PAN-EU REPORT

Humanising EU Migration Policies

Transitioning of statuses under EU legal migration and labour mobility law and policy

Sergio Carrera*

Anjum Shabbir**

* Senior Research Fellow and Head of the Justice and Home Affairs Unit at the Centre for European Policy Studies (CEPS) | sergio.carrera@ceps.eu

** Researcher at CEPS | anjum.shabbir@ceps.eu

AspirE – Asian prospects in (re)migration to/within the EU – is a three-year research project (2023-2025) that examines the decision making of aspiring (re)migrants from selected Southeast and East Asian countries (China, Japan, Philippines, Thailand and Vietnam) to and within selected EU member countries (Belgium, the Czech Republic, Finland, Germany, Italy and Portugal).

Consortium partners:

Université libre de Bruxelles (ULB), Belgium (coordinator)
The Education University of Hong Kong, China
Masarykova univerzita, Czech Republic
Tampereen korkeakoulusäätiö sr, Finland
Johann Wolfgang Goethe-Universität Frankfurt am Main, Germany
Università degli Studi di Milano (UniMi), Italy
Waseda University, Japan
Scalabrini Migration Center Inc., Philippines
Iscte - Instituto Universitário de Lisboa, Portugal
Mahidol University, Thailand
Foundation for Isaan Education and Popular Media, Thailand
Institute of Sociology – Vietnam Academy of Social Sciences (VASS), Vietnam
Vietnam Asia Pacific Economic Center (VAPEC), Vietnam

Collaborators:

Centre for European Policy Studies (CEPS), Belgium: Sergio Carrera, Miriam Mir & Anjum Shabbir
External Experts Advisory Board: Elisa Fornalé (World Trade Institute, Switzerland), James Farrer (Sophia University, Japan), Stefan Rother (University of Hamburg, Germany) & Sureeporn Punpuing (Mahidol University, Thailand)
External Ethics Advisor: Roderick G. Galam (Oxford Brookes University)

Contact:

Asuncion Fresnoza-Flot
Laboratory of Anthropology of Contemporary Worlds (LAMC)
Institute of Sociology, Université libre de Bruxelles
Avenue Jeanne 44, 1050 Brussels, Belgium
aspire@ulb.be | https://aspire.ulb.be/
https://twitter.com/AspirE_EU_Asia
https://www.facebook.com/AspirE2023EUproject

Authors:

Sergio Carrera & Anjum Shabbir

Publication date:

February 2024

Citation suggestion:

Carrera, S. & Shabbir, A. 2024. *Humanising EU migration policies. The Transitioning of statuses under EU legal migration and labour mobility law* (Pan-EU report). Brussels: AspirE. Available at: https://aspire.ulb.be/impact/reports/mobility-policy-report-european-union

Editorial design:

Asuncion Fresnoza-Flot & Catherine Gonzalez

This project receives funding from the European Union's Horizon Europe research and innovation programme under the call HORIZON-CL2-2022-TRANSFORMATIONS-01-04 – Grant Agreement n°101095289.

Executive Summary

EU legal migration law and policy does not sufficiently take into account the real-life circumstances, situations, and changing statuses of aspiring third country nationals migrating to, or residing in, the EU territory. This Report contributes to the AspirE Project (*Asian prospects in (re)migration to/within the EU*), adopting its humanisation approach to the research and investigation, to show this outcome. Mapping a range of EU legislative instruments that set out the eligibility conditions and rights of a wide range of third country nationals – workers, students, family members, investors, and tourists, and recalling EU and international fundamental rights and Better Regulation (quality-of-law) standards, it allows for this critical assessment of EU legal migration law and policy. This is considered against the historical background of EU policy which reveals predominantly economically-focused policy drivers and intentions that focus on the 'attractiveness' of *some* third country nationals, and frames them as objects rather than as individuals with human dignity; as well as acknowledging the significance of both transformative shifts in EU-decision-making and competences and the constitutional value of fundamental rights under the Treaties from 2009 onwards that enable the promotion of fair and equal treatment of third country nationals in EU policy. The resulting picture is that the EU has developed a complex, highly fragmented and compartmentalized legal system that leads to structural discrimination, a lack of legal certainty and transparency of EU legal migration policy which is driven by utilitarian and economic-related self-interests, and which stand in contradiction with EU and international legal standards applicable to it.

Keywords

EU legal migration law and policy; change of status; aspiring third country nationals; structural discrimination; compatibility of EU policy with EU and international standards; UN Global Compact on Migration.

List of Abbreviations

BRICS	Intergovernmental Organisation comprising Brazil, Russia, India, China, South Africa, Egypt, Ethiopia, Iran and the United Arab Emirates
CBI	Citizen by Investment
CESCR	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
Council	Council of the European Union
EC	European Commission
EESC	European Economic and Social Committee
EP	European Parliament
EPRS	European Parliamentary Research Service
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
FRA	European Union Agency for Fundamental Rights
GCM	UN Global Compact for Safe, Orderly and Regular Migration
GDP	Gross Domestic Product
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTs	Intra-Corporate Transferees
ILO	International Labour Organization
JHA	Justice and Home Affairs
LTRD	Long-Term Residents Directive
Member State	Member State of the European Union
Pact	European Commission's New Pact on Migration and Asylum
RBI	Residence by Investment
SBC	Schengen Borders Code
TCN	Third Country National
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
US	United States

Table of contents

1. Introduction

Does the European Union (EU) policy on legal and labour immigration take into account the real-life changing circumstances of aspiring third country nationals? This Report analyses six selected EU policies that govern the legal status of third country nationals' (TCNs)[2] who initially travelled to or moved to the EU through specific legal migration routes to work, study, join a family member, for tourism, or investment, including when they move across Member States' borders (intra-EU mobility). The Report is drawn up from the perspective of individuals and their rights, and brings to the forefront and examines whether their lived experiences, agency, changing life courses and decisions, and human dignity are considered by EU migration policy, so as to prevent them from falling into irregularity or undocumented status. It provides a foundational mapping and detailed textual analysis of the EU legal migration *acquis* developed further to the legal basis couched in Article 79 of the Treaty on the Functioning of the European Union (TFEU). In considering the relevant instruments, the Report asks: How does EU law frame the purposes for seeking and granting admission to the EU, and which time-frames and other conditions are applied in these different statuses for eligibility and rights?

The Report aims at identifying key issues regarding the interpretation of relevant EU legal instruments in practice when it comes to TCNs' change of situation or status, and whether they are consistent with the EU's and Member States' commitments under international, regional, and EU human rights and labour standards, as well as the EU's Better Regulation Guidelines on the quality of EU legislation. In particular it bears in mind the UN Global Compact on Migration (GCM),[3] and whether the current state of EU migration policy meets the GCM's Objective 7.h, to '[d]evelop *accessible and expedient procedures that facilitate transitions* from one status to another…so as to prevent migrants from falling into an irregular status' (Emphasis added).

The analysis first provides a brief background to EU legal migration policy so as to situate its origins and better understand its current design and guiding approaches (*Section 2*). The main features and characteristics of EU policy on legal and labour immigration are then presented, together with the mapping and general analysis of the six (sub-)policies under examination, including intra-EU mobility opportunities, in *Section 3*. A synthetic overview of that mapping is provided in *Annex I* of this Report. This is followed by a specific examination of the possibilities to change status under the EU legal migration framework (*Section 4),* for which a comparative overview is available in *Annex II.* The cross-cutting findings characterising these EU policies are then analysed to determine the extent to which the EU takes into account individuals' changing situations and statuses, and the problems of discrimination, effectiveness, legal certainty, and accountability this raises in terms of compliance with EU fundamental rights, international standards, and the EU Better Regulations (*Section 5*), followed by a conclusion in *Section 6*.

Methodology

The Report was developed in line with the 'humanisation' of research approach of the AspirE Project (*Asian prospects in (re)migration to/within the EU*), and focuses on six EU mobility policies. It uses various complementary methods and sources, including building upon the research findings of previous and existing EU-funded research and academic literature, analysis of relevant policy documents and legislation, comparative analysis, and through investigation, opinion and evidence-gathering in semi-structured interviews with representatives of various EU institutions and agencies dealing directly or indirectly with migration policies (See *Annex III* of this Report for a full list of interviewees). A complete analysis of the legislative updates to the Long-Term Residents Directive and the Single Permit Directive is not included, as the final legislative texts of those recast Directives were still under inter-institutional negotiations or not yet made public at the time of drafting. The external dimensions of EU migration policy, such as the conditions laid down in EU Partnership and Cooperation Agreements, or

[2] For the purposes of this Report, the notion of third country nationals is used following an EU law definition, and it comprises persons not holding the nationality or citizenship of an EU Member State, and who are not European citizens following Article 20 TFEU and Article 9 of the Treaty on the European Union (TEU).

[3] United Nations, Global Compact for Safe, Orderly and Regular Migration, Morocco, 10 and 11 December 2018, UN Resolution 73/195.

those under Association Agreements with non-EU governments, as well as the situation of asylum seekers, refugees, beneficiaries of temporary and subsidiary protection, and undocumented TCNs are not included in this Report.

2. Background: the progressive Europeanisation of legal and labour migration policies

2.1. The infancy of 'fair treatment' of third country nationals

It is only from the date that the Treaty of Amsterdam came into force - on 1 May 1999 - that the EU even had a legal mandate to make binding rules on the conditions of entry, residence, and on the rights of TCNs that would approximate national legislations. That Treaty 'Europeanised' or incorporated the intergovernmental 1985 Schengen Agreement[4] and the 1990 Schengen Convention[5] on the elimination of internal border controls into the EU Treaties framework. Political guidelines for the implementation of that common policy were issued through the European Council's Tampere Conclusions of 15-16 October 1999, and for the first time, a 'fair treatment paradigm' for TCNs legally residing in the EU was called for. This was expressed in paragraphs 18 and 21 setting the goal for 'approximating the legal status' of TCNs who are long-term residents as 'near as possible' to EU Member State nationals,[6] and with a call for a 'more vigorous integration policy' that would aim at granting rights and obligations to TCNs that are 'comparable to those of EU citizens'.[7]

For the first 10 years, 'fair treatment' of TCNs was considered to some extent at the policy level. In any event, a series of high-level EU policy documents demonstrating a certain political will for the regulation of migration, in the decade from 1999 to 2009,[8] show that there was always a main prevailing policy direction. It has been one that is mainly utilitarian, highly selective and demand-driven, and highly dependent on the agendas of the Ministries of Interior of EU Member States; a policy is supposed to benefit national interests and the EU's economy, especially by attracting[9] only those who are framed as wanted, 'talented', or 'highly skilled' to the EU, and by plugging the perceived gaps in labour market shortages. This policy rationale has run in parallel with a prominently securitarian mindset, which was further reinvigorated following the terrorist attacks in New York and Washington DC on 11 September 2001.[10] Overall, EU policy in this area has been largely dependent on, and informed by, the interests of representatives of Member States' governments to remain 'in control' regarding matters related to entry and residence conditions for purposes related to labour.

2.2. The beginnings of a structural and discriminatory impediment

A main indicator of the deliberately limited attention on driving the 'fair treatment' policy objective forward in this period is demonstrated in the failure of a key European Commission proposal, which has had a fundamental consequence in leading to a discriminatory-by-design legal framework that impedes true 'fair treatment',[11] and in turn the feasibility of taking into account the real-life changing circumstances of aspiring all TCNs regardless of class, status, and origins. The Commission presented a proposal in 2001 for a Directive that would be a single 'horizontal' act, or a kind of general framework Directive covering *all* categories of TCNs workers.[12] But the Ministries of Interior of EU Member States

[4] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A42000A0922%2801%29

[5] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A42000A0922%2802%29

[6] S. Carrera, K. Eisele, P. Melin and Z. Vankova (2022), 'Towards a Fair EU Labour Migration Policy: From Tampere to Lisbon – From the Lisbon to the Pact, and Back to Maastricht', in P. Melin and S. Schoenmaekers (eds), *The Art of Moving Borders: Liber Amicorum Hildegard Schneider*, Eleven International Publishing, p. 4.

[7] Carrera, S. (2009), *In Search on the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Leiden: Martinus Nijhoff Publishers; Wiesbrock, A. (2009), *Legal Migration to the European Union – Ten Years after Tampere*, Nijmegen: Wolf Legal Publishers.

[8] The European Council's Tampere Conclusions in 1999 established a comprehensive immigration policy framework. This was followed by the adoption of the Hague Programme in November 2004, and the Stockholm Programme of December 2009.

[9] For a critique on the attractiveness logic driving EU policy refer to S. Carrera, E. Guild and K. Eisele (2014), *Rethinking the Attractiveness of EU Labour Immigration Policies: Comparative Perspectives on the EU, US, Canada and Beyond*, CEPS Paperback Book: Brussels.

[10] S. Carrera, K. Eisele, P. Melin and Z. Vankova (2022).

[11] Although the proposal did also set out different rules for different categories of TCNs, it 'did not generally distinguish between migrants engaged in highly, medium or low skilled occupations'. On this, see Sergio Carrera, Katharina Eisele, Pauline Melin and Zvezda Vankova (2022).

[12] S. Carrera, A. Geddes, E. Guild and M. Stefan (2017), Pathways towards Legal Migration into the EU, Reappraising concepts, trajectories and policies, CEPS: Brussels, p. 185.

showed fierce resistance[13] to such a horizontal approach, and prevented this initiative from going forward. The Commission ultimately had to withdraw its proposal,[14] and instead pursued a 'partitioning strategy' splitting its original proposal into separate pieces of legislation covering separate EU-defined categories of third country workers.[15]

Despite concerns expressed about this direction, such as the European Parliament's opinion that 'EU legislation should define an overall regulatory framework of reference', and the European Economic and Social Committee's (EESC) warning that a sectoral approach geared towards highly qualified workers would be discriminatory in nature,[16] these were the beginnings of a fragmented and sectoral policy, which as will be shown in *Section 3* of this Report, has continued up to the present day. Separate legal instruments would emerge in a number of 'first generation' Directives from 2003 onwards, separating TCNs by artificially defined administrative categories, fixing and siloing them in legal statuses presenting different objectives, and conferring rights that could be applied differently according to each EU legal status.

This has allowed a hierarchy of rights to be applied depending on the TCN's EU status. The resulting EU policy framework is highly selective and utilitarian. This dehumanises the phenomenon of cross-border human mobility. Indeed, this sectoral approach 'has been identified as the official 'kick-off' of the emergence of a hierarchical, differentiated and obscure EU legal system on labour migration that accords a higher degree of rights and working conditions to third-country nationals falling under the legal status of 'highly qualified or skilled''.[17]

2.3. Evolutions triggered by the Lisbon Treaty and EU Charter of Fundamental Rights

A significant evolution occurred as a result of the adoption and entry into force of the 2009 Lisbon Treaty, and the legally binding nature that it granted to the EU Charter of Fundamental Rights ('the EU Charter'). While this Treaty kept migration policy under shared competence between the EU and the Member States, it meant the consolidation of the European Parliament as co-legislator in this domain and strengthened the role of Commission as policy agenda-setter.[18] The deepening of the 'Europeanisation' of this policy area also changed the legislative landscape, with the specific legal basis of Article 79 TFEU created with regard to TCNs' eligibility and rights.

Further, the EU Charter placed the individual and human dignity at the centre of EU action, and includes several EU-specific fundamental rights, which are granted to *everyone* irrespective of migration status. For instance, this is the case of Title IV on workers' rights. The personal scope of the rights therein unequivocally includes TCNs who are legally residing in the EU for the purpose of work, as the terminology makes it clear that they apply to 'workers', 'every worker', or 'everyone', irrespective of nationality or migration status. Of particular relevance is Article 31. It states that '*every* worker has the right to working conditions which respect his or her health, safety and dignity' (Emphasis added), with no reference to this being contingent on resident or migration administrative status. Additionally, Article 15, which covers the right to engage in work, stipulates that TCNs who are 'authorised to work' in EU's territory are 'entitled to working conditions *equivalent* to those of citizens of the Union' (Emphasis added). Equivalency, here, further confirms the equality of treatment interpretation of 'fairness' in EU

[13] S. Carrera, K. Eisele, P. Melin and Z. Vankova (2022), p. 9.

[14] S. Carrera (2007), *Building a Common Policy on Labour Immigration: Towards a Comprehensive and Global Approach in the EU?*, CEPS Working Document 356, Brussels.

[15] Commission Communication on a Policy plan on legal migration (COM(2005) 669 final). Refer to S. Carrera, A. Geddes, E. Guild and M. Stefan (2017).

[16] S. Carrera, L. Vosyliūtė, Z. Vankova, N. Laurentsyeva, M. Fernandes, J. Dennison and J. Guerin (2019), 'The Cost of non-Europe in the Area of Legal Migration', CEPS: Brussels, No. 2019-01, p. 10.

[17] S. Carrera et al, (2019), p. 10.

[18] S. Carrera (2011), The Impact of the Treaty of Lisbon over EU Policies on Migration, Asylum and Borders: The Struggles over the Ownership of the Stockholm Programme, in E. Guild and P. Minderhoud (eds), *The First Decade of EU Migration and Asylum Law*, Martinus Nijhoff Publishers: Leiden, pp. 229-254; and S. Carrera (2020), Tampere Programme 20 years on: Putting EU Principles and Individuals First, in S. Carrera, D. Curtin and A. Geddes (eds), *20 Years Anniversary of the Tampere Programme: Europeanisation dynamics of the EU Area of Freedom, Security and Justice*, EUI: Florence, pp. 51-64.

law.[19] Importantly, the Lisbon Treaty inserted into the wording of the Treaties, in particular in Article 67 TFEU, the 1999 Tampere Programme's fair treatment paradigm, which when read in light of the EU Charter, gives particular emphasis to non-discrimination and equality of treatment. The EU concept of '*fairness'* also alludes to the right to *decent* work,[20] which is nurtured by International Labour Organisation (ILO) standards, as well as the International Covenant on Economic, Social and Cultural Rights (ICESC), which Article 53 of the EU Charter itself refers to as crucial.[21]

At this moment in time, the Commission also attempted to bypass the sectoral approach by suggesting an immigration code in 2010.[22] But this idea was never officially presented and failed even before the proposal phase, also due to the Commission's serious concerns of the hesitations of some EU Member States towards codification. As a contextual inter-institutional background to this, it may have been the case that '[f]ollowing the adoption of the Stockholm Programme in December 2009' and the entry into force of the Lisbon Treaty, the 'high political ambition towards 'more EU' in a number of migration-related issues' by the Commission 'was considered by the JHA Council and Member States representatives as an act of provocation and even as a shameful practice'.[23]

It must however be pointed out that whilst this set up the scene for the 'fair treatment', this still did not change the resulting European Commission policy from prioritising the economic objectives above other considerations, including their impact on individuals. In 2009, emphasis was still placed on 'economic vitality', the need for global competitiveness, and to address both labour shortages and an aging demographic in the EU that ought to be addressed by a flexible legal migration system that Member States still had control over.[24] In fact, the sectoral approach was not remedied, but still pursued and developed. A number of post-Lisbon Directives were passed into law that did develop the rights of *some* TCNs on a micro-level.

