The principle of equal treatment is by many considered the most important feature of human rights law. This is based on the assessment that 'differential treatment, due to special features of a person or a group to which a person belongs, is not in accordance with the principle of equality in rights.' European Union law on labour migration contravenes this fundamental principle with the standards set by it on the right to equal treatment between nationals of EU Member States and third-country national labour migrants residing and working within EU territory.

EU law on labour migration does not provide for equal treatment between nationals and the various groups of third-country nationals that the Directives it is comprised of address. The four Directives on regular migration included in this study grant the right to equal treatment to a varying degree for different 'types' of migrants, depending on how important their labour contribution is considered for the EU economy. Additionally, the only EU instrument that addresses irregularly resident migrants in employment, is silent on the fundamental human rights of irregular migrants.

This study examines European Union (EU) law on labour migration from the perspective of theories and discourses on migration management and the human rights principle of equal treatment. It takes as a starting point the Commission's proposals for five Directives on labour migration which were adopted on the basis of a sectoral approach to labour migration, the Blue Card Directive, the Employers Sanctions Directive, the Single Permit Directive, the Seasonal Workers Directive and the Intra-Corporate Transfer Directive, and provides an account and analysis of the negotiations on four specific aspects of the Directives. The negotiations between the Commission, the Council and the Parliament reveal how these four aspects of the Directives, that is access to territory, access to the labour market, the right to equal treatment and the right to family reunification were constructed for the different groups of labour migrants that fall under the scope of each Directive.

Bjarney Friðriksdóttir

What Happened to Equality ?

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The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration

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The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration

Proefschrift

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Promotor:
prof. dr. E. Guild

Copromotor:
dr. P.E. Minderhoud

Manuscriptcommissie:
prof. mr. A.B. Terlouw
prof. dr. B. Ryan (Universiteit Leicester, Verenigd Koninkrijk)
dr. R. Cholewinski (International Labour Organization, Zwitserland)

Lay-out: Hannie van de Put

Cover: Jacek Smolicki

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In Icelandic folklore there is a story of two giants who hold a son of a king captive. To free himself from under their spell, he needs to hit with an arrow, an egg suspended in air while the giants continuously throw it between them. The egg (*fjöregg*), represents his life/vitality. Thinking about the cooperation with my thesis supervisors, prof. Elspeth Guild and dr. Paul Minderhoud, reminded me of this story, although the context of our cooperation is much less dramatic and the endings are different. Ours is a happy one! I am grateful for your generosity in sharing your knowledge and for your enthusiasm for this research. Your support inspired me greatly during the research for, and writing of this thesis and I sincerely thank you.

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Abbreviations

AFSJ	Area of Freedom, Security and Justice
CJEU	Court of Justice of the European Union
CoE	Council of Europe
Coreper	Permanent Representatives Committee
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECMW	European Convention on the legal status of migrant workers
EEA	European Economic Area
EEC	European Economic Community
EESC	European Economic and Social Committee
ENAR	European Network Against Racism
ESC	European Social Charter
ETUC	European Trade Union Confederation
EU	European Union
EUCFR	European Union Charter of Fundamental Rights
FEANTSA	European Federation of National Organisations working with the Homeless
GATS	General Agreement on Trade in Services
GCIM	Global Commission on International Migration
GFMD	Global Forum on Migration and Development
GMG	Global Migration Group
ICERD	International Convention on the Elimination of All forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICRMW	International Convention on the Protection of the Rights of all Migrant Workers and their Families
ICT	Intra-corporate transferee
IDM	International Dialogue on Migration
ILO	International Labour Organization
IOM	International Organization for Migration
JHA	Justice and Home Affairs
LTR	Long-term resident
MS	Member State
NGO	Non-governmental organisation
PICUM	Platform for International Cooperation on Undocumented Migrants
PWD	Posted Workers Directive
SCIFA	Strategic Committee on Frontiers and Asylum
SIS	Schengen Information System

Solidar	Advancing Social Justice in Europe and Worldwide
SQWP	Working Party on Social Questions
TCN	Third-country national
TFEU	Treaty on the Functioning of the European Union
TEC	Treaty Establishing the European Community
UN	United Nations
UNESCO	United Nations Education, Scientific and Cultural Organization
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
UNDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
WPME	Working Party on Migration and Expulsion
WPMIE	Working Party on Migration Integration and Expulsion
WTO	World Trade Organisation

General Introduction

This study concerns the right to equal treatment with nationals granted to regularly resident third-country nationals and the protection of rights provided for irregularly resident third-country nationals in employment by five Directives which comprise the European Union's (EU) law on labour migration and were adopted on the basis of the EU's sectoral approach to labour migration. The purpose of this inquiry is to answer its core question: what happened to equal treatment in the construction of EU law on labour migration?

In 1999 after the coming into force of the Amsterdam Treaty and the EU gaining competences on legislating on immigration and asylum, the Commission initiated policy discussions to identify the common priorities of EU Member States in these fields. In the following years several measures were adopted on immigration and asylum, including Directive 2003/86/EC on the right to family reunification, Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers[1] and Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals as stateless persons, as refugees or as persons who otherwise need international protection.[2] The policy plans for adopting measures on immigration included instruments on labour migration and on the basis of those, two Directives addressing students and researchers were adopted. Those were Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service and Directive 2005/71/EC on a specific procedure for admitting third-country national researchers. On 11 May 2016, the Parliament and the Council adopted Directive 2016/801/EU 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, amending and recasting these two Directives.

An agreement was however not reached by the Council to consider in detail a proposal from the Commission introduced in 2001 for a horizontal Directive addressing the admission of labour migrants. As a result of that, discussions were conducted from 2001 to 2005 between the Commission, the Member States and stakeholders on the appropriate policy approach to address common EU measures on labour migration. The outcome of these discussions was a Policy plan on legal migra-

1 Now recast as Directive 2013/33/EU of the European Parliament and of the Council of June 2013 laying down standards for the reception of applicants for international protection.

2 Now recast as Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection or for persons eligible for subsidiary protection, and for the content of the protection provided.

tion introduced in 2005. It provided for the blue print for a sectoral approach to labour migration which was the only approach the Council was prepared to follow. In 2006 the Commission introduced a communication on policy priorities in the fight against illegal immigration of third-country nationals which set forth the approach to address irregularly resident third-country nationals in employment, which are measures regarded as an integral part of the EU's comprehensive migration policy. The legislative measures on labour migration that are the subject of this study were adopted on the basis of the policy choices provided for in these documents which were developed under the auspices of the Directorate General for Justice and Home Affairs (now Migration and Home Affairs).

All but three EU Member States, Denmark, Ireland and the United Kingdom participated in the adoption of the five Directives on labour migration under discussion here. These three Member States have opted out of Justice and Home Affairs measures and are therefore not bound by EU law on labour migration. Denmark, Ireland and the United Kingdom first obtained these opt-outs in the Treaty of Amsterdam and retained them in the Treaty of Lisbon.

The five Directives on labour migration addressed in this study were adopted between 2009 and 2014 and they comprise the main body of EU law on labour migration. Those are Directive 2009/50/EC on the conditions for entry and residence of third-country nationals for the purposes of highly qualified employment, (hereafter the Blue Card Directive); Directive 2009/52/EC providing for minimum standards and measures against employers of illegally staying third-country nationals, (hereafter the Employers Sanctions Directive); Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, (hereafter the Single Permit Directive); Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, (hereafter the Seasonal Workers Directive); and Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, (hereafter the Intra-Corporate Transfer Directive). All the Directives were adopted on the basis of Article 79 of the Treaty on the Functioning of the European Union (TFEU), (former Article 63 of the Treaty Establishing the European Community (TEC)), the features of which as they address the determinants for the development of EU policy on labour migration frame this study. Those features are firstly, the development of a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat illegal immigration and trafficking in human beings.[3] Secondly, for the purposes above, the Parliament and the Council shall adopt measures on the conditions of entry and residence and the definition of the rights of third-country nationals residing legally in a Member State and illegal immigration and unauthorised residence, including removal

3 Article 79(1) TFEU.

and repatriation of persons residing without authorisation.[4] Thirdly, the reaffirmation of the sovereign right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.[5]

Having regard to the framework provided for by Article 79 of the TFEU, the study will discuss the sectoral approach to labour migration adopted by the EU and examine how status is determined for different groups of migrants on the basis of access to the territory and the labour market of the Member States, and how the right to equal treatment with nationals and the right to family reunification is granted to these groups by the Directives. The purpose of the inquiry is to answer its core question which is, what happened to equal treatment in the construction of EU law on labour migration?

The outline of the study is as follows:

To start the inquiry, Chapter 1 aims at identifying whether and how, migration management theories and discourses address the human rights principle of equal treatment to reveal if the right of migrants to equal treatment with nationals is a central factor in migration management theories and discourses. For that purpose, the discussion outlines some of the dominant academic and policy discourses and theories on migration management and State sovereignty to control migration and contextualizes the various policy issues that underpin migration management strategies employed by States. Thus theories and discourses on migration management, in particular State control of voluntary migration are discussed, firstly by addressing the origins of the concept, its main components and different meanings. Secondly, by exploring the various aspects of migration management and the theories and discourses that are employed to explain and/or justify the needs identified by States to control migration. These include State control and security, protection of national interests such as the domestic labour market, the national community and the welfare State. Thirdly, the debate on whether the international human rights regime poses a challenge to the sovereign right of States to control migration, in particular as it relates to voluntary migration, is addressed as well as the utilitarian approach to labour migration management which has been identified as an emerging approach contemporarily and is actively advocated for by some theorists. Lastly, the way in which policy discourses of international organisations and global processes address the human rights of voluntary migrants and migration management are explored.

The purpose of Chapter 2 is to inquire into the human rights principle of non-discrimination and equal treatment, in particular as it relates to nationality, to reveal whether this principle as defined in international and European human rights law and international labour law prohibits discrimination against migrants based on nationality. This is to establish what constitutes the international and European human rights framework and the international labour law framework that EU Member States are bound by as regards equal treatment of third-country nationals residing and working within the EU and irregularly present third-country nationals in employment. A

4 Article 79(2)(a),(b) and (c) TFEU.
5 Article 79(5) TFEU.

framework which is essential to assessing the right to equal treatment granted to third-country nationals by the Directives addressed in this study. The human rights and labour law instruments that this framework is comprised of applies to migrants who reside and work in EU Member States, while they provide for the human rights and labour rights norms that constitute a framework overarching EU law on labour migration.

For the purposes of this inquiry, whether and then how, the international and European human rights framework and the international labour law framework prohibit discrimination based on nationality is outlined and discussed. This examination which focuses solely on the personal scope of the instruments addressed, includes four of the core United Nations human rights treaties, which are the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the International Convention on the Protection of the Rights of all Migrant Workers and their Families. Among the European human rights instruments that are considered are the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, the Treaty on the Functioning of the European Union and the European Union Charter of Fundamental Rights. The examination of international labour standards focuses on the International Labour Organisations' (ILO) fundamental Conventions as well as Conventions 97 and 143 which address migrants in particular. This discussion includes exploring how the personal scope of these instruments has been interpreted in recommendations, comments and conclusions of committees and treaty bodies of the Council of Europe, the United Nations and the International Labour Organization as well as in key judgments of the European Court of Human Rights and the Court of Justice of the European Union.

