relevant information is not always easy to find. The Member States' guidance, provided to complete the forms, is considered not good/clear enough despite various online and offline channels. Negative scores are found in Austria, Belgium, Bulgaria, Cyprus, Czechia, Spain, Finland, Lithuania, Malta, Poland and Slovakia where either no guidance appears to be provided or it is provided in an inconsistent and or unclear way. Despite the fact that all but one Member State⁶⁵⁷ reportedly allow for online applications, full online availability and submission of forms is actually only available in four countries, namely Finland, Italy, for some statuses in the Netherlands (linked to the possession of a digital identity account) and Romania.

A single application is most often offered under the LTRD, followed closely by the RD, SPD and SD which can still however cover different elements to be filled in by different actors. No major difference were noted between EU and national equivalent permits. Where multiple applications are required, these usually cover the application for the permit itself, the visa and/or permits to reside / work depending on the permit. With regard to access to the labour market, the FRD links it to the rights of the sponsor and allows for additional limitations during the first 12 months. In other Directives (BCD, SPD mobile LTRS) access to the labour market is subject to an optional labour market test. Details of these optional tests at national level are not regulated by EU law and applicants are faced with a variety of differing national procedures, which may also have an impact on the length of the overall procedure and the time limits set by the Directives. For example with regard to the SPD, in Latvia a separate registration of the invitation by the employer is required, in Romania a pre-authorisation of

⁶⁵⁷ BG.

the right to work is required and in Bulgaria, the employer has first to apply to the Employment Agency. Other Member States require registration with social security schemes (e.g. Spain) or health bodies (Luxembourg).

2.3 Admission conditions and documentation requirements

The documentation requirements for the applications under the various Directives appear to be generally in line with documents listed in the directives required for admission.

The bulk of the documentary evidence required under the **family Reunification Directive** serves to prove the family ties, including marriage certificates, birth certificates, certificates of paternity, proof of legal custody, adoption papers and where relevant, death certificates.

In Spain, Italy, Belgium and the Netherlands, DNA tests may be required and at least in Belgium requests for such tests are made more and more frequently. This raises application costs and timelines substantially.

Another practical application issue may occur in Poland, where marriages must be recognised by local law, which in most cases excludes, in addition to polygamist and purely religious marriages, also same-sex marriages and in Cyprus, where spouses should be married for at least one year.

Spain requires again proof of family relations as part of the visa application process for the family member to enter the Member State. This may place a disproportionately high burden on the applicants and could be not in line with the obligation to grant family members every facility to obtain visas.

Originals and/or certified copies, as well as translations into the national language of documentation proving family relationship are universally required.

Proof of sufficient resources is the second most required type of evidence. Member States have different approaches to establishing this, ranging from employment contracts⁶⁵⁸, pay slips⁶⁵⁹ to bank statements⁶⁶⁰ for a period of 6 to 12 months, tax returns⁶⁶¹, going back for up to the past 3 years, etc. Practical application issues were identified by ICF in the Czechia, Latvia, Spain, Portugal and Bulgaria, where the minimum income is to be proven in absolute figures (e.g. expressed as minimum wages/pensions) and not reference amounts. The Netherlands recently decided to shorten the period covered by the examination of income from three to one year, but the relevant legislative amendments are still to be made.

Proof of adequate accommodation is required in all but four Member States⁶⁶². Private sickness insurance of sufficient coverage/sickness as part of public social security coverage for the sponsor and family members, usually for the duration of the permit, is required in all but six Member States⁶⁶³. Notably, in almost half of the Member States, the application cannot be lodged without this proof.⁶⁶⁴

⁶⁵⁸ CY, ES, DE, FI, LT, NL, PL.

⁶⁵⁹ BE, IT, LU, DE, ES, NL, PT

⁶⁶⁰ BE, PT, CY, CZ, EE, ES, FI, HU, LT, LU, NL, PT, RO, SI, SK.

⁶⁶¹ CY, ES, FI, IT, LU, NL, PL, PT, RO, SI.

⁶⁶² FI, HR, NL, SL.

⁶⁶³ FI, FR, NL, PT, SE, SK.

⁶⁶⁴ AT, CZ, ES, FI, FR, IT, LT, LU, NL, PT, SE, SL, SK.

Pre-integration measures, usually in the form of language diplomas, are required in only five Member States⁶⁶⁵, but are also being planned in Belgium.

Ten countries⁶⁶⁶ require proof that the applicant has acquired the required period of residence (residence permit of one year or more), while eight⁶⁶⁷ require proof, optional and limited back to two years as per the Directive, that the sponsor has lawfully stayed in their territory for a certain period. The low numbers may be explained by fact that this information in the other Member State can be obtained directly from their administrative databases.

Fifteen countries require proof of not constituting a threat to public policy or public security, while eight⁶⁶⁸, including criminal records. Eight Member States⁶⁶⁹ require a certificate for medical examination. The translation of relevant documents is required by all Member States, mostly in the national language although some, may also accept documents in English and, more rarely, in other languages. Besides Cyprus, where Blue Cards have not been issued, all reviewed Member States but Spain require a work contract or a binding job offer. Spain requires proof of (future) income.

Proof of sickness insurance is also required in the majority Member States, with only seven not explicitly requiring this⁶⁷⁰. As a work-related permit, BCD pre-supposes a work contract/job offer, under which health insurance will be provided, so public statutory/private insurance should only cover the period before starting/out of work.

Around half of the Member States under examination⁶⁷¹ require proof of not being a threat to national security and proof of address on the country's territory, with the exception of five⁶⁷² Member States.

Proof of fulfilment of conditions for regulated professions is not required by four Member States⁶⁷³. The type of proof to be provided varies between Member States. The majority of countries also require proof of qualifications also for unregulated professions, while just four Member States do not request this documentation⁶⁷⁴. Italy is considered to apply stricter requirements towards foreigners' qualifications, requiring both higher professional qualifications and these qualifications to be relevant in order to be admitted as highly qualified worker - which may pose a practical issue. Austria, Estonia, France, Greece, Lithuania, Luxembourg, Sweden are the countries that offer the possibility for migrants to prove that there are highly qualified only by professional experience.

Most of the Member States require an application for visa, if the person is a national of a state where a visa requirement exists, or a document proving that the person resides legally in the country, while eight⁶⁷⁵ of them do not require such documents. Thirteen⁶⁷⁶ Member States require a valid residence permit or national long-term visa, where needed.

⁶⁶⁵ AT, DE, FR, IT, NL.

⁶⁶⁶ AT, BE, EL, ES, FR, IT, MT, PL, NL, RO.

⁶⁶⁷ AT, CY, CZ, ES, FR, HR, NL, RO.

⁶⁶⁸ BG, FI, FR, HU, IT, MT, RO, SE.

⁶⁶⁹ BE, CY, CZ, ES, IT, LU, NL, RO.

⁶⁷⁰ FI, FR, IT, LU, NL, RO, SK.

⁶⁷¹ AT, CZ, DE, EE, EL, HR, LT, LU, LV, PL, PT, SI, SK.

⁶⁷² EL, FI, NL, SE, SL.

⁶⁷³ AT, HU, IT, ES.

⁶⁷⁴ AT, DE, ES, SE.

⁶⁷⁵ EE, HU, LT, LV, NL, PL, SL, SK.

⁶⁷⁶ BE, CZ, ES, FI, FR, HU, LT, MT, NL, PL, PT, SE, SK.

Out of the eleven Member States, considered to have a national equivalent BCD status, eight⁶⁷⁷ require a valid work contract or binding job offer. Belgium, Sweden, and Portugal, while requiring this under the BCD, do not require this documentary evidence for their national status. Obtaining national equivalent status is reported to be expedited in Malta, while in other Member States having such status, the deadlines are similar to those for the BCD. In addition, in Austria, Belgium, Italy, the Netherlands, Portugal and Sweden the income threshold for the national status is lower than the one for the BCD or non-existent, which means that often the national permit is more attractive to both third-country nationals and their sponsors. Estonia, however, has a higher income threshold for its ‘top specialist status’, but requires no proof of professional qualifications or labour market test. Italy does not require evidence of professional qualifications either.

However, BCD equivalent permits throughout the Member States have more unfavourable stipulations in a number of aspects. By way of example, in Estonia, ‘top specialists’ are not allowed any periods of unemployment. Malta only allows contracts under the KEI scheme for three consecutive years.

Six Member States require attestation of fulfilling conditions for regulated professions.⁶⁷⁸ A little under half of the countries⁶⁷⁹ require proof of higher qualifications for unregulated professions. Notably, in contrast to the BCD status, only a few countries⁶⁸⁰ require proof of sickness insurance.

Directive 2004/114/EC studies, pupil exchange, unremunerated training or voluntary service: While all Member States require a valid travel document, four Member States⁶⁸¹ have stipulated a minimum length of validity of these documents.

Parental authorisation for minors is also generally required, with in just five⁶⁸² Member States this is not a requirement. Although parental authorisation is not a requirement, in Hungary, the application must be signed by the legal representative of the minor applicant, while in Poland an application is to be submitted by the parent(s) or guardian(s) appointed by the court who stay legally in the territory of Poland.

Proof of sickness insurance is required by all but four Member States⁶⁸³, but the time limits for providing such proof vary. In the Netherlands, for example, third-country nationals are required to take out health insurance within four months after a positive decision on their application for a residence permit, while in Slovakia sickness insurance shall be provided upon 30 days after collecting residence permit and in the Czechia, in the event of positive decision upon an application, a health insurance is presented as from the date of entry. In contrast, countries like Austria, Bulgaria and Germany require health insurance to be submitted with the application.

Translation is of lesser significance since student documents are usually issued by a national entity. Nevertheless, all documents in a foreign language must be officially translated. Documents must be submitted either initially, or afterwards, after a deadline posed by authorities (see exceptions for health insurance above).

⁶⁷⁷ DE, EE, ES, IT, LT, MT, NL, SE.

⁶⁷⁸ BE, DE, ES, FR, MT, PT.

⁶⁷⁹ BE, ES, FI, FR, MT, PT.

⁶⁸⁰ AT, DE, EE, ES, LT, MT.

⁶⁸¹ BE, CY, ES, SI.

⁶⁸² HU, IT, NL, PL, SI.

⁶⁸³ BE, EL, NL, SK.

Regarding students, acceptance in a higher education institution is required in all Member States, as well as evidence of means of subsistence via declarations by sponsors/parents/higher education institutions, bank statements, etc. Notably, only four Member States require sufficient knowledge of the language of the course and six require evidence of paid fees⁶⁸⁴.

Out of the 18 Member States which also apply the SD to pupils, eight⁶⁸⁵ require proof of age. All 16 countries require evidence of acceptance by a secondary education establishment, which can consist of a statement from the school or relevant state authority, a certificate of acceptance from the education institution, etc. Three Member States do not require evidence of participation in a recognised pupil exchange scheme programme⁶⁸⁶, while five⁶⁸⁷ do not require evidence that the organisation accepts responsibility for the pupil. Proof of accommodation throughout the pupil's stay proves to be another key requirement, with just four Member States not explicitly requiring this⁶⁸⁸.

Seventeen Member States⁶⁸⁹ require some form of proof of not constituting a threat to public policy or public security.

Of the 17 Member States having transposed the SD for trainees (Greece has only done so partially) only two⁶⁹⁰ are not requiring a signed training agreement. The required documents can consist of a declaration/confirmation by the organisation, a liability declaration, or a contract of traineeship for the position of a trainee. In Poland, a training contract with an officially acknowledged professional training company or institution is required. In some cases, the German Federal Employment Agency must approve that there are no German candidates or candidates from a privileged country (such as an EU country). Again, almost all Member States, with the exception of Sweden, require evidence of sufficient resources to cover subsistence, training and return travel costs. The required documents can include bank statements of the applicant or statements by the bank that sufficient funds are available, income declarations of the parents or legal guardian, etc. In Cyprus a personal bank guarantee to cover the applicant's repatriation expenses or a bank guarantee by the public/private business organisation is also required, which may be rather burdensome. Depending on the Member State, the minimum amount which is considered "sufficient" ranges between 400 and 850 EUR per month. No country was found to require evidence of basic language training.

SD volunteer provisions have been transposed by 15 Member States, and all require a voluntary service agreement, while two thirds require evidence that the volunteer organisation accepts full responsibility for the volunteer. No Member State was found to require a basic introduction to the language, history and structure of the Member State.

Austria, the Czechia and Spain have equivalent SD national statuses.

In Austria an application for D visa is required instead of proof that have been accepted by an establishment of higher education to follow a course of study.

In Czechia and Spain a certificate of study or similar document is required.

⁶⁸⁴ BG, CY, ES, PL, PT, SE.

⁶⁸⁵ AT, CY, HR, IT, LU, PT, RO, SE.

⁶⁸⁶ PT, SE, SL.

⁶⁸⁷ DE, LT, PT, SE, SL.

⁶⁸⁸ LT, PT, SE, SL.

⁶⁸⁹ AT, CY, CZ, DE, EE, EL, ES, HR, LT, LU, LV, PL, PT, RO, SI, SK.

⁶⁹⁰ BG, LV.

All three Member States require evidence of sufficient resources, valid travel documents, sickness insurance and medical examination, as well as proof of not posing a threat to public security while requirements like evidence of paid fees and parental authorisation are posed by just some of them. For example, Austria does not require proof of acceptance to an educational institution and evidence of paid fees, which should in theory make obtaining the national equivalent status a lot less burdensome than the SD status.

None requires sufficient knowledge of the language of the course, which is a significant difference with the EU status, although for the latter only four Member States require this in practice.

In the case of the **Researchers Directive**, all Member States require a hosting agreement with a research organisation, while only eight Member States require a certified copy of the researchers' qualifications, as they are presumed to be verified by the hosting agreement. Proof of sufficient monthly resources is required by almost all Member States, with the exception of four, to be proven by bank statements going back 6 months, confirmation of a sufficient amount of money being available on the bank account of the third-country national and/or confirmation from the research organisation. Half of the Member States require a statement of financial responsibility by the research organisation. The written statement usually includes that the research organisation shall cover all possible costs related to the stay of the researcher, while Member States like Cyprus, Belgium, Hungary, Lithuania have also included the Directive's option that the research organisation is liable for the applicant's living and repatriation expenses in the event that he remains in country unlawfully. About a third of Member States do not have a sickness insurance requirement for researchers, as they are often covered by statutory healthcare, and even less require proof of not constituting a threat to public security, usually criminal records, while one third of Member States require certificate of medical examination for not carrying diseases of danger to public health.

Only four Member States have an equivalent national status – Austria, Spain, Finland and Italy. All of them require a valid travel document, but only Spain requires a hosting agreement with a research organisation, which, in the other Member States mentioned, means a significant facilitation of obtaining the status compared to the EU Directive. Austria and Spain require a certified copy of the third-country national's qualifications – a university diploma or higher educational degree, which makes the process in Finland and Italy even less burdensome. Austria, Spain and Finland require evidence of sufficient monthly resources, usually proven by bank statements covering the last 6 months, confirmation of sufficient amount of money being available on the bank account of the third-country national and/or confirmation from the research organisation. Austria and Spain require sickness insurance, while Finland and Italy do not. Thus, in the small group of Member States offering RD national equivalents, this status seems to be easier to obtain.

For long term residence, only eight⁶⁹¹ Member States do not explicitly require continuous residence of five years immediately prior to the submission of the application. Lithuania was considered by ICF researchers to be overly strict when assessing possible interruptions of the stay, considering an interruption even a gap of several days between temporary permits due to late application for renewal. This may pose a practical problem in applying the LTRD.

All Member States require evidence of stable and regular resources which are sufficient for the third-country national to maintain himself/herself and the members of his/her family.

⁶⁹¹ BG, CZ, FI, HU, LU, LV, SE, SL.

Cyprus, which used to exclude domestic workers from the LTRD due to the limited duration of their successive contracts/visas, changed its legislation as a result of CJEU case-law⁶⁹² but now in practice excludes domestic workers from LTRD by on the grounds that they are not fulfilling the resources requirement.

All Member States require sickness insurance, with exception for six⁶⁹³.

Half of the Member States⁶⁹⁴ require compliance with integration conditions.

Two thirds of Member States require proof of not constituting a threat to public policy or public security, usually attested by criminal records while nine Member States⁶⁹⁵ do not. Several practical issues were raised in Luxembourg where an additional requirement exists that the person should not threaten the country's international relations. Luxembourg, as well as Malta, may also refuse applications which are not accompanied by proof of adequate accommodation.

A number of Member States require other documentary evidence such as valid passport, photos in passport format, certificates of good conduct, payment of the application fees, letters of incitation, employment contract, social security registration, rental agreement, etc., while only five⁶⁹⁶ Member States do not require additional documents.

Twenty one⁶⁹⁷ Member States have an equivalent national status to the EU LTR and most of them, with exception of six⁶⁹⁸, do not require proof of legal and continuous residence in the Member State for five years immediately prior to the submission of the application, which makes proving continuous residence at least for the eligible categories of applicants significantly less stringent than under the EU LTR permit and access to the status – potentially wider. Hungary, for example, requires three years of continuous residence. Only Belgium and Spain, do not require evidence for stable and regular resources and only seven⁶⁹⁹ Member States require sickness insurance, as long term residents are usually already benefiting of the same rights as nationals, thus making the requirement less strict than under the LTR status. Six of the Member States⁷⁰⁰ in this group require compliance with integration conditions, while the others do not, which is a similar proportion in comparison with the LTR status conditions. All Member States require proof of not constituting a threat to public policy or public security, usually by criminal records, while only four⁷⁰¹ Member States do not.

Non-EU citizens residing or having resided in the EU were asked to list the documents requested in the application process. The most common documents that respondents (n=191) had to provide were: a valid travel document (82% of respondents), proof of educational qualifications (77%), proof of sufficient resources (75%), health insurance (73%), documents from the school/higher education institution they were to attend (66%), proof of accommodation (59%), job offer / work contract (55%) and bank guarantee (48%).

⁶⁹² *State Secretary van Justitie V Mangat Singh*, Court of Justice of the European Union case C-502/10, 18 October 2012.

⁶⁹³ FI, IT, LT, LV, NL, SE.

⁶⁹⁴ CY, DE, EE, FR, HR, IT, LT, LU, LV, MT, NL, PT.

⁶⁹⁵ BG, FI, FR, HU, LT, LV, MT, SE, SK.

⁶⁹⁶ AT, LV, NL, SE, SK.

⁶⁹⁷ BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, LT, LV, MT, NL, PL, PT, SE, SI, SK.

⁶⁹⁸ BE, DE, ES, FR, NL, PT.

⁶⁹⁹ AT, DE, ES, FR, HU, SI, HR for some statuses.

⁷⁰⁰ DE, FR, HR for some statuses, LV, NL, PT.

⁷⁰¹ BG, FI, FR, LV.

83% of the respondent of the OPC had problems with the length of the procedures and 57% of the respondents identified the high costs of the application procedures and the document requirements as the main problems.

According to migrant agencies (Poland), interviewed by ICF, the main issue relates to the acquisition and authentication of documentary evidence, which can lead to significant delays in the processing of an application. The acquisition of specific requested documents and their authentication can prove difficult in the country of origin, thus impacting the application processing times. The acquisition of birth certificates and the authentication of marriage certificates has proven particularly difficult in South Asia (India) and Africa.

The recognition of diplomas as a condition for admission, which is referred to in the BCD, RD and SD, is explicitly applied in most Member States⁷⁰² for the BCD in six Member States⁷⁰³ for the RD and in five Member States⁷⁰⁴ for the SD. For equivalent national statuses to the BCD, the recognition of diplomas is a condition in Germany and Poland. For other national statuses this requirement is not applicable, which may make the application process significantly less burdensome.

Recognition generally involves a number of agencies (e.g. academic information centres) and, in the case of regulated professions, professional chambers and a verification / validation process to check that the foreigners' qualifications match national requirements

In a number of Member States, researchers' qualifications must also be translated and verified⁷⁰⁵ under the RD, while for the others they are 'proven' by the hosting agreement. These can include university diplomas or proof of higher educational status, or work-related documents.

For SD, the required documents can include a diploma from high school or equivalent, which also must be translated and verified in the few cases recognition is explicitly required⁷⁰⁶. In terms of difficulties encountered, for example, third-country national doctors and nurses in Poland have reported difficulties with the recognition of their diplomas. Most of the application forms and related guidance in the Member States do not contain information on the requirement to have recognition of qualifications. Issues have been identified by ICF in the Czechia, Italy, Lithuania, Portugal and Slovakia, Belgium and Estonia, where indications are either missing, or not clear enough (e.g. the authorities responsible for recognition are not mentioned), or information is insufficient.

Most Member States provide inadequate guidance on the procedures for obtaining recognition of diplomas.

Evidence from interviews with migrants indicate that difficulties regarding the recognition of diplomas and qualifications were encountered in some Member States, including Germany and Italy, where certain types of diplomas and qualifications are not recognised by the national curricula.

In terms of proof of employment, in a significant number of Member States⁷⁰⁷ a signed contract of a duration at least one year is required for employment-related permits, however in

⁷⁰² AT, BG, CZ, DE, EE, EL, IT, LT, LV, MT, NL, PT, RO, SE, SI, SK.

⁷⁰³ BG, ES, IT, LT, MT, NL.

⁷⁰⁴ BG, EE, EL, LT, RO.

⁷⁰⁵ BG, EL, ES, IT, LT, MT, NL.

⁷⁰⁶ BG, EE, EL, LT, RO.

⁷⁰⁷ BG, CY, CZ, EL, FR, HR, LU, NL, PL, PT, RO, SI and IT only for the SPD.

seven⁷⁰⁸ Member States both a binding job offer and a signed contract are accepted under the BCD and in five Member States both are accepted under the SPD⁷⁰⁹, while only five⁷¹⁰ Member States require only a job offer both for BCD and SPD.

Austria and Cyprus apply pre-integration measures mainly in terms of language knowledge. Germany and the Netherlands have introduced pre-integration measures under the FRD. In Cyprus for the purposes of the long term residence permit, applicants must submit proof of adequate knowledge of the English language. In the Netherlands, information on the civic integration examination abroad as a pre-integration measure is provided on the IND website and in information leaflets. The Civic Integration Abroad Test takes place at a Dutch embassy or consulate in the country of origin or country of legal residence. It examines speaking skills, reading skills and knowledge of the Dutch society (150 EUR per full exam). Pre-integration requirements in the Netherlands were generally considered by ICF researchers as too demanding, especially as they constitute a specific ground for refusing the statute. Croatia and Portugal have pre-integration measures for the LTR statuses. The information provided on pre-integration measures is overall considered as clear and accessible. Most of the Member States do not apply any other pre-departure conditions or measures. Belgium requires proof that persons are not subject to expulsion or an alert on the Schengen Information system. Austria applies a credit/point system where the applicants receive points for fulfilling certain criteria for the BCD.

The OPC confirmed that only a handful of Member States apply pre-integration measures: 2% (n=188) of non-EU citizens looking to migrate to the EU had to take part in a pre-departure integration activity as a prerequisite for a successful application.

2% (n=188) of non-EU citizens looking to migrate to the EU mentioned that it was difficult to obtain information on the pre-integration activities and conditions and that they had to pay for the integration courses themselves. The most common pre-integration measures respondents participated in include integration programmes, language courses, civic education courses and integration tests.

2.4 Admission conditions – Differences with equivalent national statuses

An important difference between the requirements of the BCD and the equivalent national statuses concerns the lack or reduced minimum income requirements applied in the latter in Italy, the Netherlands, Portugal and Sweden, which seems to result in a higher use of the national equivalent status. In Sweden for example, income requirements under the national status are much lower and make no difference between low- and high-skilled workers. The rights enjoyed under the national status are the same than those offered under the BCD, which means that few labour migrants choose to use the Blue Card given that the national legislation is more favourable. There are, however, a few cases where national equivalent statuses have introduced higher salary requirements (e.g. top specialists in Estonia).

Another important difference seems to be that application forms for the national equivalent statuses are considered to be more difficult and less user friendly to fill in. This may be a result of the relative harmonisation of documentation introduced by the EU legal migration acquis.

⁷⁰⁸ BE, DE, EE, ES, HU, IT, LT.

⁷⁰⁹ AT, DE, ES, HU, LT.

⁷¹⁰ AT, FI, LV, SE, SK.

Finally, and differently to the EU status, LTR national equivalents seem to require continuous residence in a relatively small number of Member States.

Table 1: Overview of transposition of may clauses

Directives and relevant provision	No MS not transposed	MS
FRD		
Article 7	10	CY, CZ, EL, FI, HR, HU, LV, NL, RO, SI
1. When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:		
(a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned;		
(b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family;	10	BG, CY, CZ, EL, HR, HU, LV, PT, SE, SK
(c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.	5	CY, EL, HU, LV, RO
Art. 7(2) Member States may require third country nationals to comply with integration measures, in accordance with national law.	15	CZ, EE, ES, FI, HR, HU, LU, LV, MT, PL, PT, RO, SE, SI, SK
Art 15(1) Not later than after five years of residence, and provided that the family member has not been granted a residence permit for reasons other than family reunification, the spouse or unmarried partner and a child who has reached majority shall be entitled, upon application, if required, to an autonomous residence permit, independent of that of the sponsor. Member States may limit the granting of the residence permit referred to in the first subparagraph to the spouse or unmarried partner in cases of breakdown of the family relationship.	10	AT, BE, HR, IT, LT, LU, LV, NL, SI, SK
BCD		
Art. 5	8	ES, FI, HR, IT, LT, PT, SE, SI
2. Member States may require the applicant to provide his address in the territory of the Member State concerned.		

Source: ICF(2018) Annex 2A

3. Phase 3. Application phase: lodging the application

This section looks into how the different applications procedures established by the Directives are applied in the Member States, in particular, how easy is to lodge an application at national level, authorities involved in the application and time required, fees and procedures safeguards.

3.1 Easiness of lodging an application

In all Member States reviewed, the application can be lodged in person, either in the Member States (if the application can also or only be made by a sponsor, employer or family member), or in the embassy or consulate of the third country. A full online submission (i.e. the necessary information is entered and submitted online) can be made in six Member States⁷¹¹ – as opposed to making available downloadable application forms – while in seven Member States it is possible to lodge an application via the post.⁷¹² Lithuania also allows a legal representative to lodge an application. Slovenia requires third-country nationals to always present themselves in person for fingerprints, without which the application cannot be submitted. Latvia and Sweden are the Member States which offer most application options. There are no significant differences between the EU and national equivalent statuses. Some potential **application issues** have been identified with regard to the accessibility to the application procedure, for example when the applicant has to appear more than once in person as part of the application process in third countries where this can only be done centrally, or where consulates are far away (e.g. Austria). In the Czechia, the ICF national researcher noted that third-country nationals face difficulties when trying to make appointments with the diplomatic missions, as well as inconsistencies in the interpretation by visa processing offices of the type of documents to be sent along with the application, which could lead to unjust rejections. It was reported that in Spain problems were encountered because of forms only being available online, making it impossible for applicants without internet access to obtain these.

With regard to the application procedure, the non-EU citizens residing or having resided in the EU were asked about the means they were able to apply for a permit and whether it was easy or difficult to apply. Over 60% of respondents (n=189) indicated that they were not able to apply online⁷¹³. However, the majority of respondents (71%) (n=188) said that they were able to apply from their country of residence, outside the EU⁷¹⁴ and over 50% (n=161) indicated that their permit was issued when they were still outside the EU. The country of residence of former respondents was BE, CZ, DE, FR, NL, SE.

3.2 Authorities involved in the application

In 10 Members States one authority is responsible⁷¹⁵, while in 15 Member States different authorities are involved in the processing of applications⁷¹⁶.

On the basis of the SPD, the single application procedure should consist, for the applicant, of one 'starting' point (the application) and one 'ending' point (the decision). Member States should designate the authority competent to receive the application and issue the single permit, without prejudice to the role and responsibilities of other authorities in the process. A number of Member States require several steps in the procedures, including separate applications, first by the employer and then by the third-country nationals to different authorities that also issue separate decisions. In some Member States one authority is responsible whilst in others different authorities are involved in the processing of applications.

⁷¹¹ FI, FR, LV, NL, RO, SE.

⁷¹² BG, CY, LU, LV, MT, SE, SI.

⁷¹³ Question 41: Were you able to apply online?

⁷¹⁴ Question 42: Were you able to apply from your country of residence, outside the EU? Question 43: If you applied from outside the EU, was your permit issued when you were still outside the EU?

⁷¹⁵ BG, CY, EE, EL, LV, NL, PL, PT, RO, SK.

⁷¹⁶ AT, BE, CZ, DE, ES, FI, FR, HR, HU, IT, LT, LU, MT, SI, SI.

The overall application process is considered to be too complex in Italy, involving multiple applications, steps and authorities, although guidance is currently being developed. In Latvia, it is not clear who can lodge the application, i.e. the sponsor or the family member, leading to legal uncertainty. In Slovakia, there are issues in relation to the BCD and the availability of information to the applicant. The necessary steps and authorities which have to be contacted by the applicant are not well explained since the outset and the applicant needs to find all information by themselves – on recognition of diploma/educated, application process, etc.

Following interviews with migrant agencies by ICF, a migrant agency in Germany explained that three different authorities are involved in the process: diplomatic missions in the country of origin, immigration offices and employment services. This makes the process more time consuming. Based on their experience communication among the authorities is difficult. This finding is also in line with the experience of stakeholders from other Member States. Similar problems were mentioned in Poland and the Netherlands.

About one third of third-country nationals residing or having resided in the EU (34%, n=178) mentioned that they had to contact one authority to apply and 31% had to contact two authorities.

3.3 Application fees

The applications fees vary substantially among Member States. In some Member States application fees represent between 25-50% of the monthly earnings and in other Member States between 10-24%.

A practical issue arises from the fact that the high application fees charged may create an impediment to the enjoyment of the Directives, in the sense that they potentially could act as a deterrent. This goes against the provisions in the SPD, SWD, ICT and S&RD stipulating that the fees “shall not be disproportionate or excessive”⁷¹⁷. In Belgium, for example, it was noted that the fees had recently been increased to 200 euro for the FRD. Cyprus is reported to require €200 from family members under the FRD.

The Commission has launched infringement procedures on disproportionate fees against a number of Member States mainly for the single permit and the long term residence permit (the cases against the Netherlands, Italy, Belgium and Greece have been or are about to be closed following change in the national legislation lowering the fees to a proportionate level. The proceedings against Portugal are still ongoing).

Although not a fee charged by authorities, in Cyprus the most significant costs relate to the fees charged by the agents who applicants often need to hire to help prepare the paperwork, as this is a very time-consuming, bureaucratic and complex process.

Overall the migrant agencies did not raise significant concerns in relation to the application fees. In most cases the costs range between EUR 100-500. Additional costs for third-country nationals come from translating diplomas, medical certificates and travel to and from the diplomatic missions to submit the application. This was mentioned as an issue for instance in case of Russia and Brazil. Only in case of the United Kingdom and the Netherlands were relatively high application fees mentioned by the agencies.

⁷¹⁷ Disproportionate administrative fees have been subject of earlier CJEU rulings, such as case C-508/10, where the court ruled that the Netherlands had failed to fulfil its obligations under the LTR by charging third-country national applicants “excessive and disproportionate administrative charges which are liable to create an obstacle to the exercise of the rights under the LTR”.

However, almost 60% of Profile 2 respondents (n=191) agree to a small extent or do not agree at all that the costs of current immigration and residence procedures in the EU are reasonable, while around 40% of the respondents from this category said that they agreed to a (very) large extent.

With regard to cost of submitting an application, the average cost is around 700 Euro (n=160)⁷¹⁸. The cost to obtain recognition of qualifications is on average 350 Euro (n=88)⁷¹⁹.

3.4 Time to process applications

Seventeen of the Member States⁷²⁰ reviewed by ICF have put in place a legally applicable deadline to process applications under all relevant Directives. Six others only have these for certain Directives⁷²¹. In 14⁷²² of the Member States with a legally applicable deadline for all or some Directives, the timeframe for processing applications from receipt of the application until notification of the decision is published and considered easily available for reference to the applicants. Germany has no such deadlines in place, only a stipulation that a remedial legal action can be taken after three months have passed. The average number of days set for processing applications in the Member States which apply deadlines is 86 days. Member States allow themselves most time for processing applications under FRD (152 days on average), still lower than the nine months prescribed as maximum in the Directive, while applications under the SD and the BCD have much shorter deadlines. Among the countries with the shortest deadlines for processing of applications are Bulgaria, Hungary and Slovenia whereas the countries which allow themselves the longest processing periods include Member States like Luxembourg and Italy, where all Directive deadlines seem to be exceeded. The LTRD deadlines seem to be exceeded in countries like Austria, Belgium, Cyprus, Spain, the Netherlands and Portugal. National equivalent statuses, where available, do not present significant discrepancies with EU Directive deadlines. Lengthy periods taken to process applications are reported in for example Italy, the Netherlands, Sweden (FRD), Greece (FRD).

The waiting time for answer after submitting an application is usually between one and three months for over 40% of respondents to the OPC. Only 23% received an answer within four weeks.

3.5 Administrative and financial sanctions- incomplete information

When the information or documents supplied in support of the application are inadequate, 18 of the reviewed Member States⁷²³ do not impose any administrative or financial sanctions if an applicant fails to provide additional information or documents within a given deadline for, while six apply some form of sanction⁷²⁴, although most refer to rejection or rejection of the application. Only Luxembourg applies a financial sanction (25 EUR – 250 EUR) for those who fail to apply for a residence permit within three months following their arrival in

⁷¹⁸ Question 29. How much did it cost you to prepare and submit your application (including application fees, costs to obtain/translate documents, certification, etc.)?

⁷¹⁹ Question 30. If applicable, how much did it cost you to obtain recognition of your qualifications?

⁷²⁰ AT, BG, CZ, EE, FR, HR, HU, IT, LT, LU, LV, NL, PL, PT, RO, SI, SK.

⁷²¹ BE has set time deadline for BCD, FRD and LTR; CY has set time deadline for BCD, FRD, LTR and SPD; EL for all Directives except SPD; FI has set time deadline for BCD, FRD, LTR and SPD; MT has set time deadline for BCD, FRD, LTR and SPD; SE for BCD and SPD.

⁷²² AT, CZ, EE, EL, ES, FI, HU, IT, LU, LV, NL, PT, RO, SK.

⁷²³ AT, BE, BG, CY, CZ, DE, EE, EL, FI, FR, HR, LT, LV, NL, RO, SE, SI, SK.

⁷²⁴ HU, IT, LU, MT, PL, PT.

Luxembourg, which is generally equivalent to between 1.35 and 13.5 gross hourly earnings. An application problem arises in Poland with regard to the very short deadline (seven days) set for a person to appear in person before the competent authority, when s/he has sent an application by mail or when a “formal defect” in the application has been noted (e.g. a wrong form, lack of photos, invalid travel documents). Failing to appear can lead to the application not being considered.

In the majority of countries (18 Member States⁷²⁵) a failure to comply within a given deadline can lead to cancellation or rejection of the application (e.g. if an applicant does not send additional supporting documents on time).

All Member States notify third-country nationals when their application is incomplete. The process in all the countries includes contacting the third-country nationals, specifying the missing documentation that they need to provide and usually setting a new deadline. The latter ranges from seven days in Poland, to up to a maximum of 90 days in Slovak Republic. The deadline for resubmitting documents seems short, for example seven days in Poland and 10 days in Portugal and Lithuania, which might be difficult to meet especially if, for example, the missing or incomplete documents need to be specifically requested and/or certified.

Member States usually also temporarily suspend the application process until all required new documentation has been received. In some countries, the decision to suspend the procedure depends on how incomplete the application is (e.g. Sweden). The failure to reply within a given deadline leads to cancellation/rejection of the application in the majority of Member States (20) under review⁷²⁶.