However, they still severely limited the overall effect on a macro-level, covering all different categories of workers to different degrees, favouring TCNs entering and residing in the EU for only *certain* – and often mutually exclusive - work-related purposes – and in a way that was internally-hierarchical in the level of rights and administrative guarantees granted, reflecting the overriding utilitarian policy paradigm. The relevant instruments during this period include the 2009 Blue Card Directive,[25] the 2011 Single Permit Directive on a streamlined application procedure and equal treatment rights of certain employed TCNs (currently under legislative revision),[26] the 2014 Intra-Corporate Transferees

[19] According to the Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), this provision draws direct inspiration from Article 153(1)(g) TFEU, and Article 19(4) of the European Social Charter.

[20] In an interview with a European Commission representative of DG EMPL, 'decent work' was described as a standard that is externally promoted in the context of trade agreements in order to ensure that non-EU countries comply with it – but there was no mention of the EU itself applying that standard and no answer on its application to EU legal migration.

[21] Article 53 of the Charter states : 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party'; S. Carrera, L. Vosyliūtė, Z. Vankova, N. Laurentsyeva, J. Dennison, M. Fernandes and J. Guerin (2019), *The Cost of Non-Europe in the Area of Legal Migration*, *at the Request of the European Added Value Unit of the Directorate for Impact Assessment and European Added Value within the Directorate General for Parliamentary Research Services, European Parliament*, European Parliament, Directorate for Impact Assessment and European Added Value within the Directorate General for Parliamentary Research Services, p. 37.

[22] S. Carrera (2011).

[23] S. Carrera, K. Eisele, P. Melin and Z. Vankova (2022).

[24] K. Eisele (2013), ´Why come here if I can go there´. This prevailing policy focus is confirmed for instance by the 2015 European Agenda on Migration, adopted by the European Commission, which edged further in favour of the EU's economic and labour-market growth.

[25] Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *OJ L 155, 18.6.2009, p. 17–29.*

[26] Directive 2011/98/EU 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. 1–9.*

Directive,[27] the 2014 Seasonal Workers Directive,[28] the updated and now combined 2016 Students and Researchers Directive,[29] and the tourism-related provisions of the 2009 Visa Code and 2016 Schengen Borders Code.[30]

While some of the challenges characterising this sectoral policy approach were not unacknowledged, the issue of structural discrimination has remained by and large unresolved. In 2016, the European Parliament adopted a Resolution which warned against the fragmentation and called for a 'holistic' approach and need to develop a 'comprehensive labour migration policy'.[31] That year, the process also began for a 'Fitness Check' to be carried out, which the European Commission completed in 2019 in line with the EU Better Regulation Toolbox, to assess the overall effectiveness and flaws of the EU legal migration *acquis*. It identified several limits to and ineffectiveness issues in the EU's sectoral – worker-by-worker – approach,[32] a critical issue being the fragmentation of the Union legal framework, and the gaps and barriers it causes for entrepreneurs, the self-employed, non-seasonal low skilled workers, and mid-skilled workers.

That notwithstanding, the Commission's Fitness Check too easily disregarded the systematic differential treatment inherent to the sectorial approach by concluding that 'different treatment of TCNs is not *per se* illegal under international and EU law, and that Member States can legitimately differentiate rights granted to persons on the basis of their citizenship, provided they do so 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', which as studied in *Section 5* of this Report contradicts international labour and human rights standards.[33]

2.4. Recent trends in EU policy

The Commission intertwined a flagship policy approach with regard to asylum and migration law with 'legal migration', in the form of a so-called 'New Pact on Migration and Asylum' in September 2020 – as it also referred to the 'development of sustainable legal pathways for those in need of protection and *to attract talent to the EU'* (emphasis added).[34] As pointed out elsewhere, it 'is astonishing to see that the Pact mentions the term "equal treatment" only once and not even with regards to labour migrants'.[35] This (lack of) language shows that the Commission was still clearly pursuing the longstanding EU economic and labour market-policy objective, aimed at easing the restrictive agendas of the EU Member States' Ministries of Interior.[36]

---

[27] Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, *OJ L 157, 27.5.2014, p. 1–22.*

[28] Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, *OJ L 94, 28.3.2014, p. 375–390.*

[29] Directive (EU) 2016/801 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), *OJ L 132, 21.5.2016, p. 21–57.*

[30] Regulation (EC) No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81, 21.3.2001; Regulation (EU) No. 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016.

[31] S. Carrera, L. Vosyliūtė, Z. Vankova, N. Laurentsyeva, M. Fernandes, J. Dennison and J. Guerin (2019).

[32] See also W. Van Ballegooij and E. Thirion (2019), *The Cost of Non-Europe in the Area of Legal Migration*, European Parliament Research Service (EPRS), Brussels.

[33] European Commission (2019), Commission Staff Working Document, Fitness Check – on EU Legislation on Legal Migration, SWD(2019)1055 final, 29.3.2019, Brussels, page 70 and Annex 5.

[34] Carrera, S. and A. Geddes (2021), *The EU pact on migration and asylum in light of the United Nations global compact on refugees: International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, European University Institute (EUI) Book, Robert Schuman Centre of Advanced Studies (RSCAS), Florence: Italy.

[35] S. Carrera, K. Eisele, P. Melin and Z. Vankova (2022).

[36] https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en. At a European Migration Network Conference on 16 November 2023, DG Home Commissioner Johannson clarified that 'there is no formal link between them [the Pact and European Labour Mobility Policy]. There are 11 legislative files to bring about a Europeanised system. But when we presented it, we also presented initiatives on legal migration, because they fit together politically, and

Its Communication on the New Pact made reference to the issues highlighted by the Fitness Check and recognised that: 'There are a number of inherent shortcomings in the EU legal migration system, such as fragmentation, limited coverage of EU rules, inconsistencies between different Directives, and complex procedures'. But it continued with a position of not acknowledging and addressing the discriminatory and inequality impacts of the current EU approach. Its suggestion instead was that current shortcomings could be addressed through specific measures ranging from 'better enforcement to new [by which it means amending] legislation', and that it would 'first ensure that the current framework is implemented fully and effectively'. Its priority was to focus on making more micro-level legislative improvements, chiefly addressing the complexity of administrative procedures and the lack of legal certainty and predictability, and the need to harmonise conditions, procedures and rights, and improve the recognition of rights and intra-EU mobility of *certain* (the key word here) TCNs.

In line with that limited stance, the Commission indicated in its 2021 Work Programme a 'talent and skills package'. Announcements were made in November 2023 for a so-called 'EU Talent Pool' aimed at matching employers and TCNs job seekers through an IT platform for international recruitment.[37] This continued much of the long-standing Commission rhetoric focusing on the 'EU economy and labour market needs and shortages' and an EU-wide list of shortage occupations. Moreover, another priority was a legislative amendment of the 2009 Blue Card Directive, which is designed to facilitate the immigration of TCNs who are 'highly skilled workers' (the 'top of the TCN food chain' as will be detailed in *Section 3* below). The policy rationale for doing so was that it was 'underused' in order to further the EU's economic goals rather than to address issues of 'fair treatment of TCNs'. The result was a Blue Card Directive of 2021.[38]

Furthermore, at the time of drafting this Report, negotiations for a recast of the Single Permit Directive – which applies to (some but not all) TCNs who are entitled to work legally in an EU Member State – were concluding. The general goals of the recast were to streamline and simplify the application procedure to address delays and obstacles identified during the Commission's 2019 Fitness Check, increase the protection of TCNs against labour exploitation, and clarify equal treatment provisions. But crucially an extension of the scope – which would go some way in redressing the sectoral and structural problems of the EU legal migration *acquis* with regard to 'fair treatment of TCNs' – was non-negotiable.[39]

we need a comprehensive approach to migration. The Talent Pool and previous Partnerships fit into overall migration policy – but there is no formal legal link'.

[37] European Commission, Proposal for a Regulation establishing an EU Talent Pool, COM(2023) 716 final, 15.11.2023. Article 19 of the Commission Proposal grants EU Member States the possibility to apply 'accelerated immigration procedures… to allow for a faster recruitment of registered jobseekers from third countries who have been selected for a job vacancy in the EU Talent Pool.'

[38] Directive (EU) 2021/1883 of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC, *OJ L 382, 28.10.2021, p. 1–3.*

[39] The recast does however take into account change of status, albeit in a limited and narrow way, by providing more protective rules on the possibility for certain TCNs who have entered the EU through a legal migration route (on the EU level this includes Blue Card holders but not ICTs and seasonal workers) to change status to that of 'unemployed' and still have the right to remain on EU territory for a short period whilst looking for another job.

3. Mapping the EU legal migration *Acquis*

This Section carries out a detailed mapping, instrument-by-instrument, of the six EU (sub-)policies covering workers, students, investors, family members, and tourists, which is in line with the AspirE project's focus. A summarised comparative overview is provided in *Annex I* of the Report.

3.1. Workers under EU labour immigration policy

While the competence over the admission of TCNs to a Member State is shared between the EU and national levels, the split is not always a clean or straightforward one. The EU's co-legislators – the Council of the EU and the European Parliament – have the power to legislate (under the ordinary legislative procedure) to stipulate admission conditions and free travel within the EU for a 'short period', and with regard to 'short-stay' residence permits (Article 77(2)(a) and (c). It would appear that TCN-workers are in principle subject to *either* one or the other set of rules – the EU *and* national rules – based on the exact length of stay. But this is not always the case, because on the other hand, the EU can adopt *standards* on the issue by Member States of long-term visas and residence permits.

Even when the EU does have and exercises its power to legislate, there is a guiding principle that the EU must act to pass legislation only in line with the principles of subsidiarity and proportionality. The result is often that a non-EU national will be often subject to two sets of rules running *in parallel*, because EU labour migration law is not comprehensive enough. Still, it is crucial to underline that EU law in these domains now outlines a common ceiling of rights and set of administrative guarantees below, which EU Member States cannot go.

Depending on how it is read, Member States have an exclusive competence in terms of putting a stop to any EU measures because they have the power to prevent first admission, as a result of the new subparagraph added by the Lisbon Treaty in 2009: Article 79(5)). In essence, Member States can generally shut down access to their territory, rendering the EU-granted rights irrelevant. However, and importantly, this has to be read and considered carefully and practically. It is not a common occurrence to cap legal migration entirely, nor is it expected to become one, and it also means that this same subparagraph leaves 'the door open for the EU to legislate all the remaining facets that characterise legal migration policies for economic or labour considerations', providing a window 'to move forward on the adoption of shared standards dealing with other administrative aspects of labour migration'.[40] And indeed a clear 'ground floor' of EU standards and norms has been developed including provisions with direct domestic effect, and which benefit from fine-tuning and clarification through the interpretative jurisdiction of the Court of Justice of the EU (CJEU).

There is also an added layer of complexity in the *micro-splitting* of competence.[41] The *rights* of non-EU nationals once they have entered and are staying in EU territory can also be established at both the EU and nationals levels, but is '*shared' in a different way* to the way competence is shared for *entry* purposes. As mentioned above, the EU has a legal basis for it to develop a 'common immigration policy' that aims at 'efficient management of migration flows' and 'fair treatment of third-country nationals residing legally in Member States' (Article 79(1) TFEU). More specifically, under the ordinary legislative procedure, the Council of the EU and European Parliament can adopt measures on the conditions of residence, and related rights, including those concerning integration – and thus changes in the status of a TCN worker. This includes the conditions governing freedom of movement and of residence in other Member States (Article 79(2) and (4) TFEU). However, the exact division between

[40] S. Carrera, L. Vosyliūtė, Z. Vankova, N. Laurentsyeva, M. Fernandes, J. Dennison and J. Guerin (2019).

[41] The splitting of competence and division of categories also poses problems for relevant EU bodies. An interview held on 18 December 2023 with a representative of the European Labour Authority (ELA) revealed difficulties in clarifying its mandate with regard to the scope and activity concerning third-country nationals who were initially legal migrants. For example, Article 2 of the ELA's mandating regulation expressly excludes posted workers and ICTs, but is silent on seasonal workers, but the latter may be subject to joint inspections where they carry out undeclared work. And it was stated that 'we never know what kind of workers are going to be affected by various irregularities'. Moreover, the ELA's activities cover TCNs who have the right of free movement within EU territory – but that was not considered to be 'legal migration' but instead 'mobility'.

the EU and national powers to regulate rights is determined Directive by Directive, as will be seen below.

3.1.1. Highly qualified workers

EU labour migration law creates a specific category of persons subject to tailored rules, who are called 'highly qualified workers' or 'EU Blue Card holders', in what will be seen is a hallmark of narrowly defining TCN workers through specific and overlapping labour migration Directives. Blue Card holders are TCNs who have entered the EU for 'highly qualified employment' purposes under the Blue Card Directive (Article 1(1)).[42] That term is explained in Recital 14 of the Directive as meaning 'that the person employed not only has a high level of competence, as proven by higher professional qualifications, but also that the work to be carried out is inherently regarded as demanding such competence'. Further, the 'tasks and duties' 'should be so specialised and complex that the required level of competence to perform those duties is usually associated with the completion of educational programmes…'.

The words 'so specialised and complex' alone show that the Directive targets a specific, narrow, elite category of persons, and all the more so when considering that not only must they meet those employment characteristics, they must also meet certain migration-control oriented conditions – e.g. showing evidence of a valid work contract or binding job offer that is at least six months in duration, and meeting a salary threshold, which can be adjusted upwards or downwards according to the labour shortages a Member State has, and actually prove their professional qualifications and/or experience. And health insurance is also an eligibility criterion. In terms of scope, although recently the Directive has been updated to include persons who meet the Blue Card criteria and are 'beneficiaries of international protection' (Article 17), and ICTs can be included to a limited extent (Article 2I), these extensions are quite strictly governed and as a result can be expected to have limited positive impacts.

Relevant statistics reveal that the total number of Blue Card holders is relatively small in quantitative terms. In 2019 alone, EU Member States issued about 3 million first residence permits to non-EU nationals, of which roughly 40% (about 1.2 million) were issued for work reasons (and in 2022, 1.5 million permits were issued for work purposes). [43] With regard to high-skilled labour, 1.6% of first-time) residence permits were issued under the Blue Card Directive. In comparison for low-skilled labour, almost half of first-time permits (42%) in 2019 were issued for seasonal workers.[44] Indeed, the EU Blue Card is not a very popular scheme. In 2019, the total number of EU Blue Cards issued was 36,800, falling to 12,600 in 2020 and increasing to 29,000 in 2021 (22% of that figure were granted to Indian nationals).[45]

Considering the above, it is likely that this is not because of a lack of interest from TCNs who have relevant skills and professional experience, but because despite being at the top of the EU legal migration 'food chain', applicants still have serious hurdles to overcome in order to meet the eligibility criteria. As is shown in *Section 4* below, many may face difficulties to access this EU status due to the limits on and difficulties for other types of legally residing TCNs from changing to this status. Indeed, the EU Blue Card regime is still quite stringent, presenting stringent conditional admissibility criteria, and it competes with parallel national immigration schemes covering 'highly skilled' persons, as it does not do away with 28 different national procedures in this domain.[46]

---

[42] For a short and accessible overview on the rationale for this Directive, its content, and the reason for the 2021 legislative update, see I. Aleksandrovich, Z. Alekseevna, and T. Igorevna (2021), 'Blue Card as a method for regulating migration processes in the European Union'. Available on SSRN.

[43] https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=456573#First_residence_permits_by_reason

[44] EAVA Study (2019), p. 4.

[45] https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=539496#Single_procedure_for_non-EU_citizens_to_reside_and_work_in_the_EU

[46] K. Eisele (2013), p. 2; refer to C. Grutters and T. Strik (eds) (2013), *The Blue Card Directive: Central Themes, Problem Issues and Implementation in Selected Member States*, Wolf Legal Publishers: Nijmegen.

In terms of characteristics, a presumption can be made that this regime targets persons of working age who have completed their university studies – so usually older than 20-21 years of age. Where there may be greater higher education possibilities for men than women in the country of origin, the requirement to have higher education qualifications, and even more so to have five years of equivalent professional experience may rule out women, especially women of a certain age, and working mothers. In turn this might mean women from some certain third countries – such as Japan, might see an advantage compared to those from Pakistan. The same may apply to social class if that is a barrier to access to education and work in the country of origin.

Generally, however, this targeting is unsurprising and matches the rationale for the Directive. It was created to 'attract' and strongly incentivise highly-skilled workers from non-EU countries to enter the European labour markets, ensure economic growth, and compete on the global stage with other world economies like the US and BRIC countries. Those goals have been repeated over the years, as discussed in *Section 2* of this Report. In line with those incentives, EU Blue Card holders have a greater and more comprehensive set of EU rights available to them than other third country workers. It was acknowledged by one of our interviewees who was involved in the negotiations that of all TCNs, Blue Card holders are subject to the most lenient admission conditions and enjoy the most favourable regime.[47]

This is evident. For example, they enjoy the benefits such as certain equal treatment rights and a streamlined work and residents permit procedure under the Single Permit Directive (Section 4.4), whereas seasonal workers and ICTs are excluded from its scope. They do not have the same limitations with regard to temporariness that seasonal workers are subject to, but rather the opposite. They are entitled to stay for what is comparatively (looking at the EU *acquis* overall) a long minimum period of two years (Article 9(2)). This is supplemented by simply adding extra months up if the employment contract does not cover that period (and then capped) - up to four years for the first permit, and this is renewable. Moreover, the Blue Card holder will not be asked to leave if they have not met certain conditions.

The family members of Blue Card holders can join them with little formality. This is true not only in the first Member State, but also in the second Member State(s) of residence if intra-EU mobility is exercised. In fact, they have even more favourable rights than provided for in the EU Family Reunification Directive. The Blue Card holder does not have to have reasonable prospects of permanent residence or have had a residence period before family members are eligible to join them, and the family members can stay for as long as the EU Blue Card holder, and are allowed to work or be self-employed (without a time limit applying). And, again unlike their labour-migration-Directive counterparts, Blue Card holders can also benefit from permanent residence, and in a manner that is even more favourable than the EU Long-Term Residents Directive 2003/109 on which it is based. EU Blue Card holders can acquire EU long-term resident status after five years of lawful residence in a Member State, whatever the reason for admission – in this case employment, or beneficiaries of family reunification if they exercise the right to access employment and the national law permits it, and beneficiaries of international protection who have also applied and obtained a Blue Card.