Chapter 3 endeavours primarily to trace the policy developments and discourses that lead to the adoption of a sectoral approach to managing migration of regular and irregular migrants into the EU. Firstly, to disclose how the right to equal treatment of third-country nationals with nationals is addressed and constructed in EU policy on labour migration management. As well as uncovering the effect of the sectoral approach on the right to equal treatment of third-country nationals and whether rights granted to migrants are a part of migration management strategies. To that end, the policy discussions and developments on migration management into the EU that took place between 2001 and 2005 and lead to the adoption of a sectoral approach to migration management of regular and irregular migrants is outlined and discussed. This analysis aims at revealing the main determinants behind the policy developments on labour migration management, which include the need identified by the Commission to act proactively to attract the labour migrants identified as 'needed' to further the economic goals of the EU, the reluctance of EU Member States to adopt common measures on labour migration under the horizontal approach and the one-sided approach to irregularly present migrants in employment. The examination provided includes a short overview of common measures on migration before the EU gained competences on legislating on migration with the Amsterdam Treaty in 1999 and the policy priorities behind and the failure of the horizontal approach on labour migration suggested by the Commission in 2001. Most of the focus is, however, on outlining the developments that lead to the sectoral approach, starting in 2003 with a

heightened focus on the economic benefits of labour migration in the Communication on immigration, integration and employment.

Chapters 4 to 8 examine the Directives addressed in this study in the order that they were adopted. The Blue Card Directive (Chapter 4), the Employers Sanctions Directive (Chapter 5), the Single Permit Directive (Chapter 6), the Seasonal Workers Directive (Chapter 7) and the Intra-Corporate Transfer Directive (Chapter 8).

The objectives of Chapters 4, 6, 7 and 8, are to reveal how the right to equal treatment with nationals is constructed in the Directives for the third-country nationals that fall under their scope and disclose what is the right to equal treatment granted to each type/group of migrants. Additionally, the status granted to third-country nationals by each of the Directives, through access to territory and access to the labour market, is addressed in order to divulge the effect of the status granted to each group of third-country nationals under the EU's sectoral approach to labour migration, on the right to equal treatment and the right to family reunification.

In Chapter 5, the intention is to reveal the extent to which the Employers Sanctions Directive offers protection to irregularly present migrants in employment and establish if the Directive, which is the only EU instrument directly addressing third-country nationals in employment while irregularly present, protects the human rights of this group of migrants.

The method employed to address these questions is to examine how the right to equal treatment, and in the case of irregular migrants, the right guaranteed to them, was determined through the negotiations for the Directives. For the four Directives on regular migration only the provisions addressing access to territory and access to the labour market, the right to equal treatment and the right to family reunification, including access of family members to the labour market will be examined in detail. For the Employer Sanctions Directive, the provisions that address the rights and protection of irregularly resident migrants in employment will be examined as well as their access to territory and recognition and protection of their human rights. This method was selected while examining these particular provisions of the Directives reveals how the right to equal treatment was determined in the negotiations and thereby what happened to equality for regularly resident third-country nationals and the protection of rights granted to irregularly resident third-country nationals in employment.

The examination takes as a starting point the Commission's proposals for the Directives and outlines the discussions that took place on the aspects listed above during the negotiations of the Directives as well as presenting the parameters set forth in the adopted Directives and uncovering the processes that lead to that outcome. The examinations of the negotiations present the views of the partners formally included in the negotiations. Those were the Member States acting within the Working Party on Migration and Expulsion (WPME) - later Migration Integration and Expulsion (WPMIE), the Working Party on Social Questions (SQWP), the Strategic Committee on Frontiers and Asylum (SCIFA), the Permanent Representatives Committee (Coreper), the Justice and Home Affairs Counsellors and the Council, as well as the Commission and the Parliament. In the negotiations for the Blue Card and the Employers Sanctions Directive which took place before the entry into force of the Lisbon Treaty, the Parliament was consulted for its opinion on the former, and was a partner in a co-decision on the latter as provided for by Article 251 of the TEC. In

the negotiations for the three other Directives which were adopted on the basis of the ordinary legislative procedure provided in Article 294 of the TFEU, the Parliament had the status of a co-legislator with the Council and towards the end of the negotiations for these three Directives the negotiations were conducted in a trilogue between the Parliament, the Council and the Commission.

The examination of the negotiations also includes views of stakeholders that were either invited to give their opinions on the draft Directives such as the European Economic and Social Committee (EESC)[6] which was invited by the General Secretariat of the Council to give its opinion on the proposals for the Blue Card and Single Permit Directives, for the sake of consistency while it had traditionally been consulted in relation to the legislative instruments thus far submitted by the Commission in the area of admission of third-country nationals.[7] As well as Business Europe and the European Trade Union Confederation (ETUC) who were consulted for the impact assessment of the Blue Card Directive. Furthermore, the discussion provides the opinions of stakeholders who either sent their opinion to the Council or made them public. Those are the International Labour Organization (ILO), the European Trade Union Confederation (ETUC) and several non-governmental organisations working for migrants' rights, namely the European Network Against Racism (ENAR), Platform for International Cooperation on Undocumented Migrants (PICUM), Advancing Social Justice in Europe and Worldwide (Solidar) and the European Federation of National Organisations working with the Homeless (FEANTSA).

Finally, Chapter 9 aims to establish whether the right to equal treatment with nationals, granted to third-country nationals by EU law on labour migration and the approach taken to address irregularly resident third-country nationals in employment, is compatible with the international and European human rights law and international labour law frameworks that EU Member States are bound by. For that purpose, the outcomes of the sectoral approach and the effect it had in particular as it relates to the right to equal treatment and the rights of irregular migrants is explored, to reveal what were the consequences of the sectoral approach for the right to equal treatment for regularly present third-country nationals with nationals, and the human rights of irregularly resident migrants in employment. Additionally, the impact of the different statuses constructed for groups of migrants based on type, will be examined to divulge the relationship between access to territory and the labour market on the one hand and the right to equal treatment and the right to family reunification on the other. The chapter will thus discuss the five Directives included in the study in the framework of the sectoral approach to migration management on the one hand, and the human rights framework relevant to EU law on labour migration on the other.

Furthermore, the question whether migration management policies, resting on the sovereign right of States to control migration into their territory and the international and European frameworks that provide for the human rights of labour migrants are inherently incompatible, is addressed. The discourses underpinning and

6 A consultative body of the EU comprised of experts from economic and social interest groups in Europe.

7 Council of the European Union, Revised 'I' Item Note from the General Secretariat of the Council to the Permanent Representatives Committee (Part 2), 25 January 2008, document number: 5597/1/08, 2.

justifying a sectoral approach to labour migration are also considered, in particular as they relate to the policy of granting migrants status according to 'type' and determining the right to equal treatment granted to migrants based on this classification of migrants into different groups. Lastly, the outcome of EU law on labour migration and its consequences for a common EU labour market are explored, having regard to the policy processes in formulating the EU's approach to labour migration and the negotiations for the five Directives addressed in this study.

1. Theories and Discourses on Migration Management

1.1 INTRODUCTION

Theories and discourses on migration management, in particular State control of voluntary migration are discussed herein, firstly by addressing the origins of the concept, its main components and different meanings. Secondly, by exploring the various aspects of migration management and the theories and discourses that are employed to explain and/or justify the needs identified by States to control migration. These include State control and security, protection of national interests such as the domestic labour market, the national community and the welfare State. Additionally, the debate on whether the international human rights regime poses a challenge to the sovereign right of States to control migration, in particular as it relates to voluntary labour migration, is addressed as well as the utilitarian approach to labour migration management which has been identified as an emerging approach contemporarily and actively advocated for by some theorists. Finally, policy discourses of international organisations and global processes on migration management and human rights are presented. The objective of this discussion is to outline some of the dominant discourses and theories on migration management and State sovereignty to control migration and contextualize the various policy issues that underpin migration management strategies employed by States. This is in order to identify whether and then how, migration management theories and discourses address the human rights principle of equal treatment to reveal if the right of migrants to equal treatment with nationals is a central factor in migration management theories and discourses.

1.2 THE CONCEPT OF MIGRATION MANAGEMENT

The elaboration of the concept of migration management is attributed to Bimal Gosh following a request by the United Nations Commission on Global Governance and the government of Sweden in 1993.[1] The concept has been described as 'the new catchword'[2] of the early 21st Century in theories and policies addressing international migration. The initial discussions on the concept and its scope are directly related to 'global governance' on migration although that refers in particular to the need identified by some for an international institutional framework to regulate international migration. 'Global governance' on migration has been described as 'a murky and often poorly defined term,' which has the same core components as those defined for 'migration management,' and a working definition that applies to both 'can be taken to

1 Geiger, M. and Pécoud, M. 2012. The Politics of International Migration Management, in *The Politics of International Migration Management*, edited by M. Geiger and M. Pécoud. Hampshire: Palgrave Macmillan, 1.

2 Pécoud, M. 2013. Introduction: Disciplining the Transnational Mobility of People, in *Disciplining the Transnational Mobility of People*, edited by M. Geiger and M. Pécoud. Hampshire: Palgrave Macmillan, 1.

be the 'norms, rules, principles and decision-making procedures that regulate the behaviour of states (and other transnational actors),'[3] in relation to migration. An analysis of the concept that goes further beneath the surface of the framework and speaks to the political interests underlying its development, provides that migration management discourses reflect 'the growing recognition that the risks linked to uncontrollable and destabilizing migration flows can be addressed by a deep reorganization of the patterns that govern human mobility,' which 'also embodies the aspirations to both strictly control human mobility and organize it in a way that makes it compatible with a number of objectives pursued by both state and non-state actors.'[4] This discourse assumes that managing human migration to meet specifically defined objectives is possible by reorganizing human mobility on a global scale to that end. In relation to this, the ambitions set forth by the global policy discourse on migration management have been found to be comprehensive and in addition to managing migratory movements they are holistic in aiming at 'addressing all the policy issues connected to migration' including, 'development, remittances, the role of diaspora communities, human rights, health, security, labour market, integration, and so forth.' In this policy discourse, migration is 'recognized as a field of its own, whereas policy-making in the field has long been scattered between different ministries.'[5] Examined in this comprehensive manner the global policy discourse on migration management has been found to be performative, in that it 'not only describes or analyses reality, but also aims at shaping the way migration is perceived by the actors in charge of managing it.'[6]

In the above, the global discourse on migration management is based on the perceived need and the determination to achieve a sophisticated level of control over migration, but the need to control migration by organising it in a particular manner is seen as a consequence of the fact that 'states and non-state actors are increasingly concerned to find ways to manage migration in ways that enable them to maximize the benefits and minimize the costs of mobility.'[7] Pécoud has described this approach to migration management as that of disciplining it, which he sees as being about 'introducing a specific rationality to what may otherwise turn out to be a disruptive process,' and this rationality 'implies the transformation of a complex, multifaceted, sometimes unlawful and always challenging process into "predictable", "sound", "manageable", "orderly", and rule-obeying dynamics.'[8] Other key characteristics of

3 Betts, A. 2012. Introduction: Global Migration Governance, in *Global Migration Governance*, edited by A. Betts. Oxford: Oxford University Press, 4.