A possible application problem has been identified by the national researchers with regard to incomplete applications in Malta. Maltese authorities often refuse to accept incomplete applications or reject them without any notification in writing, which means that applicants are rarely aware of the status of their application. Given that the “real time” required for processing of applications in Malta can take up to 183 days for the LTR, this can be problematic, as it means that applicants may wait for a long time before finding out that their application was rejected already at the start of the process for being incomplete.

3.6 Applications and delivery of permits

- In third countries:

In three of the reviewed Member States⁷²⁷ it is possible for applicants under all permits to both lodge their applications in the respective third country and subsequently receive their residence permit whilst still on the territory of the third-country. In eight other Member States⁷²⁸, this is an option for certain permits only.

- In Member States:

Broadly three different approaches were identified in ICF research:

- In Estonia and Sweden, an entry visa is not required for any of the statuses.

⁷²⁵ AT, BG, CY, CZ, DE, EE, ES, FI, HR, HU, LT, LU, LV, MT, NL, PL, RO, SK.

⁷²⁶ AT, BG, CY, CZ, DE, EE, ES, FI, FR, HR, HU, LT, LU, LV, MT, NL, PL, RO, SI (but depending on the case), SK.

⁷²⁷ CY, HR, SI.

⁷²⁸ EE, LT, PL, RO, MT, FI, SE, SK.

- A second, small group, of Member States⁷²⁹ allow visa-free entry on their territory depending on the status granted. Greece has a general requirement for an entry visa and only applies an exception to applications under FRD and LTRD, whereas Spain applies this exception to the BCD and LTRD. Belgium and Slovakia apply the exception for the LTRD, while Portugal⁷³⁰ applies it in some RD cases.
- A larger group of Member States require an entry visa for all statuses and do not apply any exceptions⁷³¹. Of these, only three Member States⁷³² have set up a facilitated process for obtaining an entry-visa for all types of statuses and Italy has facilitated process for researchers.

The FRD, RD and BCD all require Member States to “grant such persons every facility for obtaining the requisite visas”.

3.7 Procedures guarantees

The FRD, SP, LTRD and BCD lay down the obligation for national competent authorities, when examining applications for residence or working permits, to give a written notification of the decision to the applicant within a set deadline. In addition, some of these Directives include provisions stating that Member States shall set out in their legislation the consequences of an absence of a decision on granting a permit within a specific deadline. In addition, all the migration Directives lay down, under the procedural guarantees, that a negative decision should be in writing and should include the reasons for the negative decision (whether rejection or withdrawal) and the redress procedures for the applicant.

3.7.1 Notification of a positive decision and a rejection

In 22 Member States⁷³³ the most commonly used way to inform a third-country national that a decision on their application has been made is in writing, via post. In Cyprus, Croatia, Luxembourg, the Netherlands, Slovenia and Slovakia, the decision is only communicated this way. Other Member States⁷³⁴ also have the option to inform third-country nationals of the outcome of their application by email or in person⁷³⁵.

Austria may have an application problem with respect to the SPD, as it only informs its diplomatic and consular representations, which are under no explicit obligation to issue a written communication to the applicant and the legal quality of the notification is considered unclear.

All 25 reviewed Member States provide reasons for it in writing in case of a rejection of the application, most often with reference to the relevant provisions in the national law. ICF researchers identified criticisms with regard to the ‘substance’ of the rejection decisions, for example in the cases of Malta and Greece, as they are considered to insufficiently set out the reasons and grounds for rejection. Notifications are generally in the national language. The

⁷²⁹ BE, EL, ES, PT, SK.

⁷³⁰ The most recent version of Law 23/2007 after the amendments introduced by Law No. 59/2017 of 31st of July 2017 and Law No. 102/2017 of 28th of August of 2017 (which has entered into force on the 26th of November 2017) allows TCN that have entered and stayed legally in the country to request a residence permit without necessarily needing to hold a specific residence visa.

⁷³¹ AT, BG, CY, CZ, DE, HU, IT, LT, LU, LV, MT, NL, PL, RO.

⁷³² BG, MT, NL.

⁷³³ BE, BG, CY, CZ, DE, EE, EL, FI, FR, HR, HU, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK

⁷³⁴ AT, BE, BG, CZ, EE, FI, LT, LV, MT, PT, RO, SE.

⁷³⁵ AT, BG, DE, EL, ES, FR, LT, LV, PL, PT, SE, SI.

majority of interviewed stakeholders by ICF agreed that reasons for rejection are clearly explained.

3.7.2 Administrative silence

The legislation of a number of Member States⁷³⁶ regulates the tacit rejection and the right to take legal actions against it or the tacit approval as well as the right to take actions in case of a failure of the administration to act within a specified time limit. This is done through specific implementing legislation or by reference to the general administrative law.

However, problematic national legislation or practices have been observed. Remedies applied in some Member States do not appear to be adequate and can lead to legal uncertainty for long periods of time (Finland, Sweden), and are in the case of Sweden coupled with excessive processing times.

In Belgium when processing deadlines are set by law, the legal effects of not respecting these time limits include the obligation for the decision to be positive (this applies to the LTRD, the BCD and FRD).

Redress procedures against administrative silence vary between Member States and can include administrative or judicial reviews of the tacit rejection, the invalidation of applications, injunctions or a financial penalty.

3.7.3 Appeal procedures

All Member States have appeal procedures in place. Appeal procedures against the initial rejection of the application vary in the different Member States.

An application issue raised by ICF researchers in Austria, Finland and Belgium concerns the overall effectiveness of the appeal procedure. In Austria, applicants often seek to lodge a new application rather than submitting an appeal, as the procedure is considered as too lengthy and costly. This could undermine the effectiveness of both the application and the appeal processes. In Finland, the initial appeal of a rejection involves a fee of €250 which is only reimbursed if the negative decision is reversed in court. Moreover, the majority of rejected applicants do not consider an appeal as a viable option, as the waiting times for a court decision in Finland are long - from several months to years. Lengthy and ineffective appeals are reported also in Belgium.

Some problems were reported regarding the extent to which sufficient information is available to applicants on the appeal process. Interviews provided mixed views regarding the appeal procedures. In case of the Czechia the consulate will immediately reject an application if a document is missing. Applicants can then return and complete the application based on the guidance provided. On the other hand both of the interviewed Nigerian consultancies stated that only a small minority of rejected applicants appeal (around 15%) due to the high costs associated with the procedure.

3.8 Key differences between the EU Directives and their national equivalents with regard to the application procedure

In 13 Member States some differences were identified. In Hungary, the national statuses appear to offer less favourable conditions and rights with regard to the admission procedure.

⁷³⁶ CZ, EE, EL, ES, FR, HR, HU, IT, LT, LU, PL, PT, RO and SK.

For example, in order to be granted the national settlement permit, which is the national equivalent of the EU LTR, the applicant needs to provide proof of a clear criminal record from the country of origin. This can pose a significant challenge depending on the third country. No such requirement is in place for applications under the LTR.

Another group of Member States seems to be offering more favourable conditions, as noted in Croatia, Estonia, Germany, the Netherlands, Portugal, Spain and Sweden. The national equivalents to the LTR status in Croatia, Germany and Spain, for example, are generally wider in terms of personal scope, since they include an additional list of categories of third-country nationals, not covered by the LTRD, who can lodge an application and acquire status. In Croatia, the uninterrupted legal residence for five years is not a requirement to obtain the national long-term residence status. In addition, in order to obtain the status, certain categories of third-country nationals in the Alien Act do not need to satisfy the conditions related to sufficient resources to maintain themselves, health insurance and the knowledge of Croatian language and the Latin alphabet.

Portugal also has a more favourable national equivalent of the LTR, including a much shorter deadline to decide on a permit request (90 working days compared to six months for the EU status) and application fees which are about 25% lower than those specified for the LTR. When it comes to the national schemes for scientific research and highly qualified individuals, the BCD's equivalent in Portugal, the law also sets a shorter deadline (66% shorter) for a decision on a residence permit application, the fees are again 25% lower than those charged for the BCD and there is no requirement for a wage threshold.

Although there are no substantial difference in the Netherlands between the statuses regulated under the EU Directives and their equivalents, applications for the national "highly skilled migrant" status can be submitted online via the recognised sponsor portal, something which is not offered as part of the BCD. The portal facilitates the application process.

4. Phase 4. Entry and travel phase: including acquisition of the necessary entry and transit visas

The entry and travel phase addresses the requirements that third-country nationals need to fulfil in order to enter and re-enter the country of destination, as well as to travel to other Member States, including when a permit is issued in a Schengen state. It examines the steps and procedures to obtain entry visas (where necessary), the procedures and conditions to enter and travel across the EU Member States, as well as the procedures that apply upon arrival in the country of destination.

4.1 Entry visas

Member States can require a visa for initial entry in order to obtain a permit. Clarifications in the BCD and SWD help to understand the meaning of 'visa for initial entry' in the EU legislation. The FRD, RD and BCD all require Member States to "grant such persons every facility for obtaining the requisite visas". The lack of a facilitated process could raise questions as to whether Member States have correctly applied the relevant provisions of the Directives in practice. In the SPD the processing of the visa is not covered by the Directive in accordance with Article 4(3). The time required to obtain a visa does not have to be included in the period of time required to obtain the permit. This means in practice the process to obtain a residence/work permit can be delayed due to visa procedures.

Eight Member States⁷³⁷ do not fix any particular timeframe for the granting of an entry visa if the applicant does not yet hold a valid permit before entering the Member State.

Eleven Member States⁷³⁸ have put in place set timeframes for issuing an entry visa from the moment of the application. In Bulgaria, Hungary, Latvia, Luxembourg and Romania, there is a general time limit for the issuing of visas which applies to all statuses, with the timeframe in those Member States ranging from 15 days in Bulgaria and Latvia to 90 days in Luxembourg, which can be considered fairly long for those statuses for which some form of visa facilitation is required. Other Member States (e.g. Greece, the Netherlands, and Portugal) have put in place different timeframes for visas depending on the status. For example, Greece issues visas to SD applicants within 20 days, while BCD applicants may have to wait for 90 days. RD applicants in Portugal can obtain a visa within 30 working days, while the deadline for BCD and SD applicants is 60 working days. SD and RD applicants in the Netherlands are granted visas within 60 days, while deadlines for BCD, FRD and SPD applicants are 90 days. Member States within this group thus seem to be offering a higher degree of visa facilitation to SD/RD applicants.

All reviewed Member States, with the exception of France, allow third-country nationals who hold a valid permit and a valid travel document to enter and re-enter their national territory only on the basis of the permit⁷³⁹, although some conditions apply, which are more related to how long third-country nationals are allowed to stay outside the Member State. In Cyprus, for example, re-entry is no longer allowed if the third-country national has stayed more than three months outside the Member State. In Lithuania, third-country nationals must declare their departure when leaving the Member State for a period exceeding six months. In the Netherlands, third-country nationals can freely enter and re-enter the national territory, but they are not allowed to move their main residence in the country.

All twenty one Member States which are also Schengen Member States⁷⁴⁰ allow third-country nationals to travel to other Schengen countries only on the basis of a permit issued on their territory and a valid travel document.

Third-country nationals are authorised to travel to another Schengen State for a total period not exceeding three months in a six-month period, starting from the date of their first entry on to the Schengen territory. They must also have their valid travel documents as the residence card is proving the person's legal basis for staying in a Schengen Member State but is not a travel document.

The majority of the reviewed countries⁷⁴¹ do not impose any specific entry requirements to third-country nationals of a visa-free country for entering their territory independently on whether they are coming to work or not.

If the main applicant is the employer,⁷⁴² as it can be the case under the SPD and the BCD, Cyprus requires the employer to request the entry visa. In twelve of the reviewed Member States⁷⁴³ the third-country national is expected to apply for the entry visa. In Lithuania, a visa

⁷³⁷ BE, CY, CZ, DE, EE, LT, MT, SK.

⁷³⁸ AT, BG, ES, HU, IT, LU, LV, NL, PL, PT, RO.

⁷³⁹ An explicit requirement of the BCD and required under the SPD for Schengen countries.

⁷⁴⁰ AT, BE, CZ, DE, EE, EL, ES, FI, HU, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK.

⁷⁴¹ AT, BE, CY, CZ, DE, EE, EL, ES, FI, HR, HU, LT, LU, LV, NL, PL, SE, SI, SK.

⁷⁴² No such option exists in the Czechia or Slovakia, while Estonia and Slovenia send the residence card to the country's foreign mission. In Finland, residence permits function as entry visas.

⁷⁴³ AT, BE, BG, DE, HU, IT, LU, LV, MT, PL, PT, RO, SE.

can be requested by both the employer and the third-country national. In Spain, either the third-country national or their legal representative can request the visa.

In Greece, Croatia and the Netherlands, the person allowed to submit a visa application depends on the migration status. In Greece, only the third-country national can apply for a visa under the SPD, whereas both the employer and the third-country national are allowed to request a visa under the BCD, while Croatia presents just the opposite case. In the Netherlands, the employer requests the BCD entry visa, while both can request a visa under an SPD case.

4.2 Procedures upon arrival

Twenty of the reviewed Member States⁷⁴⁴ require the third-country national to register with the competent local authority upon arrival on their national territory, sixteen⁷⁴⁵ require registration with local security institutions and twelve⁷⁴⁶ require registration with healthcare providers.

Austria, Greece, Spain, France, Italy, Latvia, the Netherlands and Romania, for example, may ask for registration with all three institutions listed above, depending on the migration status. In addition to registering with the local authority, the social security institutions and the healthcare providers, Latvia also requires third-country nationals to be duly registered by their employer with the State Revenue Authority. Cyprus, the Netherlands and Poland also apply additional procedures, such as registration with immigration authorities (e.g. Cyprus), registration with the Tax and Customs Administration (e.g. the Netherlands) and an obligation for persons who arrive as family members to submit their fingerprints and pick up their residence card (e.g. Poland).

In Bulgaria, the foreigner or national accommodating the migrant is required to declare the address at which s/he will reside upon entering the country. Moreover, the physical or legal persons providing accommodation to foreigners should also register them with the Ministry of the Interior. In Hungary, foreigners should only register with the regional office of the immigration authority at the time of delivering the residence permit.

4.3 Transiting and leaving

In most Member States⁷⁴⁷ that can deliver residence permits to applicants in the third country and do not require them to have a visa to enter the national territory, third-country nationals do not encounter any obstacles in practice to leave their countries of origin and to enter the Member State. However, in Estonia, cases have been of taking more than 30 days for the residence card to arrive at the Estonian foreign mission, which could delay the incorporation in employment or other occupation in the EU Member State of destination.

When it comes to transiting, again, only in a few Member States⁷⁴⁸ practical difficulties are encountered by third-country nationals. In Spain, ICF researchers concluded that the long and complicated process for acquiring an airport transit visa is seen as an impediment.

4.4 Differences between the EU Directives and their national equivalents

⁷⁴⁴ AT, BE, CZ, DE, EE, EL, ES, FI, FR, HR, IT, LT, LU, LV, MT, NL, PL, RO, SE, SI.

⁷⁴⁵ AT, CY, EL, ES, FI, FR, HR, IT, LU, LV, NL, PL, PT, RO, SI, SK.

⁷⁴⁶ AT, BE, EL, ES, FR, HR, IT, LV, NL, PT, RO, SK.

⁷⁴⁷ AT, EL, FI, FR, HR, LT, LU, LV, NL, RO, SE, SI.

⁷⁴⁸ EE, ES.

Regarding the entry and travel phase, in most of the countries which have national equivalent statuses in place, there are no substantial differences at the level of legislation and practice between them and the Directives. The entry and travel phase is usually the same for all kinds of permits and national statuses offer the same rights and conditions as the EU Directives. There are only slight differences observed in the Netherlands and Portugal. In the Netherlands, for instance, the maximum decision period for long stay visa applications required for the EU Blue Cards is 90 days whereas for the national permits this period can be extended with another 90 days.

In Portugal, the Blue Card Directive is slightly less advantageous than its national equivalent status as it sets about a 50% longer deadline for a decision on a BCD visa request compared to Portugal's equivalent status.

Table 2: Overview of transposition of may clauses

Directives and relevant provision	No MS not transposed	MS
Single Permit Directive		
Article 4 Single application procedure 1. An application to issue, amend or renew a single permit shall be submitted by way of a single application procedure. Member States shall determine whether applications for a single permit are to be made by the third-country national or by the third-country national's employer. Member States may also decide to allow an application from either of the two.		Only submitted by the third country national (CZ, DE, EE, EL, FI, HU, LU, MT, PL, RO, SE and SK), only by the employer (BG and IT) and either by the third country national or the employer (AT, CY, ES, FR, HR, LT, LV, NL, PT and SI)

Source: ICF(2018) Annex 2A

5. Phase 5. Post-Application phase during which competent national authorities deliver the permit

During this phase, the competent authority delivers the permit. The timeframe for delivering the permit and charges, the authorities involved and the duration of first permits are considered in this section.

5.1 The timeframe for delivering the permit and charges

According to ICF research 15 Member States⁷⁴⁹ do not have a set timeframe to deliver the permit following the notification of the positive decision on the application. The Member States which require the lowest number of days for the delivery of the permit are Lithuania (10 days) and the Netherlands (14 days), followed by Italy (20 days). Five Member States⁷⁵⁰ have indicated a timeframe of 30 days, while Latvia has the longest with 65 days. Where Member States have a set timeframe, this is generally made public to applicants.

Overall, the deadlines set are respected, and, in some cases, the real average number of days to deliver the permit is even lower than the timeframe allowed. The only exception is Italy, for which the time needed to deliver the permit after the notification can range between 90 and 290 days.

⁷⁴⁹ AT, BE, CZ, DE, EL, FI, HU, LU, MT, PL, PT, RO, SE, SI, SK.

⁷⁵⁰ BG, CY, EE, ES, HR.

Similar practical issues were identified in a few Member States⁷⁵¹ with regard to the lack of timeframe. For example, in Belgium, third-country nationals are provided with a temporary document while waiting to receive the residence permit; however, this document does not allow them to apply for a work permit, for which they need the residence permit. This can be an issue, if the permit is delivered after a long period of time.

While 12 Member States⁷⁵² do not apply any additional charges in addition to the application fee, 13 Member States⁷⁵³ charge for the act of issuing and / or delivering the permit and for the biometric features on the permit, for the loss of the permit, or other general administrative charges are added. These charges vary across the Member States from a minimum of around 10 euro in Croatia and Poland to a maximum of around 200 euro in Portugal (for the issuance of a new permit).

5.2 Authorities involved in the permit issuing procedure

The overall application and post-application process is considered to be too slow and complex in Italy, involving multiple applications, steps and authorities, although in the post-application phase only one authority is involved. Moreover, in Poland, the entire post-application phase, including the issuance of the decision, is conducted in the national language, and ICF researchers identified this as a potential problem for applicants with limited understanding of Polish, as the decision often contains further instructions on the next steps in the procedure and/or the deadline for appeal. A similar issue was noted in Czechia, where applicants might have to bring official interpreter at own cost.

5.3 Difference between non-EU family members of EU citizens and non-EU family members of third-country

Seven Member States⁷⁵⁴ make no distinction between non-EU family members of EU citizens and non-EU family members of third-country nationals, while in 17 Member States⁷⁵⁵ there is a difference between the two situations.

The differences mainly concern conditions, procedures, duration of the permit, application fees and documents in support of the application and, based on the responses gathered by ICF national researchers, it seems that rules and requirements are overall less rigid for non-EU family members of EU citizens.

5.4 Duration of the permits

Blue card: According to the BCD, the standard period of validity of the Blue Card should be between 1 and 4 years. If the work contract covers a period of less than one year, the Blue Card is to be issued (or renewed) for the duration of the work contract plus three months⁷⁵⁶.

All Member States apply a maximum duration of the first permit. In Bulgaria and Portugal, the maximum duration is 1 year, whilst in nine Member States⁷⁵⁷ the maximum period is 2 years. In Lithuania and Poland, the maximum duration is 3 years, while in five Member

⁷⁵¹ BE, EL, DE.

⁷⁵² CY, CZ, EE, EL, FI, FR, HU, IT, LU, MT, NL, SE.

⁷⁵³ AT, BE, BG, DE, ES, HR, LT, LV, PL, PT, RO, SI, SK.

⁷⁵⁴ DE, EE, EL, LT, LV, NL, SE.

⁷⁵⁵ Except DE, EE, EL, LT, LV, NL, SE.

⁷⁵⁶ Article 7(2) of the BCD.

⁷⁵⁷ AT, CZ, EL, FI, HR, IT, RO, SE, SI.

States⁷⁵⁸ 4 years, going up to 5 years in Spain and Latvia. An application issue has been identified in Cyprus, where the shortest maximum duration of the permit is only three months.

FRD: The duration of the first permit based on family reunification often depends on the permit of the sponsor – i.e. it is of the same validity and cannot exceed the validity of the permit of the sponsor. In eight cases⁷⁵⁹, application issues were identified by ICF as a problems with the transposition of the FRD, requiring a validity of residence permits of *at least one year*.

In Bulgaria, according to the national law, family members are granted a continuous residence permit of *up to one year*. This could be considered non-compliance issue which also affects the practical application of the Directive, as family members of third-country nationals who have been granted a continuous or permanent residence permit are in practice obliged to apply for residence permits each year, which poses a significant administrative and financial burden on them. In several Member States,⁷⁶⁰ the fact that the duration of the residence permit of the family member depends on the duration of the permit of the sponsor is also problematic, as in practice the length could be less than a year.

No practical issues were identified by ICF researchers for RD and SD.

LTR: Some application issues were identified in Finland and Lithuania, where the maximum duration is 1 year, and in Czechia, where it is 2 years (although the status is permanent).

SPD: The duration of the permit is not regulated in the SPD. In the majority of Member States⁷⁶¹ the duration is less or equal to 2 years.

5.6 Key differences between the EU Directives and their national equivalents

Overall, there are no significant differences between the EU Directives and their national equivalents in the post-application phase.

The main differences that have emerged at the level of legislation as well as in terms of practical application concern the duration of residence permits and the fees.

In Austria and Italy, the duration of the residence permit for the BCD is shorter in national equivalent statuses. In Portugal, the fees for issuing LTR and BCD permit documents are higher (about 20%) than in the case of their national equivalents.

Table 3: Overview of transposition of may clauses

Directives and relevant provision	No MS not transposed	MS
LTR		
Article 13 More favourable national provisions Member States may issue residence permits of permanent or unlimited validity on terms that are more favourable than those laid down by this Directive. Such residence permits shall not confer the right of residence in the other Member States as provided by Chapter III of this Directive.	4	AT , IT, LU, RO

Source: Conformity assessment carried out by Tipik.

⁷⁵⁸ DE, HU, LU, NL, SK.

⁷⁵⁹ BG, EL, ES, HU, PL, RO, SE, SI.

⁷⁶⁰ EL, ES, HU, PL, RO, SE, SI.

⁷⁶¹ CZ, LT, EE, HR, PT, RO, NL, SI, CY, IT, ES.

6. Phase 6. Residence phase

The residence phase begins after the third-country national is already on the territory of the Member State and has obtained the residence permit. The residency phase includes a number of aspects, as follows:

- Residence permits: format, use and renewals;
- Changes of status and naturalisation;
- Access to employment and self-employment;
- Labour exploitation;
- Equal treatment;
- Integration requirements.

6.1 Residence permits

No major problems generally were identified with format and use of permits.

In 23 Member States⁷⁶², the residence permit has a constitutive nature (i.e. the possession of a valid residence document creates legal assumption that the residence is legal). In Belgium and Malta, the residence permit has a mere declaratory value (i.e. it only attests to the fact that the conditions attached to the right of residence by EU/national law were satisfied at the date of issue). In Austria, while the long-term residence permit is declarative, other residence permits have a constitutive nature.

In all Member States, the residence permit gives the right to the third-country national to move freely on the whole territory of the Member State.

The table below shows when residence permits are required as legal documents for other administrative procedures (e.g. to provide proof of identity) as well as for short-term stay in other EU Member States.

Table 4: Residence permits as legal documents for other administrative procedures

Administrative procedures	Stage 1 o. of MS	Stage 2	Member States
Access to education	15	AT, BE ⁷⁶³ , BG, CZ, EE, EL, ES, FI, FR, HU, LT, LV, MT, NL, RO	
Access to healthcare	15	AT, BE, BG, EE, EL, ES, FR, HU, IT, LT, LV, MT, NL, PT, RO	
Registration with public employment services (PES)	21	AT, BE, BG, CY, CZ, EE, EL, ES, FR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK	
Social security registration	16	AT, BE, BG, CZ, EE, EL, ES, FR, IT, LT, LV, MT, NL, PT, RO, SI	
Open a bank account	19	AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HU, IT, LT, LU, LV, MT, NL, RO	
Utility subscription	14	AT, BG, CY, CZ, DE, EE, EL, IT, LT, LV, MT, NL, RO, SK	
Fixed telephone subscription	19	AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, IT, LT, LV, MT, NL, PL, RO, SI, SK	

Source: ICF (2018) Annex 2A.

⁷⁶² AT, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, LV, NL, PL, PT, RO, SE, SI and SK.

⁷⁶³ For higher education only.

6.2 Renewals

The periods of renewal and the renewal fees differ significantly across Member States and across permits.

Third-country nationals are required to renew their residence documents within a specified timeframe prior to expiry of the permit, ranging from 3-6 months prior to expiry to 60 days after the expiration of permit. In some Member States, failure to renew and/or provide information and documents on time or after a request by the authorities will result in refusal for the permit to be renewed and the applicant will be obliged to leave the Member State.

A possible practical application problem was identified in Malta in particular with SPD holders who are not allowed to apply for a new permit in case they change employer. Other Member States, such as Estonia, the Netherlands and Spain, allow for a ‘tolerance’ period also after the period has expired.

In 14 Member States⁷⁶⁴, there are no administrative or financial sanctions if the applicant fails to comply with a renewal deadline. However, most commonly, failure to comply with this deadline results in illegal stay. In six Member States⁷⁶⁵, there is an administrative sanction and in five others States⁷⁶⁶, failure to renew the permit leads, in addition to the situation of irregularity which may lead to a return decision, to financial sanctions.

The renewal of status of a FRD permit could be sometimes affected by the way Member States apply in practice the provisions of the FRD, in particular regarding grounds for refusal. There has been a number of complaints and extensive case law of the Court of Justice on this matter which have stringently framed the grounds for rejection: the Court recalled on several occasions that since authorisation of family reunification is the general rule, the faculties of Member States to derogate from this rule must be interpreted strictly. The margin for manoeuvre which the Member States are recognised as having must therefore not be used by them in a manner which would undermine the objective of the FRD and the effectiveness thereof⁷⁶⁷. Article 6(2) and Article 17 of the FRD stipulate that Member States may withdraw or refuse to renew a residence permit on grounds of public policy or public security (which must be, too, interpreted strictly⁷⁶⁸, or public health and when taking a decision based on this article, Member States shall consider the severity of the offence and shall take due account of the person's family relationship. In Lithuania, Slovenia and Sweden some problems have been identified in the interpretation of these provisions.

In Slovenia, additional grounds for refusal on the basis of public security have been introduced, significantly broadening the scope for refusals, including when “*there are reasons to assume that the alien will not voluntarily depart after the expiry of the permit; there are reasons to assume that the alien will not abide by the legal order of the Republic of Slovenia; if in the process of issuing a first residence permit it is found out that there are serious reasons for considering that an alien may be during his/her residence in Slovenia a victim of trafficking in human beings; if there are reasons to believe that the alien will not be residing in the territory of the Republic of Slovenia.”*

⁷⁶⁴ BE, BG, CY, CZ, EE, EL, ES, HR, IT, LV, LU, RO, SK, SE.

⁷⁶⁵ AT, DE, FR, HU, NL, MT.

⁷⁶⁶ FI, LT, PL, PT, SI.

⁷⁶⁷ See e.g. a topical judgment: Court of Justice, 21 April 2016, C-558/14.

⁷⁶⁸ See Court of Justice, 8 May 2018, C-82/16.

In Lithuania, the statement of a threat to national security issued by the State Security Department is not disclosed to the third-country national, therefore even during the judicial procedure s/he is not able to provide any arguments against that statement and defend himself/herself.

In Sweden, the renewal of the residence permit under Art. 6(2) may be refused if the family member has been engaged in any type of criminal activity. This could go beyond the possibility of refusing a residence permit on the basis of public order and security and gives rise to conformity concerns.

The Commission opened an infringement procedure against Romania on the incorrect transposition and implementation of provisions pertaining to the rejection of applications.⁷⁶⁹

In Malta, according to the information gathered by ICF national researchers, holders of FRD permits have sometimes been refused renewal on the basis of the fact that they do not satisfy the financial resources threshold following the birth of a child. The financial threshold being applied is that of the average wage in Malta. Subsequently, both permit holder and child are requested to leave the country without regard to the respect for family unity. In Spain, renewals can be refused on the ground of ‘violations of obligations on taxation and social security as grounds to withdraw the permit’.

With regard to residence permits issued to students, in Belgium, national law provides for the possibility to refuse the renewal of the residence permit in case the length of studies is deemed excessive. In practice, ICF researchers noted that many foreign students have no choice but continue studying and renew their residence permit in order to stay in Belgium while looking for a job at the same time. It is unclear whether the current provision complies with the SD but the situation should change with the transposition of the S&RD which allow students to remain on the territory for nine months at the end of their studies in order to look for a job.

For LTR and other directives there can be problems with renewal obligations for example every two years for the LTR in Czechia and on the fees charged as mentioned for first permits in Bulgaria.

According to information gathered during the OPC, issues encountered by third-country nationals residing or having resided in the EU when renewing or replacing their residence permit include: long procedure (69%, n=178)⁷⁷⁰; insecurity due to delay in receiving new permit, after the first one had expired (64%, n=179)⁷⁷¹; many documents required (63%, n=179)⁷⁷²; high costs of permit (40%, n=176)⁷⁷³; (v) loss of job (24%, n=159)⁷⁷⁴; getting their qualifications recognised (23%, n=164)⁷⁷⁵; new labour market tests (15%, n=158)⁷⁷⁶; and health reasons (10%, n=157)⁷⁷⁷.

⁷⁶⁹ http://europa.eu/rapid/press-release_MEMO-17-4767_en.htm

⁷⁷⁰ Country of residence: AT, BE, DE, FR, ES, IE, PL, SE.

⁷⁷¹ Country of residence: AT, DE, CH, CZ, EE, EL, ES, FI, HU, IE, IT, PL, LT, LV, MT, NL, LU, SE.

⁷⁷² Country of residence: AT, BE, BG, CZ, DE, ES, FI, FR, HR, HU, IE, IT, PL, MT, NL, SE, SK, LT, UK.

⁷⁷³ Country of residence: AT, BE, BG, CH, CZ, DE, EE, ES, FI, HU, HR, IE, IT, LU, LV, NL, PT, SE, SK, UK.

⁷⁷⁴ Country of residence: BE, DE, ES, FI, FR, HR, IT, LT, MT, NL, RO, SE.

⁷⁷⁵ Country of residence: AT, BE, CZ, ES, FR, HR, HU, IT, LU, PL, RO, SE.

⁷⁷⁶ Country of residence: AT, BE, DE, HU, IE, IT, LV, LT, PL, SE.

⁷⁷⁷ Country of residence: BE, DE, IT, LT, LV, PL, SE.

6.3 Changes of status

In the vast majority of Member States, third-country nationals are allowed to change status, provided that the conditions for the new status are satisfied. In most Member States⁷⁷⁸, in order to change status, third-country nationals must meet the same eligibility conditions and submit the same application along with required documents as in the case of those applying for the first time and there is no facilitated procedure. The main difference in terms of procedure is that the applicant does not need a visa and the application can be submitted on the territory of the Member States, whereas for some statuses, the first time applicants are subject to submission at the diplomatic mission/representation in the country of origin.

A practical obstacle reported by the majority of Member States is that it is difficult to find publicly available information and understand the conditions and requirements for status change.

6.4 Access to employment and employment related rights

Irrespective of the type of the permit issued, the SPD requires Member States, when issuing residence permits in accordance with Regulation (EC) No 1030/2002 to indicate the information relating to the permission to work. ICF research shows that the right to access to employment is indicated on the residence card in 19 Member States⁷⁷⁹.

In all Member States under examination, except for Greece and Portugal, certain permits to work are linked to a certain employer only. Moreover, in all Member States, except for Cyprus and Germany, third-country nationals need to change the permit if they lose their job or want to change employment. In Germany, If the person loses his/her job he/she remains in possession of the existing residence permit, but the immigration authority can decide to limit its duration.

In these cases, the procedure to require a new permit varies across countries. The length of the procedure to change the permit ranges from 20 days (e.g. in Hungary) to 119 days in Finland for some occupations for which a labour market test needs to be carried out. In seven Member States the procedure lasts 30 days whereas in four countries it lasts 90 days. If the applicant does not change permit, 16 Member States⁷⁸⁰ apply sanctions, mainly financial ones. Administrative sanctions are in place in eight Member States whereby failure to notify of the changed conditions for residence will result in rejection of the application.

A practical obstacle reported by national researchers in the majority of Member States is that it is difficult to find publicly available information and understand the conditions and requirements for status change.

6.5 Equal treatment

Four of the examined Directives (LTRD, RD, BCD, SPD) include provisions on equal treatment of third country nationals with respect to nationals of the Member States, covering a number of aspects, including, *inter alia*, working conditions, freedom of association, social security benefits, education, recognition of academic and professional qualifications, tax benefits, access to goods and services and advice services.

⁷⁷⁸ AT, BE, BG, CY, DE, EE, EL, ES, FI, HR, LV, LT, MT, NL, PL, PT, RO, SI, SE.

⁷⁷⁹ AT, BG, CY, CZ, DE, EE, ES, FI, HU, LU, LV, NL, PL, PT, SE, SI, SK.

⁷⁸⁰ BE, BG, CZ, DE, EE, EL, FI, IT, HR, LT, LV, NL, RO, PT, SE, SK.

The FRD and SD do not include provisions on equal treatment. However, equality is ensured by the SPD in certain circumstances, for example if third-country nationals, falling within the scope of the FRD and SD, are authorised to work.

Problems have been identified mainly with regard to social security benefits and access to public goods and services. In some Member States⁷⁸¹, the issues concern access to social security benefits whereby third-country nationals do not have access to certain social security benefits for example family benefits.

Sometimes access to public services is not explicitly granted for those who are not permanent residents. For example, it would appear that in Slovenia only those with LTR status can apply for non-profit rental housing, rental subsidies and housing loans under public scheme.

The Directives under examination allow Member States to limit the right to equal treatment in certain situations, namely they are allowed to deny grants and loans for education and vocational training; family benefits may not be granted to third-country nationals authorised to work for a period of six months or less, or to students or third-country nationals entitled to work on the basis of a visa. Access to housing and tax benefits may be restricted as well. With regard to the SPD, only Cyprus has chosen to adopt all optional restrictions, whereas some Member States⁷⁸² did not apply any of the options.

6.6 National measures to prevent labour exploitation

Several ICF national researchers drew attention to the fact that third-country nationals suffer from poor working conditions especially in the agriculture and domestic work sectors, such as Cyprus and Italy. Although equality is recognised by law, it appears to not be fully applied in practice in Cyprus. For instance, although the law provides for equal pay of foreign and local workers, migrant workers are frequently paid wages much lower than those provided for in the collective agreements⁷⁸³. Since the minimum wage applies only to a small number of occupations and collective agreements do not exist in all sectors, the also system leaves a wide margin of discretion to employers to fix salaries at will.