Blue Card holders can move around other Member States for three months within a six month period (90 days within a 180-day period) (Article 20(1)) to carry out business activities in other States fully applying the Schengen *acquis*, without needing any authorisation, compared to seasonal workers who are allowed to move around the Schengen area for up to 90 days but for tourism purposes only. More significantly, Blue Card holders have a conditional intra-EU mobility right to live, work, or study in another Member State with their family members, in stark contrast to seasonal workers who do not have any such right. They are entitled from the outset to work in other Member States.[48] They can move to that second Member State without leaving EU territory to make a new application, and have a one-month 'grace' period after having moved to apply.[49] If they wish to move again to a third Member State,

[47] Interview held on 19 December 2023 with a representative of DG EMPL.

[48] Article 1(b), Articles 20 to 23) as long as they have spent at least a one-year period in the first Member State (Article 21(1)).

[49] Article 21(3).

they can do so after six months of legal residence in the Member State.[50] Significantly, even if their family members live in different Member States, that residence can be counted together to lead up to an autonomous residence permit for them subject to a potential condition of the Member State to live in the place they apply for two legal and continuous years.

3.1.2. Seasonal workers

EU labour migration law creates another narrowly defined category of workers subject to tailored rules who are called 'seasonal workers'. The Seasonal Workers Directive carves out a very specific category by expressly excluding posted workers or those providing services (Article 2(3)(a)), other (lower-skilled) workers in general (such as nurses, carers, and domestic workers), and undocumented workers who are already working in the EU and cannot for practical or other reasons cannot be returned to their country of origin, or who fall into irregularity due to the complexity of the rules regulating their status. Nor does it allow them to regularise their status by facilitating changes of status. This is despite a two-year transition period being suggested for them during the negotiations of the Directive. The proposal to do so was rejected, and is criticised due to a 'lack of sensitivity to the vulnerable and increasingly marginalised situation of undocumented migrants' who actually 'cannot be detached from the seasonal labour demands of the agricultural sector'.[51]

The Directive further narrows the category down by the legal definition of 'seasonal worker' to those TCNs who are entering for specific purposes in specific industries that are characterised by their 'temporality'. The Directive heavily insists that it applies to those who are entering *temporarily,* with references made to 'incentives and safeguards to prevent overstaying or temporary stay from becoming permanent' (recital 7), which is given effect to by the specific and strict eligibility conditions. Applicants would only be able to enter the EU to carry out a specific type of 'seasonal work', which tends to be in the agriculture, horticulture (for the most part), or tourism industries (to a lesser extent) – examples are fruit picking, or working during the ski-ing season. The nature of that work means that in practice it applies to those who do not mind, or have no choice but to accept, the temporary nature of the work, as opposed to a steady, permanent role.

These policy choices have the effect of targeting certain profiles of workers and excluding others. The temporality rules imply that there is a targeting of or preference for TCNs who are on the younger side and who do not have dependants – presumably targeting young single, parentless people. Given the nature of the work, and because unlike the Blue Card Directive, there is no requirement for a certain level of professional qualifications, in practice, it tends to cover those who work in manual labour who have not completed higher education and who do not have higher education skills and qualifications – whether they did not want to, were not able to, did not have access to funds for, or could not complete their studies for any reason. This category of persons likely includes persons from lower social classes. The Directive likely also excludes minors, the very old, and physically unable. By avoiding vulnerable and minority categories, EU policy can avoid providing rights and benefits of a long-term nature.

Turning from the scope to the eligibility conditions that seasonal workers must fulfil, they are stringent. To begin with, applicants cannot be on EU territory at the time of making the application. Even if interviews may not be carried out in practice for seasonal worker positions (such as for farm work), it would mean that a seasonal worker who has flown from the Philippines to France for an interview (that it is compulsory to attend in person) has to return to first go through the visa process to enter EU territory, and then return to the Philippines until a decision has been made to offer him or her a job. This is akin to the EU fair treatment paradigm, as allowing legal presence at the time of application can allow the person in question to build local networks, attend interviews, and minimise the risk of labour exploitation that is rife in this field. But, the EU policy is supported by an insistence that the TCN is not

[50] Article 21(11).

[51] Medland L. (2017), 'Misconceiving 'seasons' in global food systems: The case of the EU Seasonal Workers Directive', *Eur Law J.*, 23, pp. 157–171.

eligible unless he maintains her/his legal residence in a non-EU Member State, and will not be able to easily obtain legal residence under EU rules.[52]

Additionally, they must fulfil a number of conditions. They must have a valid and detailed working contract, which can be no shorter than five months and no longer than nine months. These quite specific temporal criteria mean that recruitment agencies are often utilised as the intermediary to match employers up with employees. For shorter working periods, EU (and national) visa policy applies, for short-stay work of under 90 days or up to four months.[53] This has the potential effect of barring TCNs from working for such short periods if the national law also does not permit work visas to be issued for short-stays, for example for musicians and artists. There are also financial requirements: seasonal workers must have health insurance and sufficient funds so as not to be a 'burden' on the social systems of the EU Member State in question.

If those stringent conditions are met, then in terms of the rights they have once they have entered the EU, they can only stay for a maximum of nine months in a year, and after that period they must leave the Union's territory or otherwise will be subject to return procedures. The Directive states that it aims at 'providing for incentives and safeguards to prevent overstaying or temporary stay from becoming permanent' (Recital 7). Together with the very specific nature of the work, this temporal criteria is disadvantageous to seasonal workers who have families with children, in a structurally discriminatory way.

That inference is supported by the fact that the policy excludes their family members from joining a successful applicant, which is placed right at the beginning of the Directive in Article 1. They must presumably remain in a non-EU country or elsewhere. This separating of families is a disadvantage for working parents, and impacts young children who must be left behind. And it is inconsistent with the other main labour migration Directives on ICTs (which in principle also relates to temporary work) and Blue Card holders (see below). In this sense the Directive is contrary to Article 79 TFEU read in the light of the EU Charter (especially Article 33), because although the Directive *states* that it observes and respect Charter rights and principles, and lists specific ones, including the right to private and family life – it does the exact opposite by expressly preventing family members from joining seasonal workers in the EU.

And whilst integration measures are not obligatory under Article 79(4) TFEU, this system creates the opposite – it is a clear *barrier* to social integration. This is also not in line with the New Pact which calls for a successful integration and inclusion policy, nor the ILO-established and EU-policy adopting 'decent work' standard on 'prospects for personal development and social integration'.[54]

And this is a method of migration management: 'temporary migration schemes are seen as convenient solutions for (temporary) labour shortages and the assumption is that when their labour is no longer needed, people return to their home countries, in other words the receiving state conveniently gets rid of them when they are no longer needed',[55] and has been presented as an instance of so-called 'circular migration'[56], which expects people to move in circles and avoid permanent settlement in a given country. This is sinister when considering that the temporariness or 'circularity' imposed by this kind of labour migration policies is fictitious because it finds its toots in a permanent demand for labour, met

[52] Article 2, and Recital 2.

[53] Article 1(2).

[54] An interview held on 20 December 2023 with a European Commission Representative of DG HOME, described rules on 'integration' as being a national competence, which the Council of the EU has no intention to interfere with, and an area for which no EU legislation could be expected. In that sense, legislation was stated to 'override' integration. 'Integration' was also acknowledged as differing within the EU from the ordinary meaning, or a meaning derived from the EU Charter and ILO standards, and was described from the perspective of the TCN *integrating* by learning the language and 'customs', rather than the fact of settlement over several years and the establishment of a family and community ties.

[55] S. Carrera, A. Geddes, E. Guild and M. Stefan (2017), p. 9.

[56] J. Fudge and P. Herzfeld-Olsson (2014) The EU Seasonal Workers Directive: When Immigration Control Meet Labour Rights, *European Journal of Migration and Law*, 16, pp. 439-466.

through temporary workers whose migration experiences are extended for many years. In fact, 'nothing is more permanent than temporary migration'.[57]

Seasonal third country workers are entitled to basic 'exploitation' protections – these have developed not from the outset, but as plasters in response to scandals such as modern-day slavery, labour exploitation, and low or no pay, substandard living conditions or poor working conditions. A specific feature, which considers labour exploitation (albeit to a limited extent) is that the employer is punished for failure to meet obligations under the Directive – and there is an attempt to shield the worker from this by requiring the employer to compensate the worker. But there is an overall lack of rights granted to seasonal workers – especially when compared to the other TCNs covered in this Report. This is significant because 'the level of rights offered to immigrants is central for their inclusion and integration into the host member state because this level determines the degree to which they can take part in the labour market and society'.[58]

3.1.3. Intra-corporate transferees

A third category created by EU labour migration law is that of 'Intra-corporate transferees' (ICTs), governed by the Intra-Corporate Transferees Directive.[59] ICTs have the almost opposite profile to those of seasonal workers, but are just as narrowly defined (Article 2(1)).

They include the following highly skilled persons: first, managers - persons holding a senior position, who primarily direct the management of the host entity; second, specialists - persons working within the group of undertakings possessing specialised knowledge essential to the host entity's areas of activity, techniques, or management; and third, seconded trainees - persons with a university degree who are transferred to a host entity for career development purposes or in order to obtain training in business techniques or methods, and whose expenses are often covered by the employer for the transfer. In terms of characteristics, these TCNs are of working age – ranging from graduates who are likely to be in their 20s, to managers, who as a generalisation are more likely to be in their 30s up to retirement age.

They are distinguished from other workers who may have the same job title, salary, and nationality as them – but who do not work for a multinational that is established in the EU. This EU policy does not disguise that it is designed for the advantage of multinationals – employers that can afford to be established in one or more foreign countries, which can give form to inherent discrimination. ICTs who are legally resident in the US, Japan, China, India, and Australia where most multinationals are found[60] may have an advantage over, for example, those in the Philippines and Vietnam. Given the need for a connection to a multinational, persons from lower social classes, or with minority characteristics might be excluded if recruitment practices are discriminatory in the third country.[61] The targeting of employees of internationally-established multinationals is intentional, as the expressly stated objective of this EU policy is once more 'to attract talent' and 'highly-skilled workers' so the EU can become an economy based on knowledge and innovation, to foster 'investment flows', and put the EU in a stronger position amongst its international partners.[62]

---

[57] S. Carrera, A. Geddes, E. Guild and M. Stefan (2017), p. 22 on this disadvantageous 'circular migration'.

[58] K. Eisele (2013), p. 10.

[59] For a detailed analysis of the Directive refer to P. Minderhoud and T. de Lange (eds) (2018), *The Intra Corporate Transferee Directive: Central Themes, Problem Issues and Implementation in Selected Member States*, Wolf Legal Publishers: Nijmegen.

[60] https://www.investopedia.com/ask/answers/021715/why-are-most-multinational-corporations-either-us-europe-or-japan.asp

[61] As an example, take trainee lawyers in the UK. To have the opportunity to go on a secondment abroad, they might have to land a job with a magic circle or silver circle law firm which is notoriously difficult to obtain (there is a 2% success rate) and can be easier if you are from the 'right educational and social background' or if one is 'well connected', or part of a larger, commercial law firm, as opposed to the average full service or human rights law firm. https://congrapps.com/blog/how-to-secure-a-training-contract-at-a-magic-circle-law-firm/; https://www.chambersstudent.co.uk/law-firms/firms-by-size-and-location. Consider also the existence of the Red Circle law firms in China, the Big Four law firms in Japan, the Seven Sisters law firms in Canada, White Shoe law firms in the US, and the Big Six law firms in Australia.

[62] Refer to Recital 3, the objectives of the 2009 Stockholm Programme, and the Europe 2020 Strategy set on 3 March 2010.

In keeping with the narrow scope that is carved out, express mention is made of at least seven types of TCNs who are excluded from the personal scope of the Directive (Article 2(2)) – who are either covered by another Directive, or only by national law. For example, researchers and full-time students are mentioned as not being included because they fall under the Students and Researchers Directive of 2016, which crucially does not describe itself as a 'labour migration law' instrument.[63] Also excluded are TCNs covered by an EU-third country agreement, posted workers, the self-employed, temporary workers, and short-term supervised trainees.

The ICT Directive emphasises that a temporary stay is allowed, but by comparison with the rules for seasonal workers, ICTs' rules on temporariness are far less strict. Seasonal workers can only remain on EU territory for nine consecutive months before they must leave, whereas an ICT worker has the option to stay for three consecutive years without being required to leave EU territory. In fact, ICTs can acquire the right to permanent residence under the EU Long-Term Residents Directive. Unlike the Seasonal Workers Directive, there is no express mention of preventing overstaying, or the consequences of an ICT doing so. Notably, there is an emphasis on ICTs proving that they have been employed by the multinational for a certain period of time before they are eligible, and proving that they will have a job to return to in the non-EU country. This difference in treatment between seasonal workers and ICTs in terms of the rules of temporariness likely stems from the different reason for ensuring that the stay is 'temporary' or 'circular'.

There is also a noticeable contrast between ICTs and seasonal workers when it comes to intra-EU mobility opportunities. Like seasonal workers, ICTs mobility is facilitated for short term stays of up to three months in a six month period, or over 90 days per Member State. But they are allowed to *work* during that period. Seasonal workers do not have the right to travel to or work in other EU Member States for periods of over 90 days. In contrast, ICTs have rights of entry to and residence in other Member States for over 90 days,[64] on the basis of their initial ICT permit, for as long as it remains valid, which is a maximum of one year for trainees and three years for managers and specialists. Another procedure is available, under which the ICT is not required to leave EU territory to make the application, and does not have to have a visa. They can already start working in the second Member State even if the decision on their application has not yet been made.[65]

The EU policy for ICTs is more advantageous and contains more incentives than that of seasonal workers (who are mostly disincentivised) not only concerning the temporariness of stay but also from a societal inclusion angle. ICTs family members are allowed to join them,[66] whereas the family members of seasonal workers cannot. This is because the EU law and policy wishes to incentivise such workers to 'temporarily' (for between 1 and 3 years) move to the EU for work purposes in order to benefit in the global competition for skills and talent. Also unlike seasonal workers, there are no specific provisions that could prevent labour exploitation – but that is not to say that ICTs are immune from exploitation or abuse in the workplace.[67]

3.1.4. Single Permit holders

The Single Permit Directive is important because it provides a streamlined procedure for the third country workers it applies to obtain a combined work and residence permit, making the admission process to the EU easier, as well as a specific (though qualified) set of equal treatment and other rights.[68] Issuance of this kind of permit is significant in number. EU statistics show that between 2016 and 2021,

[63] Article 2(2)(a).

[64] Article 1(b), Article 20, Article 21(1).

[65] Article 21(2-7).

[66] Article 1(b) and 3(h).

[67] Take the example of a manager from India who has been sent to work at the employer's branch in France, but who struggles to adapt to the working culture there. He unwittingly antagonises his colleagues, and they begin to make his life unbearable. But he cannot afford to leave the job and take the risk of looking for another, as he would lose his bonus and is supporting his elder parents financially.

[68] For a detailed analysis refer to P. Minderhoud and T. Strik (eds) (2015), *The Single Permit Directive: Central Themes and Problem issues*, Wolf Legal Publishers: Nijmegen.

around 2.6 to 3 million single permits were issued every year. In 2021, 71.8% single permits issued in the EU were granted primarily for employment reasons.[69] Of those, between 100,000 and 150,000 TCNs changed status according to the following definition: 'a change of immigration status or reason to stay' occurs only 'if the period between the expiry of the old permit and the start of validity of the following permit is less than 6 months and the immigration status or reason to stay has been changed' and only 'changes between major categories can be recorded as a change of status permit', which are reasons related to family formation and reunification, reasons related to education and study, reasons related to remunerated activities.

The Single Permit Directive[70] adopted in 2011 is narrowly defined and applies only to specific TCNs.[71] It covers Blue Card holders, as well as certain TCNs whose initial reason for admission was different, for example TCNs who are in the EU under family reunification rules. But it does not apply to seasonal workers, ICTs, au pairs, self-employed persons, posted workers, etc. It does not set criteria for admission, refusal, or renewal of single permits, meaning the legal framework is further fragmented in this sense. They also benefit from the right to be treated equally to EU nationals – though not across the board. Crucially, that right is limited to working conditions – such as pay and dismissal, health and safety, working time and leave; certain aspects of social security; recognition of qualifications; access to goods and services including housing and employment advice services ; and tax benefits.[72]

At the time of drafting this Report the negotiations were in the final stages to amend[73] the Single Permit Directive. The aim is to make the application procedure more efficient and shorter in duration, enable applications from Member States as well as non-EU countries, and strengthen certain safeguards and equal treatment rights to address issues of labour exploitation (such as by not making the permit conditional on working for one employer alone). New obligations are envisaged in terms of inspections, monitoring mechanisms and sanctions against employers breaking the rules.[74]

3.2. Students mobility

The numbers of TCNs studying in the EU can be remarked upon at the outset, for the year 2021.[75] They form part of a total of 1.52 million students from abroad (including other EU Member State nationals) undertaking tertiary studies in the EU – 25% of students were from Asia, and 17% from Africa. Mobility of those with doctoral degrees tended to be the most common for 20 of the Member States, and in Latvia over half of all tertiary students were from Asia. More than 40% in Cyprus, Ireland, and Hungary were also from Asia.[76] Across the whole of the EU, China (including Hong Kong) was the most common country of origin for tertiary students from abroad in 2021. There were more students from China (than any other foreign country) studying in Germany, Ireland, Italy, and Sweden, while Chinese students accounted for the second or third largest population of foreign students within the tertiary education

---

[69] https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=539496#Single_procedure_for_non-EU_citizens_to_reside_and_work_in_the_EU

[70] 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.

[71] K. Groenendijk (2015), *Equal treatment of workers from third countries: the added value of the Single Permit Directive*, ERA Forum , 16, pp. 547–561, who concludes that 'The rights granted to third-country workers in Article 12 SPD clearly are not comparable to the rights of EU workers', and 'But, all those third-country workers are protected by Union law against a regression of the national legislation or practise below the level granted in the Directive'.

[72] Though it has been developed further by the Court of Justice of the European Union. See for instance Martinez Silva, INPS/W.S., O.D./INPS, and recently *ASGI*.

[73] https://home-affairs.ec.europa.eu/proposal-directive-single-application-procedure-single-permit-third-country-nationals-reside-work_en

[74] For an overview of the expected changes of the updated 2024 Single Permit Directive, see this comparative analysis by Steve Peers: http://eulawanalysis.blogspot.com/2023/12/take-this-job-and-shove-it-revised-eu.html

[75] Official EU statistics were only collected by Eurostat on residence permits granted to students from the year 2020, with 2019 as the reference year. Refer to https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Residence_permits_%E2%80%93_a_methodological_and_analytical_overview#Main_points

[76] For France and Portugal, a large proportion of tertiary students came from Africa.

sectors of four other EU Member States. The only other non-member countries that appeared multiple times in the rankings were India and several countries neighbouring the EU – Belarus, Bosnia and Herzegovina, Russia, Ukraine, and the United Kingdom.[77]

The EU-level rules for students are set out in Directive (EU) 2016/801.[78] That Directive adds to a fragmented, tailored, and complex policy because it also governs and applies some common rules but also different criteria and different EU-level rights to researchers, trainees, au pairs, school pupils, and volunteers. And in some cases students who are covered may also benefit from the Single Permit Directive – if the Member States have not excluded them. But this occurs in a limited way if Member States do allow them to benefit from that Directive but make use of the option not to grant equal treatment with regard to student loans and vocational training, and other restrictions therein.