4 Pécoud, M. 2013. Introduction: Disciplining the Transnational Mobility of People, in *Disciplining the Transnational Mobility of People*, edited by M. Geiger and M. Pécoud. Hampshire: Palgrave Macmillan, 1-2.

5 Geiger, M. and Pécoud, M. 2012. The Politics of International Migration Management, in *The Politics of International Migration Management*, edited by M. Geiger and M. Pécoud. Hampshire: Palgrave Macmillan, 9.

6 *Ibid.*

7 Betts, A. 2012. Introduction: Global Migration Governance, in *Global Migration Governance*, edited by A. Betts. Oxford: Oxford University Press, 1.

8 Pécoud, M. 2013. Introduction: Disciplining the Transnational Mobility of People, in *Disciplining the Transnational Mobility of People*, edited by M. Geiger and M. Pécoud. Hampshire: Palgrave Macmillan, 2.

migration management policies and discourses have been identified as being to make it beneficial for all the stakeholders involved, which is taken to imply 'both a "regulated openness" toward economically needed and beneficial flows and the continuation of restrictions regarding unwanted migration.'[9] Additionally, that the policy framework was originally intended as an argument for the expansion of labour migration and 'managed migration policies were seen as providing a middle way between highly restrictionist and expansive processes.'[10] What is noteworthy about these discourses is that they are primarily State centred while when addressing the goals to 'maximize the benefits and minimize the costs of mobility' and making migration management 'beneficial for all stakeholders,' very few of the components discussed in relation to these goals are addressing migrants as individual agents.

The various discourses on global governance of migration and migration management have thus been defined in several different ways, most likely on the basis of the underlying political objectives relevant to each case. Pertaining to this, Geiger and Pécoud noted that while the concept of migration management has a clear history and relatively precise meaning, it often 'functions as a king of empty shell, a convenient umbrella under which very different activities can be regrouped and given an apparent coherence, thus also facilitating cooperation between actors who would otherwise have little in common.'[11] Migration management can therefore be viewed as a concept that can accommodate a variety of fields and strategies that can be employed to address specific policy objectives. In relation to policy developments on migration management and their application, it has been found to be 'performative not only in creating the mental categories to apprehend migration "realities", but also in omitting other elements which – however relevant they may be – do not fit into political priorities,'[12] and to those ends formulated by selectively producing 'knowledge' to 'accompany and legitimize migration management activities.'[13] This can for example be seen in disregarding evidence of the economic benefits of migration and in ascribing diverse statuses to migrants according to 'type'. The concept of migration management is thus not a descriptive term for the procedural aspect of State policies to administer migration into their territories, but a broadly defined concept that differs in meaning and scope according to the political objectives behind its use by various actors and in the different contexts that it is employed. Having regard to that, Walters observes that migration management 'should be examined in terms of programmes, discourses, experts, technologies and interventions which do not simply

9 Geiger, M. and Pécoud, M. 2012. The Politics of International Migration Management, in *The Politics of International Migration Management*, edited by M. Geiger and M. Pécoud. Hampshire: Palgrave Macmillan, 2-3.

10 Kofman, E. 2008. Managing migration and citizenship in Europe: Towards an overarching framework, in *Governing International Labour Migration: Current issues, challenges and dilemmas*, edited by P. Gabriel and H. Pellerin. London & New York: Routledge, 14.

11 Geiger, M. and Pécoud, M. 2012. The Politics of International Migration Management, in *The Politics of International Migration Management*, edited by M. Geiger and M. Pécoud. Hampshire: Palgrave Macmillan, 3.

12 *Ibid.*, 10.

13 *Ibid.*

respond to something already there, but instead operate as an active and constitutive force which shapes the social world in particular ways with particular political consequences.'[14] Migration management which is always political and aims for achieving specific strategic goals through control of migration was first used as a concept by the European Union when the discussion on the need for EU Member States to move away from policies of 'zero migration' started. EU policy developments on migration management as regards labour migration in particular will be discussed in Chapter 3.

1.3 STATE SOVEREIGNTY AND THE NEEDS IDENTIFIED TO CONTROL MIGRATION

Theories and discourses on State control of migration or migration management centre in one way or another on the sovereign right of States to control migration into their territory and their need to protect the interests of the State by controlling migration. Hollifield in his analysis of 'restrictionism' in migration management, concluded that the will to control migration is 'political and to a certain extent symbolic.' That even though, 'immigration has proved economically beneficial, there is a strong desire among the public and politicians in the industrial democracies to control migration, for what seems to be a simple reason,' namely that control of borders is seen as the essence of State sovereignty. Migration into the territory of the State is thus regarded 'as an issue of national security,' which governments act on out of fear for 'a nationalist backlash against immigration.'[15] This argument provides that at least to a certain extent, restrictive control of migration is upheld in order to preserve the sovereign right of States to control migration into their territory and thereby protect essential national security interests. In the following sections, various reasons that have been identified as underlying factors for the need to control migration will be discussed. Those are the exercise of State control and national security, protection of the national labour market, protection of the national community and protection of the welfare State.

1.3.1 State Control and National Security

Elaborating on the argument that control of migration is first and foremost State-centred, Soysal provides, that the 'inherent' need for control has arisen from the fact that modern States are built on the idea that they are 'nation' States and thus control of migration is based on States acting upon the national model, since their existence is predicated on this model constantly trying to keep out foreigners by issuing new

14 Walters, W. 2012. Imagined Migration World: The European Union's Anti-Illegal Immigration Discourse, in *The Politics of International Migration Management*, edited by M. Geiger and M. Pécoud. Hampshire: Palgrave Macmillan, 73.

15 Hollifield, J. 1992. *Immigrants, Markets and States: The Political Economy of Postwar Europe.* Cambridge & London: Harvard University Press, 5-6.

aliens laws and adopting restrictive immigration policies.[16] This theory has an additional dimension that focuses on how State control is selective in migration management in that control is also conducted to attract the 'right' type of migrants, that is, those that the State needs or wants, as Bhabha maintains, 'the cardinal political concern that dominates all the others is nearly always the "who" of migration – the demographic characteristics of migrants.'[17] Based on these political concerns, decision making 'about eligibility for exit, transit, entry and stay is dominated by regulatory and classification systems, both implicit and explicit, which reflect assumptions about legitimacy, vulnerability and desirability' related to these demographic characteristics of the migrant,[18] which ascribe statuses to groups of migrants through political discourses resting on assumptions about each particular group. Similar arguments have been set forth by other authors addressing the power of States to control migration by classification, for example in the observation that the term 'migrant' is contested, and that 'the contents of the category alter across space and time, in different contexts, involve self-definition and exclusion, and a denial of access to rights.'[19] This approach of using classification as a means to control migration is evident in EU policies and law addressing labour migration. Therein categorisations of migrants into various 'types' of labour migrants and granting the right to equal treatment with nationals in the Member State where migrants reside and work are both used for that purpose.

The 'who' of migration is thus found in discourses on control of migration or 'the ways in which international migration in its various forms is understood as advantageous or damaging,' to be a result of decision-making processes rather than 'a consequence of the individual character or personality of migrants (that they as people are in some way "bogus", "abusive" or on the other hand "deserving").'[20] Additionally, the exercise of State control over migration has been identified as resting on various different discourses used by States to demonstrate the ability to manage migration in to their territory. Those discourses include the need to 'demonstrate the ability to exert control in a context of uncertainty and risk produced by globalizing processes,' and that the idea of being 'able to manage gives the idea of control by the nation-state and of its capacity to measure benefits against costs.'[21] Control over migration and in particular by defining 'types' and 'groups' of migrants as subject to control measures are thus considered necessary not primarily to protect the security of the nation State, but to ensure that these control measures are implemented in

16 Soysal, Y. 1994. *Limits of Citizenship: Migrants and Postnational Membership in Europe*. Chicago: University of Chicago Press, 141.

17 Bhabha, J. 2007. Border Rights and Rites: Generalisations, stereotypes and gendered migration, in *Women and Immigration Law: New variations on classical feminist theme,* edited by S. Van Walsum and T. Spijkerboer. New York: Routledge-Cavendish, 16.

18 *Ibid.*

19 Kofman, E., Phizacklea, A., Raghuram, P. and Sales, R. 2000. *Gender and International Migration in Europe: Employment, welfare and politics*. London & New York: Routledge, 13.

20 Geddes, A. 2005. *The Politics of Migration and Immigration in Europe*. London: SAGE Publications, 166.

21 Kofman, E. 2008. Managing migration and citizenship in Europe: Towards an overarching framework, in *Governing International Labour Migration: Current issues, challenges and dilemmas*, edited by P. Gabriel and H. Pellerin. London & New York: Routledge, 13.

such a manner as to benefit the interests, as defined through political processes, of the nation State in question. Discussing the Europeanization of migration policy, Huysmans draws attention to the fact that migration management 'is not only a technical and professional issue,' but also a hot political issue and a 'part of the political spectacle in which the criteria of belonging are contested.' In that context, he regards the political spectacle as referring to the creation and circulation of symbols in the political process and that the politics emerge 'in the spectacle as a drama in which meaning is conferred through evoking crisis situations, emergencies, rituals such as consultations or elections, and political myths.'[22]

A strong focus on security measures in relation to migration management is considered by the schools of security theorists as directly related to the notion of the nation State. According to Bigo for example, 'securitization of the immigrant as a risk is based on our conception of the state as a body or a container for the polity,' and that this securitization is 'anchored in the fears of politicians about losing their symbolic control over the territorial boundaries.'[23] Furthermore, the securitization of migration is assessed to be driven by the security sector itself, that is, the security concerns regarding migration are 'structured by the habitus of the security professionals and their new interests not only in the foreigner but in the 'immigrant." These security interests are viewed as 'correlated with the globalization of technologies of surveillance and control going beyond the national border,' and based 'on the 'unease' that some citizens who feel discarded suffer because they cannot cope with the uncertainty of everyday life.' This unease is considered structural in a 'risk society' framed by neoliberal discourses in which freedom is always associated at its limits with danger and (in)security, rather than a psychological unease felt by citizens of the State.[24] Discussing security discourse on migration in relation to the European Union in particular, Huysmans notes that the 'development of internal security discourses and policies in the European Union are often presented as an inevitable policy response to the challenges for public order and domestic stability that arise from abolishing internal border controls and in the case of migration, from the increase in the number of (illegal) immigrants and asylum-seekers.' In regard to this, the security problem triggers the security policy in that the problem comes first and the policy is an instrumental reaction to it, however, in these 'policy developments that claim to respond to a security problem that arises in the context of the European integration process actively inscribe security connotations into immigration and asylum.'[25] According to these theories, securitization of migration policy is complex in that the need for the securitization is in part based on the discourses on migration rather than on evidence that individual migrants constitute security threats, the policies are therefore implemented largely based on assumptions that migrants pose a threat to nation

22 Huysmans, J. 2006. *The Politics of Insecurity: Fear, migration and asylum in the EU*. London and New York: Routledge, 72-73.

23 Bigo, D. 2002. Security and Immigration: Toward a Critique of the Governmentality of Unease, *Alternatives*, 27, Special Issue, 65.

24 *Ibid.*

25 Huysmans, J. 2006. *The Politics of Insecurity: Fear, migration and asylum in the EU*. London and New York: Routledge, 68-69.