While, 17 Member States⁷⁸⁴ have a mechanism in place to monitor labour exploitation, eight Member States⁷⁸⁵ do not. This is the case of Italy which, although it has a sufficiently developed legal framework to sanction labour exploitation both at a criminal and administrative level and to offer protection to victims, it neither has a mechanism to monitor labour exploitation, nor any other specific measures to prevent labour exploitation⁷⁸⁶.

In Member States which have a monitoring mechanism, this falls within the competence of various authorities such as the Labour Inspection Office, the Anti-discrimination authority, the Tax and Customs Board etc. Despite their existence, the mechanisms in place are not always specifically tailored to third-country nationals.

⁷⁸¹ BE, LV, SI, EE, – BE under analysis.

⁷⁸² BG, CZ, ES, HR, LU, RO and SK.

⁷⁸³ ECRI [fourth report on Cyprus](#)

⁷⁸⁴ BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, LT, LU, MT, NL, RO, SE, UK.

⁷⁸⁵ AT, HR, HU, IT, LV, PL, PT, SI.

⁷⁸⁶ Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA) (2014), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy, GRETA(2014)18, <https://rm.coe.int/1680631cc1>; Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA) (2017), Report on Italy under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings, GRETA(2016)29, <https://rm.coe.int/16806edf35>.

In Belgium, there is a general labour inspection mechanism that includes the monitoring of labour conditions of third-country nationals' employment although not specifically targeted to them. This service is part of the federal administration (SPF employment). The mechanism is based on investigations on the ground with a dedicated section for labour exploitation (known as "Cellules ECOSOC").⁷⁸⁷ Moreover, in October 2015, the federal administration launched a Contact Point for fair competition through which individuals can report abuses⁷⁸⁸. This is complementary to investigations as workers can report directly to the administration. Likewise, in Greece, the Labour Inspectorate is mainly responsible for inspecting labour places and detecting violations of labour legislation.

In Germany, the Federal Anti-Discrimination Agency is *inter alia* mandated to consult persons who have been discriminated because of their race/ethnicity at their workplace including cases of labour exploitation. In Estonia, control visits, such as inspections and checks, are carried out by the Tax and Customs Board and Police and Border Guard Board in cooperation with the Labour Inspectorate. Inspections are carried out based on risk assessment as well as on an ad-hoc basis. Although multiple mechanisms exist, in Finland it is the Occupational Health and Safety Authority⁷⁸⁹ which monitors, supervises and investigates issues related to the employment of foreigners including labour exploitation and the black economy.

Nine Member States do not have a monitoring system specifically targeting third country nationals. For example, in Cyprus, the system does not differentiate between nationals and third country nationals and treats all cases equally. The Department of Labour operates an inspectorate system whereby labour inspectors perform monitoring checks on employers either on their own initiative or after receiving a complaint by workers or workers' unions. No inspections are carried out in private homes where the vast majority of the migrant labour force, such as domestic workers, are employed.

Similarly, no mechanism to monitor specifically the labour exploitation of TCNs exists in Poland, however, this issue is at least partially covered by the activities of other bodies. The National **Labour Inspectorate** is authorised to check the legality of employment and stay of foreigners. Likewise, there is no agency dedicated to the labour exploitation of TCNs in Slovenia.

Moreover, the phenomenon of labour exploitation is tackled differently across the EU in terms of sanctions and other legal consequences. In this regard, several Member States (e.g. Bulgaria, Belgium, Italy etc.) impose financial sanctions to punish labour exploitation whereas others foresee a combination of both financial penalties and the deprivation of liberty. This is the case in Belgium, where both a fine and imprisonment can be imposed along with other measures. In particular when the employer does not comply with the legal requirements regarding labour relations, for instance if labour conditions are illegal, the work permit is withdrawn⁷⁹⁰.

Sanctions against employers that do not respect labour conditions and legal requirements vary according to the level of the infraction committed. For example, if labour exploitation amounts to human trafficking this is a criminal infraction punished by the Criminal Code in

⁷⁸⁷ For more information, see the annual report of DG social inspection at:

<https://socialsecurity.belgium.be/fr/publications/rapport-annuel-dg-inspection-sociale>.

⁷⁸⁸ <https://www.pointdecontactfraudessociale.belgique.be/en/index.html>

⁷⁸⁹ <http://www.tyosuojelu.fi/web/en/employment-relationship/foreign-employee>

⁷⁹⁰ Royal Decree of 9 June 1999, Article 35.

Belgium. In such cases the employer can be punished to an imprisonment sentence of one to five years and a fine of at least 500€ and maximum 50.000€.

The deprivation of liberty is also foreseen in Portugal, where penalties vary according to the type of crime. Sanctions applying to those who solicit or attempt to solicit labour exploitation differ from sanctions applicable to those who commit exploitation. The severity of the penalty ranges from one to five years (six in case of repeated offence) unless other legal provision imposes a more grievous sentence. In Cyprus, the deprivation of liberty can be increased to up to 10 years⁷⁹¹ if the exploited person is a child. In Czechia, while financial sanctions are applicable to employers, illegally employed workers can be expelled out of the territory of the country.

Labour exploitation falls within different types of crimes across EU Member States. Finally, 10 Member States⁷⁹² have specific measures in place to prevent labour exploitation of third country nationals. For instance, in Portugal, there are several intervention measures, such as training actions, awareness campaigns, information material, conferences and seminars aimed to prevent the phenomenon etc. These actions aim at discouraging the demand for irregular third country nationals work, increase the likelihood of identification of potential victims of labour exploitation by police officers and the general population and increase the likelihood of people denouncing the potential situations.

6.7 Integration requirements

Two Directives (FRD and LTRD) stipulate that Member States may require compliance with integration ‘measures’ (FRD) and ‘conditions’ (LTRD). The Directives do not define integration ‘measures’ and ‘conditions’. According to the Commission’s guidelines on the FRD⁷⁹³, Member States may impose a requirement on family members to comply with integration measures under Article 7(2), but this may not amount to an absolute condition upon which the right to family reunification is dependent. The Directives do not define integration ‘measures’ and ‘conditions’. Integration ‘measures’ (or pre-integration measures) could refer to measures conducted in the third country national’s country of origin, including language courses, ‘adaptation’ and civic orientation courses, including courses on history and culture of the country of origin⁷⁹⁴. In contrast, integration ‘conditions’ as laid down in the LTRD refer to evidence of integration in the host society.

Integration requirements and measures differ significantly across Member States⁷⁹⁵.

In 12 Member States⁷⁹⁶, there are mandatory integration requirements, while in the remaining Member States, integration measures (such as language and integration courses) are voluntary. In five of these⁷⁹⁷, the mandatory integration requirements only concern applicants for long-term residence, who need to demonstrate integration through knowledge of national language(s) and knowledge about society and culture of the country.

⁷⁹¹ Law revising the legal framework regulating the prevention, combating of trafficking and exploitation of persons and protection of victims N.60(I)/2014, 15 April 2014, article 8. Available at http://cylaw.org/nomoi/arith/2014_1_060.pdf

⁷⁹² BG, CY, ES, FI, HR, LU, NL, PT, RO, SK.

⁷⁹³ COM(2014) 210 final.

⁷⁹⁴ IOM (2009), Stocktaking of international pre-integration measures and recommendations for action aimed at their implementation in Germany.

⁷⁹⁵ See ICF Synthesis report 'Overview of integration requirements and measures' (Annex 2B).

⁷⁹⁶ AT, BE, BG, CY, DE, EL, FI, HR, IT, LU, MT, NL.

⁷⁹⁷ CY, EL, HR, LU, MT.

For example, in Greece, in order to obtain a long-term residence permit, the applicant need to demonstrate sufficient knowledge of the Greek language, history and civilization. This can be demonstrated through the following means: document of graduation from Greek school or university; certificate of attainment in Greek of at least B1 level and special certificate of sufficient knowledge of the Greek language and elements of Greek history and civilization.

Commonly, in the majority of Member States⁷⁹⁸, refusal to participate in the integration measures can result in loss of status. In Belgium, Germany and the Netherlands, not attending the integration and language courses may also result in a financial fine. Refusing to participate in the planning (30 days) or not attending the scheduled planning session (15 days) or refusal or failure to participate in the planned activities (60 days) will result in the withdrawal of social benefits for a number of days. Fees in relation to integration and language courses depend on the country of origin, course provider or course format⁷⁹⁹.

A small number of Member States may additionally require family members to acquire further language proficiency after admission (Austria and The Netherlands), or to take a civic language exam after admission (The Netherlands, UK) as part of their general integration programme or as part of requirements for permanent settlement in the country⁸⁰⁰. Estonia, Latvia and Norway provide free-of-charge language training in instances⁸⁰¹. Other post-admission requirements may include attending civics classes⁸⁰², reporting to an integration centre (Austria) or signing a declaration of integration (Belgium and The Netherlands)⁸⁰³.

Table 5: Overview of transposition of may clauses

Directives and relevant provision	Nº of MS not transpose d	MS
SD		
Article 12 2. Without prejudice to Article 16, renewal of a residence permit may be refused or the permit may be withdrawn if the holder: (a) does not respect the limits imposed on access to economic activities under Article 17 (b) does not make acceptable progress in his/her studies in accordance with national legislation or administrative practice.	9	BG, CZ, HU, IT, LU, MT, PL, RO, SK

⁷⁹⁸ AT, BE, BG, DE, EL, ES, FI, FR, HR, IT, MT.

⁷⁹⁹ EMN Synthesis Report for the EMN Focussed Study 2016, p.26. Family reunification of Third-Country Nationals in the EU plus Norway: National Practices.

⁸⁰⁰ AT, DE, LV, NL, LU.

⁸⁰¹ EMN Synthesis Report for the EMN Focussed Study 2016, p.27. Family reunification of Third-Country Nationals in the EU plus Norway: National Practices.

⁸⁰² BE, DE, EE, NL, SE).

⁸⁰³ Ibid.

Directives and relevant provision	Nº of MS not transpose d	MS
Article 12 2. Without prejudice to Article 16, renewal of a residence permit may be refused or the permit may be withdrawn if the holder: (a) does not respect the limits imposed on access to economic activities under Article 17 (b) does not make acceptable progress in his/her studies in accordance with national legislation or administrative practice.	10	BG, CZ, HU, IT, LU, MT, NL, RO, SI, SK
Article 17 Economic activities by students 1. Outside their study time and subject to the rules and conditions applicable to the relevant activity in the host Member State, students shall be entitled to be employed and may be entitled to exercise self-employed economic activity. The situation of the labour market in the host Member State may be taken into account. Where necessary, Member States shall grant students and/or employers prior authorisation in accordance with national legislation.	6	BG, IT, LT, PL, PT, SK
Art. 17 (3) Access to economic activities for the first year of residence may be restricted by the host Member State.	13	AT, BE, BG, CZ, FI, FR, HR, HU, IT, LV, PL, RO, SK
Art. 17 (4) Member States may require students to report, in advance or otherwise, to an authority designated by the Member State concerned, that they are engaging in an economic activity. Their employers may also be subject to a reporting obligation, in advance or otherwise.	11	BE, DE, HR, HU, IT, LV, MT, PL, RO, SE, SK
RD		
Article 5 6. A Member State may, among other measures, refuse to renew or decide to withdraw the approval of a research organisation which no longer meets the conditions laid down in paragraphs 2, 3 and 4 or in cases where the approval has been fraudulently acquired or where a research organisation has signed a hosting agreement with a third-country national fraudulently or negligently. Where approval has been refused or withdrawn, the organisation concerned may be banned from reapplying for approval up to five years from the date of publication of the decision on withdrawal or non-renewal.	8	CZ, HR, LT, LV, PL, RO, SE, SK
Article 10 Withdrawal or non-renewal of the residence permit 1. Member States may withdraw or refuse to renew a residence permit issued on the basis of this Directive when it has been fraudulently acquired or wherever it appears that the holder did not meet or no longer meets the conditions for entry and residence provided by Articles 6 and 7 or is residing for purposes other than for which he was authorised to reside.	7	CZ, FI, IT, LT, LV, RO, SK
Art. 10 (2) 2. Member States may withdraw or refuse to renew a residence permit for reasons of public policy, public security or public health.	7	CZ, IT, LT, LV, NL, RO, SK
BCD		
Article 8 2. Before taking the decision on an application for an EU Blue Card, and when considering renewals or authorisations pursuant to Article 12(1) and (2) during the first two years of legal employment as an EU Blue Card holder, Member States may examine the situation of their labour market and apply their national procedures regarding the requirements for filling a vacancy.	6	DE, FI, HR, LV, PT, RO

Directives and relevant provision	Nº of MS not transpose d	MS
Art. 9 (3) Member States may withdraw or refuse to renew an EU Blue Card issued on the basis of this Directive in the following cases: (a) for reasons of public policy, public security or public health; (b) wherever the EU Blue Card holder does not have sufficient resources to maintain himself and, where applicable, the members of his family, without having recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members of the person concerned. Such evaluation shall not take place during the period of unemployment referred to in Article 13; (c) if the person concerned has not communicated his address; (d) when the EU Blue Card holder applies for social assistance, provided that the appropriate written information has been provided to him in advance by the Member State concerned.	5	DE, LT, LV, NL, SI
Article 14 Equal treatment 1. EU Blue Card holders shall enjoy equal treatment with nationals of the Member State issuing the Blue Card, as regards: (a) working conditions, including pay and dismissal, as well as health and safety requirements at the workplace;	15	AT, BG, CZ, ES, FR, HR, HU, IT, LV, PL, PT, RO, SE, SI, SK
(b) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;	20	AT, BE, BG, CZ, DE, ES, FI, FR, HR, HU, IT, LT, LU, LV, NL, PL, PT, RO, SI, SK
Art. 14 (4) When the EU Blue Card holder moves to a second Member State in accordance with Article 18 and a positive decision on the issuing of an EU Blue Card has not yet been taken, Member States may limit equal treatment in the areas listed in paragraph 1, with the exception of 1(b) and (d). If, during this period, Member States allow the applicant to work, equal treatment with nationals of the second Member State in all areas of paragraph 1 shall be granted.	15	AT, BE, CZ, DE, ES, FI, HR, IT, LT, LU, LV, NL, PL, RO, SI
LTR		
Art. 5(2) Member States may require third-country nationals to comply with integration conditions, in accordance with national law. Article 8 Long-term resident's EC residence permit 1. The status as long-term resident shall be permanent, subject to Article 9. 2. Member States shall issue a long-term resident's EC residence permit to long-term residents. The permit shall be valid at least for five years; it shall, upon application if required, be automatically renewable on expiry.	11	BE, BG, CZ, DE, FI, HU, LV, PL, SE, SI, SK
Art. 11 (2). With respect to the provisions of paragraph 1, points (b), (d), (e), (f) and (g), the Member State concerned may restrict equal treatment to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he/she claims benefits, lies within the territory of the Member State concerned.	12	AT, BG, ES, HR, HU, LT, LU, MT, PT, RO, SI, SK

Directives and relevant provision	Nº of MS not transpose d	MS
Art. 11 (3). Member States may restrict equal treatment with nationals in the following cases: (a) Member States may retain restrictions to access to employment or self-employed activities in cases where, in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or EEA citizens;	13	BE, CY, CZ, DE, ES, HU, LT, LU, LV, PL, PT, SI, SK
Art. 11 (3) (b) Member States may require proof of appropriate language proficiency for access to education and training. Access to university may be subject to the fulfilment of specific educational prerequisites.	12	AT, BG, EE, HR, HU, IT, LT, LV, PL, PT, SI, SK
Art. 11 (4). Member States may limit equal treatment in respect of social assistance and social protection to core benefits.	19	AT, BE, BG, CZ, FI, FR, HR, HU, IT, LT, LU, LV, MT, NL, PT, RO, SE, SI, SK
Art. 11 (5). Member States may decide to grant access to additional benefits in the areas referred to in paragraph 1. Member States may also decide to grant equal treatment with regard to areas not covered in paragraph 1.	20	AT, BE, BG, CY, CZ, DE, FI, FR, HR, HU, LT, LU, MT, NL, PL, PT, RO, SE, SI, SK

Source: ICF(2018) Annex2A.

7. Phase 7. Intra-EU mobility phase

Provisions on intra EU-mobility exist in the LTRD, the BCD, the SD and the RD. They also exist in the ICT and the S&RD, but these are not reviewed in this annex.

In general, third-country nationals who are in possession of a valid travel document and a residence permit or a long-stay visa issued by a Member State applying the Schengen acquis in full, are allowed to enter into and move freely within the territory of the Member States applying the Schengen acquis in full, for a period up to 90 days in any 180 days period.

This applies to all Schengen states – but those countries which are not applying the Schengen acquis in full can also recognise these permits and long-stay visas as equivalent to their national visas⁸⁰⁴.

It is necessary to distinguish two types of intra-EU mobility: whilst in LTRD and BCD the objective of mobility is to move to another Member State and to settle there/find a new job there, the purpose of mobility under SD, and RD is rather to provide for temporary mobility to other Member State.

7.1 Conditions and procedures for intra-EU mobility (in the second Member State)

Overall, with regard to work permits, procedurally the majority of Member States apply the same procedure for intra-EU mobility as for first time applicants. For residence permits this is less pronounced, and the procedures are much facilitated. In terms of the documents needed, again, in the majority of Member States there is no difference between first time applicants and mobile third-country nationals.

Regarding the LRTD, mobile third-country long-term residents in some Member States are required to submit additional documents in comparison to first time applicants in order to

⁸⁰⁴ Decision No 565/2014/EU.

obtain residence or work permit. These can include medical certificate / insurance (Belgium, Malta); criminal record (Belgium, Slovakia⁸⁰⁵); evidence of sufficient means (Belgium, Malta); a certificate issued by the educational institution in first Member State (Belgium, Malta) evidence of accommodation (Malta); language test score (Malta); and residence permit from first Member State (The Netherlands and Slovenia).

Only for national long-term residence permits, Member States have different procedures and conditions between mobile third-country nationals and first time applicants under national schemes

None of the Member States reported any provisions concerning any category of third-country nationals under which they can move to a second Member State under the same rules as EU citizens. Generally, beyond the 90 day period, all third-country nationals need to satisfy conditions to obtain a residence or work permits.

Based on the results of the Open Public Consultation, 68% (n=123) respondents did not encounter any problems in getting a residence permit in a second Member State.

Table 6: Conditions and procedures for admission in a second Member State differ for ‘mobile’ third-country nationals compared those for a first time applicant third-country nationals under EU Directives

		Blue Card Directive (2009/50/EC)	Family Reunification Directive (2003/86/EC)	Students Directive (2004/114/EC)	Researchers Directive (2005/71/EC)	Long-term residents Directive (2003/109/EC)
<u>Procedures and conditions to request a residence permit</u>	Yes	AT, BG, CZ, DE, EE, EL, FI, IT, LV, MT, NL, PT, RO, SK,	DE, EE, FI, LT, LV, NL, SK,	BG, DE, EE, FI, IT, LU, LV, MT, NL,	BG, DE, EE, FI, IT, LU, LV, NL, PL, RO, SK,	AT, BE, BG, CZ, DE, EE, ES, FI, IT, LT, LV, MT, NL, PL, PT, SE, SK,
	No	BE, ES, HR, HU, LT, LU, PL, SE, SI,	AT, BE, CY, CZ, EL, EL, ES, HR, HU, IT, LU, MT, PL, PT, RO, SE, SI,	AT, BE, CY, CZ, EL, ES, HR, HU, LT, PL, PT, RO, SE, SI, SK,	AT, BE, CY, CZ, EL, ES, HR, HU, LT, MT, PT, SE, SI,	CY, EL, HR, HU, LU, RO, SI,
	N/A	CY,	BG,			
<u>Procedures and conditions to request a work permit</u>	Yes	BG, EE, EL, IT, MT, NL, RO, SE	NL, SK,	LU, NL,	DE, EE, IT, LU, NL,	BE, BG, DE, ES, IT, NL, SE, SK
	No	AT, BE, CZ, DE, ES, HR, HU, LT, LU, LV, PL, PT, SI, SK,	AT, BE, CY, CZ, DE, EE, EL, ES, HR, HU, IT, LT, LU, LV, MT, PL, PT, RO, SE, SI,	AT, BE, CY, CZ, EL, DE, EE, EL, ES, HR, HU, LT, LU, LV, PL, PT, RO, SE, SI, SK,	AT, BE, CY, CZ, EL, DE, EE, EL, ES, HR, HU, LT, LU, LV, MT, PL, PT, RO, SE, SI, SK,	AT, CY, CZ, EE, EL, HR, HU, LT, LU, LV, MT, PL, PT, RO, SI,
	N/A	CY, FI,	BG, FI,	BG, FI, IT, MT,	BG, FI,	FI,
<u>Documentation requirements to prove residence</u>	Yes	AT, BE, BG, EL, FI, SI, SK,	FI, IT, SK,	FI, SI,	FI, SI,	BE, ES, FI, LT, NL, SI, SK,
	No	CZ, DE, EE, ES, HR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE,	AT, BE, CY, CZ, DE, EE, EL, ES, HR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI,	AT, BE, CY, CZ, DE, EE, EL, ES, HR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SK,	AT, BE, CY, CZ, DE, EE, EL, ES, HR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SK,	AT, CY, CZ, DE, EE, EL, HR, HU, IT, LU, LV, MT, PL, PT, RO, SE,

⁸⁰⁵ This requirement is at the discretion of Slovak authorities, and is not mandatory.

				SK,		
	N/A	CY,	BG,	BG,	BG,	BG,
Other different conditions / procedures	Yes	BE, CZ, LV, MT, RO, SK,	BE, LV, RO, SK,	BE, LV,	BE, FI, LV, RO,	BE, CZ, ES, LV, NL, RO, SK,
	No	AT, DE, EE, EL, ES, FI, HR, HU, IT, LT, NL, PT, SI,	AT, CY, CZ, DE, EE, EL, ES, FI, HR, HU, IT, LT, MT, NL, PT, SI,	AT, CY, CZ, DE, EE, EE, EL, ES, FI, HR, HR, HU, IT, LT, MT, NL, PT, RO, SI, SK,	AT, CY, CZ, DE, EE, EL, ES, HR, HU, IT, LT, MT, NL, PT, SI, SK,	AT, CY, DE, EE, EL, FI, HR, HU, IT, LT, MT, PT, SI,
	N/A	BG, CY, LU, PL,	BG, LU, PL,	BG, LU, PL,	BG, LU, PL,	BG, LU, PL,

Source: ICF(2018) Annex 2A.

7.2 Movement and rights of family members

The right of mobile third-country national family members to move is guaranteed in Art. 16 of the LTRD and provides for the right of LTR family members to move whenever the LTR to exercise their right to move to another Member State. The LTR sets up a number of additional conditions in Art. 16, such as the need by the family to be constituted in the first Member State, as otherwise the family would be reunited under the FRD. Art. 16 also allows Member States to require from family members to provide, along with their application, (a) their long-term resident's EC residence permit or residence permit and a valid travel document or their certified copies; (b) evidence that they have resided as members of the family of the long-term resident in the first Member State (c) evidence of sufficient income to maintain themselves (d) sickness insurance.

Art. 18 of the BCD provides for the right of family members to move along with the Blue Card holder after 18 months of legal residence in the first Member State. The specific requirements and conditions that Member States may require are articulated in Art. 19 of the BCD (residence permit in the first Member State and a valid travel document; evidence that they have resided as members of the family of the EU Blue Card holder; evidence of sickness insurance; evidence of available accommodation or sufficient funds).

All Member States seem to be in line with the general provisions of Art. 16.1 of LTRD and Art. 18 of BCD and the vast majority of Member States also grant this right to family members of mobile third-country nationals as part of the other statuses.

The SD, RD, SPD and FRD do not contain any specific provisions concerning the intra-EU mobility of family members, and the issue was left to national legislation. The S&RD (Art. 27) has now filled the gap for family members.

No specific issues were identified by ICF researchers for family members moving with the permit holder. Most Member States and for most of the permits allow family members to accompany the permit holder.

Table 7: Are dependent family members of mobile TCNs allowed to move from a one Member States to a second Member States?

	EU legal migration Directives					National equivalent statuses			
	BCD	FRD	SD	RD	LTR	BDC national	SD national	RD national	LTR national
AT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
BE	Yes	Yes	Yes	Yes	Yes	Yes	NA	NA	No
BG	Yes	Yes	Yes	Yes	Yes	NA	NA	NA	Yes
CY	NA ⁸⁰⁶	Yes	No	No	Yes	NA	NA	NA	NA
CZ	Yes	Yes	Yes	Yes	Yes	NA	Yes	NA	NA
DE	Yes	Yes	Yes	Yes	Yes	Yes			Yes
EE	Yes	Yes	Yes	Yes	Yes	Yes	NA	NA	NA
EL	Yes	Yes	Yes	Yes	Yes	NA	NA	NA	NA
ES	Yes	No	No	No	Yes	No	No	No	No
FI	Yes	Yes	Yes	Yes	Yes	Yes	NA	Yes	Yes
FR									
HR	Yes	Yes	Yes	Yes	Yes	NA	NA	NA	Yes
HU	Yes	Yes	Yes	Yes	Yes	NA	NA	NA	Yes
IT	Yes	Yes	Yes	Yes	Yes	Yes	NA	Yes	NA
LT	Yes	Yes	No	Yes	Yes	No	NA	NA	Yes
LU	Yes	Yes	NA	Yes	Yes	NA	NA	NA	NA
LV	Yes	Yes	Yes	Yes	Yes	NA	NA	NA	Yes
MT	Yes	Yes	NA	Yes	Yes	No	NA	NA	NA
NL	Yes	Yes	Yes	Yes	Yes	Yes	NA	NA	Yes
PL	Yes	Yes	Yes	Yes	Yes				
PT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
RO	Yes	Yes	No	No	Yes				
SE	Yes	Yes	Yes	Yes	NA	Yes			
SI	Yes	No	No	Yes	Yes	NA	NA	NA	NA
SK	Yes	Yes	Yes	Yes	Yes				
Total - Yes	23	22	17	21	23	9	3	4	10
Total - No	0	2	5	3	0	3	1	1	2

Source: ICF(2018) Annex 2A.

⁸⁰⁶ The law allows it but as there are no Blue Cards issued, the practical applicability cannot be assessed.

Dependent family members of third-country nationals who are allowed to move from a first Member State to a second Member State, generally do not automatically maintain the same rights they had in the first Member State. Member States grant rights to family members in accordance with their own national legislation. If they held a right in the first Member State that is not part of legislation of the second Member State, then it is not transferred. Therefore, the rights are the same as the ones provided to family members that joined under conditions of the FRD.

The type of rights that family member may have immediate access to include:

- Right to the labour market, including self-employment⁸⁰⁷
- Right to education⁸⁰⁸
- Right to vocational training⁸⁰⁹
- Access to social services⁸¹⁰
- Access to health insurance (if ensured in first Member State)⁸¹¹
- Immediate access to labour market for family member of mobile third country national⁸¹²

Belgium, Greece, the Netherlands and Malta grant the same rights as in the first Member State under all EU statuses, whereas Lithuania grants these for the BCD, FRD and LTRD.

7.3 Short term mobility

Article 22 of the Convention implementing the Schengen Agreement further leaves at the discretion of Member States to oblige third-country nationals to report their presence either at the border or within three days of their arrival.

Five Member States require some type of notification, as presented in the Table below.

Table 8: Member States requiring notification in case of short-term mobility

MS	Authority notified	Time	Scope / additional conditions
CZ	Czech Foreign Police	3 days after the arrival	All third-country nationals If staying in hotel, hostel or guesthouse, this obligation is fulfilled automatically by the accommodation provider.
IT	Questura Single Desk for Immigration of local Prefettura	8 working days from their entry	All third-country nationals Researchers should submit copy of the hosting agreement signed with the institution in the first Member State and a declaration from the institution in the second Member State.
LU		3 days of arrival	All third-country nationals
RO	Border police	Upon arrival at border	All third-country nationals

⁸⁰⁷ CY, ES, LU, PT, IT.

⁸⁰⁸ CY, IT.

⁸⁰⁹ CY, IT.

⁸¹⁰ IT.

⁸¹¹ CZ, PT.

⁸¹² CZ.

MS	Authority notified	Time	Scope / additional conditions
SI	Police Employment Service Slovenia	3 days of arrival of Prior to arrival	All third-country nationals shall be reported to the police by either a landlord or by a host or in person. Third-country nationals for employment except researchers under RD.

Source: ICF(2018) Annex 2A.

Regarding the need for authorisation for third country nationals for short term mobility, only two Member States have such provisions in their legislation. The Czechia requires a work permit, if the short term visit of a Blue Card Holder is with an employment purpose. The permit needs to be obtained in advance by the Czech Labour Office. In Greece, third-country nationals need authorisation granted by the Greek Consular Authority for short-term mobility.

Only two Member States require from the mobile third-country nationals additional documentation aside from a residence permit and a valid travel documents when it comes to short-term mobility. In Sweden, regarding the SD, a third-country national also needs a certificate from the Swedish university and a certificate from the university in the home country. The other exception is Slovenia, where regarding the FRD if the permits to family members are not issued by the State Party to the Convention implementing the Schengen Agreement, or if the family members are not citizens of a visa-free country, a visa is required, provided that the applicant fulfils requirements for the issuance of a visa (e.g. sufficient means of subsistence, health insurance).

Table 9: Overview of transposition of may clauses

Directives and relevant provision	No MS not transposed	MS
RD		
Art. 13 (3) If the researcher stays in another Member State for more than three months, Member States may require a new hosting agreement to carry out the research in that Member State. At all events, the conditions set out in Articles 6 and 7 shall be met in relation to the Member State concerned.	5	AT,LT,LV,PL,PT
BCD		
Art. 18 (3) The application may also be presented to the competent authorities of the second Member State while the EU Blue Card holder is still residing in the territory of the first Member State.	7	BG,DE,LT,PL,PT,RO,SK
Art. 18 (5) If the EU Blue Card issued by the first Member State expires during the procedure, Member States may issue, if required by national law, national temporary residence permits, or equivalent authorisations, allowing the applicant to continue to stay legally on its territory until a decision on the application has been taken by the competent authorities.	6	BE,IT,LT,PT,RO,SE
Art. 18 (6) The applicant and/or his employer may be held responsible for the costs related to the return and readmission of the EU Blue Card holder and his family members, including costs incurred by public funds, where applicable, pursuant to paragraph 4(b).	7	BG,CZ,DE,ES,LT,LU,SI
Art 18 (7) In application of this Article, Member States may continue to apply volumes of admission as referred to in Article 6. 8. From the second time that an EU Blue Card holder, and where applicable, his family members, makes use of the possibility to move to another Member State under the terms of this Chapter, 'first Member State' shall be understood as the Member States from where the person	15	AT,BE,CZ,DE,FI,HU,IT,LT,LU,IV,NL,PT,SE,SI,SK

Directives and relevant provision	No MS not transposed	MS
concerned moves and ‘second Member State’ as the Member State to which he is applying to reside.		
LTR		
Art. 14 (3) In cases of an economic activity in an employed or self-employed capacity referred to in paragraph 2(a), Member States may examine the situation of their labour market and apply their national procedures regarding the requirements for, respectively, filling a vacancy, or for exercising such activities. For reasons of labour market policy, Member States may give preference to Union citizens, to third-country nationals, when provided for by Community legislation, as well as to third country nationals who reside legally and receive unemployment benefits in the Member State concerned.	10	AT,BE,BG,EE,ES,HU,LT,LU,IV,PL,SE
Art. 14 (5) This chapter does not concern the residence of long-term residents in the territory of the Member States: (a) as employed workers posted by a service provider for the purposes of cross-border provision of services; (b) as providers of cross-border services. Member States may decide, in accordance with national law, the conditions under which long-term residents who wish to move to a second Member State with a view to exercising an economic activity as seasonal workers may reside in that Member State. Cross-border workers may also be subject to specific provisions of national law.	10	AT,CZ,FI,IT,LT,LU,NL,PT,RO,SK
Art. 15 (3). Member States may require third-country nationals to comply with integration measures, in accordance with national law. This condition shall not apply where the third-country nationals concerned have been required to comply with integration conditions in order to be granted long-term resident status, in accordance with the provisions of Article 5(2).	15	AT,BE,BG,CY,CZ,ES,FI,HU,IT,LT,PL,PT,RP,SI

Source: ICF(2018) Annex 2A.

8. Phase 8. End of legal stay, leaving the EU

8.1 Procedures around leaving the Member State

Most Member States have established a number of specific procedures or notification requirements for third-country nationals choosing to leave their territory.⁸¹³ These procedures are overall the same for all categories of residence permits. They mainly entail a requirement for de-registration from the local authorities where the third-country national was residing, the return of the residence permit and leaving details of the country of next residence. These requirements are generally notification requirements and their non-compliance is rarely sanctioned.

Deregistration (or notification of departure) from local authorities of residence is a requirement in 14 Member States⁸¹⁴.

Seven Member States do not have any specific requirements set up for third-country nationals deciding to leave the Member State.⁸¹⁵

⁸¹³ AT, BE, BG, CY, CZ, EE, ES, FI, HU, LU, LT, LV, NL, PL, RO, SE and SI.

⁸¹⁴ AT, BE, CZ, EE, ES, FI, HU, IT, LU, LV, NL, RO, SE and SI.

⁸¹⁵ DE, EL, FR, IT, MT, PT and SK.

8.2 Rights to transfer benefits

A main challenge for third-country nationals in this phase is having access to and obtaining clear information on the exportability of certain social security benefits such as old age and invalidity pensions earned during their stay in a Member State.

Some Member States limit the possibility of export of pensions for third country nationals to the existence of bilateral agreements. The principle of the portability of pensions in respect of old age, death or invalidity should apply under the same conditions as for nationals of a member State⁸¹⁶. This principle is however not fully applied in a number of Member States. As an example, recent case law in Belgium⁸¹⁷ ruled that a bilateral agreement is no longer necessary for the transferability of pensions thus ensuring the portability of statutory pensions for all third-country nationals. In France, the export of some types of pensions is subject to conclusion of a bilateral agreement. In the Netherlands, benefits can also be transferred without the existence of a bilateral agreement, but for certain third countries only a certain share of the total amount (e.g. receive a pension based on a minimum of 50% of the net minimum wage) can be accessed, whereas for other third countries, social security agreements can guarantee access to the full amount.

To request a transfer of benefits, third-country nationals may either lodge a request to the channels foreseen in bilateral agreements (i.e. either request directly to authorities of the Member States⁸¹⁸ and/or to authorities designated to manage such requests in third-countries⁸¹⁹) or lodge a request directly to Member States' authorities where there is no such agreement⁸²⁰. For example, in Italy, application for exportability may be submitted online or via consulates in third-countries.

With the exception of a few Member States, information provided above on exportability of social security benefits is in practice not easily accessible to third-country nationals nor made available by national authorities in a clear manner.

Information is generally not published on websites of national authorities responsible for migration nor on websites of diplomatic missions abroad⁸²¹, and an expert eye needs to look for them on websites of the relevant social security agencies⁸²² or request them in person or by phone⁸²³. The language in which this information is available may also be a hampering factor.

8.3 Procedures for absences from the Member State

The LTRD⁸²⁴ and BCD⁸²⁵ contain provisions regulating the period of absences tolerated outside the EU before a residence permit is withdrawn. As the other legal migration

⁸¹⁶ As established by Article 12(4) of the SPD and also stipulated in the other Directives.

⁸¹⁷ Court of cassation ruling of 15 December 2014.

⁸¹⁸ BE, HR, IT and SK.

⁸¹⁹ IT and NL.

⁸²⁰ BE, HR, FI, IT, NL, LT and SK.

⁸²¹ With the exception of BE, ES, LT.

⁸²² BE, BG, CZ, EE, FI, HU, IT, LU, NL, PT, RO, SE, SI, SK.