As with EU legal labour migration, the scope and eligibility conditions are limiting. School pupils are not covered unless a Member State decides they may also have the right to enter to study in the EU.[79] It is expressly stated as not applying to (under Article 2(2)) those seeking international protection. And long-term residence card holders and the family members of EU citizens are also prevented from benefiting from this Directive. Students who have been admitted to a higher education institution to follow a full-time course of studies in an EU Member State are eligible. But even if those conditions have been met, such students may fail if the EU Member State in question has 'duly justified reasons' for rejecting the application (Recital 36).[80] Generally, students at an earlier stage of their academic journey are not covered by the Directive's rules at the EU level automatically – each Member State has discretion as to whether to allow entry and stay for those persons, and if they decide against facilitating the mobility of those persons, the Directive does not apply.[81]

As students are required to have been admitted to a higher education institution for full-time studies, this implies that the policy is targeted at people who have at least two features: enough money and a certain skill-set.

First, applicants (or their parents/family) must have enough money to pay for what are usually higher fees for international students (especially because they must show evidence of those having been paid – see Articles 5 and 11), as well as have sickness insurance and be able to pay for their own accommodation, and without needing to work a significant amount of time in the Member State to support themselves – especially because they are not allowed to reside for purposes other than studies (Article 20(2)(f)).[82] This can be even stricter if the Member State exercises the option in the EU Directive to *also* require evidence of 'sufficient resources' to cover study costs enshrined in Article 11. And it is not ruled out that individuals or host entities also have to cover the Directive-related notification and application fees if the Member State so desires. This can also have the practical effect of ruling out persons from lower social classes.

---

[77] https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Learning_mobility_statistics

[78] For a detailed assessment see T. de Lange and P. Minderhoud (eds) (2020), *The Students & Researchers Directive: Central Themes, Problem Issues and Implementation in Selected Member States*, Wolf Legal Publishers: Nijmegen. This is a 2016 legislative recast covering a more extensive range of categories of persons compared to the previous Students Directive of 2004 (2004/114/EC). There is also an Erasmus+ Regulation 2021/817 for education and training, youth and sport. Articles 19 and 20 refer to third countries associated to the programme: from EFTA, acceding, candidate countries, ENP countries, and if there a specific bilateral agreement allowing it. If it is justified others can also join. It mentions 'learning mobility' and a 'European Education Area' but nothing suggests it permits entry and movement, etc.

[79] Article 1; and Recital 21.

[80] A Cameroonian national has legally challenged the ability to dispute a study visa refusal of Belgium in good time (which required preliminary interviews to verify the documents and study plans) – namely before the start of the academic year is currently pending before the Court of Justice (C-299/23), and whether this is compatible with the procedural guarantees entitled to under the Directive in line with Charter Articles 7, 14 and 47.

[81] The option is set out in Article 2 for exchange pupils or those part of an educational project.

[82] The interpretation of this provision is at the time of writing being deliberated at the Court of Justice. Advocate General Richard de la Tour has in the meanwhile advised the Court of Justice of the EU on the interpretation of this provision in *Perle* (C-14/23), in an Opinion of 16 November 2023. His view is that there should be *evidence or serious objective reasons* that studying for a higher education qualification is not the main purpose.

Second, that applicants already have certain 'skills'. They must show that they have been accepted to study at a higher education institution, which may mean having already achieved minimum grades and other criteria. And if the national law in the selected Member State requires it, they may additionally have to provide evidence of sufficient knowledge of the course language. That institution's own selection process therefore adds a layer of selectivity under that of the EU law. This policy of selectivity concerning the type of student whose mobility is facilitated is in fact evident from the outset in the Directive. The recitals state that it aims at 'attracting' labour and in particular, 'highly-skilled' labour, to address labour shortages, to make the EU more competitive in a global competition for 'talent', and to boost 'the economy' by providing a greater contribution to GDP growth (Recital 8). That background explains why the EU focuses on the mobility of a certain type of student – it is due to third countries being considered a 'source of highly skilled people', because students are 'increasingly sought after', and because they help to form the EU's 'key asset', which is 'human capital' (Recital 3 of the Directive).

The strictness characterising this policy is not exclusively restricted to the scope. In terms of the rights that students have once they have been admitted to the EU, there is a temporal limitation, and practical limitations as a result of the rules on how easy it is to stay on EU territory. There is a short minimum one-year period for which students are granted authorisation to study in the EU, or the duration of the study period if it is shorter. This does not take into account that a higher education institution such as a university usually offers undergraduate degrees for three years or longer. School pupils on the other hand – if included in the scope as a result of more favourable national rules - can only stay for a *maximum* of one year (not a minimum). Whilst students are of course entitled to apply for a renewal, this is an administrative hurdle. Nor does it offer any wiggle room to those studying a Master's degree that lasts that same period of time.

There are also strict and inflexible penalties for no longer fulfilling the conditions of entry and stay.[83] Those penalties do not take into account TCNs who have to drop out of their studies, run out of money, or who are kicked out of their course through no fault of their own.

Certain rights granted to other legal migrants are not available because the Directive is insistent about students being treated separately. It states that the Directive is divisible from admission for labour purposes and does not aim to harmonise law and practice concerning labour law, *especially* with regard to students. Bizarrely it accepts that in some national contexts, a researcher, volunteer, trainee, or au pair is considered to be in an 'employment relationship': but not students, despite mandating rules limiting 'economic activities' to 15 hours a week (Article 24), and the practical reality that many students might have to work at least part-time in a Member State to support all their costs. The way employment law is cross-referred to in the Directive shows that this is a specific category of persons to be treated in a specific way, rather than who benefit from the gamut of EU labour law and social security coordination rules. The EU policy also limits the duration of any work carried out to the duration of the studies. This reflects a migration management rationale.

The Directive does not really allow intra-EU mobility options for students. In fact, they are punished if found to be in another Member State without fulfilling the conditions for mobility, can be asked to leave as soon as possible. There is only a narrow exception, which applies to students covered by an EU or multilateral programme and where there also has to be an agreement between two or more higher education institutions. They are entitled to study in another Member State for almost a year (Article 27(1), Article 31(1), recital 46).[84] Even in those cases, if the first Member State's authorisation has been withdrawn or expired, the second Member State is entitled to request that the student return there immediately (and the first Member State has to accept them by issuing a re-entry document, recital 49), or even deport them to a non-EU country in accordance with the Returns Directive 2008/115/EC.

[83] Though EU Member States have the option to extend the period for students that have failed and need to repeat a year – see recital 33.

[84] If the student moves to a non-Schengen State from the first Member State, they have to show evidence of the authorisation, notification, and studies, with details on duration of mobility (Article 32). However, the second Member State can consult SIS and refuse entry if there is an alert out (Article 32(5)).

Students are also at a clear disadvantage compared to researchers, Blue Card holders, and ICTs in the actual rights granted to them because EU law does not allow students' family members to join them. This is despite the period of time that a student might stay potentially matching that of researchers (who are granted that right in the same Directive showing that the differentiation is intentional), Blue Card holders, and ICTs.[85] This has to be considered in light of the express reference that they are entitled to be treated fairly 'in accordance with Article 79 TFEU'. In practice, the parents or carers of a child or vulnerable family member (which often tends to mean women) would have to remain outside the EU. They are effectively excluded by this policy. It can implicitly be assumed that this Directive is easier to benefit from by those with a civil status of 'single' and 'childless', and directed at them.

That different, lower standard of 'fair' is also reflected by a different, lower standard of 'equal treatment' and access to social security rights under Article 22. In particular, equal treatment with regard to study or vocational grants or loans is expressly excluded. In the specific context of cross-border mobility, the extending Social Security Coordination Regulation 1231/2010 applies, but the Directive is expressly noted not to grant any rights beyond that legislation. This adds to the abovementioned strict conditions that show that wealthy or well-off students are targeted by this policy. This is relevant for a student who has been studying an undergraduate degree for three years and established a settled life, and more so if they formed (family) relationships in that time.

3.3. Investment

There is no specific EU policy on cross-border human mobility from non-EU countries for investment-related purposes. Instead there has been a growing trend among some EU Member States that have set up schemes (such as national level-Golden Visa investment programmes or businesses and entrepreneurship visa-scheme) that grant investors residence (or citizenship) rights in their countries in exchange for a 'substantial investment'.

Comprehensive and accurate statistical data on residence by investment (RBI) applications there have been in EU Member States, and of those how many have been granted, is publicly unavailable. But a European Parliament Research Service (EPRS) EAVA Study estimated that, from 2011 to 2019, 42,180 applications under RBI/CBI (citizen by investment) schemes were approved and more than 132,000 persons, including family members of applicants from third countries, obtained residence or citizenship in Member States via CBI/RBI schemes.

Those investors who obtain an investment-scheme related residence right can access EU free movement rights and permanent residence, and potentially also EU citizenship (and related rights) over time – in exchange for nothing more than a large sum of money. In many cases this lack of criteria disregards the requirement for continuous residence in the Member State, or being required for minimum periods in order to be eligible for permanent residence or citizenship.[86] This raises compatibility questions with EU law, especially with regard to non-discrimination, and the principle of sincere and loyal cooperation laid down in the EU Treaties. In fact, what many of these EU Member States are selling does not only 'belong to them' and has a clear EU dimension.[87] There is also wide scope for abuse of process and related rights extending beyond mobility rights to anti-money laundering, corruption, and tax evasion.

The EU approach – as evidenced by the responses of the European Parliament and European Commission – has been to highlight the enormous risks arising from the operation of these national schemes; to call for information about and amendments to (or termination of) the national schemes; and to tighten the existing EU rules that are affected/connected.

---

[85] Article 26.

[86] J. *Džankić* (2018), Immigrant investor programmes in the European Union (EU), *Journal of contemporary European studies*, Vol. 26, No. 1, pp. 64-80.

[87] Carrera, S. (2014), The Price of EU Citizenship: The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters, *Maastricht Journal of European and Comparative Law*; Carrera, S. and G. R. de Groot (2015), European Citizenship at the Crossroads: The Role of the European Union in Acquisition and Loss of Nationality, Wolf Legal Publishers.

The European Parliament identified problems in an EPRS Study and a Report published in October 2021.[88] It found five key issues with such schemes. The most relevant ones for the purpose of EU mobility policies are: a risk of commodification of EU residence (and citizenship); and risks of violation of the principles of fairness and discrimination. It pointed out that Member States can 'charge a price for a 'good' that is collectively created and provided at the EU level' and that the 'benefits of the scheme only accrue to some'.[89] In a Resolution of 9 March 2022, it also called for the European Commission to exert as much pressure as possible for the schemes to be phased out and abolished.[90] It described them as discriminatory with regard to traditional legal migration and asylum pathways,[91] and asked the Commission to present a legislative proposal covering the RBI schemes in order to have harmonised EU standards in this domain.[92]

The European Commission established a Group of Experts on Investor Citizenship and Residence Schemes which issued a Report in 2019 pointing out the risks that the schemes entail, and the need for more transparency and accountability of the schemes and all actors involved, including the private sector.[93] The EU institution held meetings with that group of Experts first in 2019, and recently in March 2023.[94] On 28 March 2022, a Commission Recommendation on investor residence schemes in the context of the Russia-Ukraine war also generally called for Member States to address the related risks (security, money laundering, tax evasion, corruption) by taking measures and safeguards including establishing and checking residence conditions prior to issuing residence permits – and verifying whether residence is continuous.[95] As of October 2023, the Commission's response has become more specific: it has announced a proposal to strengthen the Visa Suspension Mechanism,[96] to potentially serve to suspend visa-free travel granted by citizenship by investment programmes, and where there is 'insufficient alignment with the EU's visa policy'.[97]

3.4. Family members

3.4.1. Family reunification of TCNs

The notion of 'family reunification' reflects the EU's policy choice of dividing TCNs family members into two main groups for the purposes of legislation and rights: one group are the TCNs family members of *EU citizens* (covered by the EU free movement law and Schengen policy); and the other group are the TCN family members of other *TCNs who are residing legally in the EU*. The EU's family reunification policy covers the entry into and residence in a Member State by family members of the

[88] European Parliament INL report, EPRS Study, October 2021, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694217/EPRS_STU(2021)694217_EN.pdf

[89] In this same Report the European Parliament made several policy suggestions for the EU going forward. These include: (i) the introduction of minimum presence requirements for investment schemes for residence, and amendment of the scope of the Long-Term Residence Directive. And (ii) regulating access to the EU for third countries that run such schemes. Also of interest, it suggests ´a tax to uphold fundamental rights and rule of law, which are enshrined in the Treaties´ to compensate or discourage the use of the schemes, and which seems in line with the thinking behind the Rule of Law Conditionality Mechanism.

[90] Point 2, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022IP0065; https://www.europarl.europa.eu/delegations/en/european-parliament-resolution-of-9-marc/product-details/20220315DPU32347

[91] Point 6, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022IP0065

[92] Point 21, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022IP0065

[93] Report on Investor Citizenship and Residence Schemes in the European Union. See also https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/eu-citizenship/eu-citizenship/investor-citizenship-schemes_en

[94] At that meeting Ireland stated that it had terminated its investor residence scheme (along with the Netherlands), and noted that a significant number of the growing applications it has received in the past two years has been made by Chinese nationals. Greece, Portugal and France announced that they were carrying out amendments and reforms in response to the concerns raised. https://commission.europa.eu/system/files/2023-09/Minutes%20.pdf

[95] Point 2, https://home-affairs.ec.europa.eu/system/files/2022-03/recommendation%20limit%20access%20individuals%20connected%20Russian%20Belarusian%20government%20citizenship%20residence%20EU%20through%20investor%20schemes_en.pdf

[96] See the Proposal amending Regulation (EU) 2018/1806 as regards the revision of the suspension mechanism . See also information on the Strengthened Visa Suspension Mechanism.

[97] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4961

latter in order to preserve the family unit, whether the family relationship came into being before or after the resident's entry.[98]

The bare bones of the EU law includes two types of nuclear family members of lawfully residing TCNs (described as 'sponsors'): First, spouses all ages above the legal age of marriage. And second, (unmarried) children of either the lawfully residing country national or his or her spouse, who are 'minors' under each Member State's national laws.[99]

Children adopted under national law or international law are expressly mentioned as included. There are rules on sponsors who have custody of a child or children who depend on him or her. It is only exceptionally that adult children are included, so the policy generally excludes 18-year olds. Moreover, there may be additional hurdles concerning children over 12 for cases predating the Directive: if national law at the time of the Directive's implementation required over-12s arriving on their own to be subject to an 'integration condition', it was not prevented by this Directive. However, there is now a prohibition for EU Member States to do so subsequently.[100]

It is optional for Member States to include first-degree relative ascendants who are dependent – such as parents or grandparents – on either the side of the lawfully-residing TCN or their spouse (Article 4(2)(a)); and adult unmarried children who are 'objectively unable to provide for their own needs on account of their state of health' (Article 4(2)(b)); unmarried partners and their children (adopted, and unmarried adult children who are objectively unable to provide for their own needs …) (Article 4(3)). And it is up to Member States whether they recognise registered partnerships equally to spouses (Article 4(3)).[101]

Like seasonal workers, ICTs, and students (and Blue Card holders), the application has to be made whilst the family member is still in a non-EU country. Crucially however, Member States are allowed to derogate 'in appropriate circumstances' – a derogation that is not mentioned for the other categories. Once the application is granted the person may need an entry visa depending on nationality and whether they have to apply from abroad. Member States have to facilitate visas according to Article 13 of the Directive.

The eligibility of the family member is dependent on the TCN sponsor meeting certain criteria: the sponsor TCN must have a residence permit issued by a Member State that is at least a year old (the Member State can be stricter on the number of years), and have 'reasonable prospects' (defined nationally) of staying permanently in that Member State.[102] The family relationship has to be proven. And the applicant must have 'proof of resources' for the sponsor and family members covering adequate accommodation, health insurance, and 'sufficient, regular and stable financial support'. If national law requires it, the applicant must also pass integration conditions taking the shapes of language tests and civic knowledge tests subject to a set of EU standards developed by the Luxembourg Court.[103] Member States can also require a certain kind of accommodation, health insurance, and 'stable and regular resources' that are 'sufficient' to show the TCNs would not rely on the national social assistance system.

---

[98] This category of 'legal migrant' can benefit from more generous rules in terms of definition and who is included than the ones examined above. First of all, Member States can be more generous in their rules on who is a 'family member' for the purposes of the Directive. And there may also be more favourable rules concerning the conditions, temporality, and benefits/rights are allowed when set out in: (a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other; and (b) the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987 and the European Convention on the legal status of migrant workers of 24 November 1977. Recital 10, Article 3(5).

[99] Article 4(1)(a); and Article 4(1)(b).

[100] Article 4(1)(d).

[101] The Directive excludes persons who are covered by asylum law rules, in particular: persons pending a decision on their refugee-status or temporary protection or subsidiary protection applications.

[102] Article 3(1); and Article 8.

[103] Carrera, S. (2016), Civic Integration Exams in EU Immigration Law: What Integration is Not in European Law, in H. Verschueren (ed), *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines where they belong*, Intersentia, pp. 129-160; and Carrera S. (2014), Integration of Immigrants in EU Law and Policy: Challenges to Rule of Law, Exceptions to Inclusion, in L. Azoulai and K. de Vries (eds), *Migration and EU Law and Policy*, Oxford University Press.

Once a family member has been admitted to EU territory, they have rights with a temporal restriction. The first residence permit must be for at least a year, and is renewable – generally family members have the right to stay for the duration of lawful residence of the sponsor. Subsequent residence permits are only valid for as long as the residence of the third country national is legal (sponsor) (Article 13(2) and (3)).

Family members are granted a right that the other category of 'legal migrants' considered thus far do not have, and which is generous considering the entry requirements applicable to them. They should be granted a status independent of that of the sponsor, in particular in cases of breakup of marriages and partnerships, and access to education, employment, and vocational training on the same terms as the person with whom they are reunited, under the relevant conditions.

Family members can also acquire a residence permit in their own right by becoming long-term residents after five years of legal residence – if you are a spouse, unmarried partner (although this can be limited by national law if they have broken up), or adult child (which can be interpreted generously by the national law) (Article 15). Member States are supposed to legislate to take into account 'particularly difficult circumstances'. The conditions and duration of the autonomous permit are however decided by national law. And there can be withdrawal or refusal to renew if the sponsor no longer qualifies and the family member does not yet have permanent residence (Article 16(3)). The other rights that are applicable to family members are for education and training, in the same way as applies to the sponsor, and as mentioned above, they are given access to employment – though again the details in the form of conditions and restrictions are set by national law, and can be limited to a maximum of one year (Article 14).