States, and thereby frame State response to individual migrants and groups of migrants independent of whether they pose a threat to the identified security interest of the State. Thus, the securitization of migration directly affects individual migrants and their rights, while they have characteristics attributed to them based on generalisations of groups of persons and assumptions made about the effect of their individual decision to migrate on the interest of a particular nation State.

Most theories and policies on migration management position the individual migrant as a subject of control or an object rather than an agent when addressing the status of the migrant in relation to State control of migration. In her theory on migration control, Sassen maintains, that first 'the sovereignty of the state and border control, whether land borders, airports, or consulates in sending countries, lie at the heart of the regulatory effort.' Secondly, that 'immigration policy is shaped by an understanding of immigration as the consequence of the individual actions of emigrants' and the 'receiving country is taken as a passive agent, one not implicated in the process of emigration.'[26] In this discussion, the characterization of the State as passive in terms of migration, is related to how the individual becomes the centre of migration management as she explains it, that one of the fundamental traits of immigration policy is 'that it singles out the border and the individual as the sites for regulatory enforcement.'[27] Furthermore, that on the matter of the individual as a site for enforcement, one of the operational logics is that immigration policy 'places exclusive responsibility for the immigration process on the individual, and hence makes of the individual the site for exercise of the state's authority.'[28] Although the approach described here places exclusive responsibility for the migration event on the individual migrant, it does not regard the migrant as an agent, but rather as the cause and object of the regulatory measures enacted towards him/her. The agency of the migrant is not seen as of importance in relation to this, only the consequences it has for the State in exercising its need to control migration. The importance of recognizing the agency of the migrant in the construction of migration management policies, has however been highlighted by Guild and Mantu who provide that while 'in order to understand what state contentions are regarding the control of labour migration, it is indispensable to examine the position of the individual migrants as objects, but also actors in dialectic with state authorities,' and how their personal experiences and projects are 'influenced and transformed as a result of the state practices involved.'[29]

1.3.2 Protection of the National Labour Market

The one issue area that is most frequently cited as the underlying reason driving migration control is protection of the domestic labour market which Hollifield claims even the most liberal States seek to regulate by preventing competition between citizens and foreign workers and that 'this is the practical effect of policies designed to

26 Sassen, S. 1998. *Globalization and its Discontents*. New York: The New York Press, 7.
27 *Ibid.*
28 *Ibid.*, 7-8.
29 Guild, E. and Mantu, S. 2011. Introduction, in *Constructing and Imagining Labour Migration: Perspectives of Control from Five Continents*, edited by E. Guild and S. Mantu. Surrey: Ashgate, 3.

control immigration.'[30] Examining in particular State policies on managing labour migration, he concludes that 'immigration in the modern era is multifaceted, and States have attempted to regulate it by creating categories of migrants (workers, seasonals, family members, frontier workers, and refugees,) each of which requires a special policy or set of policies to control.'[31] Anderson makes a similar argument while maintaining that the contemporary political discourse about immigration is driven by concerns about numbers of migrants and that this 'discourse works to homogenize the Migrant, who is turned, literally into a figure, a number that is susceptible to technocratic manipulations.' Additionally, that the policies and practices based on this approach 'work to split migrants into different types of actors (by reason for entry, nationality, etc.) thereby imposing the government's own order on the population of mobile people.'[32] This categorization of migrants in control measures referred to above, alludes to both a restrictive approach to migration and a carefully thought out system to control access to the national labour market. Migrants are divided into 'types' and different policies to control access for different groups of migrants are developed by the State, both by granting different statuses to migrants in relation to access to territory and the labour market and as regards equal treatment with nationals.

Menz who has examined contemporary policies and strategies to manage labour migration and compared them to 'post war' labour migration management concludes that the new paradigm of managed migration entails much more carefully regulated and restricted access channels than were employed before. Thus, modern migration management reflects the 'paradigm realization that in liberal societies immigration cannot be stopped or reversed, yet its core is managerial, economistic, and restrictive, focusing on the potential economic and social contributions by immigrants to host societies.'[33] To achieve the aim of managing migration to certain predefined ends thereby entails selecting newcomers based on their skills profile, as well as rigorously restrictive aspects with respect to unwanted, unsolicited, and undesirable newcomers who seek alternative access paths.[34] According to this, nation States are assumed to be highly strategic in permitting migrants access to their territory and the strategies they adopt for migration management are directly related to economic strategies of the State in that 'the embedded environments of liberal and coordinated market economies shape the preferences of actors and will create different demands for different sets of labor migrants.'[35] Menz's argument continues in this vein, stating that there is a direct relationship between a State's production strategy and migration management and that in what he refers to as re-discovering 'migrants as potentially useful human resources,' governments 'implement new labor migration policies that

30 Hollifield, J. 1992. *Immigrants, Markets and States: The Political Economy of Postwar Europe.* Cambridge & London: Harvard University Press, 7.

31 *Ibid.*, 12.

32 Anderson, B. 2013. *Us & Them? The Dangerous Politics of Immigration Control.* Oxford: Oxford University Press, 69.

33 Menz, G. 2009. *The Political Economy of Managed Migration: Nonstate Actors, Europeanization and the Politics of Designing Migration Policies.* Oxford: Oxford University Press, 2.

34 *Ibid.*

35 *Ibid.*, 4.

reflect the profile of the different production strategies and the structure of the labor market across Europe.'[36] In regard to the European Union in particular, this is found to materialize in the way that even though policies differ across Europe that 'in the wake of the rediscovery of actively solicited labor migration,' labour migrants 'are recruited to complement existing strengths in terms of the production strategy and address structural weaknesses and deficiencies.'[37] In this context, labour migration management in European Union Member States is seen as a strategy thought out and crafted to meet the needs of the labour market and that it is successfully implemented in admitting migrants that match the needs of the labour market. Discussing migration in the context of theories on the relationship between the market and the State, Entzinger and al concluded that 'the logic of markets and the logic of states stand in classical opposition to one another.' That while in 'classical economic theory markets always strive for expansion,' they are in need for people who can produce and people who can consume, and that markets without perspective for growth lose their dynamism.[38] In this respect, the wariness of States to admit migrants for employment reasons is seen to be related to the fact that it is the 'ultimate prerogative' of the State 'to decide who may and who may not get access to its territory.'[39]

This sovereign power and the wariness of States is by Entzinger et al deemed as a reason why they do not follow the expansionist will of the economy so to speak, to meet their need for labour migrants and explained by the fact that the State's responsibility, in particular of what they call 'modern liberal democratic states,' with regard to migration is broader than only concerning meeting the needs of the economy to grow, that the State also 'has to make sure its citizens can live in peace and that they do not feel threatened by newcomers.'[40] The substance of this argument is that migration management is conducted with a more comprehensive regard to its assumed effect on society, than meeting the needs of the market and that the demand of the economy for labour migration is restricted by the perceived need of the State to protect domestic society and its citizens from outsiders that could change existing balance within the society. In migration policies the right to equal treatment of migrants with nationals is frequently related to the need to protect the domestic labour market, while granting migrants equal treatment is seen as protecting national workers from unfair competition and avoiding social dumping. The arguments made by Entzinger et al stand in opposition to the argument made by Menz above that migration management is largely based on economic/labour market needs perspective and that it is a primary concern to control migration to meet economic needs. Freeman in this regard, observes that changes in migration management policies which 'may be broadly understood as economic in origin are taken to supersede the political activities of

36 *Ibid.*, 9.
37 *Ibid.*, 10.
38 Entzinger, H., Martiniello, M. and Wihtol de Wenden, C. 2004. Introduction, in *Migration Between States and Markets*, edited by H. Entzinger, M. Martiniello and C. Wihtol de Wenden. Aldershot and Burlington: Ashgate, xv.
39 *Ibid.*
40 *Ibid.*, xvi.

increasingly outmoded nation states,'[41] and maintains that 'political factors should be at the centre of the explanation of comparative immigration policy.'[42] He further provides, that powerful 'economic interests press for ready access to cheap and plentiful labour and support policies that fuel population expansion, real estate development, and consumer growth,'[43] and that in this regard, politics is itself a cause of weak sovereignty and ineffective immigration policy, rather than being a 'side-show in the larger story of socio-economic change.'[44] Freeman thus suggests that even if the needs of the market are not aligned with the needs of the State to control migration, that domestic economic interests influence the political bodies that formulate and implement migration policy so as to meet the needs of the market. Control of access to national labour markets can then be seen as a factor in migration management policies which sometimes override other concerns of States.

1.3.3 Protection of the National Community

In relation to the identified need to control migration in order to protect the community of a nation State, Huysmans has noted that the 'protection and transformation of cultural identity is one of the key issues through which the politics of belonging and the question of migration are connected.'[45] Migration from outside the nation State is thus considered to pose a threat to the perceived uniform identity of national communities and has been regarded as posing a 'fundamental challenge for national identity' while as the nation State has developed since the eighteenth century, it is premised on the idea of cultural as well as political unity. Supporting this idea of outsiders threatening the national community is how 'ethnic homogeneity, defined in terms of common language, culture, traditions and history, has been seen as the basis of the nation state,' and although this unity has often been fictitious and a construction of the ruling elite, it 'has provided powerful national myths' and supported the need for control of immigration and ethnic diversity while they are seen as threatening 'such ideas of the nation, because they create a people without a common ethnic origin.'[46] The perception of foreign migrants as possibly threatening a national community is partially based on the view of a nation State as comprised of a homogeneous community and a 'static' cultural system as well as 'the idea of exclusive ownership of a certain territory and the boundary obsessed territorialism characterizing statehood' which 'were made possible by making territory part of the nationalistic ideal.' In order to achieve that, 'territory and community had to coincide, and fixed

41 Freeman, G.P. 1998. The Decline of Sovereignty? Politics and Immigration Restrictions in Liberal States, in *Challenge to the Nation-State: Immigration in Western Europe and the United States*, edited by C. Joppke. Oxford and New York: Oxford University Press, 102.

42 *Ibid.*

43 *Ibid.*, 103.

44 *Ibid.*

45 Huysmans, J. 2006. *The Politics of Insecurity: Fear, migration and asylum in the EU*. London and New York: Routledge, 73.

46 Castles, S., de Haas, H. and Miller M.J. 2014. *The Age of Migration,* 5th edition. Hampshire: Palgrave Macmillan, 20.

territorial lines placed limits to people's identifications.' Thereby, the 'territory itself became the fundamental marker of personal and collective identification and the state succeeded the church in assigning ultimate ends of territorial collectivities and in defining the enemy. The enemy was no longer the infidel or heretic, but the invader and the subversive.'[47]

Discourses on migration management are viewed as reflecting this understanding of the migrant as a threat to homogenous national communities in that the foreigner is constructed as a potential threat and in that process 'homogenized into one category and that category is allocated negative characteristics.'[48] In an assessment of how this construction of the migrant as a threat to the national community has affected internal policies in EU Member States towards migrants present in their territories, Kostakopoulou observed that there 'has been a shift from equal treatment to conditioned membership as national conceptions of integration and neo-national narratives seeking to preserve social cohesion and national values have been uploaded at the European level.' In this process, predominant national approaches are viewed as having 'diluted the traditional rights-based and participatory approach to integration,' and to have disconnected it from equalization and gradually realigned it with migration control and the preservation of the alleged homogeneity of national bodies.[49]

1.3.4 Protection of the Welfare State

Much of the negative discussion about migration into Member States of the European Union is based on the idea that migrants are seen as a burden on the State that undeservingly take advantage of the scarce resources of welfare States. Undeservingly, because they are not regarded as entitled to benefitting from the welfare State as non-citizens and their economic contribution to the State where they live and work is disregarded. Joppke, in discussing Marshall's theory of the development of citizenship rights provides that in 'a world of scarce resources rights are costly,' and that 'they can never be for the whole world.' Furthermore, that 'spreading rights more evenly requires slashing existing privilege,' which is the reason why 'immigration is even more jealously rejected by developed welfare states, which would go bankrupt overnight if literally everyone could reap its benefits.'[50] This argument is based on the premises that migrants do not contribute to the economy in the societies where they live and work, an assumption for which empirical evidence points to the contrary.