⁸²³ AT, BE, CZ, EE, ES, FI, HR, HU, IT, LT, NL, SI.

⁸²⁴ Article 9(1) of the LTR stipulates that third-country nationals are now longer entitled to the states in case of an absence for a period of 12 consecutive months from the territory of the Member State

⁸²⁵ Article 16(4) of the BCD states that by way of derogation from Article 9(1)(c) of the LTR, Member States shall extend to 24 consecutive months the period of absence from the territory of the Community which is allowed to an EC long-term resident holder of a long-term residence permit with the remark referred to in

Directives do not contain provisions on this topic, the legislative framework in a number of Member States' does not provide for rules in this area for permits issued based on the FRD, SD and RD⁸²⁶.

Periods of absences allowed in other Member States are the following:

- FRD: on average, 7 months of absence are allowed in Member States, ranging from 30 days in Croatia and Greece to up to two years in Finland.
- SD: on average, 5 months of absence are allowed in Member States, ranging from 30 days in Croatia to up to one year in the Netherlands.
- RD: on average, 7 months of absence are allowed in Member States, ranging from one month in Croatia, three months in Cyprus, Spain and Greece to up to two years in Finland
- BCD: only regulates the period of absence allowed in cases where the Blue Card holder has long-term residency status, it does not include provisions concerning absences taken before the third-country national has reached that point. Blue Card holders in Belgium and Germany can be absent for 12 consecutive months. In Bulgaria, Spain, Greece and Latvia, Blue Card holders can be absent for 12 consecutive months with a total of 18 months within the five years period of the validity of the residence permit. In other Member States, absences to the country of origin for work and/or studies (e.g. Romania), or for short-term visits or holidays (e.g. Finland) are not taken into account.
- LTRD: holders of a long-term residence status will have their status withdrawn in the event of absence from the territory of the EU longer than 12 consecutive months. Member States comply with the provisions. A few Member States have allowed for a longer period of absence in their legislation, in accordance with the option left in Article 9(2) of LTR.

Table 10: How many days can a TCN be absent of a MS without losing the residence permit/right

	EU legal migration Directives				
	BCD	FRD	SD	RD	
AT	No rules	No rules	No rules	No rules	730
BE	364	365	90	365	365
BG	364	No rules	No rules	No rules	365
CY	90	90	90	90	365
CZ	No rules	No rules	No rules	No rules	365
DE	364	180	180	180	365
EE	No rules	No rules	No rules	No rules	No rules
EL	364	30	90	90	365
ES	364	90	90	90	90
FI	730	730	No rules	730	730
FR	No rules	No rules	No rules	No rules	1065
HR	30	30	30	30	365

Article 17(2) of this Directive and of his family members having been granted the EC long-term resident status.

⁸²⁶ AT, BG, CZ, EE, HU, LV, MT, PL, SE, SI.

HU	No rules	No rules	No rules	No rules	365
IT	182	180	180	180	365
LT	180	180	180	180	365
LU	730	180	180	180	365
LV	180	No rules	No rules	No rules	365
MT	No rules	No rules	No rules	No rules	365
NL	240	180	365	240	365
PL	No rules	No rules	No rules	No rules	365
PT	180	180	180	183	365
RO	364	365	No rules	No rules	365
SE	No rules	No rules	No rules	No rules	365
SI	No rules	No rules	No rules	No rules	365
SK	180	180	180	180	365
<i>Average months</i>	<i>306.625</i>	<i>211.4286</i>	<i>152.9167</i>	<i>209.0769</i>	<i>413.125</i>

Source: ICF(2018) Annex 2A.

Table 11: Overview of transposition of may clauses

Directives and relevant provisions	N° of MS	MS
1. Researchers Directive		
2. Article 5(3). Member States may require, in accordance with national legislation, a written undertaking of the research organisation that in cases where a researcher remains illegally in the territory of the Member State concerned, the said organisation is responsible for reimbursing the costs related to his/her stay and return incurred by public funds. The financial responsibility of the research organisation shall end at the latest six months after the termination of the hosting agreement.	2	EE and EL
3. Long-term residents Directive		
4. Article 9(1). Long-term residents shall no longer be entitled to maintain long-term resident status in the following cases: [...] (c) in the event of absence from the territory of the Community for a period of 12 consecutive months.	2	HR, NL
5. Article 9(2) By way of derogation from paragraph 1(c), Member States may provide that absences exceeding 12 consecutive months or for specific or exceptional reasons shall not entail withdrawal or loss of status.	4	EE, EL, FR, MT
6. Article 9(7) Where the withdrawal or loss of long-term resident status does not lead to removal, the Member State shall authorise the person concerned to remain in its territory if he/she fulfils the conditions provided for in its national legislation and/or if he/ she does not constitute a threat to public policy or public security.	7	BE, HR, LT, MT, NL, RO, SI

Source: ICF(2018) Annex 2A.

ANNEX 9: STATISTICAL ANALYSIS

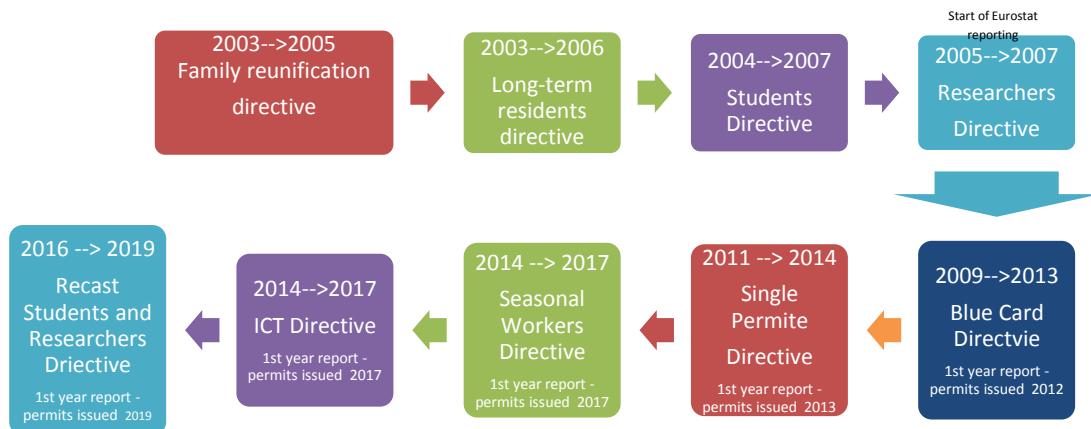
1. EU wide statistics on third country migration to the EU

Introduction on data availability on third-country migration to EU Member States

The availability of EU wide comparable statistics related to the EU legal migration Directives was improved by the adoption in 2007 of the Regulation on migration statistics⁸²⁷, which specifies which data Member States shall report to Eurostat. Therefore from the reference year 2008 on, data on residence permits issued to third-country nationals for various reasons (including some Directive specific data) is available. Prior to that only population statistics (by group of citizenship) are available from which the non-EU 28 population can be extracted, but no comparable data is available on the reason for residing in the EU (work, family, study, other) or which type of permits is held. This means that for most Directives complete and comparable baseline data on the situation prior to the proposal and subsequent adoption of the respective Directive is not available⁸²⁸.

For the flows and stock of residence permits issued for various reasons (including some Directive specific data) the first reporting year is 2008. However, for the Directives adopted after the 2007 regulation entered into force, a first reference year to provide statistics is stipulated in the Directive which means that data is only available after the transposition deadline year (see figure 1).

Figure 1. Timeline of adoption and first reference year for statistics by directives



⁸²⁷ Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection.

⁸²⁸ Note that some baseline data were extracted for the respective legislative proposal, and in various Communications issued in the reference period, but this data is partial and not comparable. Such data when available is presented in Annex 7 on Effectiveness.

Statistical picture of third-country nationals residing in EU Member States since 1999 (based on population data)

Using Eurostat population data, the evolution of the population of third-country nationals residing in the EU MS can be estimated (see figures 2 and 3 below). In order to take into account the various expansions of the EU in the reference period 1999-2017 (2004, 2007 and 2013 enlargements), third-country nationals are defined as "non-EU-28 citizens"⁸²⁹. Moreover, all 13 recently accessed Member States are considered in terms of host countries in the data from 2006 on, due to limited data availability before that reference year.

The number of third-country nationals (i.e. holding citizenship from countries outside the current EU-28 area) residing in EU-25 countries (those EU Member States bound by the *acquis* on legal migration) has increased from 10.7 million in 1999 to 18.7 million in 2017⁸³⁰.

In 2017, most of the third-country nationals in the EU-25 area were residing in EU-12 countries (i.e. EU-15 minus UK, Ireland and Denmark): 17.4 million (92% of the total in the EU-25). This represents an increase by 6.7 million (or +63%) over this 18 year period and the share in the total population of EU-12 countries increased from 3.5% in 1999 to 5.3% in 2017.

Third-country nationals in the EU-12 are concentrated in the largest Member States in terms of population: in 2017 they were located in Germany (5.2 million or 30% of the total), Italy (3.5 million, 20%), France (3.1 million, 18%) and Spain (2.5 million or 14%) while other EU-12 countries⁸³¹ accounted all together for 3.1 million third-country nationals in 2017 (or 18% of the total in the whole EU-12 area).

In % of the total population, the number of third-country nationals was (in 2017) more than 6% in Austria, Luxembourg and Germany and around 4-5% in Italy, Greece, Spain, Sweden, France and Belgium. It was lower than 3% in Portugal, Finland and the Netherlands.

In absolute terms, increases over 1999-2017 have been the most important in Italy (+2.6 million) and Spain (+1.6 million) followed by France (+1 million), all other EU-12 countries (+900,000) and Germany (+580,000).

It is important to note that these figures relate to the net increase in the stock of third-country nationals residing, fuelled on the positive side by new inflows (and births) but also by negative flows of return outflows, naturalisation and deaths. Moreover, revisions after some Census also affect time comparison: in the case of Germany, considering only the (post-Census) period 2011-2017, one sees an increase in the stock of third-country nationals residents by 1.6 million (or +43%), part of it being driven by the increasing flows of asylum seekers from 2014 on.

EU-13 countries (which joined the EU between 2004 and 2013) hosted in 2017 around 7.7% of all third-country nationals residing in EU-25 countries. Overall, the number of third-

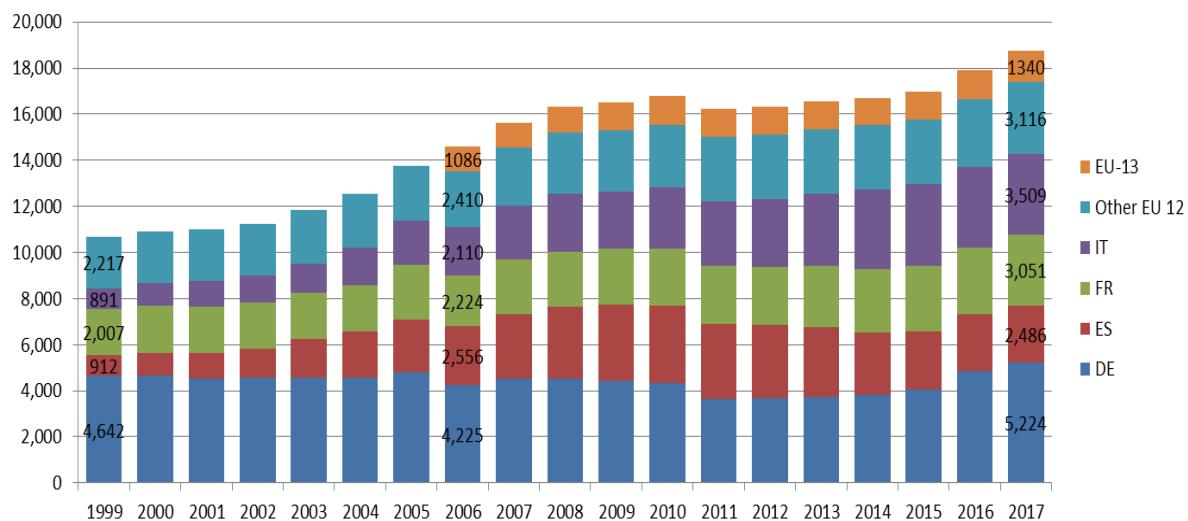
⁸²⁹ Therefore, citizens from recently accessed Member States are not included in 'the stock of third-country nationals' before their accession to the EU as otherwise the comparison over time would be biased.

⁸³⁰ One sixth of the 8 million increase corresponds to a statistical artefact due to the enlargement (from 'EU-12' to 'EU-25') to 13 Member States between 2004 and 2013. For those countries, which hosted all together around 1.4 million third-country nationals in 2017 (around 1.3% of their total population on average), available data does not make it possible to re-construct the trends before 2006.

⁸³¹ Austria, Belgium, the Netherlands, Portugal, Greece, Luxembourg, Finland and Sweden.

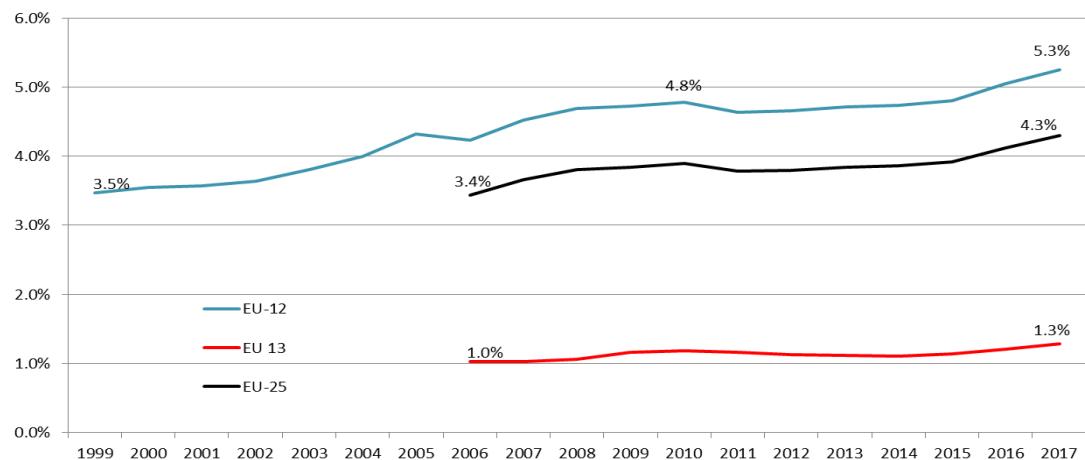
country nationals residing in EU-13 increased slightly from 1.1 million in 2006 to 1.3 million in 2017, bringing the share in the total population from 1.0% to 1.3% over the period. There are however large differences with high shares in the total population (around 14%) in Latvia and Estonia, medium levels (3-5%) recorded in Malta, Slovenia, Cyprus and the Czech Republic and very low level (<1%) in all other EU-13 countries (see figure 4 and table 1). Nevertheless over the period 2006-2017 it is in Poland (+150,000) and Czech Republic (+137,000) that the number of third-country nationals residents increased the most.

Figure 2. Non-EU 28 citizens in EU-25 Member States (1999-2017), in thousands (stock)



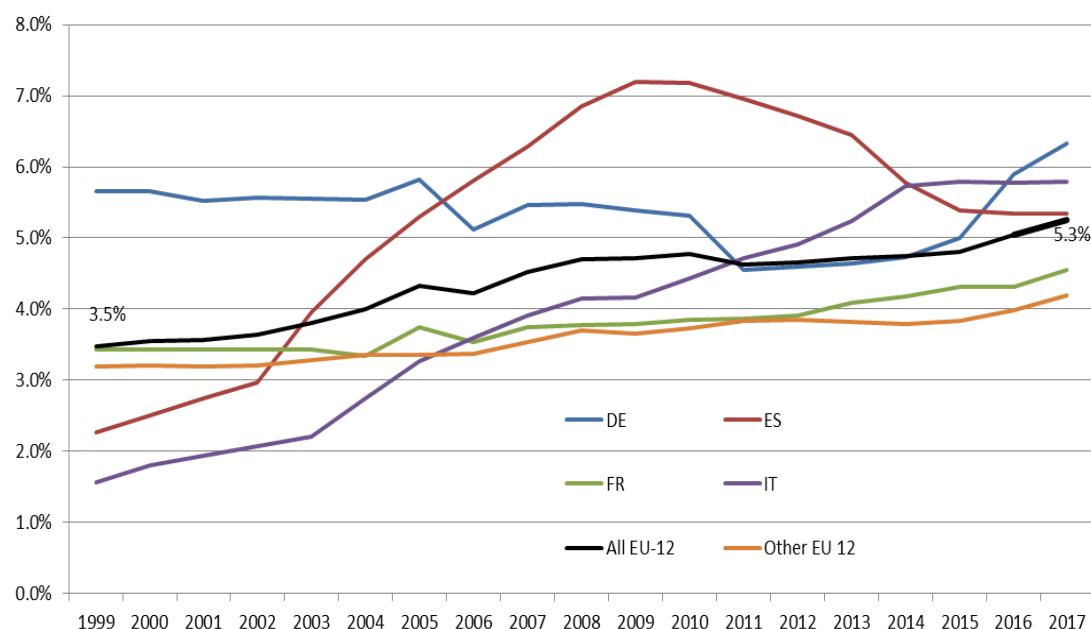
Source: Eurostat Population Statistics, [migr_pop1ctz, extracted on 06.04.2018] and DG HOME estimations for missing values. Note: EU-25 Member States are those bound by the Legal migration directives (all EU-28 Member States except Denmark, Ireland and the UK). EU-12 Member States are those 'old EU-15 Member States' bound by the Legal migration directives (all EU-15 Member States except Denmark, Ireland and the UK). 'Other EU-12 Member States' (than the top 4 countries in terms of population) are: Austria, Belgium, the Netherlands, Portugal, Greece, Luxembourg, Finland and Sweden. For EU-12 Member States, data had to be estimated for the period 1999-2013 by using the (estimated) number of 'non-EU-27' minus the (estimated) number of Croatian nationals. Moreover, due to missing observations for the period 1999-2004 for countries such as EL, ES, FR, IT, LU and AT, a number of estimations (based on past/previous years, share of foreigners in the population) had to be made. 'EU-13 Member States' are those who joined the EU in 2004, 2007 and 2013. For those countries, available data does not make it possible to re-construct the trends before 2006 – and 2006-2008 data presented include estimations (based on the share of third-country nationals among all foreigners in 2009 applied to the total number of foreigners in 2006, 2007 and 2008). Data for HR and RO could not be estimated for the period 2006-08.

Figure 3. Non-EU 28 citizens residing in EU-12, EU-13 and EU-25 Member States (1999-2017), in % of total population



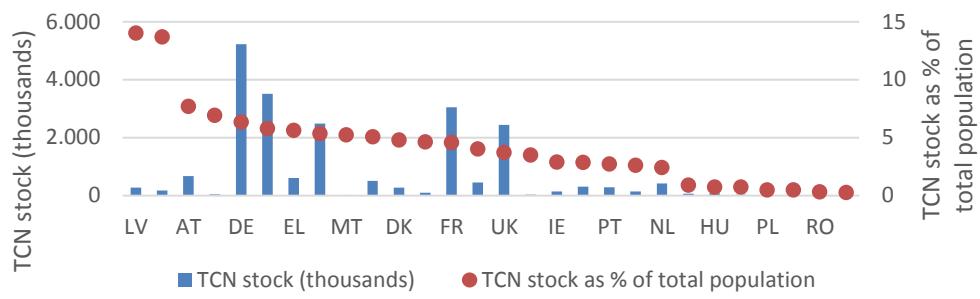
Source: Eurostat Population Statistics, [migr_pop1ctz, extracted on 06.04.2018] and DG HOME estimations for missing values. Note: For explanation of EU-12 and EU-13, see previous chart.

Figure 4. Non-EU 28 citizens in % of total population in selected EU-12 Member States (1999-2017)



Source: Eurostat Population Statistics, [migr_pop1ctz, extracted on 06.04.2018] and DG HOME estimations for missing values. Note: same as in previous chart.

Figure 5. Stock of third country nationals (non-EU 28 citizens) residing in EU Member States (2017), in thousands and in % of total population



Source: Eurostat (migr_pop1ctz). Note: Data extracted on 02/04/2018. Total population on 1 January 2017. TCN stock: population with citizenship other than those of EU-28 countries.

Table 1. Non-EU 28 citizens in % of total population in EU-25 Member States

Non-EU 28 (in %)	1999	2006	2011	2017
BE	3.1%	2.7%	3.8%	4.0%
DE	5.7%	5.1%	4.6%	6.3%
EL	5.1%	6.6%	6.6%	5.6%
ES	2.3%	5.8%	7.0%	5.3%
FR	3.4%	3.5%	3.9%	4.6%
IT	1.6%	3.6%	4.7%	5.8%
LU	5.0%	5.5%	5.8%	6.9%
NL	2.6%	2.2%	2.0%	2.4%
AT	5.6%	5.8%	5.9%	7.7%
PT	1.3%	1.8%	3.2%	2.7%
FI	1.1%	1.4%	2.0%	2.6%
SE	3.2%	2.9%	3.7%	5.1%
EU-12	3.5%	4.2%	4.6%	5.3%
BG	:	0.3%	0.4%	0.9%
CZ	:	1.6%	2.6%	2.9%
EE	:	17.3%	14.8%	13.7%
HR	:	:	0.5%	0.7%
CY	:	5.3%	7.4%	3.5%
LV	:	19.5%	16.2%	14.0%
LT	:	0.9%	0.7%	0.5%
HU	:	0.6%	0.8%	0.7%
MT	:	1.2%	1.8%	5.2%
PL	:	0.1%	0.1%	0.5%
RO	:	:	0.3%	0.3%
SI	:	2.1%	3.4%	4.6%
SK	:	0.1%	0.3%	0.3%
EU-13	:	1.0%	1.2%	1.3%
EU-25	:	3.4%	3.8%	4.3%

Source: Eurostat Population Statistics, [migr_pop1ctz, extracted on 06.04.2018] and DG HOME estimations for missing values. Note: same as in previous charts.

Stock of residence permits held by third country nationals (total and by main reason)

In addition to population data, one can use **residence permits data** to analyse the developments in terms of the number of third-country nationals holding valid residence permits since 2008 and until 2017 (on 31st December data). The number of TCNs holding a valid residence permit⁸³² in the 25 EU-Member States (those covered by the EU Directives) amounted to around 18.5 million⁸³³ in the end of 2017, compared to approximately 16 million in the end of 2008 (see table 2). Their share in the total population in the EU-25 was 4.1% in 2017, a slight increase compared to its level in 2008 (3.6%).

A majority of the Member States of the EU-25 experienced an increase in the number of 'valid permits' between 2008 and 2017. Those with the largest growths (in relative terms) in the stock of valid permits between 2008 and 2017 were Poland, Malta, Bulgaria, Slovakia and Sweden. In all these countries but Sweden and Malta, the share of all valid permits in the total population remained nevertheless well below the EU-25 average in 2017.

Table 3 shows the number of third-country nationals holding a valid permit **per main reason** as of 31 December 2017 in EU-25 compared to EU-3⁸³⁴. In the whole of EU-25, the main reason why TCNs held a valid permit were family reasons (39% or 7.2 million), followed by remunerated activities reasons (16% or 2.9 million), international protection (8% or 1.4 million) whereas 3.5% (or 650 thousand) were holding a permit for education reasons. A large share of TCNs (35% or 6.5 million)⁸³⁵ in the EU-25 was holding a permit for 'other' reasons.

The distribution by reason varies largely across EU-25 Member States. For instance, the share of **family-related permits**⁸³⁶ in all permits is higher than 45% in Belgium, Luxembourg, Italy and Sweden but lower than 10% in Latvia, Poland and Estonia. In % of the total population, third-country nationals with valid permits for family reason represented 1.6% of the total population in the end of 2017, compared to 1.0% in 2008. This share was the highest in Luxembourg and Italy, followed by Sweden, Spain, Germany, Belgium and Greece. The increase over this period has been pronounced in South European countries such as Spain, Italy, Portugal, Malta and Cyprus⁸³⁷.

⁸³² Eurostat defines a residence permit as any authorisation valid for at least 3 months issued by the authorities of a Member State allowing a third country national to stay legally on its territory. First permit is defined as a residence permit issued to a third country national for the first time or after more than six months after the expiry date of the previous residence permit. All valid permits at the end of the reference period include notably first permits, change of status or reason to stay permits and renewed permits.

⁸³³ For the EU-28 (without Denmark, which does not provide data to Eurostat on this), the number was 20.3 million (in the end of 2017).

⁸³⁴ These data include statistics on all valid permits at the end of the reference period, therefore including first permits, change of status or reasons to stay and renewed permits.

⁸³⁵ This includes a variety of categories of third-country residents, on which administrative practices vary across Member States so it is not possible to precisely disaggregate it. It includes categories such as: permanent residents- who might be working or not – non-active persons (e.g. pensioners, children not yet in education), persons granted a national protection status and a variety of other national statuses. It may also include valid permits held by third-country nationals who originally came for work, asylum or family reasons but for which the national administrations cannot (any more) identify the reason of the original permit.

⁸³⁶ This may be third-country nationals having joined a non-EU national (those covered by the FRD) but this also includes those third-country nationals having joined EU nationals (both mobile and non-mobile).

⁸³⁷ ICF, Legal migration Fitness check – Contextual analysis, Annex 1Bii (overview and analysis of legal migration statistics). See table 11.

As regard **work-related permits**, their share in all permits was, in the end of 2017, high (>40%) in Italy, Cyprus, Malta and Poland but much lower (<5%) in Germany, France, Estonia, Latvia and Austria. These patterns reflect historical differences in the size and type of migration flows as well as some differences in the statistical practices and reporting (for instance third-country nationals whose work permits become a permanent one are then included in the "other reason" category). In % of the total population, third-country nationals with valid permits for work reason represented 0.7% of the total population in the end of 2017, a similar share than in 2008. This share was higher than 1% only in three Member States: Cyprus, Italy and Malta⁸³⁸, as well as in Poland since 2017.

Table 2. Number of all valid permits on 31 December in EU-25 and EU-3 and share of valid permits in total population, 2008–2017

Covered	Valid permits on 31 December of each year (thousands)											% of total population										
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Trend	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Trend
Covered	15,575	16,578	16,127	16,398	16,566	16,547	16,773	17,231	17,581	18,625		3.6	3.9	3.7	3.8	3.8	3.8	3.9	4.0	4.0	4.3	
Belgium	350	365	325	342	340	339	352	367	403	416		3.3	3.4	3.0	3.1	3.1	3.0	3.1	3.3	3.6	3.7	
Bulgaria	11	12	14	14	17	19	40	45	36	51		0.1	0.2	0.2	0.2	0.2	0.3	0.5	0.6	0.5	0.7	
Czech Republic	306	305	267	283	262	275	281	288	310	304		3.0	2.9	2.6	2.7	2.5	2.6	2.7	2.7	2.9	2.9	
Germany	3,644	3,695	3,744	3,692	3,746	3,543	3,624	3,762	4,062	4,644		4.4	4.5	4.6	4.6	4.7	4.4	4.5	4.6	4.9	5.6	
Estonia	217	213	209	206	202	198	195	193	191	189		16.2	15.9	15.7	15.5	15.2	15.0	14.8	14.7	14.5	14.4	
Greece	523	566	524	550	485	510	540	568	585	565		4.7	5.1	4.7	4.9	4.4	4.6	4.9	5.2	5.4	5.2	
Spain	2,681	2,992	2,682	2,797	2,800	2,705	2,614	2,585	2,575	2,665		5.9	6.5	5.8	6.0	6.0	5.8	5.6	5.6	5.5	5.7	
France	2,299	2,273	2,294	2,363	2,444	2,512	2,577	2,633	2,673	2,808		3.6	3.5	3.5	3.6	3.7	3.8	3.9	4.0	4.0	4.2	
Croatia	:	:	:	:	:	12	11	24	26	31		:	:	:	:	0.3	0.3	0.6	0.6	0.7		
Italy	3,036	3,588	3,526	3,638	3,775	3,885	3,943	3,914	3,713	3,608		5.2	6.1	6.0	6.1	6.4	6.5	6.5	6.4	6.1	6.0	
Cyprus	113	117	112	113	49	56	47	47	52	57		14.6	14.7	13.7	13.4	5.6	6.5	5.5	5.6	6.1	6.6	
Latvia	398	385	372	365	352	344	337	330	321	313		18.1	17.8	17.6	17.6	17.2	17.0	16.8	16.6	16.3	16.1	
Lithuania	29	29	28	29	30	32	36	36	39	45		0.9	0.9	0.9	1.0	1.0	1.1	1.2	1.2	1.3	1.6	
Luxembourg	:	24	23	26	28	30	32	34	37	40		:	4.9	4.6	5.0	5.3	5.6	5.8	6.1	6.4	6.8	
Hungary	101	93	91	90	77	66	40	45	55	63		1.0	0.9	0.9	0.9	0.8	0.7	0.4	0.5	0.6	0.6	
Malta	5	5	5	6	7	10	15	19	21	26		1.2	1.1	1.2	1.4	1.6	2.4	3.6	4.2	4.6	5.6	
Netherlands	418	433	371	321	300	351	342	365	373	550		2.5	2.6	2.2	1.9	1.8	2.1	2.0	2.2	2.2	3.2	
Austria	457	446	463	477	493	450	428	453	471	476		5.5	5.4	5.5	5.7	5.9	5.3	5.0	5.3	5.4	5.4	
Poland	72	87	131	145	227	316	365	501	545	617		0.2	0.2	0.3	0.4	0.6	0.8	1.0	1.3	1.4	1.6	
Portugal	357	360	342	329	317	301	295	283	279	285		3.4	3.4	3.2	3	3.0	2.9	2.8	2.7	2.7	2.8	
Romania	59	62	60	61	54	56	58	61	63	54		0.3	0.3	0.3	0	0.3	0.3	0.3	0.3	0.3	0.3	
Slovenia	96	89	86	88	82	99	94	102	110	123		4.8	4.4	4.2	4	4.0	4.8	4.6	4.9	5.3	6.0	
Slovakia	20	22	24	23	25	25	29	34	40	48		0.4	0.4	0.4	0	0.5	0.5	0.5	0.6	0.7	0.9	
Finland	107	113	122	119	124	63	92	98	100	105		2.0	2.1	2.3	2	2.3	1.2	1.7	1.8	1.8	1.9	
Sweden	276	303	312	320	333	349	388	441	504	541		3.0	3.3	3.3	3	3.5	3.7	4.0	4.5	5.1	5.4	
Not covered	142	134	133	128	1,751	1,655	1,615	1,659	1,615	1,662		0.2	0.2	0.2	0	2.6	2.4	2.3	2.4	2.3	2.4	
Denmark	:	:	:	:	:	:	:	:	:	:		:	:	:	:	:	:	:	:	:		
Ireland	142	134	133	128	120	107	106	114	111	128		3.2	3.0	2.9	3	2.6	2.3	2.3	2.4	2.3	2.7	
United Kingdom	:	:	:	:	1,630	1,548	1,509	1,545	1,504	1,534		:	:	:	:	2.6	2.4	2.3	2.4	2.3	2.3	

Source: Eurostat (*migr_resvalid*, *demo_pjangroup*) Data extracted on 14.12.2018. Note: 'residence permit': any authorisation valid for at least 3 months issued by the authorities of a Member State allowing a third country national to stay legally on its territory; 'valid permits': all valid permits at the end of the reference period, including first permits, change of status or reason to stay permits and renewed permits; ":" not available. Data missing from Luxembourg for 2008.

⁸³⁸ ICF (2018), Legal migration Fitness check – Contextual analysis, Annex 1Bii (overview and analysis of legal migration statistics). See table 14.

Table 3. Number of all valid permits by main reason on 31 December in EU-25 and EU-3, 2017

	Total	Main reason (% of total)					
		Family reasons	Education reasons	Remunerated activities reasons	Refugee status	Subsidiary protection	Other
Covered	18,625,264	38.6	3.5	15.5	5.3	2.5	34.7
Belgium	415,998	57.9	3.1	7.0	12.0	3.4	16.7
Bulgaria	51,021	29.5	5.6	11.0	0.0	0.0	53.8
Czech Republic	304,269	36.2	7.0	15.5	0.4	0.5	40.5
Germany	4,644,288	38.4	3.7	4.2	13.0	4.1	36.5
Estonia	189,385	4.1	1.3	2.4	0.1	0.1	92.1
Greece	564,608	39.2	0.3	10.7	0.0	0.0	49.7
Spain	2,664,901	37.9	2.1	6.9	0.7		52.4
France	2,807,593	41.4	5.8	4.4	6.2	1.0	41.3
Croatia	31,024	32.1	2.2	24.6	0.9	0.2	40.0
Italy	3,608,115	51.2	1.2	41.9	0.8	1.5	3.5
Cyprus	56,505	25.8	10.6	45.4	1.9	5.9	10.3
Latvia	313,212	6.7	1.1	1.6	0.0	0.1	90.5
Lithuania	44,525	15.9	5.2	37.4	1.1	0.3	40.1
Luxembourg	40,294	53.5	1.9	15.3	7.9	0.2	21.2
Hungary	63,322	15.3	28.1	39.4	0.0	0.0	17.2
Malta	25,871	30.0	5.9	49.6	0.0	0.0	14.6
Netherlands	550,188	28.0	4.6	11.0	4.3	7.4	44.8
Austria	476,406	17.3	4.2	1.4	0.0	0.0	77.0
Poland	617,211	6.7	6.0	67.7	0.2	0.3	19.1
Portugal	284,724	26.4	3.7	14.1	0.0	0.5	55.2
Romania	54,045	37.3	26.3	6.6	3.9	1.9	24.0
Slovenia	123,176	11.4	2.0	20.1	0.4	0.1	66.1
Slovakia	48,119	33.7	9.7	35.3	0.6	0.3	20.3
Finland	105,007	37.1	9.0	17.2	0.0	0.0	36.7
Sweden	541,457	45.7	3.1	7.1	14.6	22.4	7.0
Not covered	1,661,617	34.7	33.9	21.2	2.2	0.0	7.9
Denmark	:	:	:	:	:	:	:
Ireland	128,066	23.6	31.1	20.4	1.1	0.4	23.4
United Kingdom	1,533,551	35.6	34.2	21.3	2.3	0.0	6.7

Source: Eurostat (migr_resvalid). Data extracted on 14.12.2018. Note; 'valid permits': all valid permits at the end of the reference period, including first permits, change of status or reason to stay permits and renewed permits; ":" not available.