3.4.2. TCN-family members of EU citizens

EU law governing the rights of TCNs who fall under the legal definition of 'family member' of an economically active national of a Member State (EU citizen) is well-established.[104] It is found in primary[105] and secondary law (chiefly the Citizens´ Directive 2004/38), and it is also subject to more generous national law. Questions on the interpretation of their rights have also been subject to thorough and numerous examinations by the Court of Justice of the European Union (CJEU), resulting in significant development of the law in this area.

The legal term 'family members' includes those listed in Article 2(2) and can be described as part of the so-called 'nuclear family'. TCNs who are the husband or wife of the EU citizen benefit from this mobility policy. As do their children under the age of 21 (even if only one of them is the legal parent).[106] Registered or civil partners are also included, as long as the national law of the Member State they are moving to treats their relationship as equivalent to marriage.[107] It is also possible for grandparents of either spouse/partner to be covered by this mobility policy if they are 'dependent'.[108] Although not expressly and clearly given the right, EU Member States are told to 'facilitate entry and residence' for other types of family members as well: (i) unregistered partners, if a durable relationship can be proven; and (ii) if they form part of the household, are 'dependants', or where they are being taken care of by the family because of 'serious health' issues (illness or disability).[109]

In order to be eligible to enter EU territory, to start with, TCN family members must only have a valid passport and an entry visa.[110] However, if they already have a residence card they do not even need an entry visa.[111]

[104] Article 1(a), Article 3, and Recital 5.

[105] Articles 18 and 20 TFEU.

[106] Article 2(2)(c).

[107] Article 2(2)(b), recital 5.

[108] Article 2(2)(d).

[109] Article 3(2).

[110] Articles 4(1) and 5(2). Applied for under Regulation (EC) No 539/2001or national law where appropriate.

[111] Article 5(2), Article 10, recital 8.

In terms of the rights they are entitled to that have a temporal aspect, family members receive a residence card valid for the period of time the EU citizen intends to stay in that Member State, or for five years from the date it was issued if it is expected to be longer than that (Article 11(1)). If EU citizens do not fulfil the conditions to stay in the Member State for longer than three months, they have to leave the Member State with their TCN family members. They will not have to leave if evidence of job seeking and a genuine chance of being employed can be shown. If their intention is to stay for longer than three months, they must submit a residence card application less than three months from the date of arrival. As part of that application, they must meet further admissibility criteria and show that they have a valid passport, documentation to show they are the family member of the EU citizen, a registration certificate for the EU citizen or proof of residence in the host Member State, and a document attesting that the family member is a dependant, has a serious health problem, or is a partner in a durable relationship where relevant.[112] Only temporary absences of six months are allowed for the validity of the residence card not to be affected, and this period can be longer – up to a year – for 'important' reasons like pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.[113]

Residence rights are dependent on the EU citizen generally, but can continue following the death of, or departure of, the EU citizen. It can also continue if the EU citizen and TCN break-up (divorce, annulment, terminated partnership) if certain conditions have been met.[114] The residence right is retained if marriage or partnership lasted at least three years, of which one year was spent in the host Member State; there are custody arrangements in place for children; or there was a domestic violence situation. They must not however become an 'unreasonable burden on the social assistance system'.

Moreover, they are entitled to permanent resident status. After 5 years of 'continuous legal residence' family members may apply for permanent residence.[115] Legally, the five year period is completed as long as the EU citizen (or the TCN family member) satisfied the conditions of being a worker, or self-employed person, or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover. TCNs can leave for up to six months in a year and that is still 'continuous residence'. Once permanent residence has been acquired, TCNs can leave EU territory – but they lose the right if they have left for two consecutive years (Article 16(4)).

If the EU citizen did not complete five continuous years of legal residence, but qualified for permanent residence on the basis of an exemption for incapacitated persons or retirees, the TCN family member still has the right to permanent residence.[116] Where the residence right became independent of the EU citizen, for permanent residence purposes it has to be shown that the family member was a worker or self-employed person or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover (Articles 12-14). The permanent residence card is automatically renewed every ten years (Article 20(1)). And the greater the degree of 'integration', the greater degree of protection against deportation there should be – taking into account how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, 'social and cultural integration' into the host Member State, and the extent of his/her links with the country of origin (recital 24, Article 28(1)).

In terms of intra-EU mobility, these TCNs benefit from the right to free movement that is granted to the national of a Member State (EU citizen) seeking work, or working and living, in another Member State under Article 21 of the TFEU and Article 45(2) of the EU Charter. If the EU citizen can lawfully stay only for three months, Article 6 governs the family member's right to stay, and Article 7(2) governs

[112] Article 10.

[113] Article 11(2).

[114] Recital 15, Article 12 to 14.

[115] Article 1(b), Article 16(2), Article 18.

[116] Article 17(1) and (3), Article 18.

longer periods. Another crucial and distinguishing feature for this type of 'TCN legal migrant' is that they have the right to work (including as a self-employed person) in that Member State in line with Article 23.

Finally, these TCN family members have the right not to be discriminated against and equal treatment with nationals of the Member State in areas covered by the Treaty and secondary law.[117] This is with an exception for the first three months of residence, when there is no obligation on the Member State to provide social assistance. Crucially, the rules covering the family reunification of third country family members of EU citizens who have not exercised intra-EU mobility or 'freedom of movement' falls within the scope of national migration laws of EU Member States, which has been said to lead to more stringent conditions and *reverse discrimination* for non-moving EU citizens and their families. As underlined in the above-mentioned European Commission Fitness Check on the Legal Migration *acquis*, the resulting picture is one where 'Member States may treat their own 'non-mobile' nationals less favourably than the 'mobile' ones or TCNs covered by the EU Family Reunification Directive', which results in reverse discrimination.[118]

3.5. Tourism

3.5.1. General overview

Tourism policy is significant because it connects with the EU's objectives in line with how legal migration policy strongly favours migration that provides an economic benefit (such as for highly skilled workers, and financially secure students), albeit in a different way - in the form of the purchasing power that tourists bring to the consumer market, and the employment opportunities it generates.

This is one of the most significant policies in terms of numbers of TCNs affected: there were around 596 million tourists in 2022, making Europe the region with the highest number of international tourist arrivals worldwide that year.[119]

As highlighted in previous research, EU policy on tourism frames the conversation in terms of 'mobility' instead of 'migration'.[120] The EU's approach is from one perspective seen through the European Commission's Communications on the type of tourism the EU seeks to attract.[121] It is intertwined with the Schengen-area rules.

To provide some background, ex Article 61 TEC set out that an area in which persons may move freely should be created – but that there should be rules to regulate *external* border controls, asylum, and immigration. The former Article 62(2) TEC set out rules requiring non-EU nationals to have a visa in order to cross the EU's external borders into the EU for stays of under three months. The secondary law that now gives expression to the primary law in this field includes the Visa Code Regulation (EC) 810/2009, Schengen Borders Code Regulation (EC) 2016/399, Visa List Regulation 2018/1806,[122] the

[117] Article 24, and Recital 20.

118 Page 37 of the Fitness Check. Refer to H. Kroeze (2018), Distinguishing Between Use and Abuse of EU Free Movement Law: Evaluating Use of the "Europe-route" for Family Reunification to Overcome Reverse Discrimination, *European Papers*, Vol. 3, No 3, pp. 1209-1243.

[119] https://www.statista.com/statistics/186743/international-tourist-arrivals-worldwide-by-region-since-2010/

[120] On the relevance of the EU framing of certain human mobility as 'mobility' (e.g, rich tourists) and not 'migration', and the problems inherent to that distinction from discrimination view point, refer to Marco Stefan, Chapter 13 in the Legal Pathways CEPS Book (https://cdn.ceps.eu/wp-content/uploads/2017/09/PathwaysLegalMigration_0.pdf). Stefan argues that 'Visa facilitation is granted in a highly discretionary way, and only targets tourists with high purchasing power and other predefined categories of legitimate travellers (i.e. for business and intra-corporate transfers) who are economically valuable for the EU. Very little or no consideration is given to the individual motivations for travelling to the EU.'

[121] In 2006, the European Commission adopted a Communication titled 'A renewed EU tourism policy: towards a stronger partnership for European tourism' (COM(2006) 134 final). It was followed in October 2007 by another Communication, titled 'Agenda for a sustainable and competitive European tourism' (COM(2007) 621 final). 'Europe, the world's No 1 tourist destination — a new political framework for tourism in Europe' (COM(2010) 352 final) was adopted by the European Commission in June 2010.

[122] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement : https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02018R1806-20230515

Visa Suspension Mechanism, and ETIAS Regulation (EU) 2018/1240, to which visa-exempt travellers visiting the Schengen area have been subject since the end of 2022.

3.5.2. A limited policy

The EU's tourism policy is also characterised by a fragmentation of the rules due to split-competence between the EU and EU Member States over substantive rules on the temporal and territorial aspects, and due to a complex design for the personal scope. There are two layers of EU and national substantive rules that overlap, apply in parallel, or where one set is given priority to the other.

It only partially covers rules on temporality – namely those for short-stay visas for tourism that are granted for up to about three months (90 days) in an almost six-month period (180 days). After that, it is Member States who set the rules for long-stay visas exceeding 90 days.

This also occurs with regard to territorial reach. EU visa rules to enter the Schengen area do not apply to all the Member States, but do extend to some non-EU Member States. There are 22 Member States that make up the Schengen area, as well as Iceland, Liechtenstein, Norway (European Economic Area countries), and Switzerland.[123]

The fragmentation also occurs with regard to personal scope.[124] The existence of visa waiver agreements (with about 60 non-EU countries) mean that it is complex to rationally understand which TCNs must obtain a visa and which are exempt, especially as this list is dynamic and subject to change. The visa requirements and waiver agreements also differ according to the form of travel – there are different visa rules carved out for those transiting EU territory.

3.5.3. Nationality-specific rules

The adoption of the 2018 Visa Code has meant the simplification and streamlining of rules. Under the 2018 Visa Code Regulation, a general short-stay visa is required to cross into external borders (Article 3). They are issued by one of the Schengen States. There is no need to acquire a visa if their non-EU country has a visa waiver agreement with the EU (or a visa waiver agreement with the Member State to which they wish to travel). The list of who is exempt (so-called White List) or targeted (under the Black List) can be found in the Visa List Regulation 2018/1806.

Nationals from countries who must apply for and have a short-stay visa to cross the external EU borders and enter a Member State must follow the procedures and meet the conditions set out in the 2018 Visa Code Regulation. Applicants must have a valid travel document, a valid visa, state the purpose of the visit, show sufficient means for the stay, provide supporting documentation, and show an intention to leave the Schengen area before the visa expires.[125]A case-by-case assessment is made based on criteria as broad and general as: 'irregular immigration', public policy and security, economic benefit, in particular in terms of tourism and foreign trade, and 'the Union's external relations with the relevant third countries', including, in particular, considerations of human rights and fundamental freedoms, as well as the implications of regional coherence and reciprocity. However, little consideration is given on how this visa policy co-creates the very irregularity of cross-border human mobility which it seeks to address, in particular from countries who are major sources of refugees and asylum seekers.

The 2016 Schengen Borders Code (SBC) lays down rules governing border control of persons crossing the external borders of the Member States of the EU. As it abolishes internal border controls to allow

[123] Austria, Belgium, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Spain (special rules apply for Ceuta and Melilla – Article 41, Schengen Borders Code), Sweden, Switzerland.

[124] EU tourism policy does not however affect the rights of TCNs who are the family members (as legally defined) of EU citizens exercising the right to free movement under Article 21 TFEU and the Citizens' Directive 2004/38 (Article 3, Schengen Borders Code), and the 2009 Visa List Regulation does not apply to them or those who have 'equivalent' rights – regulated by a bilateral agreement between a Member State and a non-EU country. Nor does it affect the rights of refugees and persons requesting international protection (Article 3, Schengen Borders Code).

[125] Article 6 and Annex I(c), Schengen Borders Code.

the free movement of people within the Schengen area, the Schengen visa means tourists entering the EU can benefit from that intra-EU mobility or 'freedom of movement'. The 2018 Visa List Regulation specifies that this includes third-country nationals from 105 non-EU countries listed in its Annex I (Article 3 cross-refers to it).[126] Nationals of these countries can enter the Schengen-*acquis* applying countries for short stays of up to 90 days in any 180-day period (around 3 months in an almost six-month period) without a visa. Visas for visits for a longer period are governed by national law. Temporality depends on the reason for which the visa was issued. It also depends on whether the visa applicant has been granted a single-, double-, or multi-entry visa (where the visa is valid for a maximum of six months allowing stays of 90 days – but this is punctuated as it must be per entry). Crucially, it does not apply to TCNs from wealthy countries such as the US, Canada, Australia, New Zealand, Japan, or South Korea.

The EU has Visa Waiver Agreements with Antigua and Barbuda, Barbados, Mauritius, Bahamas, Seychelles, Saint Kitts and Nevis, Brazil, Colombia, Solomon Islands, Marshall Islands, Tuvalu, Kiribati, Micronesia, Peru, Palau, Tonga, Grenada, Timor-Leste, Trinidad and Tobago, Saint Lucia, Dominica, Vanuatu, Samoa, Saint Vincent and the Grenadines, or the United Arab Emirates. Exceptions are possible under Article 4 and listed in Annex II: EU countries can grant exceptions to the visa requirement for certain categories of person. For example holders of diplomatic or service passports, air and sea crews, school groups (the national law has the option to exempt them under Article 6), holders of local traffic permits, and exemptions can be made for recognised refugees and stateless persons who live in the EU and have a travel document issued by the country of residence. The rules and procedures applying to TCNs wishing to obtain a Schengen visa in Asian countries including China, the Philippines, and Thailand, reveal that entry into the EU is facilitated only for highly specific categories of individuals. In particular, direct or indirect visa facilitations mainly target business people, intra-corporate transferees, and tourists with 'high purchasing power'.[127] In this manner, the EU is increasingly misusing its visa policy as a 'bargaining chip' in its broader foreign affairs relations[128] and as a constitutive part of its readmission policy.[129]

[126] Afghanistan, Armenia, Angola, Azerbaijan, Bangladesh, Burkina Faso, Bahrain, Burundi, Benin, Bolivia, Bhutan, Botswana, Belarus, Belize, Democratic Republic of the Congo, Central African Republic, Congo, Côte d'Ivoire, Cameroon, China, Cuba, Cape Verde, Djibouti, Dominican Republic, Algeria, Ecuador, Egypt, Eritrea, Eswatini, Ethiopia, Fiji, Gabon, Ghana, The Gambia, Guinea, Equatorial Guinea, Guinea-Bissau, Guyana, Haiti, Indonesia, India, Iraq, Iran, Jamaica, Jordan, Kenya, Kyrgyzstan, Cambodia, Comoros, North Korea, Kuwait, Kazakhstan, Laos, Lebanon, Sri Lanka, Liberia, Lesotho, Libya, Morocco, Madagascar, Mali, Myanmar/Burma, Mongolia, Mauritania, Maldives, Malawi, Mozambique, Namibia, Niger, Nigeria, Nepal, Oman, Papua New Guinea, Philippines, Pakistan, Qatar, Russia, Rwanda, Saudi Arabia, Sudan, Sierra Leone, Senegal, Somalia, Suriname, South Sudan, Sao Tome and Principe, Syria, Chad, Togo, Thailand, Tajikstan, Turkmenistan, Tunisia, Turkey, Tanzania, Uganda, Uzbekistan, Vietnam, Yemen, South Africa, Zambia, Zimbabwe.

[127] https://cordis.europa.eu/project/id/612921/reporting

[128] For a detailed examination of the building blocks of EU visa policy refer to S. Peers, E. Guild and J. Tomkin (2012), *EU Immigration and Asylum Law (Text and Commentary)*: Second Revised Edition, Martinus Nijhoff Publishers, Volume 1: Visas and Border Controls. According to these authors, 'the EU's demands on third States as a condition for exempting them from visa requirements are clearly disproportionate…to insist that they readmit their own citizens in the event of breach of EU or national immigration law,…[and] including the control or readmission of non-nationals of the relevant State, cannot be justified', p. 236.

[129] See Regulation 2019/1155 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code) of 19 June 2019, which in Recital 13 and Article 25.a (Cooperation on Readmission), which conditions visas on the basis of assessments as to whether a relevant country is cooperating with the EU on expulsions.

4. Change of status and EU migration policy

This Section examines the extent to which EU policy, and its corresponding pieces of legislation studied in the previous Section, envisage possibilities for TCNs to change statuses or transition from one to another, so as to take into consideration their changing life experiences and circumstances, and the purposes for staying and living in the EU.

4.1. EU Blue Card holders

EU provisions allowing aspiring Blue Card holders experiencing changes in situation and status exist for Blue Card holders. Blue Card holders are entitled to permanent residence under the Long Term Residents' Directive 2003/109. But the Blue Card Directive goes further, as they can even accumulate residence in different EU Member States to apply for an EC long-term residence permit. This advantage is granted precisely to enable 'easier access to EU long-term resident status', in keeping with the European Commission's goal to 'to attract highly qualified workers from third countries and to encourage their continued stay in the Union, while enabling mobility within the Union and circular migration'.[130] The conditions are that two years of that time must have been spent in the first Member State. The total five years must also be justified by having held other kinds of EU legal migrant statuses. This shows that Blue Card holders could change to another status: national residence permit holder, researcher, or student under the 2016 Researcher and Student Directive, or international protection beneficiary (as an overlapping status). Another advantage is that Blue Card holders are allowed to interrupt that five year period: they can leave the EU if they do so for less than a year, and have not been away for more than 1.5 years in the 5 year period. Moreover, once they have long-term resident status they can leave the EU for up to two consecutive years without losing the status.[131]

Unlike other TCN categories governed by EU Directives (seasonal workers and ICTs), EU provisions also exist to potentially allow Blue Card holders to change to the status of 'unemployed'. But this change of status once the Blue Card period has ended depends on the discretion of the Member State. It 'may' withdraw or refuse to renew a Blue Card if the person is residing for purposes other than Blue Card purposes (Article 18(2)(d)). Technically, they no longer have the right to stay on EU territory (Article 9(7)). But a specific EU law provision gives Member States the discretion to permit a change of status to that of 'unemployed' for up to a year (or longer if they wish, Article 8(5)) if that has occurred due to illness, disability, or parental leave (Article 8(4)). And there is also a derogation, where 'unemployment status' was for less than three months and the Blue Card was held for under 2 years, or if unemployment was for less than 6 months and the Blue Card was held for over 2 years (Article 8(5)). However, if the person is seeking employment in a highly-qualified, niche sector where demand is low/rare to find, and has not been able to find employment within that three or six month period, they may fall into a situation of irregularity.