47 Kostakopoulou, D. 2004. Irregular Migration and Migration Theory: Making State Authorization less Relevant, in *Irregular migration and human rights: Theoretical, European and international perspectives*, edited by B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszcak. Leiden: Martinus Nijhoff, 47.

48 Guild, E. 2009. *Security and Migration in the 21st Century*. Cambridge: Polity Press, 133.

49 Kostakopoulou, D., Carrera, S. and Jesse, M. 2009. Doing and Deserving: Competing Frames of Integration in the EU, in *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, edited by E. Guild, K. Groenendijk and S. Carrera. Surrey: Ashgate, 168.

50 Joppke, C. 1998. Immigration Challenges the Nation State, in *Challenge to the Nation-State: Immigration in Western Europe and the United States*, edited by C. Joppke. Oxford and New York: Oxford University Press, 7.

Additionally, it does not take into account the fact that lack of access to common societal goods is rather a consequence of inequalities in the distribution of wealth than the 'scarcity of resources' to be distributed between the residents of the State. The view that inclusion in the welfare State can only be granted to those that 'belong' by virtue of citizenship, and not on equal treatment independent of nationality, has been reconsidered with regard to migrants based on the individual migrant's relationship to the society in claiming that access to the welfare State should be 'based on the contribution made by labour migrants rather than nationality,' while the 'exclusion of contributing non-nationals' would 'undermine the organizational basis of these welfare states.'[51] This view has been attributed to the development of international human rights law from which persons derive 'post-national membership' in relation to which in essence, civic and social rights 'are grounded, first, in the modern rule of law, which allows no distinctions on the basis of race, ethnicity, and (in certain respects) nationality; and secondly, in the residence-rather than nationality-based inclusion principle of the welfare state, whose boundaries are in important respects drawn differently from those of the nation state.'[52] This 'post-national membership' has been found to have greatly diminished the importance of citizenship as the determining factor in access to welfare benefits in that 'rights and identities, formerly fused in the concept of national citizenship, have become decoupled. Legitimized by an international discourse on human rights, the rights component of citizenship is reconfigured as universal rights of personhood, independent of nationality.'[53]

This changed understanding of the status of migrants towards the welfare State is still very much dependent on the contribution of migrants to the State of residence, and whether they are seen as actively contributing economically and not a 'social burden' and not everyone agrees that the importance of citizenship or belonging has diminished. In this regard, Brochman maintains that the 'limited resources of the welfare states make it more pertinent for the governments to seek to control borders to protect the interests of the members of the state from increased competition from newcomers,' and that the welfare State '*increases* the value of citizenship, which assures access to goods and services.'[54] A discussion on whether migrants are entitled to benefit from the welfare State cannot be conducted in isolation from the fact that in addition to migrants often being regarded as a burden on, rather than contributing to the welfare State, migrants as well as ethnic minorities are often blamed for 'social and economic problems.'[55] Torpey views this placing of the blame on 'outsiders' or those who are not part of the majority population as related to States seeking to 'mo-

51 Geddes, A. 2005. *The Politics of Migration and Immigration in Europe*. London: SAGE Publications, 165.

52 Joppke, C. 1998. Immigration Challenges the Nation State, in *Challenge to the Nation-State: Immigration in Western Europe and the United States*, edited by C. Joppke. Oxford and New York: Oxford University Press, 26-27.

53 *Ibid*., 8.

54 Brochman, G. 2003. Citizenship and Inclusion in European Welfare States: The EU Dimension, in *Migration and the Externalities of European Integration,* edited by S. Lavenex and E. Uçarer. Oxford: Lexington Books, 183.

55 Castles, S., de Haas, H. and Miller M.J. 2014. *The Age of Migration,* 5th edition. Hampshire: Palgrave Macmillan, 19.

nopolize the capacity to authorize the movements of persons' which reflects the ambiguous nature of modern States, which are at once sheltering and dominating.[56] As will be discussed later in this study, the extent to which migrants are seen as entitled to welfare benefits in the State where they reside and work is still highly contested among EU Member States. The right to equal treatment granted to migrants within the EU is not based on the human rights principle to equal treatment but varies in accordance with what group a migrant is classified as belonging to and the way the law is implemented in each Member State, which is an approach that has a direct relation to migration management policies.

1.4 HUMAN RIGHTS AS A CHALLENGE TO STATE SOVEREIGNTY TO CONTROL MIGRATION

Present times are often said to be characterized by globalization, the dominant features of which are the flow of capital, goods and people between nation States. The changes this has caused are mostly seen as positive, in particular with reference to international trade and markets but less so when it comes to movement and migration of people. The changes in increased mobility of people have led to what Hollifield claims all globalization theorists agree on, that 'the sovereignty and regulatory power of the nation State has been weakened by transnationalism.'[57] As many globalization theorists have argued, economic liberalism and political liberalism pertaining to migrants have not gone hand in hand. Although the nation State may be seen as having weakened in relation to the forces enabling the flow of capital, goods and people in the last decades, this weakening of power has not resulted in loss of control of the nation State over migration. As Geddes rightly observes with regard to immigration in Europe, it is 'not something that simply "happens to" European welfare states as though it were an exogenous shock beyond their control.'[58]

In theorizing about migration control Soysal puts forth the argument that there are 'two institutionalized principles of the global system in regard to immigration' those of 'national sovereignty and universal human rights.' She states that 'these principles form pivotal components of post-war international migration regimes,' and that 'the principle of national sovereignty ordains that every "nation" has a right to its own territorially delimited state, and that only those who belong to the nation have the right to participate as citizens of the state.'[59] Furthermore, that equally 'emphasized in the global framework is the human rights principle, advocated and practiced by national and transnational actors.' Through this the 'notion of human rights, as a

56 Torpey, J. 2000. *The Invention of the Passport: Surveillance, Citizenship and the State*. Cambridge: Cambridge University Press, 7.

57 Hollifield, J. 2000. The Politics of International Migration: How Can We 'Bring the State Back In'?, in *Migration Theory: Talking Across Disciplines* edited by C.B. Brettell and J.F. Hollifield. London & New York: Routledge, 155.

58 Geddes, A. 2005. *The Politics of Migration and Immigration in Europe*. London: SAGE Publications, 165.

59 Soysal, Y. 1994. *Limits of Citizenship: Migrants and Postnational Membership in Europe*. Chicago: University of Chicago Press, 7.

codification of abstract concepts of personhood, has become a pervasive element of world culture.'[60] In Soysal's explanation of how this functions in practice, she states that these 'two global precepts simultaneously constrain and enhance the nation-state's scope of action. On the one hand, nation-states are charged with expanding "responsibilities", on the basis of human rights, with respect to the foreign populations living within their borders. On the other hand, they are expected to regulate immigration and exercise border controls as fundamental expressions of their sovereignty.'[61] From this one can gather that once a migrant is residing within a nation State, that State is constrained by international human rights law and obliged to respect human rights, but that the human rights regime poses no duty on States to admit voluntary migrants, only asylum seekers and refugees, and their sovereign right to control voluntary migration remains intact. The principles of national sovereignty of States to control migration and the principles enshrined in human rights law are therefore compatible as regards voluntary migrants.

In relation to this discussion, migration management policies developed by European Union Member States in recent years are not regarded as 'indicative of states losing control or surrendering sovereignty, but of them trying to reassert control and seeking new "venues" at supranational level that facilitate control efforts.'[62] In this context, Guiraudon and Lahav have expressed scepticism of the view of globalists that international human rights norms constrain national policy making on migration.[63] In their assessment, that what is not included in international texts on human rights is equally telling as that what is included while 'the prerogative of a nation-state when it comes to refusing access, residence, or naturalization to its territory have not been put into question.'[64] Thym concurs with the above in outlining that 'State discretion in migratory matters is usually described as an expression of sovereignty' while 'the perspective of migrants is presented on human rights grounds,' and provides that since human rights are, generally speaking, on the advance and State sovereignty is in retreat, public migration control can easily be portrayed as a remnant of the past. He considers that there is a certain truth to this, but argues however that it would be wrong to 'conclude that the erosion of sovereignty renders migration control obsolete,' while sovereignty has traditionally served as a black box permitting the pursuit of public interests without the need for justification.[65]

Although international human rights law has not challenged or limited the power of nation States to control voluntary migration, human rights standards recognised internationally and by regional institutions in Europe do constrain EU Member States

60 Soysal, Y. 1994. *Limits of Citizenship: Migrants and Postnational Membership in Europe*. Chicago: University of Chicago Press, 7.

61 *Ibid*., 7-8.

62 Geddes, A. 2011. The European Union's Extraterritorial Immigration Controls and International Migration Relations, in *Migration, Nation States, and International Cooperation* edited by R. Hansen, J. Koehler and J. Money. London and New York: Routledge, 87.

63 Guiraudon, V. and G. Lahav. 2000. A Reappraisal of State Sovereignty Debate: The Case of Migration Control, *Comparative Political Studies* 33(2), 163.

64 *Ibid*., 168.

65 Thym, D. 2013. EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook, *Common Market Law Review* 50, 730.

as regards treatment of migrants who reside within their territory. In writings about the rights and status of migrants however, the most common parameter of comparison is citizenship, rather than international human rights norms. Citizenship is used both to discuss whether and to what extent migrants should enjoy rights within a nation State of which they are not citizens. Opinions about using citizenship as a parameter for measuring the rights of migrants vary in relation to why it is used as such and whether it is for the benefit of migrants or not. Thus Klusmeyer concludes that one 'major reason for this growing interest in citizenship matters has been the increasing scale and pace of international migration in a world organized geopolitically around membership boundaries of nation-states,' while the 'citizenry of a nation-state or even of a supranational body such as the European Union is a membership association whose collective identity presupposes drawing lines between the included and the excluded.'[66] Having regard to this increased interest in citizenship, Kofman et al state that the 'exclusionary practices of citizenship have been recognized as being ill-equipped to deal with an age of large-scale and heterogeneous migratory movements.' Due to this, many theorists and activists have advocated for a 'more internationalist and multi-layered global governance whereby rights are delivered and guaranteed at different levels, ranging from the local, national, and international.' In advocating for this approach, the hope was 'that international human rights law would "provide a tool for sculpting a more inclusionary model of citizenship" transcending nation-state boundaries.'[67]

Based on regarding citizenship as already having been replaced by universal human rights as a parameter for the rights of migrants, Soysal maintains that rights 'that used to belong solely to nationals are now extended to foreign populations, thereby undermining the very basis of national citizenship,' a transformation which she sees as requiring 'a new understanding of citizenship and its foundations.'[68] This transformation is regarded as having led to migrants enjoying a status of 'postnational' membership in relation to a State where they are not citizens, which reflects a different logic and praxis, while 'what were previously defined as national rights become entitlements legitimized on the basis of personhood.' The normative framework for, and legitimacy of, this model is viewed as deriving from transnational discourses and structures celebrating human rights as a world-level organizing principle. Postnational membership, accordingly, confers upon every person the right and duty of participation in the authority structures and public life of a polity, regardless of their historical and cultural ties to that community.[69] Soysal goes on to argue that the 'justification for the state's obligations to foreign populations goes beyond the nation-state itself,' and maintains that the 'rights and claims of individuals are legitimated by ideologies grounded in transnational community, through international codes, conventions, and

66 Klusmeyer, D. 2000. Introduction, in *From Migrants to Citizens: Membership in a Changing World,* edited by T.A. Aleinikoff and D. Klusmeyer, Washington D.C.: Carnegie Endowment for International Peace, 1.