Flows of residence permits issued to third country nationals (total and by main reason)

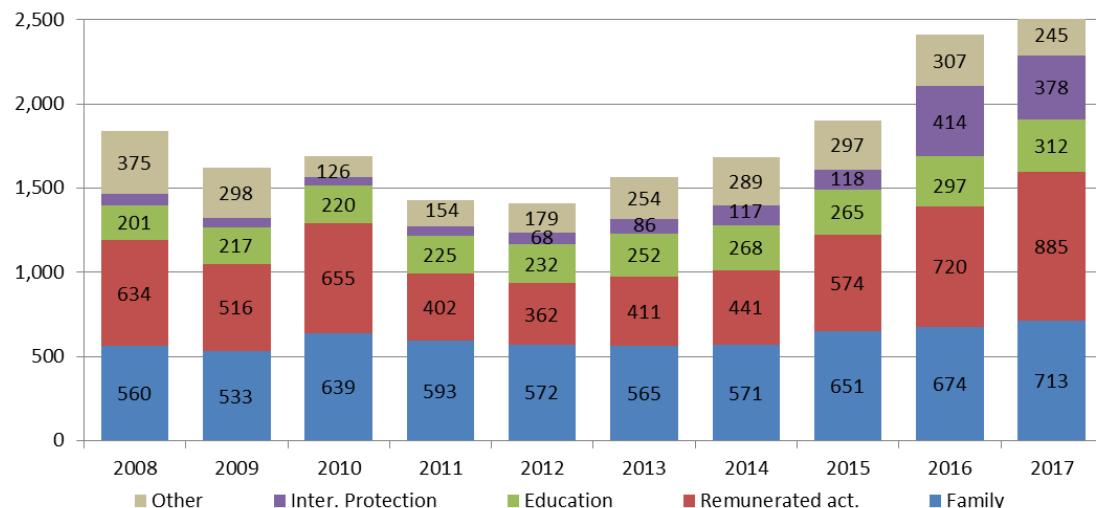
In addition to the stock of third-country national residents covered in section above, it is important, in order to assess the impact of EU legal migration Directives, to draw the statistical picture based on **inflows** of third-country nationals to EU Member States (estimated by first residence permits), first of all in total and then for various reasons. This section uses Eurostat data to describe the total number of first resident permits⁸³⁹ issued over 2008-2017 in

⁸³⁹ Eurostat defines a 'first permit' as a residence permit issued to a person for the first time. A residence permit is considered as a first permit also if the time gap between expiry of the old permit and the start of validity of the new permit issued for the same reason is at least 6 months, irrespective of the year of issuance of the permit.

the EU-25 as well as in the EU-3 (Ireland, Denmark, and the United Kingdom, i.e. those Member States not covered by the *acquis*) for comparison purposes.

Overall, the number of all first permits issued in the Member States of the EU-25 and EU-3 increased between 2008 and 2017. While 1.8 million first permits were issued in 2008 at the EU-25 level, such number peaked to 2.5 million in 2017 (+38%). At the level of EU-3, the number of first permits issued increased from 694 thousand in 2008 to almost 800 thousands between 2010 and 2013, before declining to around 602 thousand in 2017⁸⁴⁰.

Figure 6. Number of first permits issued total and by main reason in EU-25, 2008-2017 (thousands)



Source: Source: Eurostat (*migr_resfirst* and *migr_resoth*. Last update 25-09-2018). Missing data: Croatia from 2008-2012; Luxembourg for 2008. If all EU-28 Member states are considered, first residence permits issued in 2017 amount to 3.1 million in 2017.

A deeper look at the trends reveals that, in the EU-25, the overall number of permits declined during the 2008-2012 period (from 1.84 million to 1.41 million or -23%) before recovering in the 2012-15 period (from 1.41 million to 1.90 million or +35%). These trends have been mainly driven by the changes in the number of permits issued for remunerated activities, influenced by the labour demand and in particular the 2008 financial crisis and its repercussions on EU labour markets from 2009-10 and later on the gradual economic recovery in most EU Member States. The reasons behind the strong growth over 2015-17 are partly different:

- a rise in the number of work-related permits (+312,000 or +54%) though a number of them for short-duration (i.e. the strong increase in the number of seasonal work permits issued by Poland since 2015 has a strong influence - see further analysis in Annex 7, section 4.1);
- the increase in the number of permits issued to beneficiaries of international protection (+260,000 or +220%)

⁸⁴⁰ This decline in permits issued by EU-3 over 2008-17 was mainly driven by a drop in the first permits reported by the UK i.e. from 633,000 permits in 2008 to 517,000 in 2017, in particular those granted –for education (from 223,000 permits in 2008 to 180,000 in 2017).

- as well as an increase in the number of permits issued for family reasons (+62,000 or +10%) in particular for those joining non-EU citizens (+105,000 or + 29%) driven to a great extent by family reunification with refugees (see details in Annex 7).

In the EU-25, the trends since 2008, disaggregated by reason can be summarised as:

- a **strong variation in the number of work-related permits in line with labour demand**: distinctive drop in permits issued during the economic slowdown phase after the 2008 financial crisis (and its repercussions on EU labour markets from 2009-10) and steady increase since 2012⁸⁴¹, driven however largely by an increase in the number of seasonal workers/temporary work permits rather than other types of work permits⁸⁴²;
- a rather **stable picture of the number of permits issued for family reasons**⁸⁴³ (in most years around 550-590 thousands) **until 2014** followed by upward trend in 2015 due to family reunification with EU citizens (not regulated by the FRD) and another **increase since 2015 due to a rising number of cases of family reunification with third-country nationals**, driven to a great extent by family reunification with refugees (see details in Annex 7).
- a **gradual increase in the number of study-related permits**, from around 200 thousands in 2008 to around 312 thousands in 2017;
- a **steep increase in the number of permits issued to beneficiaries of international protection** in the latest years (and especially between 2015 and 2017).

Comparatively, in the EU-3 countries, there has also been a decline in the number of work-related permits related to the economic crisis, mostly between 2010 and 2012. Later on the overall number of permits recovered in particular in 2013 and 2015, due to the number of study-related permits in the UK. However, it went down around 600 thousands in 2016 and 2017, due to lower number for all categories of permits, in particular study-related permits but also the "other" category.

The EU-wide trends described above differ largely when considering developments country by country (see table 4). Within the Member States of the EU-25, the growth of the number of first permits issued was substantial between 2008 and 2017, especially in Poland, Germany, France, Sweden, the Netherlands and Austria. Nonetheless, not all Member States experienced a rise in the number of first permits issued during that period. Such number followed a downward trend in Member States such as Italy, Spain, Portugal, Greece and Slovenia.

In 2017, the Member States of the EU-25 which issued the highest numbers of first permits were Poland (683 thousand), Germany (535 thousand), and to a lesser extent France (250

⁸⁴¹ However this is due mainly to increase in the number of permits issued by Poland, mostly for short-term period/seasonal work. If one excludes the large number of permits issued by Poland, the number of permits issued for the purpose of work in the rest of the EU-25 countries decreased from 326,000 in 2011 to 198,400 in 2015 before increasing in 2016 (226,000) and in 2017 (289,000).

⁸⁴² The increase in the number of work permits between 2014 and 2016 was almost entirely driven by the increase in the number of 'seasonal workers' (in a wider sense, i.e. including temporary work permits in Poland) from 188,000 in 2014 to 458,000 in 2016 (therefore not related to the adoption of the Seasonal workers directive which had to be transposed only from end 2016 on).

⁸⁴³ This aggregate includes both third-country nationals joining third-country nationals (those covered by the FRD) and those joining EU nationals (both mobile and non-mobile).

thousand), Spain (231 thousand) and Italy (187 thousand). However, when all EU Member States are considered, the United Kingdom was also one of the top destination (524,000 during 2017).

Trends in the number of permits across countries also differ depending on the reason of the permit. During 2017, the first permits issued at the EU-25 level were for remunerated activities (35%), family reasons (28%), international protection (15%), education (12%) and other reasons (10%). At the EU-3 level, the patterns were different since 36% of first permits were issued for education reasons, 24% for "other reasons" including international protection⁸⁴⁴, 21% for remunerated activities and around 19% for family reasons.

Inside EU-25, some countries issued (in 2017) the majority of residence permits for remunerated activities such as Poland, Lithuania, Slovenia, Slovakia, Malta and Croatia and others issued as least one third of their overall first residence permits for remunerated activities : Cyprus, Czech Republic and Estonia (see table 5). Another clear pattern is found in some Member States that issued most or a large part of the permits for family reasons: >45% in Greece, Portugal, Spain, Sweden, Belgium and Luxembourg. Finally education reasons represent a large part of the first residence permits issued in (with more than 30%) Romania, Hungary and France and to some extent (20-30%) in Cyprus, Latvia, Finland and Estonia.

⁸⁴⁴ However, most of the "other reasons" permits were not related to asylum.

Table 4 Number of all first permits issued in EU-25 and EU-3, 2008–2017

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Trend
Covered	1,840,920	1,621,561	1,689,998	1,425,910	1,413,053	1,568,112	1,685,557	1,904,419	2,411,946	2,534,117	
Belgium	46,201	58,939	57,855	55,449	47,278	42,463	43,823	50,085	53,096	56,246	
Bulgaria	3,933	4,383	4,051	5,030	6,418	6,436	8,795	9,595	7,942	10,958	
Czech Republic	61,350	27,539	34,653	20,978	42,123	45,544	35,458	68,804	80,070	57,721	
Germany	114,289	121,954	117,202	110,349	184,070	199,925	237,627	194,813	504,849	535,446	
Estonia	3,884	3,777	2,647	3,408	2,530	2,496	3,222	3,984	4,308	4,380	
Greece	40,411	45,148	33,623	21,269	16,252	18,299	22,451	37,464	44,072	29,995	
Spain	399,827	290,813	258,309	282,763	223,318	196,244	189,481	192,931	211,533	231,153	
France	188,723	200,649	204,321	199,581	199,500	214,346	220,599	228,687	237,218	250,175	
Croatia	:	:	:	:	:	3,320	3,334	3,433	5,315	9,733	
Italy	550,226	506,833	589,988	331,083	246,760	243,954	204,335	178,884	222,398	186,786	
Cyprus	25,156	25,638	19,139	15,645	11,715	11,455	13,841	15,569	16,970	18,971	
Latvia	7,706	2,304	2,329	3,982	5,620	7,615	9,857	6,357	6,037	6,647	
Lithuania	5,298	2,659	1,861	2,429	3,696	4,601	7,252	5,178	6,750	10,207	
Luxembourg	:	2,969	2,366	2,698	3,804	4,169	4,289	4,918	5,627	7,207	
Hungary	37,486	14,289	14,601	14,893	13,282	16,833	21,188	20,751	22,842	32,229	
Malta	4,836	3,547	2,763	3,484	4,526	6,795	9,895	9,984	8,995	10,974	
Netherlands	62,589	56,488	54,473	55,074	51,162	64,739	69,569	86,691	95,753	97,395	
Austria	21,783	28,035	30,596	35,442	37,852	34,308	40,062	51,282	50,066	55,968	
Poland	40,896	33,427	101,574	108,036	146,619	273,886	355,521	541,583	585,969	683,228	
Portugal	63,715	46,324	37,010	35,172	32,590	26,593	29,764	29,021	30,993	37,242	
Romania	19,354	15,380	10,218	9,740	10,125	11,160	10,294	11,289	11,867	13,264	
Slovenia	29,215	15,759	7,537	9,800	9,092	8,271	9,891	11,417	13,517	19,609	
Slovakia	8,025	5,336	4,373	3,641	4,210	4,416	5,510	9,279	10,227	13,688	
Finland	21,873	18,034	19,210	20,230	20,263	21,122	21,552	21,797	28,792	25,141	
Sweden	84,144	91,337	79,299	75,734	90,248	99,122	107,947	110,623	146,740	129,754	
Not covered	693,751	723,242	783,020	750,934	683,570	788,339	640,420	717,603	612,595	602,024	
Denmark	31,655	26,409	28,577	24,707	24,812	31,311	35,886	46,153	41,440	37,123	
Ireland	28,926	25,509	22,235	24,570	26,818	32,780	36,728	38,433	41,279	47,901	
United Kingdom	633,170	671,324	732,208	701,657	631,940	724,248	567,806	633,017	529,876	517,000	

Source: Eurostat (migr_resfirst). Data extracted on 14.12.2018. Notes: 'residence permit': any authorisation valid for at least 3 months issued by the authorities of a Member State allowing a third country national to stay legally on its territory; 'first permit': residence permit issued to a person for the first time. A residence permit is considered as a first permit also if the time gap between expiry of the old permit and the start of validity of the new permit issued for the same reason is at least 6 months, irrespective of the year of issuance of the permit. ":" not available.

Table 5. First permits issued by main reason in EU-25 and EU-3, 2017

Total		Main reason (% of total)				
		Family reasons		Education reasons		Remunerated activities reasons
						Other
Covered	2,534,117	28.1	12.3	34.9	24.6	
Belgium	56,246	50.9	12.3	10.6	26.2	
Bulgaria	10,958	33.0	11.6	16.6	38.8	
Czech Republic	57,721	26.8	19.2	40.4	13.6	
Germany	535,446	29.3	9.1	9.9	51.7	
Estonia	4,380	29.0	27.2	35.0	8.8	
Greece	29,995	46.0	2.8	6.7	44.4	
Spain	231,153	54.4	17.2	18.5	10.0	
France	250,175	37.1	31.5	11.0	20.4	
Croatia	9,733	17.4	6.1	71.8	4.7	
Italy	186,786	60.3	9.6	4.5	25.6	
Cyprus	18,971	14.4	26.0	43.2	16.4	
Latvia	6,647	31.0	24.1	32.5	12.4	
Lithuania	10,207	9.8	9.7	74.2	6.3	
Luxembourg	7,207	45.5	8.0	24.7	21.8	
Hungary	32,229	11.8	33.7	41.0	13.6	
Malta	10,974	14.4	13.9	54.6	17.0	
Netherlands	97,395	31.8	17.7	18.2	32.3	
Austria	55,968	24.8	8.2	5.2	61.8	
Poland	683,228	0.5	5.1	87.4	7.0	
Portugal	37,242	46.0	12.8	22.4	18.9	
Romania	13,264	27.0	33.5	22.3	17.2	
Slovenia	19,609	27.6	9.1	62.2	1.1	
Slovakia	13,688	19.2	14.5	54.2	12.0	
Finland	25,141	34.9	20.3	24.7	20.1	
Sweden	129,754	46.5	7.8	14.4	31.3	
Not covered	602,024	19.4	36.2	20.6	23.8	
Denmark	37,123	33.9	28.8	27.9	9.4	
Ireland	47,901	6.4	57.6	19.6	16.4	
United Kingdom	517,000	19.6	34.7	20.2	25.5	

Source: Eurostat (migr_resfirst). Data extracted on 14.12.2018; Note: 'residence permit': any authorisation valid for at least 3 months issued by the authorities of a Member State allowing a third country national to stay legally on its territory; 'first permit': residence permit issued to a person for the first time. A residence permit is considered as a first permit also if the time gap between expiry of the old permit and the start of validity of the new permit issued for the same reason is at least 6 months, irrespective of the year of issuance of the permit; The 'other' category covers international protection status, refugee status and subsidiary protection, humanitarian reasons, residence only, and other reasons not specified.

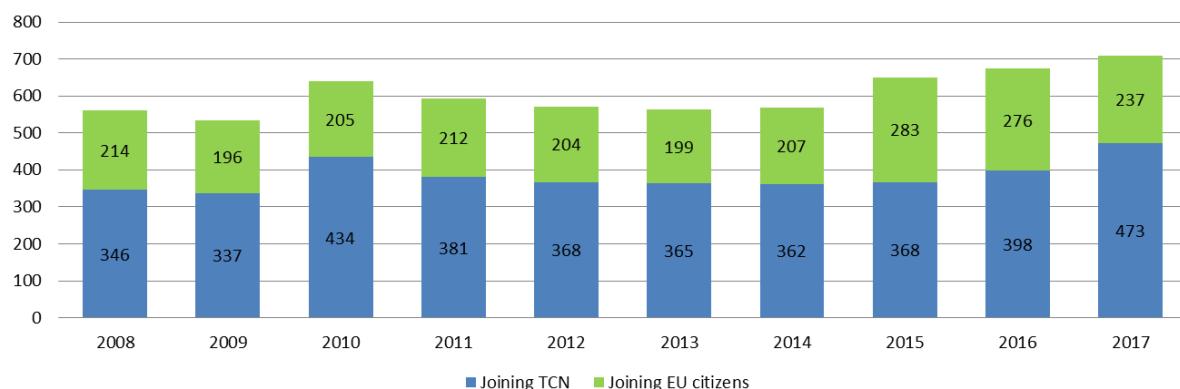
2. Directive specific analysis

Beyond the general picture provided in section 9.1 above, this section focused specifically on analysing the developments in the number of permits issued for categories covered by EU legislation on legal migration.

Family Reunification Directive (2003/86/EC)

Figure 7 depicts the number of first residence permits issued for family reasons over 2008-2017, with a clear distinction between those joining non-EU citizens (generally covered by the FRD⁸⁴⁵) and those joining EU citizens (not covered by the FRD). This shows that the majority of third-country nationals coming to the EU-25 for family reasons joined non-EU family member, a rather stable number (around 350,000 per year) over the period 2008-15 then increasing over 2015-2017 As regards the number of TCN that have joined EU citizens, it increased from around 200,000 over 2009-14 to around 280,000 in 2015-16 before declining in 2017 to 240,000.

Figure 7. First permits issued for family reasons to TCNs joining TCNs versus EU citizens, in EU-25, 2008-2017 (in thousands)*

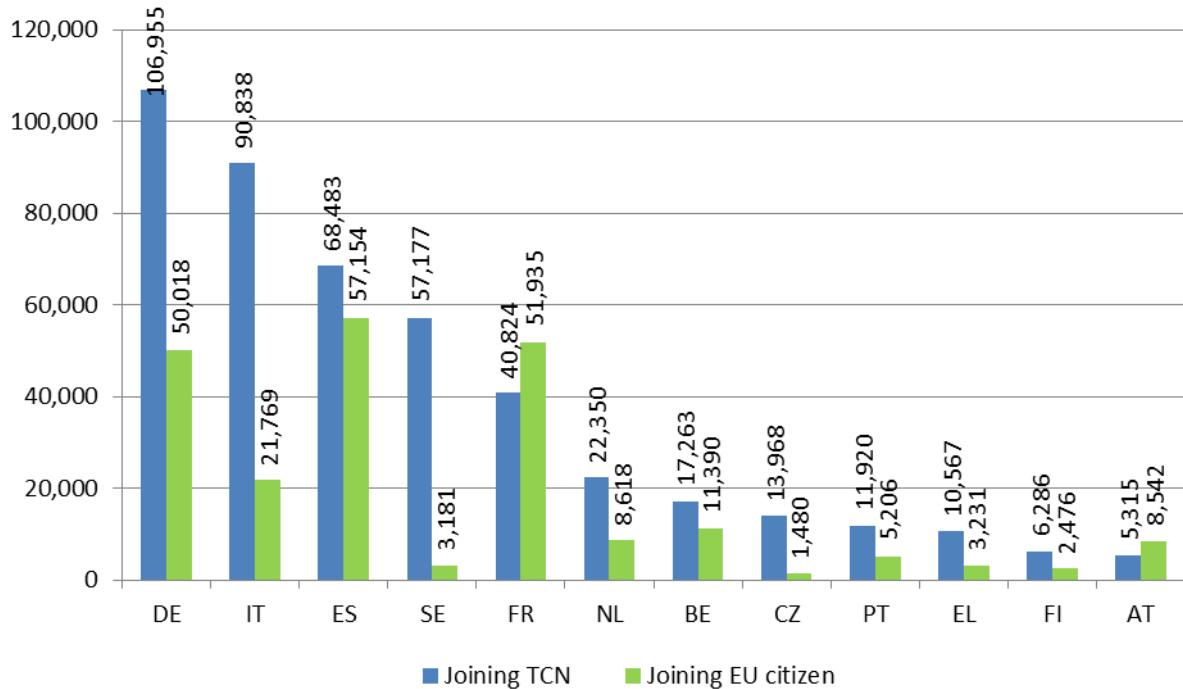


Source: Eurostat (migr_resfam). Data extracted on 14.12.2018 (*) The aggregate covered by the fitness check (EU-25) includes all EU-28 countries but Denmark, Ireland, and United Kingdom.

The EU-25 picture is driven by various situations across countries. In most Member states (bound by the EU legal migration directives), the majority of family permits are issued to family members of third-country nationals. Among the top host countries, this is the case for instance in Germany, Italy, Spain, Sweden, the Netherlands, Belgium, the Czech Republic, Portugal, Greece and Finland. On the contrary, family reunification of third-country nationals with EU citizens was larger in France and Austria (see figures 8 and 9).

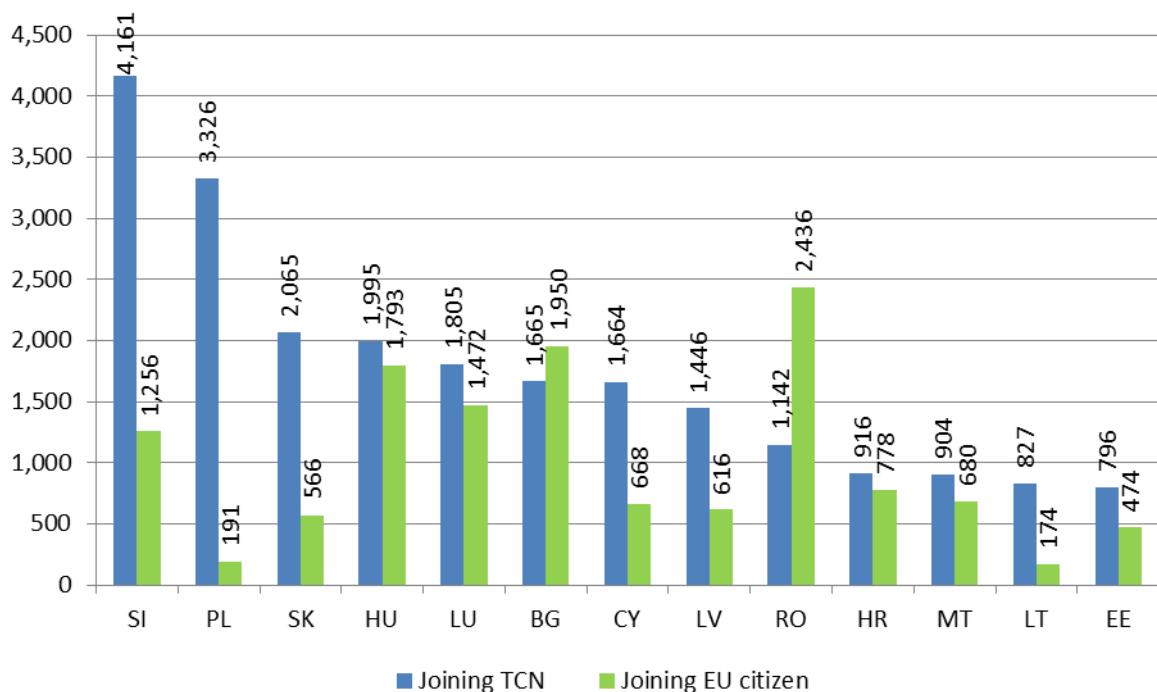
⁸⁴⁵ The scope of the FRD does not cover all cases of third-country nationals joining their third-country national family members for instance 'non-core family members' are covered as an optional category in the Directive; moreover, beneficiaries of subsidiary protection are not covered (in terms of 'sponsors') by the FRD.

Figure 8. First permits issued for family reasons to TCNs joining TCNs versus EU citizens, in top EU-25 countries of destination, 2017



Source: Eurostat (migr_resfam). Data extracted on 14.12.2018

Figure 9. First permits issued for family reasons to TCNs joining TCNs versus EU citizens, in other EU-25 countries of destination, 2017

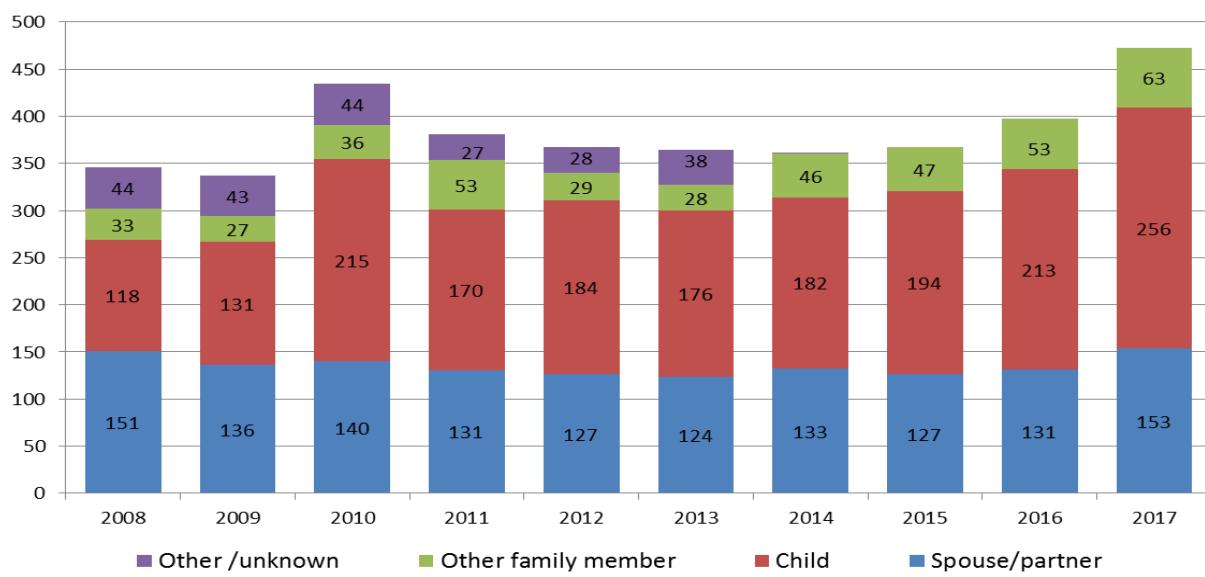


Source: Eurostat (migr_resfam). Data extracted on 14.12.2018

Focussing only on **family permits for those joining non-EU citizens (most of which covered under the FRD)**, it appears that, apart from a sharp rise in 2010 due to a specific case (Italy, see table 6), it has been overall rather stable (around 350,000) over the period 2008-15, before increasing over 2015-17, partly due to family reunification with refugees (see details in annex 7). Given the FRD entered into force over 2003-05, it is not possible to detect the direct impact of the Directives on the number of family permits issued.

Figure 10 shows the type of family member that have been issued permits for family reunification. In the EU-25, a majority (50-55% since 2012) of permits for family reunification with TCN has been issued to **children** of the sponsor while around one third of permits have been issued to the **partner** of the sponsor. The other permits have been issued to other types of family members who are outside the scope of the FRD and therefore covered by national law (except in those Member States who decided to cover them in the FRD). However it is to be noted that for some countries (in particular France and Austria, see figure 11) there may also be reporting issues behind the large number of "other" family member reported to Eurostat.

Figure 10. First permits issued for family reasons to persons joining TCNs by type of family member, in EU-25, 2008-2017 (thousands)*



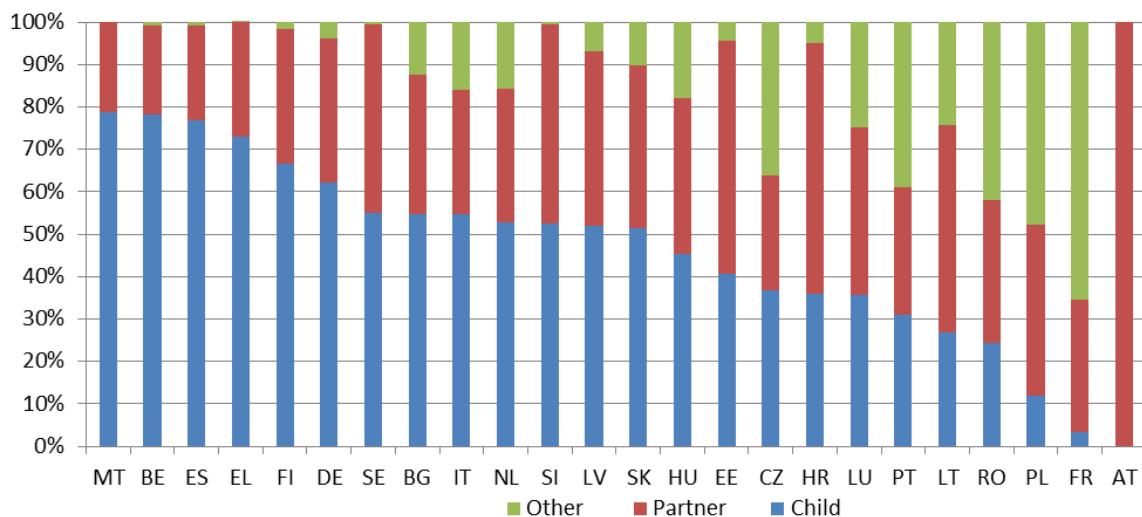
Source: Eurostat (migr_resfam). Data extracted on 14.12.2018

(*) The aggregate covered by the fitness check (EU-25) includes all EU-28 countries but Denmark, Ireland, and United Kingdom. (**) Data on permit categories should be interpreted with caution due to methodological issues. (***)

According to figure 11, children represented (in 2017) the majority of family reunification permits granted in most EU-25 countries, with highest share (more than two thirds) recorded in Spain, Belgium, Malta and Greece. On the other hand, partners of the sponsor represent the top category in countries such as Croatia, Estonia, Lithuania, and Luxembourg. As regards 'other family members', they represent a substantial share in family permits for those joining their TCN family member in Portugal, Poland, France, Romania and Czech Republic. While this may reflect different legal practices (e.g. family reunification opened to non-core family members), it may also be the result of reporting issues from these countries to Eurostat as well

as differences in administrative practices (for instance, France does not usually grant residence permits to thirds-country nationals when they are younger than 15).

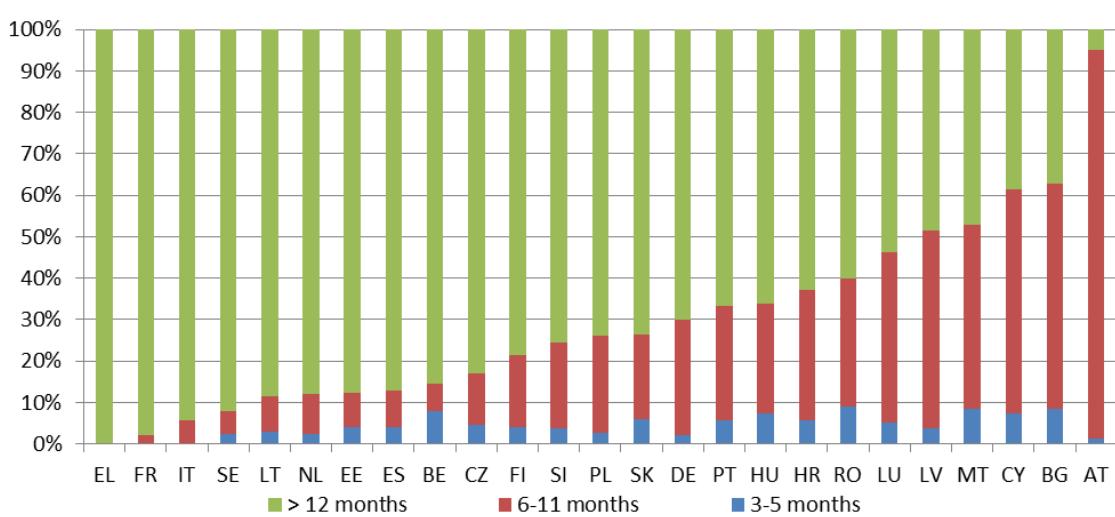
Figure 11. First permits issued for family reasons to TCNs joining TCNs, in EU-25 countries, 2017, by type of family member (in % of the total)



Source: Eurostat (migr_resfam). Data extracted on 14.12.2018. Note: Data on permit categories should be interpreted with caution due to methodological issues (for instance with data reported by France and Austria). No data for CY in 2017.

Figure 12 depicts the breakdown of family permits for joining TCN family member by duration of the permit. In most countries the large majority of permits are issued for 12 months, which is logical given the provisions in the FRD. Nevertheless in some Member States, a majority (Austria, Bulgaria and Cyprus) or a large share (>40%) (Latvia, Malta and Luxembourg) of permits are issued for duration comprised between 6 and 12 months.

Figure 12. First permits issued for family reasons to TCNs joining TCNs, in EU-25 countries, 2017, by duration of the permit (in % of the total)



Source: Eurostat (migr_resfam). Data extracted on 14.12.2018

Table 6 presents the total number of family permits for joining TCN family member over the period 2008-2017 for all EU25 as well as EU-3 countries (as well as their share in all family related permits issued for third-country nationals).