There is a double protection for them in this regard, as the recently amended Single Permit Directive also provides them with the right to remain on EU territory for a three month period in the event of loss of unemployment. And in line with the principle of preference for EU citizens (Article 15(9)), Blue Card holders are also allowed to have an additional status as self-employed person subject to any national limitations – if it is carried out simultaneously to the highly qualified employment they entered the EU for (Article 15(5)), and is subsidiary to that work, and engage in other 'professional activities as long as that is in line with national law (Article 15(7)). Moreover, they do not have to leave the EU during a renewal process if their Blue Card has expired (Article 11(5).

Change of status between that of Blue Card holder and researcher seems to be expressly allowed. Researchers are treated as being separately regulated by the Researchers Directive. But once they are legally residing, they can apply for a Blue Card. And vice versa, a Blue Card holder can apply to reside as a researcher once already legally residing (recital 19). Overlap with the status of 'beneficiary of

[130] Recital 51 of the EU Blue Card Directive.

[131] Article 18.

international protection' is also allowed – but to a limited extent (recital 49). Those beneficiaries only benefit from the Directive if they live in a different Member State to the one that granted that protection (Recital 16). This is a practical hurdle, and does not reflect behaviour where the international protection beneficiary may wish to stay in the same Member State in which they have already begun to settle. Moreover, if there is a misunderstanding of expulsion rules where there is overlap of these statuses, the person may end up in a situation of irregularity.

4.2. Intra-corporate transferees

There is a key challenge of interpretation and legal certainty here as the ICT Directive contains some ambiguities when it comes to change of status. It *appears* that change of status is *generally* not allowed for by a specific provision: one of the eligibility conditions is that ICTs must have a work contract proving that the person will go back to the original employer (Article 5(1)(c)(iv)) – i.e. that they must not have any intentions of 'overstaying' in the EU. And, if the conditions are no longer met – for example if there is a change of status to be 'unemployed', which means the person no longer has an employment contract with the employer-host-entity – then authorisation can be withdrawn or not renewed (Article 8(5)(a)). Moreover, it is stated that they are not authorised to reside for other purposes, and if they do, they can have the authorisation withdrawn or renewal refused (Article 8(1)(b)). They are also *seemingly* required not to overstay and to leave once the maximum period of stay allowed - either 1 year or 3 years depending on what kind of ICT they are - has been reached according to Article 12(1). But this is unclear and does not seem like an absolute requirement, because an ICT is allowed to remain if a residence permit is issued for another EU or national law reason – the EU reasons are not specified further.[132]

Indeed, despite it not being expressly referred to in the ICT Directive, ICTs are allowed to change status to that of Blue Card holder – there is a specific provision noting that ICTs can apply for Blue Card holder-status, but it is found in the Blue Card Directive[133] and not the ICT Directive. An ICT who has been in a Member State for the maximum of three years might reapply to re-enter the EU again soon as an ICT, and the Member State might not have set a long period of required absence between ICT applications.

Factually, they would therefore have accumulated a period of residence of over five years. The EU law does not legally entitle ICTs who have done so to permanent resident status under the EC Long-Term Residents Directive. An interview carried out for the purposes of this Report revealed that ICTs are not mentioned expressly but were intended not to be in the scope of the Long-Term Residents Directive, based on the (original) intention of not settling on a long-term basis. But crucially, if their status changed to that of Blue Card holder, that would change.[134]

However, change of statuses to or overlapping of statuses with a researcher (in contrast to Blue Card holders), posted-worker, self-employed person, temporary worker, full-time student, and short-term supervised trainee are expressly excluded, as those categories are said not to be covered by the ICT Directive.[135] The Students and Researchers Directive also expressly states that it does not apply to trainee-ICTs (Article 2(2)(f)) – though why it does not expressly mention the other two types of ICTs is unclear.

Unlike Blue Card holders, there is no change of status provision to legally allow them to become unemployed, for example in the event of dismissal, whether unfair or constructive dismissal – which may well occur in several circumstances, such as a result of sexual or other workplace harassment.

Finally, it is not inconceivable that an ICT who intends or does stay in a Member State forms a new family relationship. But the Directive is silent on whether the ICT can legally change status if they factually become the family member of a legally residing TCN or an EU citizen, and their status is not

[132] Article 12(1), and Recital 17.

[133] Article 3(2)(e) and recital 20 of the Blue Card Directive.

[134] Interview held on 20 December 2023 with a representative of DG HOME.

[135] Article 2(2).

expressly mentioned in the Family Reunification Directive or the Citizens Directive. This is also a key issue, as those ICTs will not know their legal rights. And if it is not permissible to change to a family member status, they will fall into a situation of irregularity.

4.3. Seasonal workers

There are no provisions in the Seasonal Workers Directive that allow for change of status to another status. According to an interview held for the purpose of this Report, the Council of the EU did not accept this during the negotiations of the Blue Card Directive on the grounds that 'different statuses should not be mixed up'.[136] There are provisions that enable one extension of their stay with the same employer (Article 15(1)) or a different employer (Article 15(3), or to stay 'more than once' (Article 15(2)), but only if the 9-month period within a 12-month period is not exceeded.[137] However, this is not a real 'change of status' from that of seasonal worker to something else, but rather a continuation of the EU seasonal worker status. Instead, there are provisions that serve to the opposite effect.

Articles 1(1), 2(1), and 3(b) reemphasise that the rights are granted on the condition that the person in question will be a seasonal worker carrying out work temporarily, while maintaining their legal residence in a non-EU country. Articles 5(5)(b) and 6(5) support this by essentially preventing 'overstaying' by making the granting of the application dependent on there being an 'intention to leave the territory' when the seasonal worker-authorisation expires. Article 14(1) states that once the seasonal work is over, the person must 'leave the territory'. In fact, if change of status occurs, the seasonal worker status is lost (Article 9(1)(b) – if 'the holder is staying for purposes other than those for which he or she was authorised to stay', the authorisation is withdrawn.[138]

Other EU legal migration Directives complete this picture: seasonal workers are not allowed to be students (who also only obtain and maintain that status if they are full-time employees, with any work carried out having to be ancillary); and they may not qualify under the stringent admission conditions set by the ICT Directive (which targets a very specific kind of employee of a multi-national) and the Blue Card Directive (which requires the person not only to be highly educated and going into a highly-skilled profession, but also to have a certain salary threshold). If Article 9(1)(b) is interpreted strictly, then it also appears to be the case that they cannot remain in the EU on the basis that they are the family member of a lawfully residing TCN (who in any event are required to be abroad at the time of the application) under the Family Reunification Directive. They are expressly stated not to be covered by the Directive if they become the family member of an EU citizen under the Citizens Directive (Article 2(3)).

In line with the goal to ensure that this type of TCN only stays temporarily, the limited set of rights referred to above is also used as a disincentive to/the impossibility of staying or integrating. Seasonal workers are not given the right to regularise and make permanent their stay, to stay on a Member State's territory for more than nine months in a year. This prevents seasonal workers from obtaining the right to permanent residence as established in the Long-Term Residents Directive, which Blue Card holders are expressly entitled to (Article 18 BCD). Nor are their family members entitled to join them. And they do not have any right to intra-EU mobility. They are allowed to travel to other Member States that fully apply the Schengen acquis for up to three months within a six-month period for tourism purposes, in line with the Schengen Borders Code and Schengen implementing agreement. But they are not allowed

[136] Interview held on 19 December 2023 with a European Commission representative of DG EMPL. Furthermore, on how the equal treatment provisions in the original Commission proposal where restricted during negotiations by EU Member States, refer to M.H. Zoeteweij-Turhan (2017), The Seasonal Workers Directive: ' . . . but some are more equal than others', *European Labour Law Journal*, Vol. 8(1), pp. 28–44.

[137] A 'softener' of that inflexible approach is that, if applying again – because they have been forced to return to the country of origin and they have to do so, they can benefit from a facilitated admission procedure, as long as they have 'behaved' well in the past and 'followed all the rules' (also stated in the recitals – see recital 34).

[138] Despite this general clause, the Directive emphasises that Member States are especially allowed to withdraw authorisation if there is a change of status to that of applicant for international protection, or in any other way under national and international law and practice (Article 9(4)). This would likely result in irregularity if the person loses her/his status as seasonal worker and her international protection application fails.

to work. And they will be penalised for entering the EU via a legal/labour migration route instead of the asylum route, and applying for international protection once in the EU, by having the right to work removed.

The EU law for seasonal workers does not therefore consider that a seasonal worker may become a family member factually, that they may become pregnant, may wish to study or professionally upskill, or may face constructive dismissal (unless this is covered by 'labour exploitation') that leads them to become unemployed, and that they do not have any social security, tax, housing, healthcare, or other welfare rights. Nor does it consider that seasonal workers are denied legal means to reflect a factual inclusion that has occurred for many months (maybe nine months per year) over consecutive years, and their impact on their private life.[139] The temporariness is not actually 'temporary' *strictu sensu* given that a seasonal worker can return several years in a row. Therefore, if a seasonal worker changes status factually, for example in the ways referred to above, or in other ways, the fact that the status is lost means that they become irregular migrants.

4.4. Students

The conditions for students to be eligible under EU law to remain in a Member State are that they must be accepted to a higher education institution for full-time study that will result in a recognised higher education qualification, must have health insurance, and must have sufficient resources for the purpose of the stay. Generally, there is no right to remain once student status has ended, and the person is required to leave (Article 11, Article 20(1)(a)) or would technically be 'overstaying'. Change of status is not possible – students are strictly stated to only be allowed to reside for purposes of studying (Article 20(2)(f)) – if they do otherwise they will lose the status (Article 21(1)(d)). Whilst employment is acknowledged as possible, there are quite difficult obstacles to overcome: first, it can be prevented if the post can be filled by a national of the Member State, other EU citizen, or another lawfully residing third country national (Article 20(3)); second, it must be ancillary to the full-time studies (Article 24), and third the Member State may withdraw the student authorisation if any employment has an impact on studies (Article 21(2)(f)).

Change of status to that of 'jobseeker' or setting up as self-employed *once the student period is over* is however possible for at least nine months (Article 25(1)). Conditions apply: Member States have the discretion to set a minimum degree level, and after three months might have to prove (if the Member State wants to check) that they have a 'genuine change of being engaged or of launching a business'. EU Member States can additionally require that business corresponds to the level of studies which have been achieved. Change of status is expressly not allowed for other statuses however, as the Directive expressly states it does not apply to (under Article 2(2)) those seeking international protection (in contrast to Blue Card holders); EU citizen-family members and those who have equivalent EU citizen rights; long-term residents; trainee-employee ICTs (Article 2(2)(f)); and Blue Card holders. Change to permanent residence status is not mentioned in this Directive – as mentioned above the Long-Term Residents Directive is excluded from its scope. But the factual number of years a student has resided can count for half the period of time to calculate the legal period. Students might not be able to complete their studies due to illness, disability, parental leave, problems of funding. This individual behaviour is not taken into account by EU law, and would therefore lead such persons falling into irregularity.

4.5. Family members

Third country family members of legally residing TCNs. Family members of legally residing TCNs do not have a right to change status. If the person no longer lives in a real marital or family relationship, or a new relationship has been formed with someone else that can mean loss of family member status (Article 16, Family Reunification Directive). And they will lose the right based on family reunification

[139] According to an interview conducted with a European Commission representative from DG Home Affairs this is 'based on temporariness based on intention for the stay. And that is considered from the beginning of the migration procedure. Does not take into account evolving change of status situations. For people who are in an irregular situation and who cannot get permanent residence, they could try to remain under private life reasons if they can prove they are integrated.'

if the sponsor loses their status/legal residence. This changes after five years if the family member has acquired permanent residence, which they can do in their own right, under the Long-Term Residents Directive (Article 15(1)). But five years is a long period of time, and it is conceivable that the sponsors' situation might change, or that there is a breakdown in the family relationship. However, EU law does not protect against this, which may lead a number of people who have not yet spent five years in the EU to fall into irregularity.

Third country family members of Blue Card holders. These family members have more favourable conditions than those in the Family Reunification Directive in light of Article 17 of the Blue Card Directive. They are allowed to have an overlap in status to be employed or self-employed. The Member States cannot put a time limit on that search (Article 17(6) of the Blue Card Directive). On change to permanent residence, if the family member of a Blue Card holder lives in different Member States, that residence can be counted together to lead up to an autonomous residence permit subject to a potential condition of the Member State to live in the place they apply for two legal and continuous years (Article 17(7) of the Blue Card Directive). But family members who have the right to free movement under EU law are not covered by these rules (Article 17(8) of the Blue Card Directive).

TCNs family members of EU Citizens. Family members of EU citizens also have more favourable rights.[140] They must be a family member as defined by the Directive, and the main persons qualifying are spouses and children – but also dependant relatives in the ascending line – such as parents. They need only apply for a residence permit after three months of residence and must show proof of relationship. Change of status when the relationship with the EU citizen breaks down is possible. They can still reside on EU territory following the death of, or departure of, the EU citizen (children can stay with the parent who remains as long as they are in school). It can also continue if the EU citizen and TCN break-up (divorce, annulment, terminated partnership) if certain conditions have been met.[141] The residence right is retained if marriage or partnership lasted at least three years, of which one year was spent in the host Member State; there are custody arrangements in place for children; or there was a domestic violence situation. They must not however become an 'unreasonable burden on the social assistance system'. Overlap of status to be employed or self-employed is allowed.[142] And transition to permanent residence is allowed.[143]

4.6. Tourism

To be eligible for a tourist visa, the person must be travelling to the Member State for tourism or family visit-purposes for only up to 90 days, must show sufficient means to fund the stay and must show intention to leave before the visa expires. For tourists, when the stipulated period is over, the rights to enter, stay, and travel end. However, the Visa Code foresees the possibility for Member States to extend visas to visa holders who are already present on their territory and who are unable to leave before the expiry of his/her visa for reasons of *force majeure*, humanitarian reasons, or serious personal reasons under Article 33 of the Visa Code.[144]

It is however uncertain the exact ways in which EU Member States authorities interpret and apply these exceptions in practice, which creates a high level of legal uncertainty for TCNs who may qualify in

[140] One European Commission representative interviewed for the purpose of this Report underlined that: 'Right comes from the Treaties, difference in treatment is because the scope and objectives are different. Not comparable in our view. Family reunification under national law, don't have much of a say. Outside our scope.'

[141] Recital 15, and Articles 12 to 14 of the Citizens Directive.

[142] Article 23 of the Citizens Directive.

[143] Article 1(b), Article 16(2), 18 of the 2004 Citizens Directive.

[144] The Code also foresees that a Schengen visa may be extended 'if the visa holder provides proof of serious personal reasons justifying the extension of the period of validity or the duration of stay'.

these situations. According to the EU Visa Handbook,[145] EU Member States have an obligation to extend Schengen visas in cases of force majeure, such as for example 'last minute change of flight schedule by airline (e.g. due to weather conditions, strike)', or for humanitarian reasons, such as for instance in cases of 'sudden serious illness of the person concerned (meaning that the person is unable to travel) or sudden serious illness or death of a close relative living in a Member State'. EU Member States have the faculty, and therefore are under no legal obligation, to extend the Schengen visa when the visa holder provides 'proof of serious personal reasons justifying the extension of the period'. Here the Handbook gives an example of personal reasons not justifying the extension of a visa 'a Bolivian national has travelled to Sweden to participate in a family event. At this event he meets an old friend and would like to prolong his stay for another two weeks.'[146]

[145] European Commission, Annex to the Commission Implementing Decision amending Commission Decision C(2010) 1620 final as regards the replacement of the Handbook for the processing of visa applications and the modification of issued visas (Visa Code Handbook I), C(2020) 395 final, 28.1.2020, Brussels, page 127.

[146] The Handbook provides as an example of justifiable personal circumstances the following situation: 'an Angolan businessperson has travelled to Italy to negotiate a contract with an Italian company and to visit several production sites in Italy. Negotiations take longer than expected and the Angolan national has to stay one week longer than intended', page 128.

5. Cross-cutting findings

5.1. A predominantly utilitarian and fragmented approach disregarding rights and the principles of transparency and legal certainty

There have been significant legislative, decision-making, and fundamental rights developments in the EU allowing for the strengthening of TCNs rights – including some limited consideration of the changing decisions and circumstances of aspiring TCNs. But the previous Sections of this Report show that this is qualified by a predominant focus on the EU and Member States 'economic and labour-related' self-interests. This has been done in a manner that deprioritises the proper attainment of the EU's fair treatment paradigm, because the rights of TCNs are advanced through a structurally fragmented and highly complex system, namely in a qualified and hierarchical way, with those labelled as 'highly-skilled and talented' people at the top of the food chain. TCNs rights are more like an additional, supplementary – yet not a self-standing priority or objective to the Commission's utilitarian agenda. Taking into account changing situations and statuses is not a main political priority of EU policy.

As a result, there is a mismatch between EU migration policy frameworks and 'the actual features of people's cross-border movements, their changing life courses and motivations'.[147] This policy disregards overarching rights and standards, and the need for legal certainty to ensure the quality of EU legislation[148] that may result in TCNs falling into irregularity or undocumented status.

The selectivity of the EU's highly tailored labour migration policy in scope amounts to a bottleneck because, unless national law provides the legal plug where there are a lack of legal migration channels, it blocks a wide number of would-be TCN workers from entering and working in the EU. This may drive them to find other routes and venues which are not entirely designed for their specific 'migration purpose', and increase the number of irregular migrants in the EU. Moreover, it causes fragmentation, overlapping, and complexity in the EU's legal frameworks, which is to the detriment to TCNs who cannot easily understand the relevant legal standards and their rights, but also to the EU's objectives, raising questions of the policy's effectiveness, and with that lack of transparency and accessibility, 'the sectoral approach in EU labour migration policy' also goes against the principle of legal certainty.[149]

By way of an example of the fragmented and hierarchical nature of EU legal migration and policy, a summary comparison of the difference between TCN workers' rights is set out. Concerning eligibility conditions, whilst all three main categories of TCN workers covered by EU policy must be in employment or have secured employment to be eligible to work in the EU, seasonal workers and ICTs are expressly prohibited from making an application when they are already on EU territory (see Article 2 of the corresponding Directives examined in *Section 3* above). And seasonal workers in particular are not eligible if they have legal residence in the EU. Even when it comes to renewal of status, seasonal workers must leave EU territory when they have been in the EU for nine months, irrespective of whether they and the employer wish to continue the working relationship, and are forced to make a new application from abroad.

Not only must TCN workers be in employment or have secured employment, there are temporal and other conditions attached – but these are different for each category. Seasonal workers must have an agreed or detailed work contract that is valid for a minimum period of five months and maximum period of nine months, which is quite a specific condition. ICTs must have worked a minimum of three months with their employer (known as the host entity) and up to a year in the position they are being transferred from before they are eligible, and must also show they will go back to work for that same employer. And Blue Card holders also have additional employment criteria to meet: that the job offer or work contract is for at least six months, and that they are being paid above a certain salary threshold.