67 Kofman, E., Phizacklea, A., Raghuram, P. and Sales, R. 2000. *Gender and International Migration in Europe: Employment, welfare and politics*. London & New York: Routledge, 77.

68 Soysal, Y. 1994. *Limits of Citizenship: Migrants and Postnational Membership in Europe*. Chicago: University of Chicago Press, 137.

69 *Ibid*., 3.

laws on human rights, independent of their citizenship in a nation-state.' Thus, the individual transcends the citizen, which is seen as 'the most elemental way that the postnational model differs from the national model.'[70] Benhabib puts forth a similar argument that provides that people are entitled to rights by virtue of being humans, in stating that transnational migrations 'pertain to the rights of individuals, not insofar as they are considered members of concrete bounded communities but insofar as they are human beings *simpliciter*.' She goes further though than Soysal in arguing that this is applicable both when migrants come into contact with and seek entry or want to become members of territorially bounded communities,[71] and not only after they have been admitted into a nation State. Hollifield concurs with the views expressed in the above in assessing that 'developments in international human rights law have helped to solidify the position of individuals *vis-à-vis* the nation state, to the point that individuals (and certain groups) have acquired a sort of international legal personality.'[72]

The theories on postnational membership and international legal personality obtained through internationally recognised human rights are challenged by Bosniak in her discussion on 'alienage' which puts the relationship between the nation State, international human rights and migration management in an interesting perspective. She claims, that the 'very existence of the status of alienage presupposes a national state with boundaries and the sovereign authority to maintain those boundaries against outsiders,' and that as part of that sovereign authority, the government has provided an 'ascending scale of rights [to the alien] as he increases his identity with our society.'[73] This theory is in opposition to those that maintain that rights are granted to outsiders based on their claim to human rights and makes some very important observations in the following pertaining to the gap that remains between the citizen and the alien in spite of aliens being granted rights while residents within a nation State. In relation to that, Bosniak observes that the 'regulation of national boundaries is not confined to the specific domain of the nation-state's physical or territorial border but extends into the territorial interior as well, and shapes the pursuit of democratic/equal citizenship within the national society.' She maintains that this 'introgression of the border is precisely what occurs in the case of immigrants who reside within a liberal democratic society as status noncitizens, who live within the national territory and enjoy important rights and recognition by virtue of their presence but who remain outsiders under the community's threshold-regulating citizenship rules.' That outsider status, which the law calls alienage, shapes their experience and identity within the community in profound ways while aliens are among other factors, 'denied the vote and most significant welfare benefits, and, notwith-

70 *Ibid*., 142.

71 Benhabib, S. 2004. *The Rights of Others: Aliens, Residents, and Citizens*. Cambridge: Cambridge University Press, 10.

72 Hollifield, J. 2004. Migration and International Relations: The Liberal Paradox, in *Migration Between States and Markets* edited by H. Entzinger, M. Martiniello and C. Wihtol de Wenden. Aldershot: Ashgate, 14.

73 Bosniak, L. 2006. *The Citizen and the Alien: Dilemmas of Contemporary Membership*. Princeton & Oxford: Princeton University Press, 37-38.

standing the ties they may have developed in and with the community, they are always potentially subject to deportation by the state.'[74]

This State sanctioned discrimination based on 'alienage', that can be considered to be a by-product of the fact there is such a system of migration management that continues to distinguish between migrants and citizens even after migrants have been accepted as members of the society, upholds a system of distinction that is counter-productive at least as concerns the goal of social cohesion. In the words of Kofman et al, by defining migrants as non-nationals, States categorize them as not belonging which is used as a mechanism for restricting or denying rights to employment, welfare and political activity. Thus, exclusion and inclusion are not only imposed, but also perceived and 'migrants who are accepted and even have citizenship in the host country may still perceive themselves as migrants, particularly in collective settings where shared ethnic grouping can become the definitive criteria for belonging, and differences between the groups and host population become highlighted.'[75] Based on these arguments, the impact of internationally recognised human rights on the status of migrants residing in a State where they are not citizens is limited in the sense that although they may be granted some rights based on an 'international legal personality', their status as non-nationals is a determining factor in their relationship to the authorities and the national community of the State where they reside.

1.5 UTILITARIAN APPROACH TO MIGRATION MANAGEMENT

One approach to migration management that places rights of migrants at the centre of admission policies and is based on distinguishing between types of migrants is the utilitarian approach which provides that migrants should be granted rights based on how 'useful' they are found to be for the nation State into which they migrate. In this regard, different types of migration processes have been described as posing 'specific problems to be resolved' and that 'the process of management articulates the different forms of migration within an overarching system within which a distinction is made between useful exploitable human capital and human by-products of global crisis, who are accepted grudgingly as a result of an earlier recognition of universal human rights.'[76] In a similar vein Anderson concludes, that it 'is commonly observed that immigration policy and research rest on a fundamental distinction between asylum and immigration, between those who are fleeing persecution and those who are seeking employment or to better their lives in some way.' Furthermore, that this separation of migration into different fields, 'rests on the distinction between the political and the economic', and that 'it has often been noted that such a binary, between

74 *Ibid*., 9.

75 Kofman, E., Phizacklea, A., Raghuram, P. and Sales, R. 2000. *Gender and International Migration in Europe: Employment, welfare and politics*. London & New York: Routledge, 8.

76 Kofman, E. 2008. Managing migration and citizenship in Europe: Towards an overarching framework, in *Governing International Labour Migration: Current issues, challenges and dilemmas*, edited by P. Gabriel and H. Pellerin. London & New York: Routledge, 17.

forced and free, political and economic, and refugee and migrant is not at all clear cut.'[77]

This separation into different policy fields can be seen as a consequence of the will of States to keep some types of migrants out, while trying to attract other types of migrants. Geddes refers to this in discussing the request for integration of migrants, as a 'neo-national reassertion' which 'has occurred because of the recognition that continued immigration into European countries is necessary to sustain employment, economic growth and international competitiveness.' While the policy approach that is characterised by openness to 'skilled labour migration has been accompanied by a stricter demarcation between those forms of migration seen as contributing to the national welfare state and those that are constructed as a threat to it, such as asylum-seeking.'[78] This demarcation between labour migrants and asylum seekers in migration management policies, and as regards integration of migrants, is also found in the exclusion of asylum seekers and beneficiaries of protection from labour market participation in EU Member States. An approach that disregards the skills, experiences and qualifications with which they could contribute to the labour market of the State where they are offered protection and/or residence, both for their own individual benefits and those of the labour market. Having regard to migration management approaches that rest on the type of migrant in question, Huysmans notes that nationality 'does not play a central role in utilitarian mediation of inclusion and exclusion (at least in principle),' but that membership follows from one's utility. He sees this approach as depoliticizing membership and reproducing functionalist imaginations of political community where inclusion and exclusion of immigrants and refugees, of the healthy and the sick, of the haves and have-nots is not regulated via a harsh battle for power, a clash of different views of the true story, or emotional and ritualized rhetoric of belonging. Rather, it is done by means of 'neutral' calculations of costs and benefits embedded in a morality of matching the levels of giving and receiving.[79]

The utilitarian approach to migration management takes for granted that the human rights of migrants are negotiable in relation to the numbers and different types of migrants that should be admitted into a nation State. Thus those advocating for this approach have maintained that 'finding the proper balance between numbers and rights is a difficult and complex challenge for migrants, employers, and governments in the twenty-first century,'[80] and that the 'continuing dialogue that honestly evaluates the trade-offs inherent in migration' is seen as 'the foundation for effective migration management.' Noting however, that 'migration dialogues must deal with a fundamental contradiction' while 'most international and many national standards call for equal treatment of migrants' which 'complicates the discussion because the number of

77 Anderson, B. 2013. *Us & Them? The Dangerous Politics of Immigration Control.* Oxford: Oxford University Press, 55.

78 Geddes, A. 2005. *The Politics of Migration and Immigration in Europe.* London: SAGE Publications, 159.

79 Huysmans, J. 2006. *The Politics of Insecurity: Fear, migration and asylum in the EU.* London and New York: Routledge, 117.

80 Martin, P., Abella, M. and Kuptsch, C. 2006. *Managing Labour Migration in the Twenty-first Century.* New Haven & London: Yale University Press, 167.

migrants tends to fall as rights and equal treatment rise.'[81] Elaborating on this discussion, Ruhs maintains that there is a 'need to reframe as well as expand the current debates and analysis of migrant rights by complementing conversations about the human rights of migrants with a systematic, dispassionate analysis of the interests and roles of nation-states in granting and restricting the rights of migrant workers.' This is seen as necessitated by the assessment that 'the rights of migrant workers not only have *intrinsic* value as underscored by human rights approaches but also play an important *instrumental* role in shaping the effects of international labor migration for receiving countries, migrants, and their countries of origin.'[82] Furthermore, that 'because rights shape the effects of labor immigration, migrant rights are in practice a core component of nation-states' labor immigration policies.' Thus the design of labour immigration policy is seen as requiring simultaneous policy decisions on how to regulate the number of migrants to be admitted, how to select migrants and what rights to grant to migrants after admission, and the impact of these decisions 'on the "national interest" (however defined) of the existing residents in the host country' are deemed likely to be of great significance.[83] This approach basically addresses the human rights of migrants, in particular as concerns equal treatment, as a policy tool that can be employed to shape the effect of labour migration on a State and not as principles enshrined in European and international human rights law that naturally, based on their purpose, lack flexibility to the extent that they can be implemented to obtain specific labour market or economic goals.