Table 6. - Number of first permits issued to TCNs joining a non-EU citizen and share in first permits issued for family reasons in EU-25 and EU-3, 2008–2017

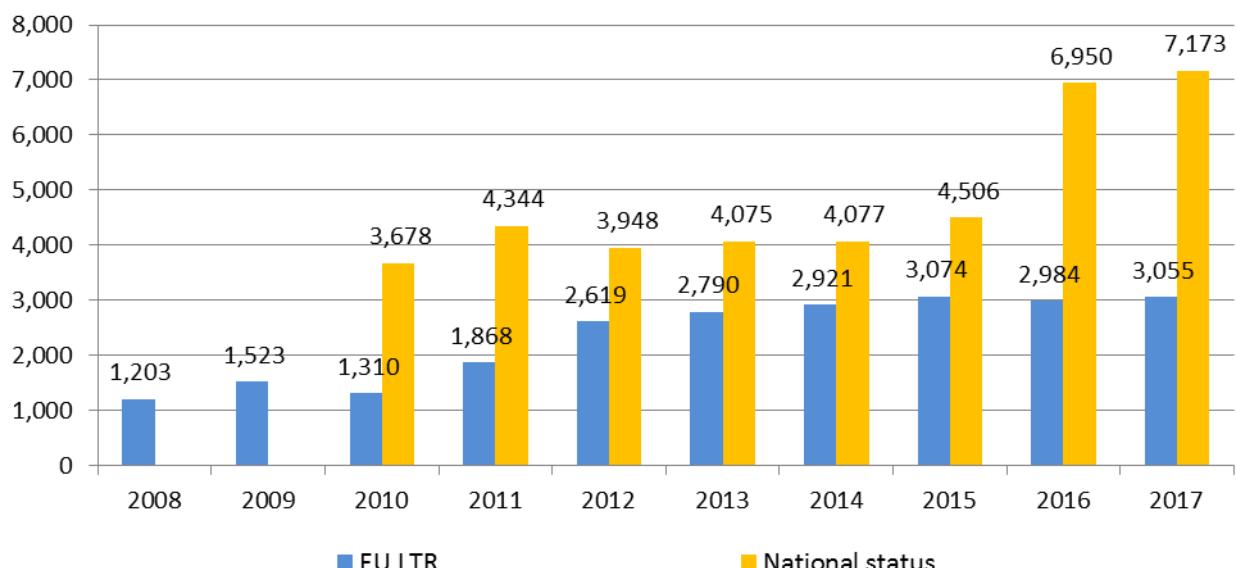
	First permits for TCNs joining a non-EU citizen											Trend	% of all first permits for family reasons										
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2008		2009	2010	2011	2012	2013	2014	2015	2016	2017	Trend	
Covered	345,763	337,057	434,284	380,910	367,551	364,725	361,931	367,641	397,509	467,536		61.7	63.2	68.0	64.3	64.3	64.5	63.4	56.5	59.0	65.5		
Belgium	7,333	8,596	13,406	14,944	14,041	12,576	13,353	15,745	16,067	17,263		36.1	30.1	43.9	49.1	56.0	56.5	57.8	60.1	61.0	60.2		
Bulgaria	1,480	1,482	1,725	917	1,129	1,178	1,404	1,549	1,637	1,665		95.7	96.3	97.0	47.9	50.4	52.5	54.2	53.3	50.5	46.1		
Czech Rep.	9,712	8,281	13,398	9,077	8,600	9,325	9,599	19,159	22,343	13,968		90.8	89.2	90.2	90.7	89.3	90.4	89.8	90.1	90.9	90.4		
Germany	29,215	29,761	28,200	24,810	40,031	43,081	47,496	74,982	87,469	106,955		58.9	55.0	54.1	53.0	52.7	52.2	51.8	56.0	63.9	68.1		
Estonia	:	:	:	904	711	653	752	842	866	796		:	:	:	70.1	61.8	59.2	59.5	62.3	60.8	62.7		
Greece	18,684	19,570	13,398	9,783	7,619	5,396	6,541	14,211	19,563	10,567		85.5	86.5	81.0	76.9	64.4	49.7	51.7	74.1	82.9	76.6		
Spain	103,640	82,521	98,358	92,891	75,146	66,605	61,996	61,772	67,048	68,483		69.0	65.9	69.3	62.7	62.7	62.2	61.4	60.3	58.2	54.5		
France	32,333	29,626	29,898	26,146	27,195	37,199	37,325	44,465	41,847	40,824		37.8	33.7	34.9	32.6	32.1	40.6	40.5	44.8	44.4	44.0		
Croatia	:	:	:	:	:	0	0	472	427	916		:	:	:	:	0.0	0.0	25.5	25.5	54.1			
Italy	60,134	70,904	160,200	119,756	99,493	89,035	80,470	:	:	90,838		78.3	94.3	88.8	84.7	83.1	82.2	81.2	:	:	80.7		
Cyprus	1	1	741	402	436	307	1,540	1,807	1,664	0		0.5	0.2	40.1	23.1	30.3	25.0	73.0	70.0	71.4	0.0		
Latvia	1,498	414	413	1,333	1,620	2,959	4,212	1,894	1,570	1,446		60.8	54.5	53.2	75.7	77.5	84.0	85.9	74.2	71.5	70.1		
Lithuania	641	764	691	738	844	946	1,399	1,179	1,062	827		97.3	97.0	96.4	96.6	95.6	95.7	95.0	92.6	90.5	82.6		
Luxembourg	:	300	340	679	1,133	1,072	1,303	1,544	1,521	1,805		:	14.5	19.0	40.4	47.5	49.8	52.8	55.0	51.5	55.1		
Hungary	5,337	1,144	1,349	2,487	1,143	2,247	4,896	3,937	2,809	1,995		63.5	65.3	40.0	59.7	39.6	55.4	72.7	68.9	59.4	52.7		
Malta	172	61	30	25	20	806	1,433	1,392	868	904		18.0	15.6	7.7	7.2	5.6	53.2	69.0	65.0	50.5	57.1		
Netherlands	:	11,756	11,404	12,563	20,002	23,835	14,284	13,428	17,311	22,350		:	50.9	52.9	56.3	94.5	93.9	64.6	61.9	69.3	72.2		
Austria	7,891	7,651	7,838	7,107	5,737	5,916	6,381	6,692	6,593	5,315		54.8	52.5	53.8	51.8	43.7	46.8	47.6	43.1	42.2	38.4		
Poland	8,805	8,549	598	714	1,182	787	657	755	7,237	3,326		98.7	98.3	23.3	26.8	38.6	29.9	55.3	74.8	86.0	94.6		
Portugal	17,087	11,036	11,967	11,931	9,274	7,821	9,608	8,138	9,384	6,462		62.7	55.3	68.5	65.5	63.3	64.0	69.4	63.0	63.2	36.2		
Romania	1,216	1,261	910	1,103	1,362	1,478	1,303	1,463	1,533	1,142		19.9	20.9	19.6	28.1	34.9	35.6	39.1	38.8	39.6	31.9		
Slovenia	:	2,110	2,231	2,841	2,346	2,987	4,192	3,492	3,556	4,161		:	67.7	70.4	70.6	69.5	76.1	82.2	76.0	77.4	76.8		
Slovakia	619	640	697	631	799	1,038	1,337	2,011	2,017	2,065		50.6	55.4	60.0	60.6	70.2	73.6	77.1	79.1	78.1	78.5		
Finland	4,915	4,304	4,302	4,828	4,892	5,422	5,426	5,126	5,318	6,286		68.5	64.8	64.2	65.3	68.1	68.6	67.5	66.7	67.9	71.7		
Sweden	35,050	36,325	32,190	34,300	42,796	42,056	45,024	44,792	45,034	57,177		95.7	95.9	95.9	95.5	97.3	97.5	97.3	96.6	94.4	94.7		
Not covered	106,994	98,319	108,069	96,520	78,289	78,021	71,710	81,154	73,382	70,291		85.8	76.5	79.8	76.2	78.9	73.5	65.6	74.2	69.0	60.2		
Denmark	:	1,410	4,582	4,177	4,359	6,091	1,351	13,507	10,648	9,849		:	30.1	56.6	68.9	67.7	67.2	13.1	84.6	82.7	78.2		
Ireland	456	568	300	296	286	117	186	162	312	235		13.4	21.8	14.8	14.8	15.1	5.7	7.4	4.7	7.6	7.7		
United King.	106,538	96,341	103,187	92,047	73,644	71,813	70,173	67,485	62,422	60,207		91.0	79.4	82.3	77.6	81.0	75.6	72.7	75.0	69.9	59.5		

Source: Eurostat (migr_resfam). Note: Data extracted on 07.01.2019. ; ":" not available.

Long term residents Directive (2003/109/EC)

The number of long-term residence permits under EU law has increased from 1.2 million in 2008 to around 3 million in the latest years. The comparison to the number of national residence permits is made difficult by limited data availability (no data before 2010) and changes in terms of country coverage (for instance data for Germany included only from 2016 on). Nevertheless, it appears clearly that in 2017, the number of permanent-type of permits under national law largely outnumbered those issued under EU law (respectively 7.2 million and 3.1 million overall in the EU-25).

Figure 13. Total number of EU Long term resident permit vs. National permanent resident status in 2008-2017 for EU -25 (in thousands).



Source: Eurostat: [migr_reslong]. Data extracted on 07.01.2019. Note: Data for long-term residence under national status not available before 2010 and not fully available for some countries (for instance missing for Germany and Sweden) before 2015-16. Moreover, some countries seem to report lower number than expected for national permits (for instance Finland).

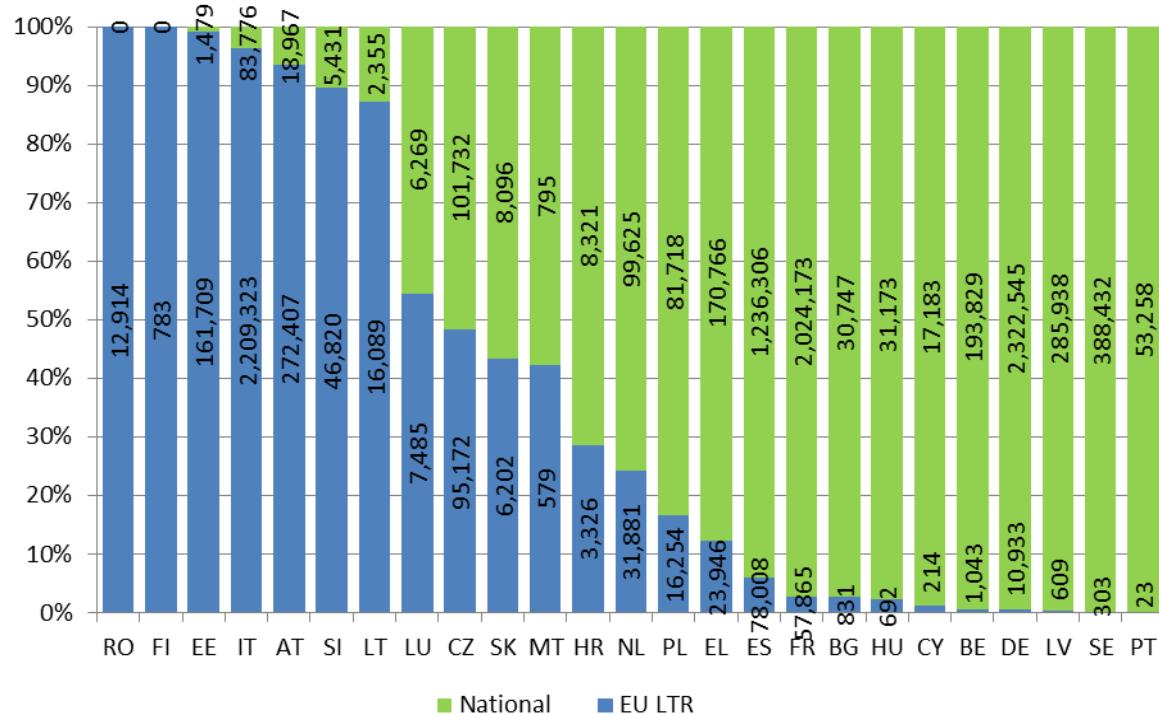
The distribution between EU vs national long-term/permanent residence permits varies largely across EU Member States. For instance in 2017, while for some countries (Romania, Estonia, Italy and Austria) more than 90% of permanent type of permits are issued under EU law (LTR), this proportion is lower than 20% in 13 Member States (out of the 25 bound by the acquis), including 4 out of the top largest Member States in terms of population (France, Germany, Poland and Spain).

As a result, in 2017, 90% of EU LTR were valid in only 4 Member States (Italy, Austria, Estonia and Czech Republic) and Italy alone represented 72% of all EU LTR. On the contrary, a large number of Member States mostly using their own national status, including large host countries of third-country nationals such as France, Sweden, Belgium and Germany. Table 8 below presents the share of EU status among all long-term residence permits over the period 2010-17.

On the basis of flow data (reported by 17 Member States to Eurostat for the year 2017, see table 7), it appears that some countries issue only (or almost only) EU long-term residence status (Italy, Austria, Romania, Luxembourg, Slovenia and Finland) while other Member States issued permits under both types of EU and national status. Among the later, the top

countries in terms of newly granted permits (Germany, France, Spain and Sweden) issued mostly permits under national rules.

Figure 14. Total number of EU Long term resident permit vs. National permanent resident status in 2017 for EU -25 (in million).



Source: Eurostat: [migr_reslong]. Data extracted on 07.01.2019. Note: Data for long-term residence under national status not available before 2010 and not fully available for some countries (for instance missing for Germany and Sweden) before 2015-16. Moreover, some countries seem to report lower number than expected for national permits (for instance Finland and Portugal).

Table 7 - Long-term residence permits issued during the year 2017, (EU LTR vs national status)

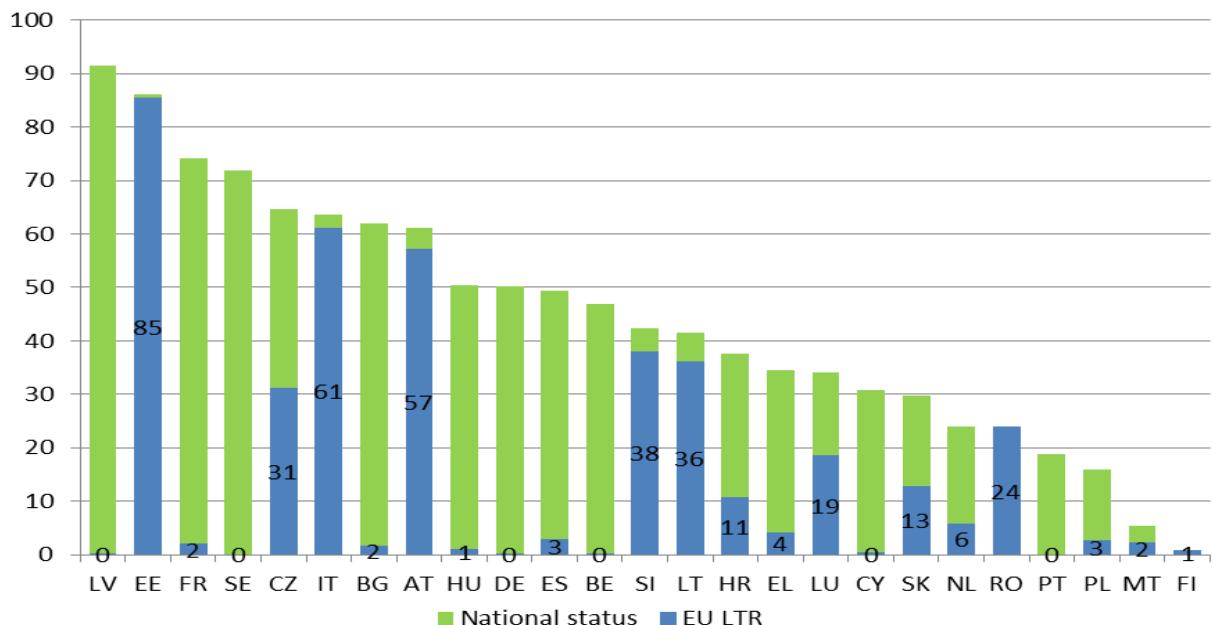
	EU LTR	National status
Italy	103,429	0
Romania	1,198	0
Finland	109	0
Austria	43,545	6
Slovenia	1,876	10
Slovakia	832	617
Luxembourg	741	891
Estonia	494	843
Croatia	284	574
Greece	5,610	14,888
Poland	1,895	13,210
Spain	6,990	61,893
Latvia	100	1,722
Belgium	755	13,860
France	10,266	250,642

Bulgaria	61	3,423
Hungary	35	6,986
Cyprus	11	3,378
Sweden	0	49,453

Source: Eurostat: [migr_restr]. Data extracted on 07.01.2019.

Figure 15 depicts the share, among all third-country nationals residing in the country, of those having EU (or national) long-term residence permit. In eight Member States (Latvia, Estonia, Sweden, France, Czech Republic, Italy, Bulgaria and Austria) at least 60% of third-country national residents have a long-term status, in half of the cases under EU status. At the other side of the spectrum, the share of long-term residents among third-country national residents is below 30% in Slovakia, the Netherlands, Romania, Poland and Malta. It is also the case in Portugal and Finland though for those countries this may be explained by data reporting issues given that the figures covered under national status are expected to be larger than reported.

Figure 15. Long-term residents among all non-EU citizens holding residence permits (EU vs national status) for EU -25 countries (in %) (2017)



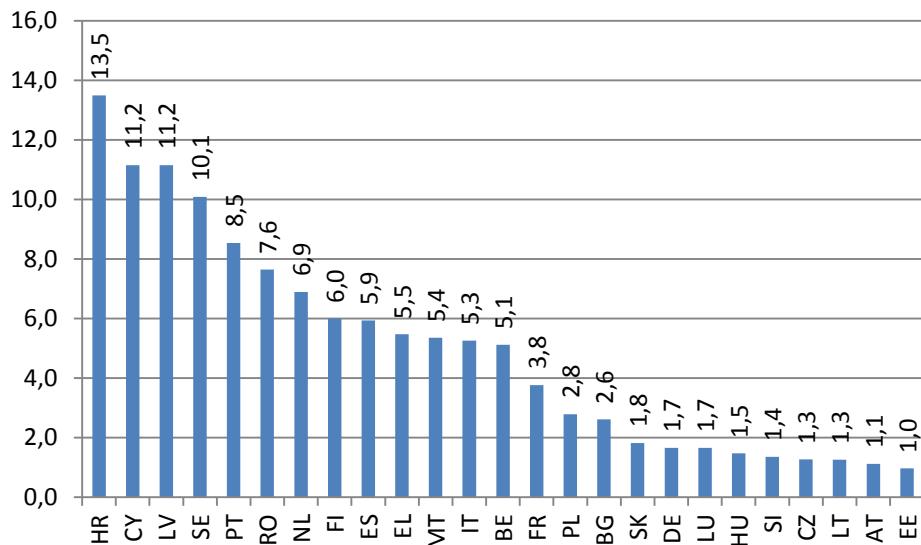
Source: Eurostat: [migr_resshare]. Data extracted on 07.01.2019. Note: The data label refers to share covered under EU status. Some countries seem to report lower number than expected for national permits (for instance Finland).

It should be noted that the evolution in the number and share of long-term residence permits across EU Member States should be interpreted cautiously as it is influenced by:

- the number of third-country nationals ;
- their timing of arrival (given that 5 years of residence is one of the basic requirement to be granted this status) as well as if and how long they stay; and,
- the naturalization phenomenon (through which some third-country acquire the citizenship of the host country and therefore are not included any more in the 'stock of long-term residence permits').

Regarding naturalization, figure 16 shows that in some countries (Croatia, Cyprus, Latvia, and Sweden) more than 10% of third-country national residents acquired the citizenship of their (EU) host country during 2016. On the other side of the spectrum, in nine member States, less than 2% of the third-country national residents were naturalized. This should be taken into account when analysing data on the number of long-term residence permits, also because naturalization and long-term residence permits have somewhat similar effects (granting permanency of the residence as well a set of equal rights with nationals).

Figure 16. Residents who acquired citizenship as a share of third- country national residents (in %) (2016)



Source: Eurostat [migr_acqs], Data extracted on 13.03.18

Table 8 Long-term residents under EU Directive as a share of long-term residents on 31 December of each year in EU-25 (%), 2010–2017

Covered	2010	2011	2012	2013	2014	2015	2016	2017
Belgium	1.4	1.6	1.7	1.9	0.1	0.3	0.3	0.5
Bulgaria	100.0	84.1	85.6	72.0	52.9	4.2	3.3	2.6
Czech Republic	0.0	100.0	41.0	45.2	47.5	48.1	48.4	48.3
Germany	100.0	100.0	100.0	100.0	100.0	100.0	0.4	0.5
Estonia	100.0	99.1	99.1	99.1	99.1	99.1	99.1	99.1
Greece	90.5	89.6	88.4	1.3	6.3	8.6	10.1	12.3
Spain	2.4	3.2	4.1	4.7	5.2	5.4	5.6	5.9
France	0.4	0.7	0.9	1.2	1.6	2.0	2.5	2.8
Croatia	:	:	:	:	12.2	20.5	28.6	
Italy	65.9	67.8	97.1	97.1	96.9	96.8	96.4	96.3
Cyprus	44.7	91.4	6.7	2.2	5.9	3.1	1.9	1.2
Latvia	100.0	0.1	0.1	0.1	0.1	0.2	0.2	0.2
Lithuania	91.8	92.1	92.7	93.2	92.0	90.7	89.0	87.2
Luxembourg	100.0	63.5	67.4	68.2	63.9	61.2	58.0	54.4
Hungary	12.2	1.4	1.7	4.7	4.9	4.1	3.0	2.2
Malta	100.0	100.0	100.0	46.3	47.0	47.9	48.1	42.1
Netherlands	22.8	21.4	17.1	35.3	17.9	22.1	23.2	24.2
Austria	100.0	60.8	61.2	70.5	77.3	87.9	91.1	93.5
Poland	11.8	14.2	11.7	16.4	17.2	17.4	17.4	16.6
Portugal	0.6	0.9	1.1	1.0	1.0	0.9	0.8	0.0
Romania	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Slovenia	77.7	80.2	81.2	85.5	88.3	88.7	89.2	89.6
Slovakia	30.6	20.4	23.8	30.4	34.3	37.2	39.6	43.4
Finland	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Sweden	98.2	100.0	100.0	100.0	100.0	0.0	0.1	0.1

Source: Eurostat (*migr_reslong*). Note: Data extracted on 08.01.2019. 'Long-term residents': long-term resident status refers to permits issued under Council Directive 2003/109/EC. ":" not available. Some countries seem to report lower number than expected for national permits (for instance Finland and Portugal). In some cases the values reported as 100% relate to missing information for the number of permits under national schemes for instance Germany before 2016, Sweden before 2015 and Finland for the entire period.

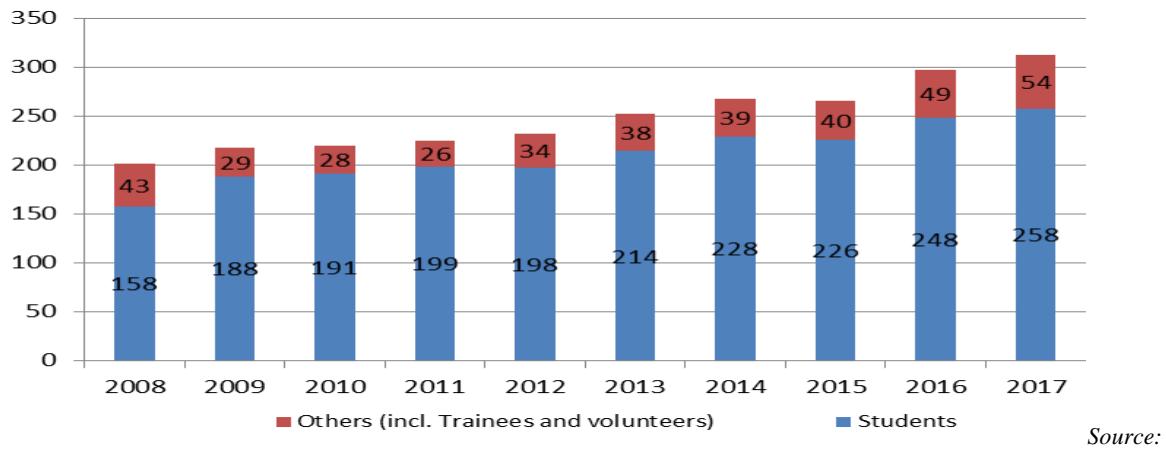
Students Directive (2004/114/EC)

Eurostat provides statistics on the number of first permits issued for study reasons, on the one hand, and, on the other hand, for other education reasons as a whole (including school pupils, unremunerated trainees, and volunteers). The number of first permits issued to TCNs for study reasons increased sharply from 158 thousand in 2008 to 258 thousand in 2017 at the EU-25 level.

This strong trend may be slightly biased because statistics are not available for the first half of the period for a number of EU-25 Member States, including Bulgaria, Estonia, Croatia, Lithuania, and Slovenia. Hence, the growth of these permits in absolute terms over the whole period may be overestimated but to a small extent given that data is available on the whole

period for all the top host Member States of international students. The statistics are available for all EU-25 Member States since 2013. Taking this year as a base year reveals that the number of first permits delivered for study reasons has still followed an upward trend until 2016. In 2013, 214 thousand first permits were delivered for study reasons, 44 thousand less than in 2017.

Figure 17. First permits issued for education reasons in EU-25, 2008-2017, in thousands



Source: Eurostat [[migr_resedu](#)] Last update: September 2018. Missing data: Croatia from 2008-2012; Luxembourg for 2008.

The six EU-25 Member States who issued the largest number of first permits for study reasons in 2017 were France (79,000) Germany (40,000), Spain (38,000), Poland (22,000) and the Netherlands (17,000).

At the EU-3 level, the analysis of the trends over the whole period is not possible due to the partially missing statistics from the United Kingdom prior to 2013. Available statistics for all the Member States over the second half of the period nevertheless show a rise in the number of first permits issued in these countries from 2013 to 2015 followed by a decline due to the number of study permits going down in the UK.

Table 9 Number of first permits issued for study reasons and share in first permits issued for education reasons in EU-25 and EU-3, 2008–2017

	First permits for study reasons											% of all first permits for education reasons											
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Trend	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Trend	
Covered	157,677	188,155	191,159	198,583	197,657	214,134	228,434	225,851	247,989	257,798		78.4	86.6	87.1	88.4	85.1	85.0	85.3	85.1	83.6	82.6		
Belgium	6,383	6,772	5,184	5,199	5,266	5,468	5,794	5,840	5,718	6,248		94.7	93.8	87.9	89.1	90.6	92.6	92.2	92.0	90.7	90.6		
Bulgaria	:	:	:	1,058	1,396	935	911	874	1,067	1,267		:	:	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	
Czech Rep.	1,424	1,202	1,399	1,020	1,867	2,294	2,516	5,484	5,668	2,934		33.7	29.0	27.1	20.4	29.3	36.9	41.7	40.2	33.1	26.5		
Germany	22,159	24,200	23,497	21,172	32,305	36,862	40,388	13,475	37,297	39,546		73.9	77.2	78.2	76.8	79.8	80.2	81.7	80.8	80.9	81.3		
Estonia	:	:	:	339	349	434	698	846	946	1,072		:	:	85.8	82.3	87.1	89.8	85.8	84.9	89.9	85.8	89.9	
Greece	1,411	1,453	1,288	1,261	779	953	353	281	297	286		97.4	97.6	97.4	97.2	92.5	88.7	42.3	32.3	32.9	33.6		
Spain	:	20,056	22,882	32,769	26,344	25,863	27,924	31,170	33,700	37,531		:	90.9	92.0	93.5	97.2	97.9	94.1	94.2	94.6	94.6		
France	52,226	58,738	65,538	65,145	59,045	62,988	65,201	70,250	73,865	78,758		100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0		
Croatia	:	:	:	:	:	179	308	296	416	472		:	:	:	:	96.8	73.7	76.5	79.1	79.9	79.9		
Italy	25,098	24,219	17,559	24,066	18,484	16,201	15,042	14,195	8,542	2,893		87.7	74.2	68.4	79.5	60.3	59.8	61.7	62.1	50.7	16.1		
Cyprus	3,761	5,022	2,311	1,434	959	846	806	1,703	3,228	4,861		93.5	92.9	85.7	75.2	66.9	60.6	55.8	76.5	97.4	98.7		
Latvia	256	142	280	440	647	772	1,030	1,095	1,287	1,566		74.0	67.0	94.6	95.9	96.0	95.5	98.1	98.0	97.9	97.7		
Lithuania	:	:	:	0	362	542	607	678	850	898		:	:	0.0	94.0	89.9	91.1	91.3	91.6	90.3	90.3		
Luxembourg	:	83	94	173	148	153	209	214	205	372		:	86.5	62.7	59.5	36.1	37.9	45.8	48.4	48.8	64.2		
Hungary	7,760	4,167	3,951	3,666	3,936	5,448	5,139	5,807	7,821	10,779		100.0	98.4	98.9	90.1	89.2	98.8	99.4	98.8	99.3	99.3		
Malta	202	191	157	136	195	170	174	117	256	326		100.0	100.0	100.0	100.0	100.0	9.2	6.0	5.0	13.9	21.3		
Netherlands	8,850	9,944	10,510	10,701	10,747	12,507	12,347	14,925	15,950	16,873		100.0	100.0	100.0	100.0	100.0	97.1	96.9	97.8	97.8	97.9		
Austria	2,313	2,615	3,058	4,213	5,312	4,604	5,359	6,009	4,875	3,876		81.1	80.9	81.9	83.7	84.3	83.1	84.4	85.1	84.5	84.4		
Poland	4,464	5,329	7,324	3,880	6,035	16,853	22,862	29,764	21,256	21,579		72.6	75.4	80.5	55.5	62.8	73.3	76.7	75.7	65.1	62.2		
Portugal	3,508	4,043	5,288	6,322	7,877	3,971	2,823	2,727	3,353	4,057		80.8	94.0	97.7	97.6	93.7	83.9	82.9	86.9	96.9	83.1		
Romania	2,274	2,604	2,478	2,623	2,989	3,303	3,145	3,788	3,967	3,817		76.6	73.5	75.9	82.5	87.2	89.5	89.0	86.6	85.7	85.8		
Slovenia	:	:	:	618	564	300	500	910	1,318	1,344		:	:	59.5	52.6	50.3	100.0	69.2	73.3	75.3	75.3		
Slovakia	267	304	299	312	466	694	947	1,294	1,509	1,729		59.5	91.0	84.7	77.4	82.9	83.7	87.5	87.7	87.6	86.9		
Finland	4,441	3,949	4,433	5,370	5,405	5,314	5,528	5,756	6,235	5,094		100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0		
Sweden	10,880	13,122	13,629	6,666	6,180	6,480	7,823	8,353	8,363	9,620		93.0	93.9	97.5	98.5	88.5	86.7	85.1	93.1	95.0	95.2		
Not covered	6,329	12,105	12,505	11,926	211,825	198,544	194,217	244,405	190,396	201,088		2.5	4.2	4.3	4.4	95.4	93.6	92.9	93.9	93.9	92.3		
Denmark	:	5,064	4,991	4,975	5,331	6,022	6,330	7,307	8,111	7,936		:	79.1	82.3	81.4	81.6	80.7	78.1	79.0	77.4	74.3		
Ireland	6,329	7,041	7,514	6,951	7,714	9,325	10,653	8,001	11,342	13,519		50.5	57.4	55.0	45.9	45.8	43.6	44.9	36.2	52.9	49.0		
United King.	:	:	:	:	198,780	183,197	177,234	229,097	170,943	179,633		:	:	:	:	100.0	100.0	100.0	100.0	100.0	100.0		

Source: Eurostat (migr_resedu) Note: Data extracted on 08.01.2019; ":" not available.

Researchers Directive (2005/71/EC)

First permits issued for researchers rose significantly in the EU Member States between 2008 and 2017. The Council Directive 2005/71/EC may have contributed to this expansion.

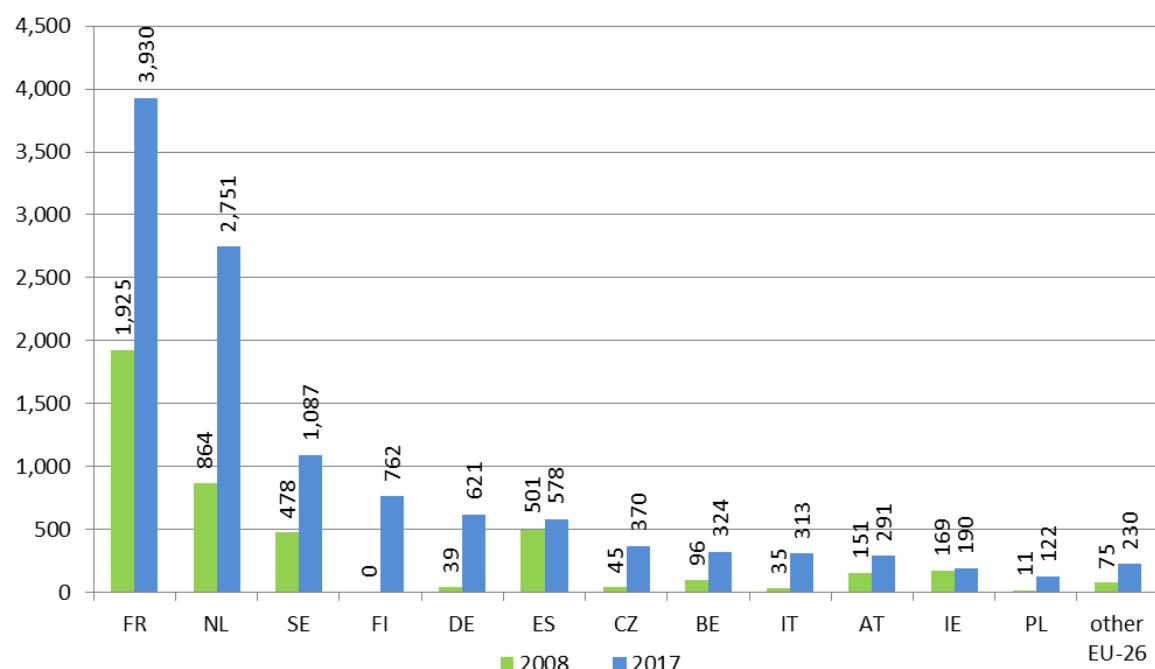
In the EU-25 (plus Ireland, also bound by the Directive), more Member States gradually reported first permits under this category during that period (Table 10). Moreover, many of those who already reported these first permits in 2008 increased issues afterwards. While in 2008 the number of first permits issued for researchers was around 4,000, it was more than the double in 2017, reaching more than 10,000 (though around one quarter of this increase is due to more countries reporting data). Although the share of these permits in all first permits

delivered for remunerated activities reasons remained small in 2017⁸⁴⁶, amounting to 1.3%, it was only 0.7% back in 2008.

Within the EU-25, two countries (France and the Netherlands) issued first permits for researchers at levels well above the others in 2017 (see figure 17). The shares of these permits in all the first permits issued for remunerated activities reasons in these two countries were considerably higher than those of the other EU-25 Member States at the end of the period (16% in the Netherlands and 14% in France). Four other countries issued more than 500 first permits for researchers during that year: Sweden, Finland, Germany, and Spain. In all these countries but Spain, the number of first permits for researchers rose between 2008 and 2017.

In countries not bound by the Directive, the number of first permits issued for researchers was rather limited in 2017. With slightly more than 500 first permits issued for researchers, Denmark issued a higher number of these permits than the United Kingdom⁸⁴⁷ and the share of these first permits in all first permits delivered for remunerated activities reached 5% in Denmark (versus 0.3% in the UK).

Figure 18. First permits issued for researchers in EU-26 (i.e. EU-25 plus Ireland), 2008-2017



Source: Eurostat (migr_resocc) Note: Data extracted on 08.01.2019

⁸⁴⁶ This small share is partly due to the very high number of work-related permits issued for short duration. Indeed, if calculations only include work permits valid for at least 12 months, the share of first permits for research in overall work permits is much larger (3.2%).

⁸⁴⁷ However, there may be data reporting issues given the fact that residence permits for the UK are estimations by the UK NSI and not administrative data derived from a residence permits register, as in other EU countries.

Table 10 Number of first permits issued for researchers and share in first permits issued for remunerated activities reasons in EU-26 (i.e. EU-25 plus Ireland), 2008–2017

	First permits for researchers											Trend	% of all first permits for remunerated activities reasons										
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Trend		2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Trend
Covered	4,389	5,459	6,148	6,656	8,107	9,045	9,453	9,960	10,009	11,569	↑	0.7	1.0	0.9	1.6	2.2	2.2	2.1	1.7	1.4	1.3	↓	
Belgium	96	0	152	192	242	223	242	283	301	324	↑	1.4	0.0	3.5	4.1	5.2	5.1	5.1	5.7	5.8	5.4	↑	
Bulgaria	0	0	0	0	0	2	3	0	1	0	↑	0.0	0.0	0.0	0.0	0.0	0.6	1.0	0.0	0.4	0.0	↑	
Czech Rep.	45	61	0	0	162	241	184	365	434	370	↑	0.1	0.5	0.0	0.0	0.9	1.3	1.7	1.8	1.9	1.6	↑	
Germany	39	94	129	167	290	369	328	111	370	621	↑	0.2	0.6	0.8	0.9	1.1	1.3	1.1	0.8	0.9	1.2	↑	
Estonia	7	15	15	18	25	21	21	15	24	9	↑	0.7	1.3	2.0	1.4	4.1	3.6	2.4	1.2	1.8	0.6	↑	
Ireland	169	166	89	111	164	88	146	141	183	190	↑	2.9	3.4	2.8	3.2	4.4	2.2	2.8	2.3	2.3	2.0	↑	
Greece	16	31	23	28	22	27	46	18	14	19	↑	0.1	0.2	0.2	0.5	2.1	2.2	2.1	1.6	0.7	0.9	↑	
Spain	501	390	442	447	379	370	385	398	440	578	↑	0.5	0.4	0.6	0.5	0.6	0.7	0.9	1.0	1.2	1.4	↑	
France	1,925	2,243	2,271	2,073	2,689	3,046	3,271	3,765	3,316	3,930	↑	8.8	10.9	12.1	11.3	17.0	16.7	16.8	17.9	14.2	14.3	↑	
Croatia	:	:	:	:	:	3	9	8	17	12	↑	:	:	:	:	:	0.5	1.5	1.0	0.6	0.2	↑	
Italy	35	118	336	353	388	272	351	334	325	313	↑	0.0	0.1	0.1	0.3	0.6	0.3	0.7	1.9	3.5	3.7	↑	
Cyprus	0	0	0	0	0	0	9	4	4	8	↑	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.1	0.1	0.1	↑	
Latvia	3	1	7	3	0	5	6	3	5	5	↑	0.2	0.2	1.8	0.6	0.0	0.6	0.6	0.2	0.3	0.2	↑	
Lithuania	1	2	5	0	2	3	8	17	14	19	↑	0.0	0.1	0.8	0.0	0.1	0.1	0.2	0.6	0.3	0.3	↑	
Luxembourg	:	14	15	26	38	46	40	46	44	60	↑	:	4.0	5.4	4.9	6.0	3.6	4.1	3.7	3.3	3.4	↑	
Hungary	33	35	34	22	29	33	24	35	38	51	↑	0.2	0.7	0.8	0.6	0.8	0.9	0.6	0.8	0.6	0.4	↑	
Malta	0	0	0	0	0	0	0	0	0	0	↑	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	↑	
Netherlands	864	1,305	1,485	1,616	1,689	2,363	2,310	2,418	2,519	2,751	↑	7.4	12.5	14.2	14.7	15.5	18.6	19.6	18.2	17.2	15.5	↑	
Austria	151	143	228	184	250	229	248	266	296	291	↑	4.9	5.3	7.8	5.7	6.7	6.4	7.2	7.4	8.9	9.9	↑	
Poland	11	11	69	55	66	96	111	119	250	122	↑	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.0	0.1	0.0	↑	
Portugal	0	0	0	0	0	0	0	0	0	0	↑	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	↑	
Romania	0	0	12	8	4	5	6	11	16	9	↑	0.0	0.0	0.7	0.4	0.2	0.3	0.3	0.7	0.9	0.3	↑	
Slovenia	5	8	8	17	12	7	22	11	11	24	↑	0.0	0.1	0.2	0.4	0.3	0.2	0.5	0.2	0.2	0.2	↑	
Slovakia	10	10	5	9	4	10	6	8	12	14	↑	0.3	0.4	0.3	0.7	0.2	0.6	0.3	0.3	0.3	0.2	↑	
Finland	0	0	0	510	526	559	586	639	588	762	↑	0.0	0.0	0.0	10.2	11.3	11.8	12.2	12.7	10.9	12.2	↑	
Sweden	478	812	823	817	1,126	1,027	1,091	945	787	1,087	↑	3.4	4.3	5.4	5.0	6.1	6.0	7.3	6.0	5.0	5.8	↑	
Not covered	0	783	860	737	4,573	1,375	743	933	912	844	↑	0.0	0.7	0.7	0.7	4.0	1.2	0.7	0.7	0.7	0.7	↑	
Denmark	0	783	860	737	644	567	652	575	555	541	↑	0.0	7.0	7.1	7.2	7.1	5.3	6.0	5.9	5.4	5.2	↑	
United King.	0	0	0	0	3,929	808	91	358	357	303	↓	0.0	0.0	0.0	0.0	3.7	0.7	0.1	0.3	0.3	0.3	↓	

Source: Eurostat (migr_resocc) Note: Data extracted on 08.01.2019; ":" not available. Note: some data reported as "0" in the tables are in fact data which are not available.