[147] S. Carrera, A. Geddes, E. Guild and M. Stefan (2017), p. 183.

[148] See Chapter 9 of S. Carrera, A. Geddes, E. Guild and M. Stefan (2017), on the high degree of confusion caused by the paradoxes of the ICT Directive compared to previous national schemes, leading to companies trying to 'legitimately' avoid its application.

[149] K. Eisele (2013), p. 15.

And all three types of TCN worker, if they are going to work in a regulated profession, must show evidence they meet the national law conditions to do so. All three types of workers must also have health insurance, though the rules for seasonal workers are stricter – they must also show that they have 'sufficient funds' not to be a burden on the welfare systems of the Member State in question, and 'adequate' housing.

A marked difference between the three types of TCN workers once they have successfully met the eligibility criteria is how long they are allowed to stay on EU territory to work under one application – a maximum of nine months on an annual basis (seasonal workers), three consecutive years, which is renewable (ICTs except for trainees for whom it is one year), or four consecutive years (which is also renewable). As for intra-mobility rights for under 90 days, all three categories are entitled to move around the Member States applying the Schengen rules in full – but ICTs have a right to work whilst doing so, and Blue Card holders are allowed to carry out business activities, where seasonal workers cannot.

Concerning intra-mobility rights for over 90 days, seasonal workers are simply not allowed to move to another Member State. ICTs, on the other hand, have the benefit of such right if they wish to work in another Member State, though are technically required to leave EU territory to make that application. This is not the case for Blue Card holders who are already resident or legally present on EU territory on the other hand. They are not encouraged by the framing of the legislative text to leave or make a new application from outside the EU. They are not expressly told they cannot, or penalised for doing so. This means that in principle, the Blue Card applicant could have entered an EU Member State as a tourist, attended interviews, secured a job offer, made a Blue Card application, and then changed status to become an EU Blue Card holder. Crucially, they also do not have to leave the Member State they are in if they wish to work in another Member State.

5.2. Differing rights depending on status, class and origin: discrimination

As shown by *section 5.1.* and the mapping of the legislative framework, current EU policy allows and encourages EU Member States to illegitimately differentiate – and therefore discriminate – on labour standards and crucial human rights on the basis of skills, specific sector of employment, and expected length of regular stay. The enhanced set of rights for those workers who qualify as 'highly qualified' or desired TCNs 'raises questions as regards the general principle of non-discrimination' and is an approach that is profit-oriented in that the 'economic interests' of the state dictate 'special employment schemes with a facilitated administrative system for entry and residence only for the kind of labour force categorised as 'highly skilled', 'profitable' or 'talented''.[150]

The EU policy and law as demonstrated by the strict conditions of entry, stay, and rights under the Seasonal Workers' Directive in particular reveals a few key bottlenecks. The fair treatment paradigm is not respected as a result of how the category is narrowly defined, which disadvantages persons who have families, and vulnerable categories who are able and willing to work.[151] Such 'minimal or non-existent application of rights would contribute to ensuring that migrant labour remains cheap, docile, temporary, and easily removable when not needed', which is not a rights-based approach that is grounded in universal values of equal treatment and non-discrimination.[152] And the clear administrative burden for relatively short periods of migration may also actually serve as a deterrent, which is not in line with international migration standards. The family members of seasonal workers are again, simply not allowed to join them in the EU (expressly spelt out in recital 46), even if the seasonal worker works in a Member State for nine months a year, several years in a row.

These EU rules do not take into account the reality on the ground that a seasonal worker is not and cannot be prevented from factually forming a relationship or having children in the Member State or

[150] See K. Eisele (2013), p. 17.

[151] S. Carrera, A. Geddes, E. Guild and M. Stefan (2017), p. 58.

[152] H. Verschueren (2016), 'Employment and social security rights of third-country labour migrants under EU law: an incomplete patchwork of legal protection', *European journal of migration and law*, 4, pp. 373-408.

doing so in the home country. Moreover, the rules do not consider that a person can still factually integrate in a Member State. For example, consider a person who has worked in a Member State for nine consecutive months, three years in a row, and has paid taxes to the Member State for that duration of time, but never reaped the corresponding benefits. Having to be abroad when making the application is also a barrier to social integration. And the bar against legal residence and integration lowers the bargaining power of seasonal workers, which increases the risk of labour exploitation of this kind of TCN worker. Moreover, the bar to international protection applications does not consider that war might break out in the country of origin whilst seasonal work is being carried out, and this policy does not take into account that almost 40% are overqualified for the job they do,[153] and that the restrictive rules set out in this Directive are likely to be contributing to that problem.[154]

In contrast, ICTs are allowed to be joined by their family members (as defined by the Family Reunification Directive), and they are granted access to the labour market, which should be facilitated (according to recital 40). Indeed, there is a difference in how human rights (including the right to family life) and employment rights apply to each of the three main categories of TCN worker, which ought to be considered in light of intertwined international standards and commitments, as well as EU and ECHR law that is legally binding in areas of EU law according to Article 6 TEU. Equality and non-discrimination rights, an aspect of human rights, are also different for each category. Seasonal workers are granted the right to equal treatment only to a limited extent, in a list setting out the minimum areas in which it applies.

There are particular limits concerning social security, and unemployment benefits can be excluded (Article 23, recital 46). ICTs, on the other hand, are entitled to be treated 'equally' - but to different standards. In the terms and conditions of employment, they are to be treated equally to *posted workers* (covered by Directive 76/71/EC). That means they are to be treated in the same way as a person who, for a limited period of time, carries out his or her work in the territory of a Member State other than the State in which he or she normally works. But in terms of salary, they are entitled to one that is equal *to nationals* of the Member State (so a higher level than for posted workers) in comparable jobs (recital 15). The Social Security Coordination Regulation 883/2004 is stated as applying to ICTs but to a limited extent with regard to equal treatment (recital 38).

Blue Card holders have a slightly different set of rights. They are entitled to equal treatment in respect of the branches of social security listed in Article 3 of Regulation (EC) No 883/2004 (recital 46), and benefit from freedom of association, training, recognition of qualifications, branches of social security, and access to goods and services including housing, information, and counselling services. However, the Member State is allowed to restrict student funds and access to housing procedures (Article 16). Moreover, unlike the other two categories, Equality Directives 2000/43 and 2000/78 apply. In the national implementing legislation, Member States are expressly required not to discriminate on the basis of 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. This is supported by the possibility of Blue Card holders being required by a Member State to seek legal redress and to lodge complaints as provided for by national law if they face any kind of discrimination, including in the labour market (recital 9).

For seasonal workers, the rights mentioned that are predominantly related to employment law are the rights to 'equivalent' conditions, workers' right to information and consultation, collective action, fair and just working conditions, the right to protection from dismissal relating to being a parent, and also the right to property. The European Social Charter, European Convention on the Legal Status of Migrant

[153] Action Plan on Integration, Commission Communication, 24 November 2020. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0758&qid=1632299185798. It is also pointed out in literature that ´temporary migrants are more likely to work in jobs below the level for which they are qualified and to work longer hours´. M. Kahanec and K. Zimmerman (2011), ´Highly-skilled immigration in Europe´, *DIW Berlin Discussion Paper* No. 1096, p. 4.

[154] Refer to https://www.etuc.org/en/document/etuc-comments-commission-guidelines-seasonal-workers

workers are also expressly mentioned as applying to this category of persons. Effective protection of their rights because they are vulnerable is mentioned, but this does not match the actual impact of the Directive. The reference in the ICT Directive to human rights is far briefer and only in the recitals, mentioning the EU Charter rights, and how that builds on the vaguely worded 'Social Charters adopted by the EU and the Council of Europe', directly lifted from the EU Charter preamble.[155] This vagueness is similar in the Blue Card Directive, which makes the fundamental rights reference all the way down in recital 67 and nowhere else in the Directive.[156] In the latter two cases, the fundamental rights reference is rather general, and not framed as an obligation addressed specifically to either the Member States or employers.

Furthermore, the eligibility conditions applying in all six EU mobility policies examined in this Report have indirect and visible negative impacts over individuals based on grounds such as their wealth status, national origin, gender, etc. This is first related to the restrictive and inhuman design of EU visa policy targeting particularly nationals from least-developed or development countries, and crucially those which are sources of refugees and people seeking international asylum in the so-called 'Global South'.

Whilst differential treatment based on 'nationality' has been interpreted to be permissible to states to regulate cross-border human mobilities internationally, there is a very thin and often overlapping line between nationality restrictions based on migration management goals and those related to, or indirectly impacting, the national origin of aspiring migrants, which is prohibited under Article 2(2) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[157] The 2004 General Recommendation No XXX of the Committee on the Elimination of Racial Discrimination (CERD) has underlined that 'xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism', and highlights that '*undocumented non-citizens* and persons who cannot establish the nationality of the State on whose territory they live are also of concern to CERD' (Emphasis added).

Previous research has showed how the way in which EU visa policy places nationals of certain countries under Schengen visa obligations in the so-called 'negative visa list' carries significant risks of discrimination, which shows to have larger adverse impacts on larger group of persons by reference to their origin.[158] Additionally, the EU's prevailing focus on 'talent' and 'economic interests and impacts' translates into eligibility conditions under each Directive and piece of legislation where salary thresholds, economic independence and self-sufficiency, and other migration-related eligibility conditions put a disproportionate emphasis on the wealth status of non-EU nationals aspiring to enter, reside, and work in the Union, which in turn raises discrimination-related questions based on origin.

Treating *some* TCN more favourably than others without a legitimate justification for the difference in treatment is unlawful.[159] But of those who are covered by EU policy, there is lopsided emphasis in the legal rules that favour a specific aspect of the labour market – those who are already privileged, namely highly skilled and educated people who are paid high salaries, as opposed to low-paid, blue collar,

[155] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016P/TXT&rid=3

[156] That recital states that the Directive respects EU Charter rights and principles.

[157] Refer to the Committee on the Elimination of Racial Discrimination (CERD) General Recommendations XI on non-citizens, 2003, para. 1 (which was replaced by CERD Conclusion XXX. 44 CERD), No XXII: Article 5 and refugees and displaced persons, 1996; and XXX on discrimination against non-citizens, 2004. For a critique of the 2021 International Court of Justice (ICJ) judgment *Qatar v. United Arab Emirates* refer to S. Carrera, M; Ineli-Ciger, L. Vosyliute and L. Brumat (2022), *The EU Grants Temporary Protection for People Fleeing War in Ukraine: Time to Rethink Unequal Solidarity in EU asylum Policy*, CEPS Policy Insight, Brussels; see also J. Kienast and J. Vedsted-Hansen (2024), Differential Treatment and Temporary Protection Arrangements: Discrimination or Legitimate Distinctions?, *European Journal of Migration and Law,* Vol. 26, pp. 1-25.

[158] According to R. Cholewinski (2002), *Borders and Discrimination in the European Union*, Immigration Law Practitioners' Association (ILPA), London, where he argues that 'the overt distinctions made by the EU on the basis of nationality would appear to have an indirect adverse impact on large groups of persons distinguished by reference to their race or colour since the majority of non-white people living in the world would need to obtain a visa in order to enter EU territory. People of Islamic faith are also in a similar position.', page 21.

[159] This is not a new problem. The discriminatory treatment was pointed out as long ago as 2005, by the European Economic and Social Committee (EESC). See also K. Eisele (2013), p. 3; see also S. Carrera, A. Faure Atger, E. Guild and D. Kostakopoulou (2011), *Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020,* CEPS Policy Brief, Brussels.

medium/lower-skilled, and more socially and economically disadvantaged persons. For the former categories of TCNs, admission and residence to the EU is easier and facilitated, and they have a wider range of and stronger EU-level rights.[160] There is a kind of sliding scale in how long those who are covered by EU labour migration law can legally work and reside on EU territory, and in the extent of rights they have.

EU law and policy concerning 'seasonal migration' fails to take into account changes in situation and status by virtue of the rules on temporariness, which when prolonged as is possible – in fact encouraged – by the Directive means an 'insecurity of residence status mean living in a limbo state, being unable to plan the future or build one's life with a long-term perspective'.[161] Further, it is problematic, and concerning, that the personal scope of the Seasonal Workers Directive does not cover undocumented third country workers, nor does it envisage any procedure for these people to transition towards regularity of stay and work in the EU without fearing expulsions.

The analysis carried out in *Section 4* of this Report shows that in terms of change of status, the ICT Directive leaves their position somewhat ambiguous, but when reading it in conjunction with the Blue Card Directive, it becomes clear that ICTs can apply for a Blue Card, which in turn entitles them to permanent residence when the conditions have been met. Therefore, the ICT Directive is discriminatory in comparison to the Seasonal Workers Directive from the perspective of EU (Article 21(2) of the EU Charter) and international anti-discrimination law. It also does not protect employees as well as it should – for example there is no provision to regulate the workers' situation if they were discriminated against, mistreated by their employer, or became a whistleblower, and this is significant because the workers' rights are directly connected to their employment. These EU provisions do not reflect the real-life behaviours and courses of individuals.

5.3. The compatibility of EU policy with standards relevant to transitioning statuses

The EU legal migration *acquis* is not a standalone area of law. There are higher, overarching, and connected areas of EU and international labour, migration and fundamental rights law.[162] Furthermore, all European Institutions, including the European Commission, have committed to comply with so-called EU Better Regulation Guidelines and Toolbox which pays particular emphasis on the obligation to ensure the quality of EU legislation, including issues related to its consistency with EU Treaty principles, legal certainty, and a reading of the effectiveness of EU policies which is intimately linked to their compliance with fundamental rights under the EU Charter. As underlined in *Sections 5.1.* and *5.2.* above, the findings of this Report raise serious and far-reaching incompatibility questions between the existing EU legal and labour immigration *acquis* and these standards.

As a way of illustration, international labour law, as developed and interpreted by the ILO, applies to *every worker*, irrespective of migration status, and puts special emphasis on the need to guarantee equality of treatment and non-discrimination between third-country workers and national workers. ILO standards are an example of where 'fairness' alludes to the right to 'decent work'.[163] In particular, the ILO's standards as seen in the Decent Work Agenda and Migrant Workers' Conventions are relevant. The interplay between EU policy and law and the International Labour Organization's standards

[160] The privileged treatment also applies to *third country nationals who move to the EU to join an EU citizen-family member*, as defined in the Citizens´ Directive 2004/83. The protections they receive are framed as not primarily for them - but for the benefit of the ´enjoyment of the EU citizen´. This category is the first to have been regulated in detail in 2003, showing a pattern of distinction between EU citizens and third country nationals, who might in all other respects factually be equal, such as the length of time they have resided in a Member State, or the type of work they carry out in the EU.

[161] S. Carrera, A. Geddes, E. Guild and M. Stefan (2017), p. 12.

[162] An interview held on 21 December 2023 with a representative of the EU Fundamental Rights Agency (FRA) noted that there is hardly full implementation of EU Charter standards – and that they are qualified or more like rather aspirations or endeavours, and that there should be a move towards making them less restrictive.

[163] The ILO defines 'decent work' as 'productive work… in conditions of freedom, equity, security and human dignity' such as a fair income, secure form of employment, equal opportunities and treatment for all, social protection for workers and their families, and prospects for personal development and social integration. For a study of the right to decent work as a composite right refer to Costello, C. and O'Cinneide (2020). *The Right to Work of Asylum Seekers and Refugees*, ASILE Report, Brussels.

concerning 'decent work' is significant. First, due to the Member States membership and ratification of the ILO and its standards,[164] and the EU's adoption and promotion of 'decent work' in its policies. The ILO is one of the oldest international organisations and is made up of 187 Member States including all EU Member States[165] (who have all ratified the eight core labour standards). The ILO Committee of Experts has on several occasions raised concerns regarding the inherent discriminatory framing of the EU legal migration acquis and its Directives, and how these EU legal instruments have not duly considered and upheld ILO standards.[166]

Moreover, EU policy stands in contradiction to the obligation to ensure right of decent work to every worker. International human rights law standards as set out by Article 6 and Article 7 ICESC apply to '*everyone'* including migrant workers,[167] as they set out 'minimum core' obligations of the right to work – the right to freely choose and accept *decent* work that is compatible with their physical and mental integrity, and safeguards that enable 'steady economic, social and cultural development'; 'just and favourable conditions of work' especially for categories of workers vulnerable to exploitation; and the prohibition of discrimination in access to employment.[168] It is also important to recall that the UN Committee on Economic, Social and Cultural Rights (CESCR)'s General Comment 18 points out that work is both 'essential for realizing other human rights' and 'an inseparable and inherent part of human dignity'.

Therefore, a reading of EU policy through the lens combining international labour law with socio-economic human rights brings to the forefront the inherent or structural incompatibility of the selective and utilitarian rationale characterising EU migration policy with these legally binding standards.[169] This, together with legal uncertainty pertaining to the existing EU legal instruments, and their interplay with EU Member States' national migration policies, stands at odds with the EU Better Regulation Guidelines[170] and the 2016 inter-institutional agreement on Better Law-Making putting it into effect.[171] EU legislation must be drafted in a way 'that allows political decisions to be prepared in an open and transparent manner',[172] that it will be 'effective', 'easy to understand, implement and apply', and be coherent – because 'EU laws and regulation cannot be adopted in isolation'. Furthermore, as all the relevant piece of EU legislation incorporate general statements celebrating their compliance with fundamental rights, this Report has identified a worrying lack of independent assessments regarding the

[164] Which Advocate General Trstenjak describes as 'minimum international standards which EU law itself may surpass' in her Opinion for *KHS,* C-214/10, EU:C:2011:465, point 89.

[165] https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/member-states/lang--en/index.htm

[166] International Labour Office (ILO) (2016), General Survey concerning the migrant workers instruments, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 105th Session, Geneva, 22 February, para. 106; see also International Labour Office (ILO) (2014), "Fair Migration: Setting an ILO Agenda", Report of the Director General, International Labour Conference, 103rd Session, Geneva; ILO (2010), 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 seasonal employment, COM(2010) 379 ILO Note based on International Labour Standards with reference to relevant regional standards, Geneva.

[167] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 23.

[168] It has been previously explained that this instrument is 'often perceived as being normatively weak', or interpreted as 'soft' law, but that this is 'due in part to a misunderstanding about the "progressive realization" standard', and is incorrect in light of Article 2(1) and (2) of the ICESR. See pages 9 and 13, https://www.asileproject.eu/the-right-to-work-of-asylum-seekers-and-refugees/. There is no nationality or status-related limitation on the right to work (p. 28).

[169] S. Carrera, K. Eisele, P. Melin and Z. Vankova (2022), Chapter 4.