The views expressed above that are closely related to what Oger refers to as 'utilitarian politics' are based on a largely utilitarian conception of migrants, while hierarchizing migrants and their rights 'on the basis of their (economic) interests for Europe.'[84] Huysmans has described this as a 'functional and instrumental reading of the politicization of immigration and asylum.' A method that 'disconnects the policy process from political contexts in which the stake of the game is not the effective or efficient management of the phenomenon, but the mode of allocating values, rights and duties that define the good life in a political community.' Additionally, that while immigration and asylum are phenomena that often raise tough questions about the good life in a political community, treating them mainly as a policy problem would hide the inherently political nature of these phenomena.[85] In a similar vein, Torpey maintains that modern 'nation-states' have grown increasingly committed to and reliant upon their ability to make strict demarcations between mutually distinct bodies of citizens, as well as among different groups of their own subjects, when one or more of these groups are singled out for 'special treatment.' Furthermore, that the

81 *Ibid.*

82 Ruhs, M. 2013. *The Price of Rights: Regulating International Labor Migration.* Princeton & Oxford: Princeton University Press, 2.

83 *Ibid.*, 3.

84 Oger, H. 2009. The French political refusal on Europe's behalf, in *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights*, edited by R. Cholewinski, P. De Guchteneire and A. Pécoud. New York: UNESCO Publishing and Cambridge University Press, 320.

85 Huysmans, J. 2006. *The Politics of Insecurity: Fear, migration and asylum in the EU*. London and New York: Routledge, 106-107.

need to sort out 'who is who' and, perhaps more significantly, 'what is what' becomes especially acute when States wish to regulate movement across external borders.[86] In this regard, he observes that 'identities have been discussed in purely subjective terms, without reference to the ways in which identities are anchored in law and policy,' and that this 'subjectivistic' approach, 'tends to ignore the extent to which identities must become codified and institutionalized in order to become socially significant.'[87] These analyses of Huysmans and Torpey which are directly applicable to the utilitarian approach to migration management are important in particular as regards the newly developed EU law on labour migration which is based on differentiating between various types/groups of migrants and granting migrants access to territory and the labour market and the right to equal treatment in accordance with the policy goals identified by the EU as regards each of the groups. By adopting a sectoral approach to migration, the EU has institutionalized differentiation between labour migrants. In ascribing statuses to groups of migrants, through the access and rights granted, the EU has codified the 'identity' of the different types of labour migrants through law and given each of the different statuses assigned to groups of migrants and codified in law, a 'social significance' as for example highly desirable, temporary and excluded. While the right to equal treatment with nationals granted to each of the groups of migrants differs based on status, this utilitarian approach to migration management is incompatible with the human rights principle of equal treatment, the adherence to which the policy approach regards as negotiable in order to meet economic interests of nation States.

1.6 MIGRATION MANAGEMENT AND HUMAN RIGHTS IN POLICY DISCOURSES OF INTERNATIONAL ORGANISATIONS AND GLOBAL PROCESSES

Specialised agencies of the United Nations, for example the United Nations Development Programme (UNDP) and the UN Office of the High Commission for Human Rights (UNOHCR), as well as the International Labour Organization (ILO), have discussed migration management policies as they relate to human rights protection of migrants. The United Nations and the International Organization for Migration (IOM) have initiated and/or convened policy processes on migration with the participation of experts, their Member States or UN specialized agencies. The policy recommendations in relation to labour migration management and human rights set forth by these organisations and policy processes will be outlined in this section.

In its 2009 Human Development Report, addressing human mobility and development, the UNDP sets forth a proposal which is stated to involve 'new processes and norms to govern migration.' It consists of six 'pillars' that together are seen as 'offering the best chance of maximizing the human development impacts of migra-

86 Torpey, J. 2000. *The Invention of the Passport: Surveillance, Citizenship and the State*. Cambridge: Cambridge University Press, 12.

87 *Ibid*., 13.

tion.'[88] The six pillars listed are (1) Liberalizing and simplifying regular channels that allow people to seek work abroad; (2) Ensuring basic rights for migrants; (3) Reducing transaction costs associated with migration; (4) Improving outcomes for migrants and destination communities; (5) Enabling benefits from internal mobility; and (6) Making mobility an integral part of national development strategies.[89] In relation to protection of basic human rights, the report provides that even if there is 'no appetite' by States 'to sign up to formal conventions, there is no sound reason for any government' to deny basic rights to migrants.[90]

Significantly more ambitious in addressing the human rights of migrants is the UN Office of the High Commissioner for Human Rights, which defines international migration governance as it relates to migration as 'a process in which the combined framework of legal norms and organizational structures that regulate and shape how states act in response to international migration, addressing rights and responsibilities and promoting international cooperation.' Because 'migration is a phenomenon involving a wide range of actors including, but not limited to, states,' the use of the term 'governance' instead of 'management' is regarded as presenting 'an important counter-balance to the concept of "management", which could be seen as more concerned with control or even containment of migration.'[91]

For the purposes of this study, it is worth quoting in full the UNOCHR's formulation of the value and function of a human rights-based approach in migration governance policies:

> 'A human rights-based approach is normatively based on international human rights standards and operationally directed to respecting, promoting fulfilling and protecting human rights. Applied to international migration governance, two main rationales for implementing a human rights-based approach to migration can be highlighted: (1) the intrinsic rationale, acknowledging that a human rights-based approach is the right thing to do, morally and legally, and (2) the instrumental rationale, recognizing that a human rights-based approach leads to better and more sustainable outcomes. In practice, the reason for pursuing a human rights-based approach will be a blend of these two.
>
> The underlying feature of a human rights-based approach identifies rights holders, who have a claim to certain entitlements, and duty bearers, who are legally bound to respect, protect and fulfil the entitlements associated with those claims. Such an approach works towards strengthening the capacities of rights-holders to make their claims, and of duty-bearers to meet their obligations. In the context of migration governance, it is all the more attractive because the approach elevates policy goals and practices to recognized normative standards and principles with international legitimacy, thus providing a universal and clear vision of implementation by States. A human rights-based approach to migration brings the treatment of migrants as hu-

88 United Nations Development Programme. 2009. *Human Development Report 2009 – Overcoming barriers: Human mobility and development*. New York: United Nations Development Programme, 95.

89 *Ibid.*

90 *Ibid.*, 101.

91 Office of the High Commissioner for Human Rights. 2013. *Migration and human rights: Improving Human Rights-based Governance of International Migration*. Geneva: Office of the High Commissioner for Human Rights, 9.

> man beings to the forefront of all discussions and programming on migration, underlined by the fundamental principles of non-discrimination, empowerment, participation and inclusion, and accountability.'[92]

In the period from 2001 to 2007, the International Organization for Migration and the United Nations initiated four separate policy processes related to migration. Those are the International Dialogue on Migration (IDM) launched by the IOM in 2001, the Global Commission on International Migration (GCIM)[93] launched by the UN in 2003, the Global Migration Group (GMG)[94] established by the UN in 2006 and the Global Forum on Migration and Development (GFMD)[95] initiated within the UN in 2007.

The International Dialogue on Migration (IDM) is a forum for IOM Member States and Observers to identify and discuss major issues and challenges in the field of international migration. In its 2009 workshop, the IDM addressed the human rights of migrants in the context of migration policies, based on lessons learned from policy implementation. In relation to that, the report from the workshop observes that 'human rights, as expressed in international and regional instruments, have entered all spheres of policymaking' and that migration is no exception. It notes, that nevertheless, 'migrants continue to be disproportionately affected by human rights violations,' which is seen to be 'due principally to their status as non-nationals in the country in which they reside.'[96] Based on lessons learned in implementation of migration management policies, the report provides that 'human rights are crucial components of effective and comprehensive migration governance,' that they 'form the baseline for interactions between States and migrants, but they also enter into the relationship between migrants and other players in areas such as recruitment, employment, integration and return of migrants.'[97] Additionally, the IDM considers that from a human rights perspective and in terms of migration governance, 'migration for work, irregular migration flows, trafficking in persons, smuggling of migrants, mixed migration, and the accessibility of legal migration options are interdependent phenomena,' that cannot be treated in isolation from each other. Based on that, the IDM concludes that 'a solid overarching framework to ensure respect for the human rights of *all* migrants combined with a balanced approach to preventing irregular

92 *Ibid*., 32.

93 The GCIM was officially launched by the United Nations Secretary-General and a number of governments on 9 December 2003 in Geneva. It was composed of 19 experts. The GCIM finished its work on 31 December 2005.

94 The GMG is an inter-agency group established by UN Secretary-General Kofi Annan in 2006. Its aim is to foster greater coordination among UN agencies involved in migration-related activities.

95 The GFMD which was initiated in 2007, is a voluntary, informal, non-binding and government-led process open to all States Members and Observers of the United Nations. Its purpose is to advance understanding and cooperation on the mutually reinforcing relationship between migration and development and to foster practical and action-oriented outcomes.

96 IOM-Migration Policy and Research. 2010. *International Dialogue on Migration, Human Rights and Migration: Working Together for Safe, Dignified and Secure Migration*. Geneva: International Organization for Migration, 11.

97 *Ibid*., 12.

migration and opening adequate legal migration channels will benefit migrants and societies as a whole.'[98]

In its report entitled *Migration in an interconnected world: New directions for action*, the Global Commission on International Migration discussed the need to enhance governance of international migration by improving coherence and strengthening capacity of governments at the national level, greater consultation and cooperation between States at the regional level, and more effective dialogue and cooperation among governments and between international organizations at the global level. In relation to that, the GCIM provided that efforts in respect to the above 'must be based on a better appreciation of the close linkages that exist between international migration and development and other key policy issues, including trade, aid, state security, human security and human rights.'[99] The GCIM considered that 'if the benefits of international migration are to be maximized and its adverse consequences minimized, then migration policies should be based on shared objectives and have a common vision,' and that efforts in this respect should be guided by a set of principles.[100] One of the principles identified in relation to the above is protecting the rights of migrants and the GCIM concluded that the 'legal and normative framework affecting international migrants should be strengthened, implemented more effectively and applied in a non-discriminatory manner, so as to protect the human rights and labour standards that should be enjoyed by all migrant women and men.'[101]

The Global Migration Group addressed the challenges related to migration and human rights in its report entitled *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*. Therein, the GMG provides in regard to migration governance, that the respect 'for the human rights of all migrants is a fundamental duty of all States and must underly all policies and practices with respect to their treatment by public authorities in all situations.'[102] The GMG regards the protection of migrants 'as a key issue in the current era of globalization,' and observed that 'as it is becoming increasingly obvious that economic globalization also implies increased human mobility, the protection of people on the move needs to be revisited to address new challenges.'[103] In a discussion paper for the Post-2015 United Nations Development Agenda, the GMG provided its assessment that migration can be a powerful tool for development 'when grounded in human rights, and underpinned by humane, fair and well-governed migration policies.' However, if policies 'aligned with international human rights and labour standards are not implemented, migration can negatively affect

98 *Ibid.*, 12-13.

99 Global Commission on International Migration. 2005. *Migration in an interconnected world: New directions for action, Report of the Global Commission on International Migration*. Geneva: Global Commission on International Migration, 65.

100 *Ibid.*, 3.

101 *Ibid.*, 4.

102 Global Migration Group. 2008. *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*, 13. Available at: http: //www.globalmigrationgroup.org/sites/default/files/uploads/documents/Int_Migration_Human_Rights.pdf (accessed on 15 August 2016).

103 *Ibid.*, 13.

development, and contribute to inequalities, exacerbating the violations of migrant rights.'[104] The GMG thus considers it essential that migration governance policies, in general and those particularly related to development, have a human rights-based approach.