Permits issued for remunerated activities

Figure 19. First permits issued for remunerated activities by reason in EU-25, 2008-2017, in thousands



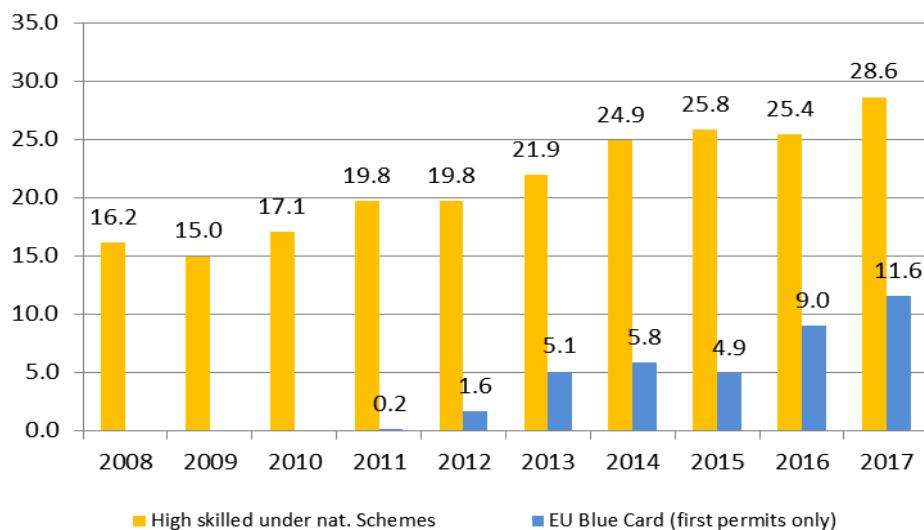
Source: Eurostat (migr_resocc) Data extracted on 25.09.2018. Missing data: Croatia from 2008-2012; Luxembourg for 2008; Belgium in 2016 (for highly skilled workers under national scheme). Permit category that exists in the national legal/administrative system cannot always be delivered under residence permit data collection for various reasons. For instance, for many Member States (and especially before 2014) data on permits issued to "Seasonal workers" cannot be distinguished from other employment related permits and are included in the category "Other remunerated activities".

EU Blue Card Directive (2009/50/EC)

Statistics on first permits for Blue Card are available only from 2011 onwards in the Member States of the EU-25. They grew from 156 in 2011, to nearly 6,000 in 2014, to 9,000 in 2016 and 11,600 in 2017, with 22 out of 25 Member States of the EU-25 reporting the issuance of such first permits (Table 11). In 2017, the share of these first permits in all first permits for remunerated activities in the EU-25 was 1.3%, an increased compared to the 2015 level (0.9%)⁸⁴⁸.

Compared to permits issued for highly skilled under national schemes, the number of first Blue Card issued is lower (11,600 vs 28,600, or 29% of the total) but rising more quickly over the last few years (see figure 20)⁸⁴⁹.

Figure 20. Comparison of (first permits) number of Highly Skilled Workers (national schemes) and EU Blue Cards issued (in thousands)



Source: Eurostat [migr_resocc]. Last update: 28.9.2018. Missing data: Croatia from 2008-2012; Luxembourg for 2008; Belgium in 2016 (for highly skilled workers under national scheme).

The EU25-wide picture is strongly influenced by the situation in a few Member States, in particular Germany. Indeed, in 2017, almost three quarters of all Blue Card first permits issued in the EU-25 were reported by Germany. The number of these permits issued was much smaller in the other countries.

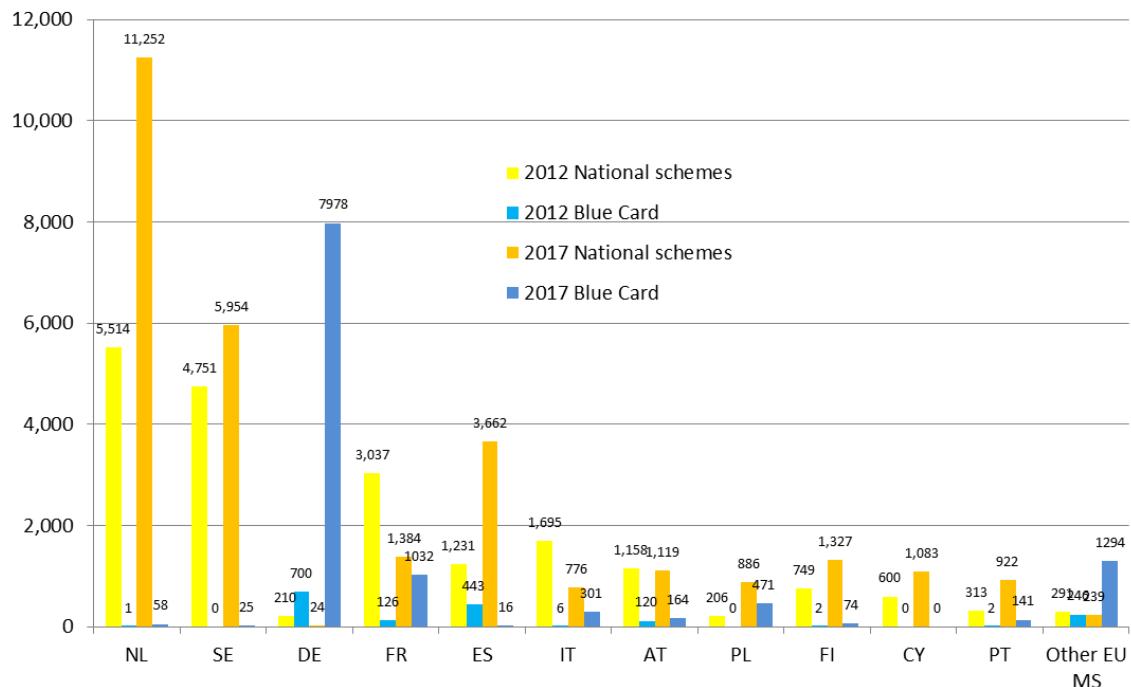
The majority of EU-25 Member States that had a national ‘highly skilled workers’ schemes and, were already reporting on the number of these first permits issued under these schemes in

⁸⁴⁸ Such a small share is partly due to the very high number of work-related permits issued for short duration in the EU-25. Indeed, if calculations only include work permits valid for at least 12 months, the share of first Blue Card permits in overall work permits is much larger (4.5%).

⁸⁴⁹ It should be noted however that this comparison is possible only for those Member States that do have and report to Eurostat high-skilled permits data under national schemes which is not the case for all EU25 countries. There may be higher number of highly skilled workers from third countries admitted under general (non-specific) scheme in some EU 25 countries that are therefore currently not included in this general comparison. For instance for the reference year 2016 and 2017, Belgium reported zero or very low values while the number that country were rather high over the preceding years (around 2,500 in 2014 and 2015).

2008, continued to issue them, and none of them seemed to increase substantially the number of first Blue Card permits issued (see figure 21). With the exception of Germany, most other Member States continued to report higher numbers of permits granted to highly skilled workers under their national schemes, not under the Blue Card Directive. In 2017, 12 MS (PT, RO, ES, FR, IT, CY, LV, NL, AT, PL, FI, SE) issued over 28,000 high skilled workers permits under national schemes compared to only 2,450 Blue Card permits. However, the number of Blue Cards issued rose from 8% in 2012 of all highly skilled workers permits, to 29% in 2017.

Figure 21. EU Blue Cards and national permits for highly skilled issued as first permits by the MS in 2012 and 2017



Source: Eurostat ([migr_resocc](#)). Last update: 25.09.2018. 'Other EU MS' refer to the rest of Member States applying the EU Blue Card directive.

Finally, it should be noted that the total number of Blue Card issued in the EU25 in 2017 (24,300) is much higher than the number of first Blue Card permits issued (11,600). This is due to the fact that a number of Blue Card are issued in EU25 countries to third-country nationals who already had residence permits under other schemes (students, workers under other permit categories, researchers). When including therefore those status changers, the overall number of Blue Card issued in the EU was, in 2017, not far from the number of first permits issued under national schemes (respectively around 24 and 29 thousands).

Table 11 Number of first permits issued for Blue Card and share in first permits issued for remunerated activities reasons in EU-25, 2008–2017

	First permits for Blue Card							Trend	% of all first permits for remunerated activities reasons							
	2011	2012	2013	2014	2015	2016	2017		2011	2012	2013	2014	2015	2016	2017	Trend
Covered	156	1,646	5,096	5,825	4,908	8,988	11,554		0.0	0.5	1.2	1.3	0.9	1.2	1.3	
Belgium	0	0	0	0	0	0	16		0.0	0.0	0.0	0.0	0.0	0.0	0.3	
Bulgaria	2	7	2	10	52	99	108		0.7	2.1	0.6	3.3	2.3	35.9	5.9	
Czech Rep.	0	68	67	101	160	214	266		0.0	0.4	0.4	0.9	0.8	0.9	1.1	
Germany	0	700	3,776	4,197	2,642	6,189	7,978		0.0	2.6	13.6	14.3	19.6	15.6	15.1	
Estonia	0	12	12	12	16	12	33		0.0	2.0	2.1	1.4	1.3	0.9	2.2	
Greece	0	0	0	0	0	0	0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	
Spain	107	443	303	37	2	10	16		0.1	0.7	0.6	0.1	0.0	0.0	0.0	
France	0	126	371	604	657	498	1,032		0.0	0.8	2.0	3.1	3.1	2.1	3.7	
Croatia	:	:	4	8	27	22	30		:	0.7	1.3	3.4	0.8	0.4	0.4	
Italy	0	6	84	164	237	254	301		0.0	0.0	0.1	0.3	1.4	2.7	3.6	
Cyprus	0	0	0	0	0	0	0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	
Latvia	3	5	11	32	71	113	168		0.6	0.7	1.4	3.3	4.3	6.5	7.8	
Lithuania	0	0	17	71	128	127	144		0.0	0.0	0.6	1.5	4.6	3.1	1.9	
Luxembourg	0	96	236	262	336	333	492		0.0	15.3	18.6	27.2	26.7	24.9	27.6	
Hungary	1	1	4	5	15	5	9		0.0	0.0	0.1	0.1	0.4	0.1	0.1	
Malta	0	0	0	0	0	2	2		0.0	0.0	0.0	0.0	0.0	0.1	0.0	
Netherlands	0	1	3	8	20	42	58		0.0	0.0	0.0	0.1	0.2	0.3	0.3	
Austria	42	120	102	121	132	150	164		1.3	3.2	2.9	3.5	3.7	4.5	5.6	
Poland	0	0	17	26	322	673	471		0.0	0.0	0.0	0.0	0.1	0.1	0.1	
Portugal	0	2	4	3	57	89	141		0.0	0.0	0.1	0.0	0.8	1.5	1.7	
Romania	0	46	71	148	0	92	0		0.0	2.8	4.6	8.2	0.0	5.2	0.0	
Slovenia	1	7	2	7	11	17	22		0.0	0.2	0.1	0.2	0.2	0.2	0.2	
Slovakia	0	4	5	3	4	4	4		0.0	0.2	0.3	0.2	0.1	0.1	0.1	
Finland	0	2	5	5	17	33	74		0.0	0.0	0.1	0.1	0.3	0.6	1.2	
Sweden	0	0	0	1	2	10	25		0.0	0.0	0.0	0.0	0.0	0.1	0.1	

Source: Eurostat (migr_resocc). Note: Data extracted on 08.01.2019; ":" not available.

Table 12 Number of first permits issued for highly skilled workers under national schemes and share in first permits issued for remunerated activities reasons in EU-25 and EU-3, 2008–2017

	First permits for highly skilled workers										Trend	% of all first permits for remunerated activities reasons									
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017		2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Covered	16,157	14,980	17,053	19,751	19,755	21,940	24,922	25,818	25,446	28,647		2.5	2.9	2.6	4.9	5.5	5.3	5.7	4.5	3.5	3.2
Belgium	3,577	1,202	101	137	95	73	2,484	2,679	:	22		50.4	22.3	2.3	2.9	2.0	1.7	52.1	54.1	:	0.4
Bulgaria	0	0	0	0	0	0	0	0	0	0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Czech Rep.	0	18	0	0	69	69	46	45	4	4		0.0	0.2	0.0	0.0	0.4	0.4	0.4	0.2	0.0	0.0
Germany	96	119	122	177	210	11	13	11	11	24		0.5	0.7	0.7	0.9	0.8	0.0	0.0	0.1	0.0	0.0
Estonia	0	0	0	0	0	0	0	0	0	0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Greece	0	0	0	0	0	0	0	0	0	0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Spain	2,884	2,071	1,441	1,690	1,231	1,480	2,137	2,547	3,211	3,662		3.0	2.0	1.8	2.0	1.9	3.0	5.0	6.1	8.4	8.6
France	1,681	2,366	2,554	3,148	3,037	2,667	2,567	2,551	2,198	1,384		7.7	11.5	13.6	17.2	19.2	14.6	13.2	12.1	9.4	5.0
Croatia	:	:	:	:	:	565	0	0	0	0		:	:	:	:	94.3	0.0	0.0	0.0	0.0	0.0
Italy	0	0	1,984	1,563	1,695	1,543	1,066	1,006	709	776		0.0	0.0	0.6	1.3	2.5	1.9	2.0	5.8	7.6	9.2
Cyprus	393	436	634	551	600	385	469	662	718	1,083		2.8	3.2	5.3	5.6	8.7	5.8	5.9	9.0	9.7	13.2
Latvia	0	85	114	97	106	82	122	143	144	100		0.0	18.3	28.7	18.7	13.8	10.3	12.6	8.7	8.3	4.6
Lithuania	0	0	0	0	0	0	0	0	0	0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Luxembourg	:	96	74	102	21	0	0	0	0	0		:	27.2	26.6	19.2	3.3	0.0	0.0	0.0	0.0	0.0
Hungary	0	0	0	0	0	0	0	0	0	0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Malta	0	0	0	0	0	0	0	0	0	0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Netherlands	6,411	4,895	5,531	5,594	5,514	7,046	7,123	7,909	9,084	11,252		55.2	46.9	52.9	51.0	50.5	55.6	60.5	59.4	62.1	63.4
Austria	827	575	668	868	1,158	1,228	1,083	1,173	1,124	1,119		26.7	21.4	22.9	26.8	31.1	34.5	31.5	32.6	33.7	38.1
Poland	0	0	12	275	206	387	691	570	1,184	886		0.0	0.0	0.0	0.4	0.2	0.3	0.3	0.2	0.2	0.1
Portugal	288	307	342	282	313	767	989	896	814	941		1.1	1.7	3.1	3.9	5.3	12.0	15.4	13.2	13.7	11.5
Romania	0	0	0	0	0	0	0	140	0	113		0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.3	0.0	3.8
Slovenia	0	0	0	0	0	0	0	0	0	0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Slovakia	0	0	0	0	0	0	0	0	0	0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Finland	0	0	0	861	749	971	1,120	959	957	1,327		0.0	0.0	0.0	17.1	16.1	20.6	23.4	19.1	17.8	21.3
Sweden	0	2,810	3,476	4,406	4,751	4,666	5,012	4,527	5,288	5,954		0.0	14.8	22.8	26.8	25.7	27.1	33.7	28.8	33.8	31.9
Not covered	7,825	24,008	22,824	17,176	13,566	10,518	10,614	9,460	10,515	11,168		5.1	18.1	16.7	14.1	11.4	8.5	8.0	7.1	7.8	9.0
Denmark	0	3,594	5,392	4,157	4,088	5,730	5,698	5,457	5,762	5,273		0.0	32.3	44.4	40.7	44.8	53.6	52.0	56.2	56.4	51.0
Ireland	1,925	1,483	992	1,340	1,408	1,707	2,438	2,376	3,508	4,628		33.1	30.7	30.9	39.1	37.8	42.5	47.4	39.1	44.7	49.2
United King.	5,900	18,931	16,440	11,679	8,070	3,081	2,478	1,627	1,245	1,267		4.2	16.2	13.5	10.8	7.6	2.8	2.1	1.4	1.1	1.2

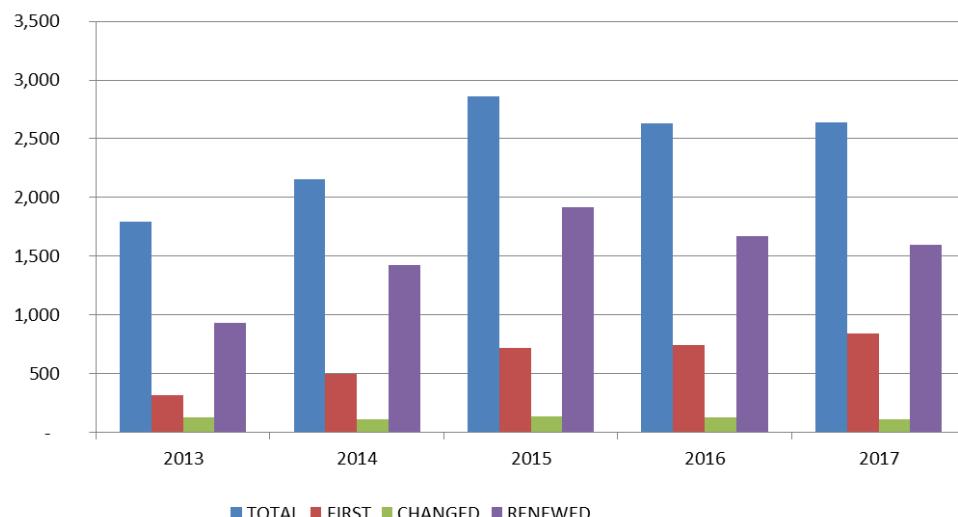
Source: Eurostat (migr_resocc). Note: Data extracted on 08.01.2019";": not available.

Single Permit Directive (2011/98/EC)

Between 2013 and 2017, a growing number of EU-25 Member States reported on the issuance of single permits. In 2013, only 11 EU-25 Member States issued single permits while in 2017, most of them⁸⁵⁰ reported on single permits. Keeping in mind these and other data limitations⁸⁵¹, it can be observed that the total number of single permits issued in 2017 was 2.6 million at the EU-25 level, a stable level compared to the two preceding years. The total number of single permits increased by 360 thousand from 2013 to 2014 and by around 480 thousand from 2014 to 2017 (figure 22). To some extent the increase in the number of permits issued in the early years reflects the late implementation of the Directive in some Member States, and one Member State (Belgium) has not yet started reporting permit due to their delay in implementing the Directive.

The rise of recorded single permits was mainly fuelled by renewal decisions during the period 2013–2017, and to lesser extent by first single permits decisions. Status changes accounted for only a minor share of single permits during that period. In 2017, renewals amounted to around 1,600 thousand, against 840 thousand for first permits and 115 thousand for status changes.

Figure 22. Single permits issued by type of decision in selected Member States of the EU-25, 2013–2017



Source: Eurostat (migr_resing). Note: Data extracted on 14.01.2019. ‘single permits’: a single permit means a residence permit issued by the authorities of a Member State within a simplified procedure that allows a third-country national to ‘reside legally in its territory for the purpose of work’ (Article 2(c) Directive 2011/98/EU); The EU-25 aggregate excludes Belgium and Greece due to the lack of available data over the period and it is based on the simple sum of all available statistics at the level of EU-25 Member States for the total number of single permits and the different decision types; Due to their recent implementation, statistics on single permits have been undergoing developments in most of the reporting countries. In particular, early years of reporting should be interpreted with caution.

⁸⁵⁰ Data on the total number of single permits are now available for all the EU-25 Member States but Belgium and Greece. The latter do not report data on single permits during the period.

⁸⁵¹ Data on single permits for all the types of decision (i.e., first permit, renewal, and status change) during the whole period are not available for Belgium, Greece and Austria. In addition, 16 other countries do not provide details of the issuance of single permits by decision type in 2013. Finally, several countries do not report for certain types of decision during the whole period or specific years. 17 countries provide statistics for the three types of decision for 2017.

At the country level, 70% of the single permits in 2017 were recorded by three EU Member States, namely France (915 thousand), Italy (550 thousand), and Spain (259 thousand). Other important issuers of single permits in 2017 included Germany (235 thousand), Sweden (138 thousand) and to a lesser extent Portugal (110 thousand). These six countries accounted for more than 80% of the single permits issued the same year.

Among these countries, Germany considerably reduced the number of single permits issued in 2017 compared to 2013. The number of single permits also noticeably diminished in Spain and Portugal over the period. Conversely, the number of single permits issued in France and Sweden followed an upward trend between 2013 and 2016 (before diminishing slightly in 2017) while the evolution of the number of single permits in Italy was more contrasted.

First single Permits issued

In the EU-25 Member States as a whole, the number of first permits issued more than doubled over the period, jumping from 319 thousand in 2013 to 744 thousand in 2016 and 840 thousand in 2017. This growth should nonetheless be nuanced since several countries, including Germany, did not report a breakdown of the records of single permits in 2013. Still, there was a sharp rise in the number of first permits issued at the EU-25 level from 2014 (i.e. when most Member States did report data) to 2016.

In 2017, four EU-25 Member States issued first single permits at levels much higher than the other countries, namely Germany (210 thousand), France (204 thousand), Spain (100 thousand) and Sweden (95 thousand). These four countries made up around three quarters of the first permits issued in 2017. Among these countries, France, Germany, and Sweden substantially increased the number of first permits issued over the period while such number fluctuated around 100 thousand in Spain.

Single Permits issued by reason

The Single Permit Directive covers permits issued for different reasons, but only for those third country nationals that have the right to work, including those admitted according to national law.

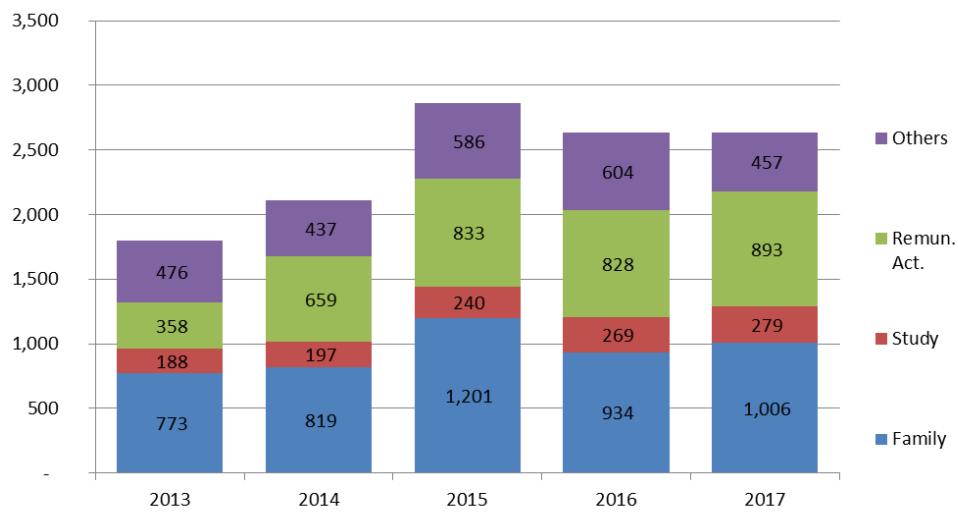
In 2017, the majority of single permits issued in accordance with Directive 2011/98/EU were for family reasons (38%) and remunerated activities reasons (34%) in the EU-25 Member States while the share of these two main reasons reached respectively 43% and 31% in the *first* single permits delivered.

Among the countries having the highest number of all single permits issued in 2017, these permits were predominantly delivered for family reasons in France (46%), Germany (47%) and Sweden (48%). Single permits were issued in higher proportion for remunerated activities reasons in Italy (61%) and Spain (39%).

Among the countries having the highest number of first single permits delivered in 2017, these permits were principally issued for family reasons in Italy (96%), Spain (59%), Germany (51%), Sweden (51%) and France (40%).

A number of Member States do not report permits issued for other reasons than occupation under the Single Permit, notably Bulgaria, Czech Republic and Lithuania, and some Member States (Hungary, Malta and Slovenia) less than 1 % of single permits issued for other reasons than occupation, although a larger share of family members for instance would have the right to work.

Figure 23. Single permits issued for different reasons 2013-2017, in thousands



Source: Eurostat (migr_resing). Data extracted on 14.01.2019. Missing data: EL as well as BE the latter having not yet transposed the Directive. All types of decisions covered (first, renewed, change of status), all duration of permits covered (3-5 months, 6-11 months, 12 months and more).

Table 13 Single permits issued in the EU-25 Member States, 2013–2017

Covered	2013	2014	2015	2016	2017
Belgium	:	:	:	:	:
Bulgaria	0	96	189	267	307
Czech Republic	:	2,293	13,574	10,923	19,293
Germany	392,610	97,954	162,627	179,726	235,504
Estonia	4,123	8,148	11,155	11,009	11,431
Greece	:	:	0	0	:
Spain	365,481	317,183	316,671	276,477	259,306
France	810,029	844,277	962,360	987,995	915,031
Croatia	11,975	8,033	5,323	6,842	12,326
Italy	:	423,749	842,992	574,355	550,521
Cyprus	:	27,492	26,774	30,009	29,273
Latvia	:	29,685	32,931	27,397	33,160
Lithuania	:	:	2,753	6,017	10,145
Luxembourg	1,219	2,168	1,638	1,968	2,996
Hungary	:	5,214	8,234	10,395	20,535
Malta	:	653	5,970	7,660	10,949
Netherlands	:	1,290	2,353	2,362	2,967
Austria	:	78,590	87,332	86,365	82,046
Poland	9,821	41,436	41,472	76,674	86,707
Portugal	135,796	124,443	112,633	107,149	109,572
Romania	1,312	1,948	8,164	13,967	18,301
Slovenia	:	:	5,442	12,805	24,267
Slovakia	7,126	8,498	12,936	12,794	17,713
Finland	:	70,468	42,108	42,110	45,410
Sweden	55,270	59,613	154,931	149,323	138,136

Source: Eurostat (migr_resing). Note: Data extracted on 14.01.2019. 'single permits': a single permit means a residence permit issued by the authorities of a Member State within a simplified procedure that allows a third-country national to 'reside legally in its territory for the purpose of work' (Article 2(c) Directive 2011/98/EU); The EU-25 aggregate is based on the simple sum of all available statistics at the level of EU-25 Member States for the total number of single permits; Due

to their recent implementation, statistics on single permits have been undergoing developments in most of the reporting countries. In particular, early years of reporting should be interpreted with caution.

Table 14 All single permits and first single permits by reason in EU-25 Member States (%), 2017

	All single permits				First permits			
	Family reasons (% of single permits)	Education reasons (% of single permits)	Remunerated activities reasons (% of single permits)	Other reasons (% of single permits)	Family reasons (% of first permits)	Education reasons (% of first permits)	Remunerated activities reasons (% of first permits)	Other reasons (% of first permits)
Covered	38.2	10.6	33.9	17.3	43.0	18.0	31.1	7.9
Belgium	:	:	:	:	:	:	:	:
Bulgaria	0.0	0.0	100.0	0.0	0.0	0.0	100.0	0.0
Czech Rep.	0.0	0.0	100.0	0.0	0.0	0.0	100.0	0.0
Germany	47.2	21.4	26.6	4.7	50.9	23.4	24.3	1.4
Estonia	32.2	23.3	23.6	20.8	30.1	28.3	36.4	5.1
Greece	:	:	:	:	:	:	:	:
Spain	34.7	0.0	39.3	26.0	59.2	0.0	33.5	7.3
France	46.3	19.8	12.9	21.0	40.3	38.6	11.4	9.7
Croatia	16.7	7.6	72.5	3.1	15.6	6.6	76.7	1.2
Italy	39.1	0.0	60.9	0.0	96.0	0.0	4.0	0.0
Cyprus	4.3	29.0	66.5	0.3	1.9	36.9	61.2	0.1
Latvia	35.1	11.3	15.9	37.7	22.1	26.5	36.1	15.3
Lithuania	0.0	0.0	100.0	0.0	0.0	0.0	100.0	0.0
Luxembourg	5.0	0.0	92.0	3.0	2.2	0.0	94.4	3.4
Hungary	0.2	0.0	99.4	0.4	0.1	0.0	99.6	0.4
Malta	0.2	0.0	99.8	0.0	0.1	0.0	99.9	0.0
Netherlands	0.0	11.9	88.1	0.0	0.0	19.6	80.4	0.0
Austria	53.1	0.0	7.1	39.8	:	:	:	:
Poland	7.8	9.9	68.5	13.8	5.1	8.1	86.8	0.0
Portugal	6.7	0.5	26.9	65.8	30.5	0.4	48.0	21.1
Romania	34.2	34.2	31.6	0.0	25.0	45.7	29.2	0.0
Slovenia	0.7	0.1	99.2	0.0	1.3	0.2	98.4	0.0
Slovakia	33.4	14.4	42.1	10.1	15.0	17.7	52.6	14.7
Finland	25.1	26.5	29.7	18.7	28.4	31.4	38.6	1.6
Sweden	48.0	0.9	19.8	31.3	50.8	0.0	16.9	32.2

Source: Eurostat (migr_resing). Note: Data extracted on 14.01.2019. 'single permits': a single permit means a residence permit issued by the authorities of a Member State within a simplified procedure that allows a third-country national to 'reside legally in its territory for the purpose of work' (Article 2(c) Directive 2011/98/EU); The EU-25 aggregate is based on the simple sum of all available statistics at the level of EU-25 Member States for the different decision types; Due to their recent implementation, statistics on single permits have been undergoing developments in most of the reporting countries.

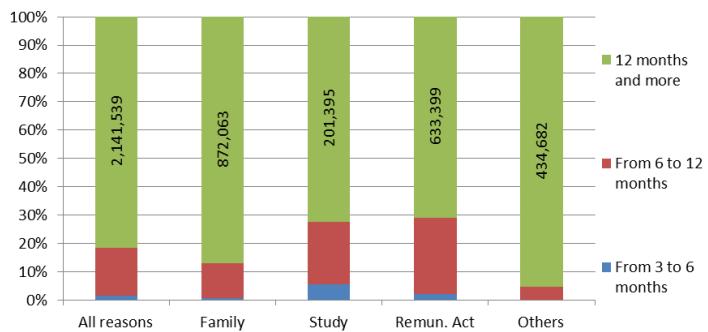
The majority of single permits issued are also of a longer duration of 12 months or more, but for some Member States (Bulgaria, Cyprus and Austria) the share of shorter duration permits are higher. The share of permits issued for shorter duration differ depending on the reason, and for "other reasons" and "family" no or very few permits are issued with a duration of 3-5 months.

Figure 24. Duration of single permits issued (for all reasons related to the Single Permit) (2017)



Source: Eurostat [migr_resing]. Note: Data extracted on 14.01.2019. Belgium and Greece did not report data on Single permits.

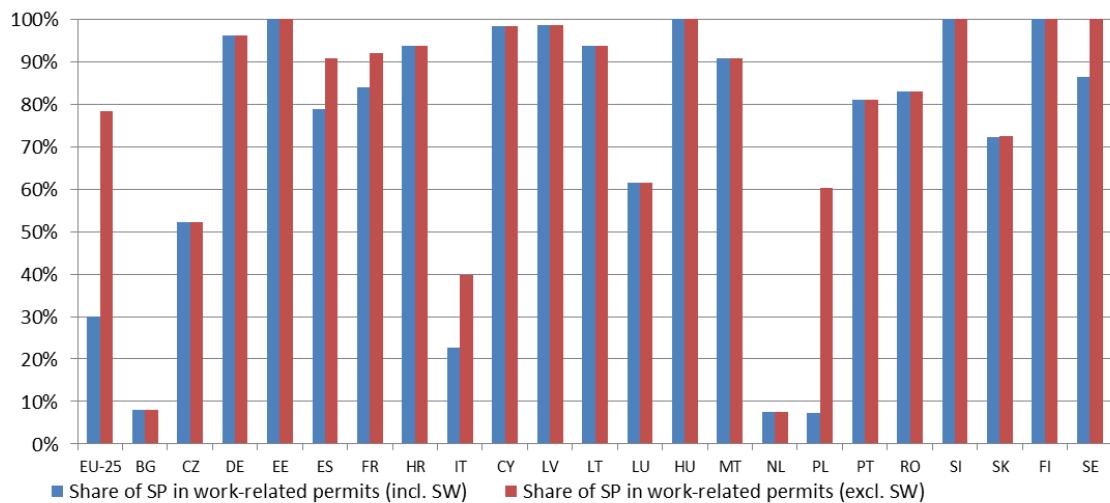
*Figure 25. Duration of single permits issued for different reasons related to the Single Permit (2017), EU-25**



*Source: Eurostat [migr_resing]. Note: Data extracted on 14.01.2019. *Belgium and Greece did not report data on Single Permits.*

The share of work-related permits reported as Single Permits differs greatly if one does not consider seasonal workers data, most notably in Poland, where the majority of work permits reported are for seasonal work. Disregarding seasonal workers permit the SPD covers more than 75% of all permits issued for work (i.e. 78% at EU level and >75% in 15 out of 22 countries covered) and reaches close to 100% for several Member states notably DE, EE, CY, LV, HU, SI, FI and SE (figure 26). The lower share for other Member States requires further analysis.

Figure 26. Proportion of SPD first permits reported for remunerated activities of all first permits issued for remunerated activities (2017), with or without including seasonal workers in the first permits.