[170] European Commission, Staff Working Document: Better regulation guidelines. SWD (2021) 305 final. Brussels, 3.11.2021. https://commission.europa.eu/system/files/2011-11/swd2021_305_en.pdf

[171] Interinstitutional Agreement between the European Parliament, the Council of the EU and the European Commission on Better Law-Making. Interinstitutional Agreement of 13 April 2016 on Better Law-Making. OJ L 123/1. 12 5 2016. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016Q0512(01)

[172] A problem with transparency was pointed out already back in 2019 that not all the Directives include provisions on information and documentation. Only the Single Permit Directive, Seasonal Workers Directive, ICT Directive, and Student and Researchers Directives explicitly require Member States to provide TCNs with access to information, and even then, there were problems afflicting that access in terms of availability, completeness, and quality of information in some Member States (FITNESS check, p. 29).

impacts of the current EU legal migration policy and proposals on the essence of individuals' rights, which is required by EU Better Regulation Guidelines Toolbox #29.[173]

Additionally, the fact that EU mobility policies do not embrace and envisage transitioning statuses possibilities, and are mainly focused on fixing some TCNs into specific non-changeable statuses to prevent that they stay in Union's territory and are forcibly expelled, stands in contradiction with the political commitments enshrined in the United Nations Global Compact for Migration (GCM).[174] In fact, interviews conducted for the purposes of this Report have confirmed that the actual main political purpose of many of these instruments is that TCNs do not transition or change of status, but rather that they leave EU's territory as soon as the time-allocated purpose in a fixed status expires.[175] In fact, the as one interview underlined, EU Member States Ministries of Interior tend to see the possibilities for transitioning as TCNs 'abusing the system'.

However, the GCM emphasises a people-centric approach and takes a strong human rights dimension that places individuals at its core.[176] Objective 6.b of the GCM underlines the commitment 'to promote full respect for the human and labour rights of migrant workers at all skills levels, including migrant domestic workers'. This comes along, for example, Objective 6.i which stipulates the call for providing third country workers 'engaged in remunerated and contractual labour with the same labour rights and protections extended to all workers in the respective sector, such as the rights to just and favourable conditions of work'. And crucially, GCM Objective 7.h includes an increasingly shared international consensus about the need to '[d]evelop accessible and expedient procedures that facilitate transitions from one status to another…so as to prevent migrants from falling into an irregular status… as well as to enable individual status assessments for migrants, including for those who have fallen out of regular status, without fear of arbitrary expulsion'.

[173] Available at de79fb8e-4cc1-45a0-ac34-72f73a5147ca_en (europa.eu) Further, once passed, that legislation remains subject to a continuous assessment in line with the Better Regulations. There ought to be a 'thorough analysis' of how legislation performs to check that they are 'efficient, effective, relevant and coherent, and that EU-level intervention is actually adding value'.

[174] United Nations, Global Compact for Safe, Orderly and Regular Migration, adopted at Marrakech, Morocco, 10 and 11 December 2018, UN Resolution 73/195. The GCM calls for the promotion and effective implementation of existing international legal instruments related to international labour including labour rights and decent work. Importantly for the EU legal migration policy context, it lists those international human rights instruments that are labour and labour-exploitation related, such as the International Labour Organization conventions on promoting decent work and labour migration, and the Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Refer to J. Bast, J. Wessels and A. Farahat (2022), *The dynamic relationship between the Global Compact for Migration and Human Rights Law*, PROTECT publication, p. 3.

[175] Interview held on 19 December 2023 with a European Commission representative of DG EMPL.

[176] One of the guiding principles of the GCM are human rights. According to the text of the Compact, it is 'is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle. We also reaffirm the commitment to eliminate all forms of discrimination, including racism, xenophobia, and intolerance, against migrants and their families'.

6. Conclusions: humanising EU policy

This Report has contextualised and examined the place of aspiring migrants' dynamic life-experiences and agency in EU mobility policies covering workers, students, family members, tourists and investors. During the last 25 years of European integration, the EU has developed a wide policy framework covering legal and labour immigration which provides a common ceiling of rights and guarantees to certain categories of TCNs and their families, and codify common legal standards on border management and visa policies. However, our analysis confirms previous research findings underlining that the very fact of macro-level fragmentation through sectoral legislation on the rights of TCNs, and the resulting inconsistency, incoherence, lack of transparency, and resulting lower standard of rights for most TCNs (to varying degrees) is structurally discriminatory. Moreover, that lack of coherence and transparency also occurs as a result of macro-level splitting of competence between the EU and Member States at the Treaty-level. Whilst that may not be changeable, it is within the EU's competence to draft clear rules meeting legal certainty and ensuring equality before the law.

The fragmented, sectoral, and selective legal framework is not in line with the EU's Better Regulation Guidelines, as shown by this Report. The direct consequence of this matrix of EU policy, with its parallel legal and policy schemes, is inconsistency, incoherency, and a lack of transparency because it is not accessible to the public to which it is addressed. The opportunity to defragment and streamline the EU legal migration *acquis* and make it more consistent and coherent has not been taken with regard to the latest revisions of the Blue Card Directive, nor seemingly with the Single Permit Directive that is in the final stages of adoption. The failure to apply the Better Regulation Guidelines is a missed opportunity to ensure the effectiveness of the EU's objectives.

EU mobility policies raise serious fundamental rights issues in contravention of EU Better Regulation Toolbox #29. The discrimination-by-design characterising the current EU framework is not in line with the interpretation of Article 79 TFEU and the EU Charter. In particular, the EU 'fair treatment paradigm' means equal treatment and non-discrimination for *all* workers no matter the legal status further to Articles 31 and 20 of the EU Charter. From a policy perspective, whilst each EU Directive and piece of legislation can set specific objectives, purposes and require compliance with more specific referred to fundamental rights by instrument, the objectives and text of these instruments cannot be used to circumvent constitutionally binding fundamental rights law and international law standards of a higher value. Doing otherwise is contrary to the rule of law, one of the founding principles of the EU itself.

Furthermore, the EU mobility under assessment do not always envisage effective and facilitated access to procedures enabling transitions in EU statuses so as to prevent TCNs falling under irregular administrative or undocumented status, or allow those under irregular status to transition towards regularity without needing to leave EU's territory. This is particularly so in respect of TCNs who are not considered or framed as 'wanted', 'financially useful', or 'talented' in light of EU and Member States' economies and labour markets interests. This runs contrary to the obligation to ensure decent work to all workers and their families under international labour and human rights law, and to uphold the human dignity of every person irrespective of migration status. It further contradicts the political commitments stipulated in the UN Global Compact on Migration (GCM), which places the individual at the centre of attention, and incorporates an increasing international consensus to ensure that migration policies do not co-create irregularity by artificially fixating or trapping people in statuses without access to procedures for transitioning depending on their real life developments, experiences, and choices. Ultimately, these findings call for the need to *humanise* policies dealing with cross-border human mobilities in the EU and ensure a human dignity-centric approach corresponding with the EU's foundations.[177]

[177] Refer to Preamble of the EU Charter which states that 'the Union is founded on the indivisible, universal values of human dignity, and Article 1 which states that 'Human dignity is inviolable. It must be respected and protected'. As referred to in the Methodology section of the Introduction to this Report, the AspirE Project applies and promotes a 'humanisation' approach to research.

ANNEX I

LEGAL MIGRATION AND MOBILITY UNDER EU LAW							
Purpose of Migration	**To work**			**To study**	**To join family members**		**For tourism**
Governing EU legislation	**Seasonal workers (Directive 2014/36/EU)**	**Intra-Corporate Transferees (Directive 2014/66/EU)**	**Blue Card holders (Directive 2021/1883)**	**Students (Directive (EU) 2016/801)**	**Family member of a lawfully residing third country national (Directive 2003/86/EC)**	**Family member of an EU citizen (Directive 2004/38/EC)**	**Schengen Borders Code Regulation (EC) 2016/399; Visa List Regulation 2018/1806; Visa Code Regulation (EC) 810/2009**
Conditions	*the purpose must be to carry out seasonal work *must be abroad when applying *must maintain legal residence abroad *must have an employment contract *must have adequate housing (especially when the employer is providing it) *must have health insurance *must have a certain level of funds *must intend to leave when the seasonal work is over	*the purpose must be to work temporarily in an established company; *must be an employee of a company that has established a presence in the Member State (i.e. a multinational) *must be abroad when applying *must have been an employee for a certain period of time, and intend to return to that role *must have health insurance	*must be highly skilled or qualified and the purpose must be to carry out highly qualified employment *do not need to be abroad when applying *must meet a salary threshold *must have health insurance	*must be accepted to a higher education institution for full-time study that will result in a recognised higher education qualification *must have health insurance *must have sufficient resources for the purpose of the stay *cannot reside for other purposes	*must be a family member as defined by the Directive, the main persons qualifying are spouses and children *may be subject to integration conditions set under national law *must apply while abroad *must acquire an entry visa *the 'sponsor' must have had a	* must be a family member as defined by the Directive, the main persons qualifying are spouses and children *must apply for a residence permit after three months of residence *must show proof of relationship	*must be travelling to the Member State for tourism or family visit-purposes *must show sufficient means to fund the stay *must show intention to leave before the visa expires *must not be for a long-stay visa – those are covered by national law

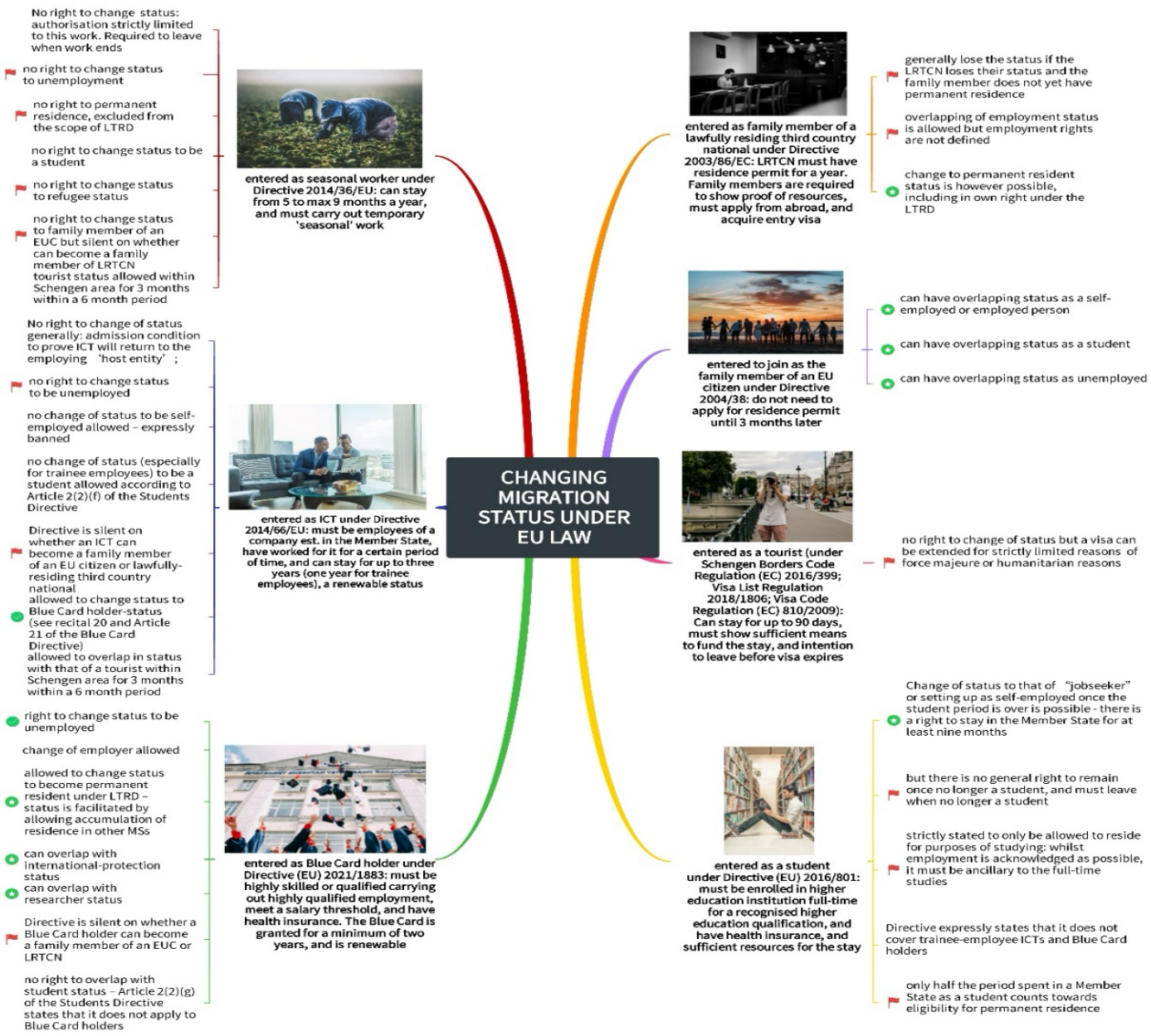
					residence permit for a year at least *must show proof of relationship *must show proof of resources – including for housing, funds, and health insurance		
Rights	*right to stay and work for 5-9 months, a renewable (but time-capped) right *right to facilitated process if applying a second time *right to adequate compensation *limited right to equal treatment *right to compensation in labour exploitation situations *right to redress	*right to stay and work for up to 3 years (1 year for trainee employees), a renewable period *right to be joined by family members *right to a simplified procedure *some procedural rights *equal treatment with nationals for salary *equal treatment with posted workers for terms and conditions of employment *limited social security rights	*right to stay for a minimum of two years, renewable *right to be joined by family members *right to a simplified procedure and equal treatment rights as set out by the Single Permit Directive *equal treatment for social security *right to freedom of association, recognition of professional qualifications, access to goods and services *right not to be discriminated against *some procedural rights *redress right *protection from loss of status when the eligibility criteria are not met for illness, disability or parental leave reasons	*right to stay for minimum one year to study *right to fair treatment, and in some aspects equal treatment *right to redress	*right to a residence permit for a minimum of a year and for the same duration as the sponsor *autonomous right to stay can be acquired *autonomous permanent residence is also possible *right to education, training *access to employment *right to redress *some procedural rights	*right to work, including as a self-employed person *rights lasting beyond the relationship (though there are conditions) *right to permanent residence *equal treatment and non-discrimination compared to nationals	*right to stay for the duration of the visa *right to redress *some procedural rights

Change of Status	*No right to change of status: the authorisation is strictly limited to this work, and the TCN is required to leave when the seasonal work is over *no right to change status to be unemployed: if conditions are not fulfilled, the TCN is required to leave the territory *no right to permanent residence even if TCN has carried out 9 months of seasonal work per year for 5 years – excluded from the scope of the EU Long-Term Resident's Directive *no right to change status to be a student unless TCN leaves the territory and applies under the Student and Researcher's Directive and fulfils the conditions therein (the Students Directive reinforces that students have to mainly be residing for full-time study so this practically excludes overlap of status too) *no right to change status to refugee status (consequence is losing rights as a seasonal worker) *Directive is silent on whether a seasonal worker can become a family	*No right to change of status <u>*in principle*</u> because it must be proven that the ICT will return to the employing 'host entity'; *no right to change status to be unemployed: if conditions are not fulfilled, the TCN is required to leave the territory *no change of status to be self-employed allowed – expressly banned. *no change of status (especially for trainee employees) to be a student allowed according to Article 2(2)(f) of the Students Directive *Directive is silent on whether an ICT can become a family member of an EU citizen or lawfully-residing third country national (LRTCN) *allowed to have overlapping status with that of a tourist: travel within Schengen area as a tourist for 3 months within a 6 month period is permissible	*right to change status when unemployed; *change of employer allowed *no right to overlap with student status – Article 2(2)(g) of the Students Directive states that it does not apply to Blue Card holders *Directive is silent on whether an ICT can become a family member of an EU citizen or lawfully-residing third country national (LRTCN) *allowed to have overlapping status with that of a tourist *allowed to change status to become permanent resident – the Long Term Residents' Directive applies and the status is facilitated by allowing accumulating of residence periods in other Member States for calculating eligibility *can overlap with international-protection status *can overlap with researcher status	*no general right to remain once no longer a student, and must leave when no longer a student *under certain conditions entitled to remain on EU territory for up to nine months as a jobseeker (as long as self-funded and in a sector related to the degree obtained) *strictly stated to only be allowed to reside for purposes of studying: whilst employment is acknowledged as possible, it must be ancillary to the full-time studies *the Directive expressly states that it does not cover trainee-employee ICTs, Blue Card holders, and the Single Permit Directive does not apply *as for permanent residence, only half the period spent in a Member	*no right to change status in *principle:* will lose the right based on family reunification if the sponsor loses their status/legal residence and the family member does not yet have permanent residence *right to employment is not linked to the other labour migration directives, and the scope of the right is not defined *change to permanent residence is possible, including in own right, under the Long-Term Residents Directive	*can be self-employed or employed *can study *can be unemployed	*no right to change of status. However, the Visa Code foresees the possibility for Member States to extend visas in Article 33 of the Visa Code in cases of proof of force majeure or humanitarian reasons preventing the person from leaving their before the expiry of the period of validity of or the duration of stay authorised by the visa The Visa Code also foresees that a Schengen visa may be extended ´if the visa holder provides proof of serious personal reasons justifying the extension of the period of validity or the

	member of lawfully-residing third country national (LRTCN) – but it is not allowed for EU citizen-family members *allowed to have overlapping status with that of a tourist: travel within Schengen area as a tourist for 3 months within a 6 month period is permissible	*allowed to change status to Blue Card holder-status (see recital 20 and Article 21 of the Blue Card Directive)		State as a student counts towards eligibility for it (which excludes persons who are students unless they have studied for 10 years, as that is improbable)			duration of stay′.
Intra-EU Mobility	*none – only for tourism purposes as stated above	*none – only for tourism purposes as stated above	*can carry out business activities in another Member States for up to 90 days within a six month period without seeking authorisation *can apply for a Blue Card in a second Member State after a year – can move first and apply later (within a month) *can also move to a third Member State after six months in the second Member State	*no – only for very specific kinds of students who are enrolled in a programme covered by an agreement to study in another Member State for up to one year	*the family member can join the sponsor if the sponsor is moving to another Member State	*the family member can join the EU citizen if the EU citizen is moving to another Member State	*with a Schengen visa, it is possible to move between Member States for tourist purposes

Source: Authors' own elaboration

ANNEX II



Source: Authors' own elaboration

ANNEX III

List of interviews

- Interview with a representative of the European Labour Authority, 18 December 2023
- Interview with a European Commission representative of DG EMPL, 19 December 2023
- Interview with a European Commission representative of DG HOME, legal migration sub-unit, 20 December 2023
- Interview with a European Commission representative of DG HOME, integration sub-unit, 20 December 2023
- Interview with a representative of the Fundamental Rights Agency, 21 December 2023
- Interview with a European Commission representative, visa policy sub-unit, 16 January 2024
- Interview with a Member of the European Parliament, 31 January 2024