Source Eurostat. [migres_sing], [migres_first] EU-25, excluding BE and EL T that do not report on Single permits and AT that does not report on type of decisions and reason. The difference is largely due to the reporting of seasonal workers, but the reporting for seasonal workers is incomplete and not comparable yet, as the reporting under the Directive 2014/36/EU has only begun with a limited number of countries reporting data.

Seasonal workers (2014/36/EU)

Whilst data for seasonal work is not analysed for the purpose of evaluating the effectiveness of this recent Directive, this data is analysed in relation to permits issued to third country migrants for other type of work, notably the Single Permit Directive. In view of the reference period chosen for this fitness check being until 2016, the 2017 data is only shown for background purposes⁸⁵².

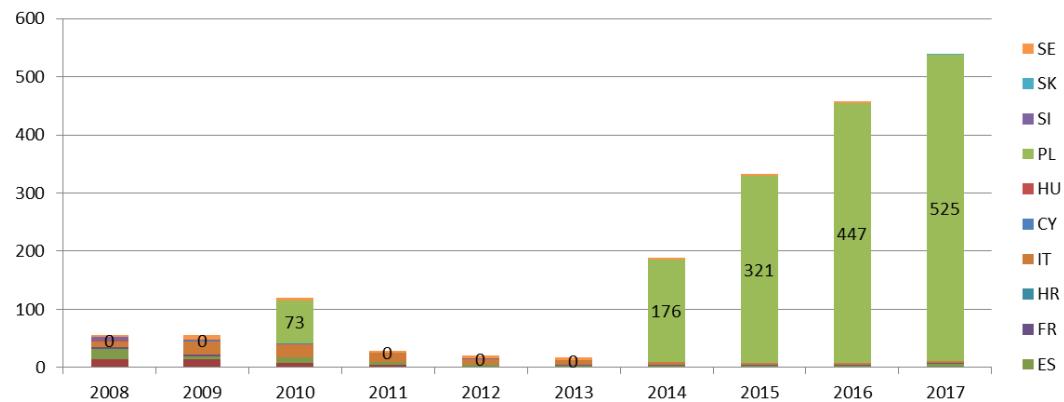
Statistics concerning permits issued for seasonal work have been reported since 2008 as part of the Eurostat reporting on permits issued for the purpose of remunerated activities (Eurostat table migr_resocc). Only 10 Member States report data, and data reported by Poland since 2014 is a clear outlier, due to a significant increase in the number of such permits issued. For other Member States, the number of permits issued for seasonal has gradually decreased since 2008.

It should be clear that the statistics presented below is therefore not necessarily considered to be compliant with the requirements of the 2014 Directive. Indeed, data specific to the SWD (which only entered into effect in end 2016) was collected in July 2018 for the reference year 2017 but is not presented below.

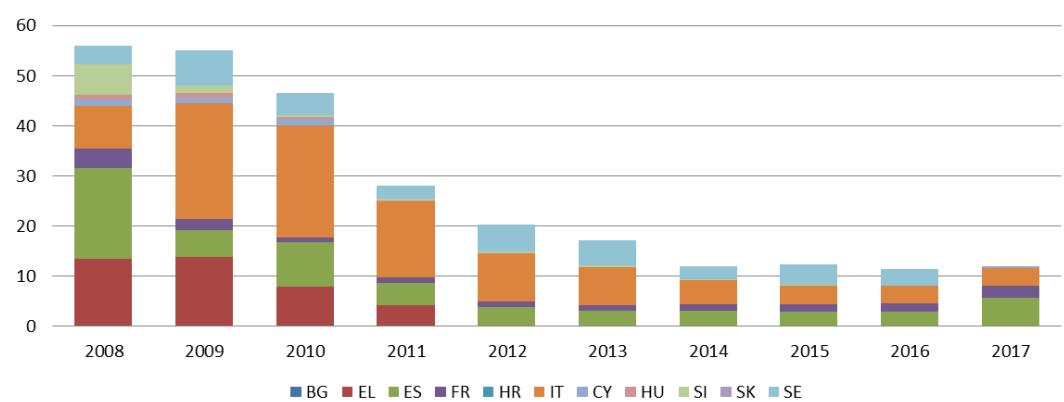
⁸⁵² 2017 data not yet complete as of January 2019.

Figure 27. Permits issued for seasonal work from 2008-2016 in 10 of the EU-25 Member States that report such permits. (a) all reporting Member States (b) same without Poland

(a)



(b)



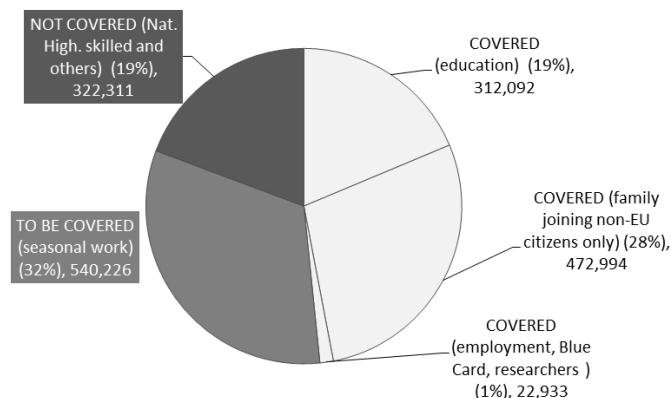
Source: Eurostat [migr_resocc]. Comment: Extracted 22.8.2018. (a) The number of permits issued by Poland is indicated in the first graph, for which the allocation of permits between other and seasonal work is not fully clear.

3. Statistics on the coverage of third-country nationals by EU rules on admission conditions, procedures and equal treatment

Admission conditions

The pie chart below shows that, when considering all reasons for migration, around half (48 %) of *all* TCNs granted a residence permit are covered by EU rules on **admission conditions** (*Figure 28*), while this share does not reach 3% with regard to those *admitted for work reasons* (*Figure 29*). Though the most recent Directives (ICTD, SWD) are not evaluated here, the current statistics on work reasons include until 2017 also national schemes for **seasonal workers**, most of which should be covered under the SWD once fully implemented (around 61% of permits for work reasons). The share of permits covered by EU admission conditions is therefore expected to increase substantially (in particular when considering only permits issued for work reasons)⁸⁵³.

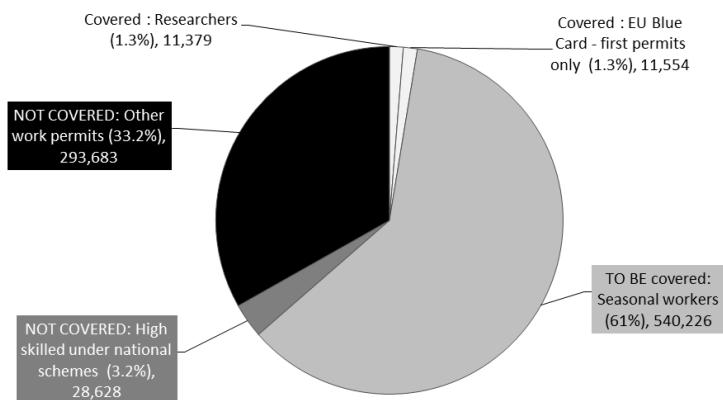
Figure 28. Share of (first) residence permits issued for all reasons that are covered (or not covered) by EU legislation in terms of admission conditions, 2017, in EU-25.



Source: DG HOME calculations based on Eurostat, [migr_resfirst], [migr_resocc] and [migr_resfam], last update: 25.09.18. In the chart residence permits issued for family reunification/formation with EU citizens are not included as well as residence permits issued for "other reasons" (including "residence only", "other permits" and those granted for international protection or protection under national status). Moreover, a small share of permits issued for education reasons may in fact be granted under national schemes and therefore not covered by admission conditions regulated by the EU acquis as such– it is nevertheless not possible to isolate them based on data as currently reported to Eurostat by MS.

⁸⁵³ Though not necessarily to the same extent as presented in the charts due to issues of statistical reporting. The large number of permits reported under Seasonal workers (national schemes) in 2017 (in particular by Poland) may not all translate into "seasonal workers" authorisations granted under the SWD since part of them may still be reported under permits granted for work reasons under national schemes. At the time of publication, reporting of permits issued in 2017 in accordance with the Directive is not sufficiently complete to enable an assessment of the impact of the Directive.

Figure 29. Share of remunerated activities (first) residence permits issued that are covered (or not covered) by EU legislation in terms of admission conditions, 2017, in EU-25

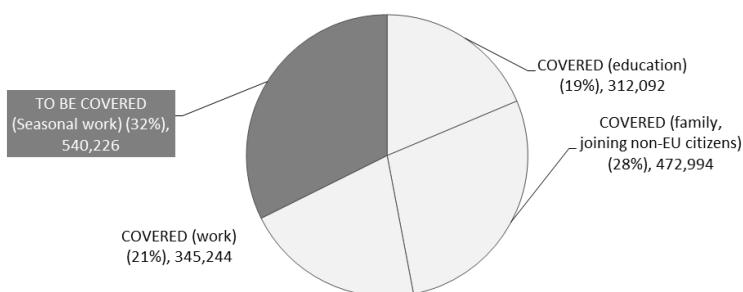


Source: DG HOME calculations based on Eurostat, [migr_resocc], last update: 25.09.18. The data presented above related to seasonal workers is based on statistics reported prior to the entry into effect of the reporting requirement related to the SWD, and data is only provided by eight MS, out of which 97% are reported by one MS (Poland). The data for 2017 may therefore not yet present an accurate picture of how the share of permits will be distributed between seasonal workers permits and other work permits when all Member States will report accurate data (most probably from the reference year 2018 on).

Admission procedures

The pie-chart below (*Figure 30*) depicts the share of TCNs (being granted a residence permit for various reasons) covered by EU rules in terms of **admission procedures**. It shows a very high (68%)⁸⁵⁴ coverage rate by admission procedures, much higher than compared to admission conditions above, due to the SPD which also covers permits issued under national law for the purpose of work.

Figure 30. Share of (first) residence permits issued for all reasons that are covered (or not covered) by EU legislation in terms of admission procedures, 2017, in EU-25*



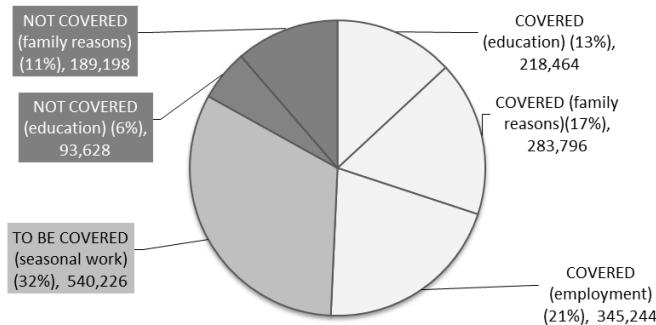
⁸⁵⁴ This coverage will be close to 100% once the SWD is fully implemented, given that only a few categories of work permits are excluded from the scope of the Single Permit Directive: for instance self-employed, seafarers, posted workers will remain not covered by EU legislation in terms of admission procedures.

Source: DG HOME calculations based on Eurostat, [migr_resfirst], [migr_resocc] and [migr_resfam], last update: 25.09.18. In the chart residence permits issued for family reunification/formation with EU citizens are not included as well as residence permits issued for "other reasons" (including "residence only", "other permits" and those granted for international protection or protection under national status). Note: it is assumed in the chart above that all first permits granted under remunerated activities are (or will be, i.e. seasonal workers) covered by EU legislation in terms of admission procedures while in reality this may not always be the case as the SPD does contain some limited exceptions (for instance self-employed, seafarers, posted workers).

Equal treatment

The pie chart below (*Figure 31*) shows the share of TCNs (being granted a residence permit for various reasons) covered by EU rules on **equal treatment**. Due to the SPD, this shares reaches 51% (and 83% if counting in seasonal workers). Only family members and students (and some exceptional categories of workers, see above) not covered by SPD would not benefit from equal treatment under EU law.

Figure 31. Share of (first) residence permits issued for all reasons that are covered (or not covered) by EU legislation in terms of equal treatment, average over 2014-2016, in EU-25*



Source: DG HOME calculations based on Eurostat, [migr_resfirst], [migr_resocc] and [migr_resfam], Last update: 06.12.18. *In the chart above residence permits issued for family reunification/formation with EU citizens are not covered as well as residence permits issued for "other reasons" (including "residence only", "other permits" and those granted for international protection or protection under national status). The share of family and study-related permits covered by equal treatment has been estimated based on the share of Single permits issued for each of the respective reason (comparison between table [migr_ressing] and [migr_resfirst]). Given that data on Single permits issued for family/study reasons was not available for all countries bound by the Directive, an average covering only Member States for which Single permits data was available has been used (i.e. exclusion of Member States for which the values for single permits were equal to zero or marked as ':'). It assumes that in 2017, overall 60% of family-related permits and 70% of study-related permits were covered by Single permit rules, including equal treatment. Moreover, it is assumed in the chart above that all first permits granted under remunerated activities are (or will be, i.e. seasonal workers) covered by EU legislation in terms of equal treatment procedures while in reality this may not always be the case as the SPD does contain some limited exceptions limited (for instance self-employed, seafarers, posted workers).

4. Ageing and labour market needs

Population projections

Taking into account the available demographic and economic data, indeed a number of factors may lead to a significant **shrinking of the EU labour work force and corresponding increased need for TCN workers** in the medium and long term. It is anticipated that the

projected increase in life expectancy for women and men in Europe⁸⁵⁵, and the corresponding **ageing of the EU population** coupled with decreasing fertility rates, will lead to inevitable aggregated labour shortages⁸⁵⁶.

Beyond projections in terms of working-age population, it is important also to consider projections in terms of labour force. Indeed, given the increasing participation rate among women and older segment of the working-age population as well as the increasing average level of education of the population, it is estimated that the labour force will be increasing more rapidly (or decreasing less rapidly) than the overall working age population. The labour force size is expected to decline sharply in the EU in the upcoming years⁸⁵⁷, from 245.8 million in 2015 to 232.5 million in 2030 and 214.1 million in 2060⁸⁵⁸. In a **zero-migration scenario**, projections indicate that the labour force in the EU-28 would decrease even more quickly: by 18.9 million over 2015-30 (or -7.7%) and by 56.6 million between 2015 and 2060 (-23.0%). Conversely, in a scenario where **net migration rates doubled** (by 2030), the decline of the labour force would be much more limited: a drop by around 7.9 million over 2015-30 (-3.2%)⁸⁵⁹ and by only 9.1 million (-3.7%) over the entire 2015-60 period.

Finally, the labour force dependency ratio (the ratio of economically inactive population to economically active population) is also projected to increase quickly in the future due to ageing of the population. According to CEPAM Medium scenario, it will increase (in the EU-28) from 1.06 in 2015 to 1.19 in 2030 and then to 1.36 in 2060. While in a **zero-migration scenario**, the labour force dependency ratio would increase even more quickly (to 1.20 in 2030 and 1.43 in 2060), a scenario where **net migration rates doubled would lead to lower** labour force dependency ratio but to a relatively limited extent (1.18 in 2030 and 1.32 in 2060) than in the Medium scenario. This reflects the fact that in the long-run additional migrants assumed by this scenario will also age and end up in the older/inactive part of the population⁸⁶⁰.

Labour market trends in the medium term (based on 2018 CEDEFOP Skills Forecasts)

Moreover, the European economy is envisaged as undergoing an accentuation of the trend where the main driver for growth is **the service sector**⁸⁶¹, meaning the skills demanded to supply a service-based workforce will change. In certain cases (e.g. services in the field of

⁸⁵⁵ European Commission, 'The 2015 Ageing Report: Underlying Assumptions and Projection Methodologies', 2015. A EUROPOP2013 projection suggests an increase of 7.1 years and 6.0 years for men and women respectively, from 2013 to 2060.

⁸⁵⁶ Ibid.

⁸⁵⁷ According to the CEPAM Medium (SSP2) scenario in terms of demographic behaviours and migration, European Commission (2018) Joint Research Centre, Demographic and Human Capital Scenarios for the 21st Century: 2018 assessment for 201 countries, Wolfgang Lutz, Anne Goujon, Samir KC, Marcin Stonawski, Nikolaos Stilianakis

⁸⁵⁸ If labour force participation rates (for each group of sex, age and education) remained constant, *ibid.*

⁸⁵⁹ It should be noted that CEPAM projections indicate similar developments in a scenario where net migration would remain constant but where participation rate of women would reach levels recorded among men for all education and age group: the labour force would decline by only around 7.6 million over 2015-30 (-3.1%). However, in the long-term (by 2060) the decline would be much more pronounced: -18.6 million (or -7.5%), pointing out the fact that 'equalising' women and men's activity rates would have large impacts in the short run but more limited impact on ageing of the workforce in the long-run.

⁸⁶⁰ From the point of view of the labour force dependency ratio, a more favourable picture would emerge from the CEPAM scenario of 'equalising' women and men's activity rates it would increase to only 1.14 by 2030 and to 1.23 in 2060.

⁸⁶¹ 'Future skill needs in Europe: critical labour force trends', Cedefop, 2016.

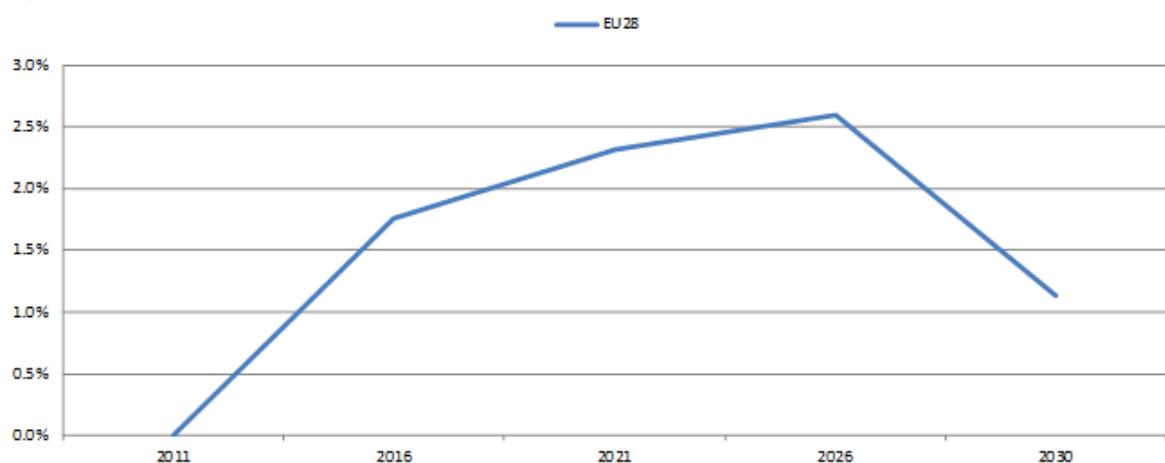
tourism, distribution, construction), there are already signals of scarcity of medium and low-skilled workers in the EU.

On the basis of the most recent labour market projections (CEDEFOP skills forecasts published in May 2018⁸⁶²) the following expected trends can be highlighted:

a) Outlook of employment until 2030

EU28 employment level is projected to increase further from 2016 onwards, with total estimated increase close to 6% during the period up to 2030. During the period 2021 – 2026, the employment growth is estimated to be the highest (2.6%) while a mild slowdown will follow thereafter; mainly reflecting Europe's declining demographic trends. Some of the Member States expected to experience the highest growth rates, over the forecast period, include Cyprus, Ireland, Luxembourg, Malta and Spain.

Figure 32. Employment growth (2011-30), in % (EU-28)



Source: CEDEFOP 2018 Skills Forecasts

b) Labour force overview

Europe's working age population is forecast to increase by 3.5% over the period up to 2030. However, the labour force is only expected to experience a minor increase (0.6 %) over the same period. In more detail, some countries like Luxembourg or Cyprus are estimated to experience an increase over 11%, in the contrary with Bulgaria, Greece, Latvia or Lithuania which are projected to face significant decrease.

⁸⁶² Available at: http://skillspanorama.cedefop.europa.eu/en/analytical_highlights/skills-forecast-key-eu-trends-2030. Cedefop skills forecasts offers quantitative projections of the future trends in employment by sector of economic activity and occupational group. Future trends on the level of education of the population and the labour force are also estimated. Cedefop's forecasts use harmonised international data and a common methodological approach with the aim to offer cross-country comparisons about employment trends in sectors, occupations and qualifications. The latest round of forecasts covers the period up to 2030. The forecasts take account of global economic developments up to May 2017. The key assumptions of the baseline scenario incorporate the Eurostat population forecast available in 2017 (Europop 2015) and the short-term macroeconomic forecast produced by DG ECFIN in May 2017.

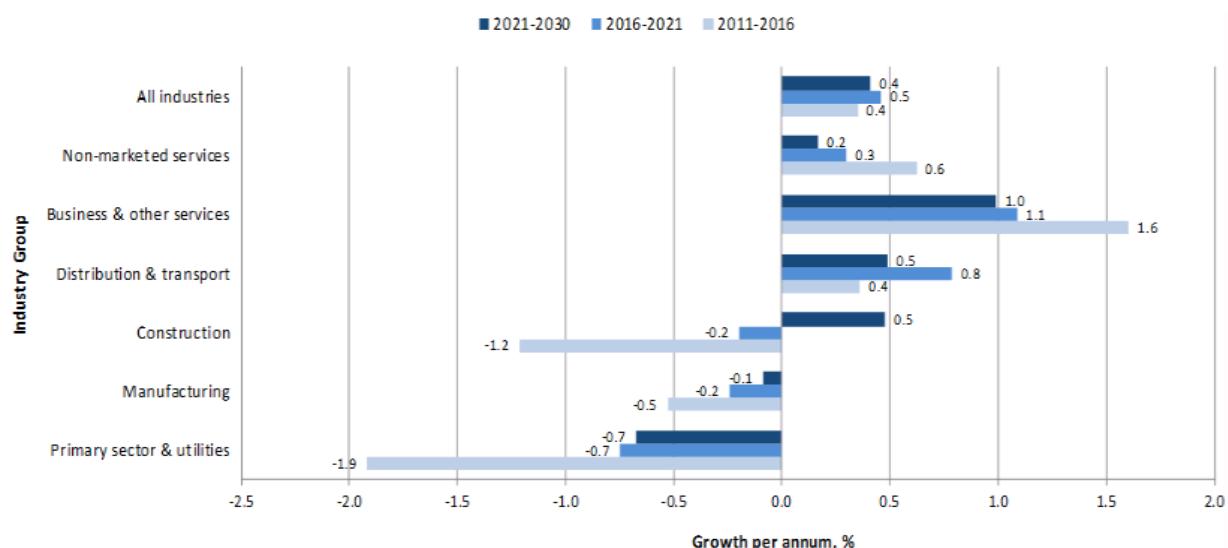
At an EU level, the participation rate is estimated to experience a slight decrease (-1.6 percentage points) with only a few countries, such as Hungary, Denmark, the Netherlands and Finland, expected to have a minor positive change. The falling participation rates may be attributed to the changing composition of the labour force, as younger aged cohorts (aged 25 – 34), with generally very high participation rates for both sexes, are expected to decline in numbers. Substantial decreases are also forecasted for older aged cohorts (aged 45 – 49), which are also highly active in the job market. On the other hand, the number of workers with traditionally low participation rates (e.g. 60+) is expected to increase considerably; and even though the extension of the retirement age in many countries will increase the participation rates of this cohort, such increases are not able to offset the negative impact on the overall participation rate of the whole labour force.

c) Sectoral employment trends

The declining trends in employment over the period 2011 – 2016 is forecast to moderate for most of the broad sectors of economic activity and inverse for the *construction* sector (see *Figure 33*). Especially, the latter will face a slight rise after 2020 (next to consecutive recessions of - 0.2% in 2016 – 2021 and - 0.5 % in 2021 – 2030). On the contrary, in France and Malta, the *construction* sector is projected to have the highest annual growth (during 2016 – 2030), amongst the broad sectors. The *primary sector & utilities* will continue shrinking, while the decrease will be sharpest for *mining & quarrying* (exceptions are Denmark and Luxembourg, where it will experience the highest annual growth). In more detail, the highest increase *per annum* in employment, for 17 EU Member States, will be observed in *business & other services* (over both periods 2016 – 2021 and 2021 – 2030).

In terms of sub-sectors, *other business services* (*i.e. telecommunications, real estate activities, advertising and market research*), and *miscellaneous services* (*i.e. libraries, archives, museums and other cultural activities, gambling and betting activities*) are those where the greatest (annual) increase is expected.

Figure 33. Employment growth by broad sector of economic activity (2011-30), in % (EU-28)

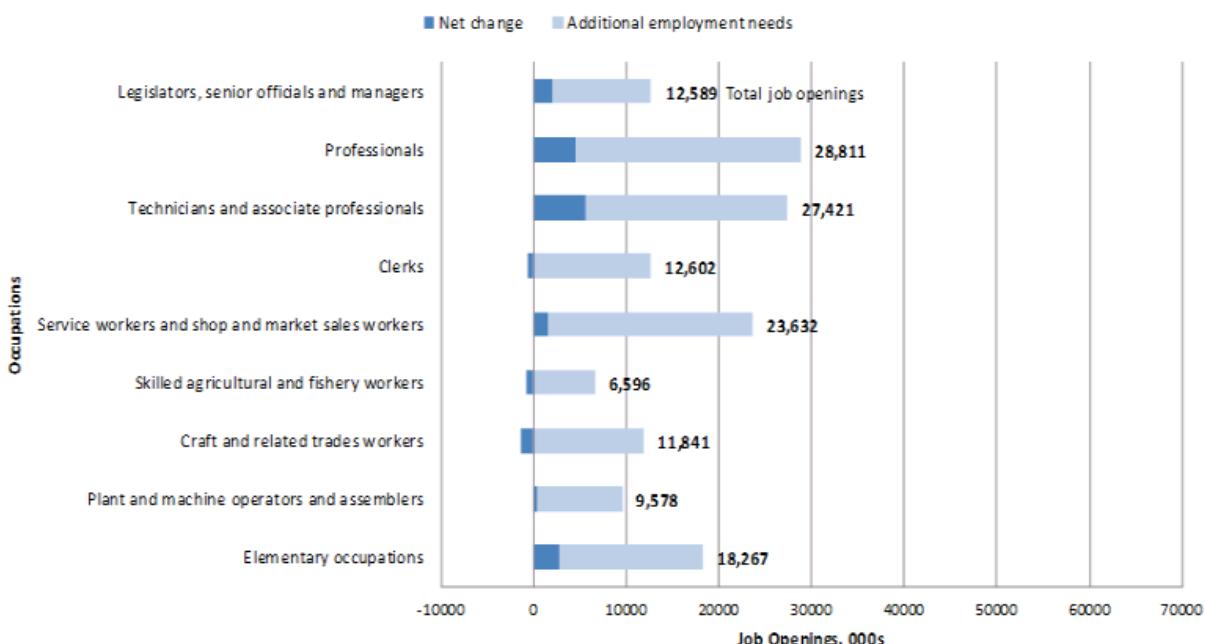


Source: CEDEFOP 2018 Skills Forecasts

d) Job openings by occupational group

The figure below shows the **total job openings**⁸⁶³ by broad occupational group over the period 2016 – 2030. The first part (dark blue) of each bar presents the net change that can be either positive or negative. The second part (light blue) presents the additional employment needs that add to the total job openings once the net change has been considered.⁸⁶⁴ The figure below clearly demonstrates that most jobs expected to be created in EU28 will be due to the need to replace workers leaving particular occupations. Therefore, numerous job opportunities will arise for *Professionals*, contributing close to 19% in the whole economy, with almost 29 million job openings (more than 80% of them due to replacement demand). *Craft and related trades workers* even though will experience a decline in size of employment (i.e. as shown by the negative expansion demand); the need to replace existing workers will create a significant number of new jobs.

Figure 34. Total job openings by broad occupational groups (2016-2030), EU-28



Source: CEDEFOP 2018 Skills Forecasts

The majority of **new jobs** will be created for *legal, social, cultural and business & administration associate professionals*, with 4 out of 5 new jobs referring to high-skilled occupations. Regarding **total job openings** (openings due to both net change and replacement needs), the occupations that will contribute the highest numbers in the European economy over the period up to 2030 are *business & administration associate professionals*. However, a

⁸⁶³ Cedefop skills forecasts estimate the total job openings by occupational group as the sum of net employment change and replacement needs. Net employment change refers to new jobs created due to the expansion of the economy. Replacement needs arise as the workforce that leaves the occupation due to retirement or career changes. Replacement needs, generally, provide more job opportunities than new jobs, meaning that significant job opportunities arise even in occupations that are otherwise declining in size (i.e. agricultural workers are a typical example, as ageing workers employed in the sector will need to be replaced).

⁸⁶⁴ https://skillspanorama.cedefop.europa.eu/en/analytical_highlights/skills-forecast-key-eu-trends-2030%20-%20_fmn

substantial number of job openings will be created for occupations that are traditionally considered as medium skilled, such as *sales workers, cleaners and helpers*. In particular, in seven countries these two occupations are estimated to have the greatest demand over the period 2016 – 2030 (e.g. in Cyprus, France, Malta).

e) Drivers of occupational change

The sectoral changes of the EU28 economy and the shift towards *business services* will benefit, and create new demand for, a number of typically high-skilled occupations such as *legal, social and cultural professionals, business and administration professionals, hospitality, retail and other services managers*. However, some medium and low skilled occupations, such as *customer services clerks* and *cleaners and helpers* will also benefit from these sectoral shifts. On the other hand, low skilled occupations related to *primary sector and utilities* and manufacturing, like *subsistence farmers, fishers, hunters and gatherers* or *assemblers*, is estimated to suffer from the negative sectoral shifts.

The advances of technology and especially of ICT, which now become easier for everyone to use irrespective of specialisation, will have a negative impact on the structure of a number of low skilled occupational groups, including *numerical and material recording clerks* and *general and keyboard clerks* (especially in Denmark, Spain, France or Latvia). Other low skilled occupations, though, such as *assemblers* will benefit from these advances of technology, making their role more valuable.

Therefore, the final effect on occupational change depends on a number of factors that all need to be considered together. For instance, as described above, for *assemblers* there will be both positive and negative effects; however the positive are expected to outweigh negatives resulting in an increasing demand over the period up to 2030 (except of Netherlands and Slovenia).

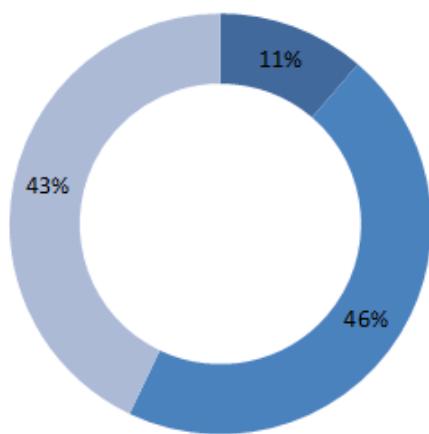
f) Demand for and supply of skills⁸⁶⁵

The figure below shows the shares of **total job openings** for qualifications needs. Most jobs, forecasted to be created over the period up to 2030, will require medium level of education, while about 43% of jobs will require high. The countries with the lowest percentages estimated of total job opening requiring a high qualification, through this period, are Portugal, Germany, Austria and Romania. While inverse will be the case for Poland, Ireland and Cyprus, with more than 50% of job openings demand high qualifications. On the other hand, close to 11% of total job openings will require low level of qualifications (Portugal, Denmark and Romania will have the highest shares).

⁸⁶⁵ Within the Cedefop Skills Forecasts, skills are proxied by the highest level of qualification held by individuals in the labour force and employment. Three levels are distinguished, namely high, medium, and low, which correspond to the official ISCED classification. However, the occupational group also offers an indication of the skill level required, as some occupations (e.g. professionals) typically require high level skills, while some others (e.g. elementary) typically require only basic. Therefore, occupational groups are also linked to a skill level.

Figure 35. Share of total job openings by level of education (2016-2030), EU-28

■ Low qualification ■ Medium qualification ■ High qualification

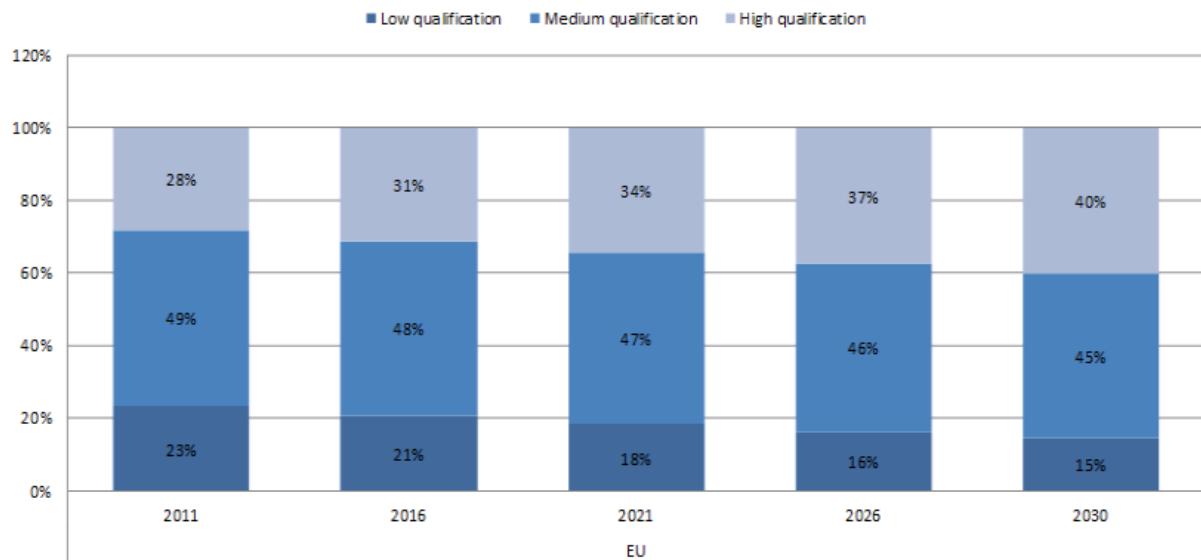


Source: CEDEFOP 2018 Skills Forecasts

Looking into future employment opportunities (total job openings) for high qualifications, the largest numbers are expected to occur within business and administration associate professionals, teaching professionals, and legal, social and cultural professionals. However, an uprising demand is expected for job opportunities with high qualifications for sales workers as well.

As can be seen from the figure below, the percentages of people with high level qualifications are expected to continue increasing over the period up to 2030 while those for medium and low levels of education are expected to experience a slight decrease.

Figure 36. Labour force shares by level of qualification (2011-30), EU-28



Source: CEDEFOP 2018 Skills Forecasts

When demand and supply are looked together, it is expected that the growing demand for high-level qualifications will outpace the supply in the decade to come. On the other hand, CEDEFOP estimates that the declining numbers in the supply of low-level qualifications, which are currently higher than demand, will eventually come into balance with the demand.

ANNEX 10: REFERENCES

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2. Legislation

Legal Migration

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- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23.1.2004, p. 44. (So called Long Term Residence Directive, LTR).
- Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purpose of studies, pupil exchange, unremunerated training or voluntary service. OJ L 375, 23.12.2004, p. 12. (So called Students Directive, SD).
- Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purpose of scientific research. OJ L 289, 3.11.2005, p. 15. (So called Researchers Directive, RD).
- Council Directive 2009/50/EC of May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment. OJ L 155, 18.6.2009, p. 17. (So called Blue Card Directive, BCD).
- Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. OJ L 343, 23.12.2011, p.1. (So called Single Permit Directive, SPD).
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Others

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- Convention on the Recognition of Qualifications concerning Higher Education in the European Region; ETS No: 165.
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- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. OJ L 212, 7.8.2001, p. 12. (So called Temporary Protection Directive).
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