The Global Forum on Migration and Development describes migration as an 'outcome of a process through which an individual decides to move or not to move, depending upon an interplay of forces and drivers within the context of political, economic, environmental and cultural factors, and shaped by gender norms.' In the context of that, the GFMD notes that both migration and its outcomes are effected by the policies in place to govern the phenomenon, that these policies 'can affect the numbers and legal status of those that cross international borders, as well as whether the potential benefits are realized and the challenges addressed (including vulnerability which migrants are exposed to in the process).' Based on this, it concludes that in 'today's fluid "geo-politics", "geo-economics" and commensurate socio-cultural contexts, international migration must be addressed as the complex global phenomenon that it truly is, while promoting and protecting the human rights of all migrants, including women and girls.'[105] In his comments on the focus of the work of the GFMD, the UN Special Rapporteur on the Human rights of migrants, François Crépau, observed that it has 'tended to focus more on the economic development dimensions of migration, rather than on the rights dimensions.'[106] This observation is also relevant with regard to the UN's 2030 Agenda for Sustainable Development. The sustainable development goals set by the Agenda do not call for protection of all human rights of migrants in the few instances that they address migrants or migration. In relation to migration, the Agenda calls for facilitating 'orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration.'[107] As regards labour, it calls for protection of labour rights and promotion of 'safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment.'[108] There is no special emphasis put on the overall protection of migrants in the Agenda which will guide the United Nations in 'Transforming our World' up until the year 2030.

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104 Global Migration Group. 2015. *GMG Discussion Paper: Realizing the Inclusion of Migration in the Post-2015 United Nations Development Agenda*, 2. Available at: http://www.globalmigrationgroup.org/sites/default/ files/ForCirculation_Post-2015_discussion%20paper_April_2015.pdf (accessed on August 15 2016).

105 Global Forum on Migration and Development. 2016. Concept Paper – Ninth Global Forum on Migration and Development – Bangladesh 2016. *Migration that works for Sustainable Development for All: Towards a Transformative Migration Agenda*, 1. Available at: http://www.gfmd.org/docs/bangladesh-2016 (accessed on 26 June 2016).

106 United Nations General Assembly, Human Rights of Migrants: Note by the Secretary-General transmitting the report of the Special Rapporteur on the human rights of migrants, François Crépau, submitted in accordance with Assembly resolution 67/172, UN Doc A/68/283. New York: United Nations, 2013, paragraph 50.

107 United Nations General Assembly, Resolution adopted by the General Assembly-Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc A/RES/70/1. New York: United Nations, 2015, Goal 10.7.

108 *Ibid*., Goal 8.8.

The International Labour Organisation (ILO) has consistently advocated for a rights-based approach to labour migration management. In 2004 the International Labour Conference adopted a resolution which provides that 'a fair deal for all migrant workers requires a rights-based approach, in accordance with existing international labour standards and ILO principles, which recognizes labour market needs and the sovereign rights of all nations to determine their own migration policies, including determining entry into their territory and under which conditions migrants may remain.'[109] In ILOs assessment, national policy and practice regarding labour migration and the protection of migrant workers requires a sound legal foundation based on the rule of national and international law, to be effective, credible and enforceable.[110] In a monograph entitled *International labour migration: A rights-based approach*, the ILO discussed some of the problems with the concept of migration management and observed among other things that policies 'based on the assumption that migrant workers can be brought in when needed and then sent home when no longer needed have failed in every region where they have been tried.' Additionally, that the concept is linked to a view of unilateral migration control by destination countries, that the dividing line between migration 'management' and migration 'control' is indeed very thin.[111] In the context of 'good governance' in the field of migration, the monograph concludes that 'migration policies and practices can only be viable and effective when they are based on a firm foundation of legal norms and operate under the rule of law,' and that most measures needed to 'govern labour migration and ensure adequate protection for migrant workers can be found in the framework of international human rights and labour standards.'[112] In a report of the Director-General of the ILO entitled *Fair migration: Setting an ILO agenda*, it is stated that in policy making on migration, 'it is not sufficient to reiterate points of principle,' that these principles need to be made operational. This is seen to entail, 'constructing an agenda for fair migration which not only respects the fundamental rights of migrant workers but also offers them real opportunities for decent work.' In this respect, 'the recognition of the contribution that migrants make to the societies from which they come and where they work has to be translated into instruments of governance which guarantee a fair sharing of the prosperity which migration helps to create.'[113]

All of the policy discourses outlined above, with the exception of those focusing primarily on development, have in common placing the human rights of migrants at the centre of migration governance policies. Most of them call for the implementation of a human rights-based approach to migration and address the protection of human rights as a fundamental duty of States. The manner in which the UNDP and

109 International Labour Conference, 92nd Session 2004. *Resolution concerning a fair deal for migrant workers in a global economy*. Geneva: International Labour Office, paragraph 20.

110 International Labour Conference, 92nd Session 2004. *Resolution concerning a fair deal for migrant workers in a global economy*. Geneva: International Labour Office, paragraph 10.

111 International Labour Organization, *International labour migration: A rights-based approach*. 2010. Geneva: International Labour Office, 144.

112 *Ibid*., 146.

113 International Labour Conference, 103rd Session 2014. *Report of the Director-General, Report I(B), Fair migration: Setting an ILO agenda*. Geneva: International Labour Office, paragraph 18.

the UN's 2030 Agenda for Sustainable Development address the human rights of migrants in relation to development is surprising and inadequate. In particular having regard to the status of the United Nations as the leading international organization in standards setting on human rights and the link between development and low-skilled migrants, seasonal workers and irregular migrants in employment who are generally considered the most vulnerable groups of labour migrants.

1.7 CONCLUSIONS

Most of the theories and discourses on migration management that are outlined and discussed in this Chapter have in common three components. Those are, a focus on the sovereign right of States to control migration into their territory, a focus on the legitimate reasons provided for the approaches adopted by States to exercise their control to manage migration for specific ends, and the fact that they place the demographic characteristics of migrants or what has been referred to as the 'who' of migration at the centre of the policies. Many of these discourses have revealed that in particular with regard to securitization of migration and control of migration for the purpose of protecting the national community or the welfare State, those policies are mostly based on rhetoric used to justify restrictive responses to policy problems. They do not take into account the existing cultural diversity within a national community, aside from migration, and that migrants are overwhelmingly contributing to the welfare State through labour market participation.

These theories and discourses centre primarily on the interest of States to control migration for various reasons but at the core of those reasons is always an identified need or interest of the State. Migrants are not addressed as agents and bearers of rights, but as objects. The policies implemented in line with these theories and discourses do however affect the rights of migrants in various ways. The securitization of migration directly affects individual migrants and their rights, while through security discourses they have characteristics attributed to them based on generalisations about groups of persons and assumptions made about the consequences of their individual decision to migrate on the interest of a particular nation State. In relation to migration management policies set forth for the protection of the labour market, the right to equal treatment of migrants with nationals is frequently related to the need to protect the domestic labour market while granting migrants equal treatment is seen as protecting national workers from unfair competition. Related to policies implemented to protect the national community, Kostakopoulou observed that national approaches on migration control to preserve the 'alleged homogeneity of national bodies,' have led to a stronger connection between migration control and the right to equal treatment for migrants having the effect of the migration control measures compromising the human rights of migrants.

The right of migrants to equal treatment with nationals and/or migrant as a bearer of human rights are only addressed in substance in the following: theories on the constraints the international human rights regime has placed on the sovereign right of States to control migration and the status the human rights regime has granted migrants in relation to the State, referred to for example as 'post-national membership'; discourses on citizenship and alienage as determining factors concerning the rights

granted to migrants; in relation to the utilitarian approach to migration management; and in policy discourses of international organizations and global processes initiated or established by them.

The discussion on the compatibility of upholding the sovereign right of States to control migration and protecting the human rights of voluntary migrants provided that the international human rights regime has not challenged State sovereignty to control migration, while in essence it only establishes the duty of States to respect the human rights of migrants once they are within the territory of a State but does not impose on them a duty to admit them. In defining the status of migrants as that of 'post-national membership', a status that non-citizens are regarded as enjoying in relation to a State in which they are not citizens on the basis of a universal human rights regime, the rights of non-citizens are seen as having become legitimized on the basis of personhood, not nationality. In the discussions on the importance of citizenship there are however diverging views on whether the rights granted by the international human rights regime have replaced citizenship as parameter for rights. Directly related to that, Bosniak provides that the fact that non-nationals are granted a status of 'alienage' towards the State where they are not citizens however presupposes that States maintain a boundary towards non-nationals that affects the right to equal treatment they are granted while resident within the State as well as in relation to entry into the State. In the utilitarian approach to migration, the demographic characteristics of migrants take on an additional dimension while the approach has at its core a 'dispassionate' way to shaping labour migration management policies in which rights of migrants are determined based on their 'cost' versus the 'benefits' gained by the nation State from their labour contribution. This utilitarian approach is inherently incompatible with the international and European human rights frameworks while it regards human rights as flexible standards that can be negotiated to meet some specific needs of economic and labour market policies. In policy discourses of international organisations and global processes established by them, respect for the human rights of *all* migrants is generally regarded as an essential component of migration governance. They mostly advocate for migration governance policies being grounded in a human rights-based approach and that they recognise the contribution that labour migrants make to society and guarantee them a fair sharing of the prosperity they help to create. An exception to calling for full respect for human rights of migrants is found in the discourses related to development discussed in section 1.6 above. This fact is both surprising and unfortunate having regard to that the link between migration and development is most relevant in relation to low-skilled labour migrants, seasonal workers and irregularly present migrants in employment. These groups of migrants are generally considered to be the most vulnerable among labour migrants and due to their vulnerability often subjected to exploitation. This calls for a human rights-based approach to ensure that their human rights are respected and protected by States.

2. The Right to Non-discrimination and Equal Treatment as it Relates to Nationality in the International and European Human Rights and International Labour Law Framework

2.1 INTRODUCTION

The principle of non-discrimination is enshrined in all human rights instruments and the personal scope of all the core international and European human rights instruments extends to 'everyone.' Additionally, these instruments stipulate that the rights set forth in them shall be granted on the basis of equality. This is by many regarded as the single most important feature of human rights law, and it is 'based on the belief that differential treatment, due to special features of a person or of a group to which a person belongs, is not in accordance with the principle of equality in rights.'[1] International human rights law, in particular in relation to the principle of non-discrimination, has been criticized for being of little value while the material scope of human rights instruments generally does not address the equal distribution of wealth among individuals and nations. The personal scope of human rights law does however apply to individuals regardless of their economic status and the principle 'which unifies and underlies' the human rights system 'is universality, "Everyone" is protected, and human rights are linked not to citizenship but to a common humanity.'[2] Nonetheless, migrant workers are repeatedly discriminated against based on their nationality and excluded from equal treatment even though this fundamental, universal principle of non-discrimination and equality applies to them. Having regard to that, the purpose of this chapter is to inquire into the human rights principle of non-discrimination and equal treatment, in particular as it relates to nationality, to reveal whether this principle as defined in international and European human rights law and international labour law prohibits discrimination against migrants based on nationality.

For purposes of this inquiry, this chapter will outline and discuss whether and then how, the international and European human rights framework and the international labour law framework prohibit discrimination based on nationality. The human rights and labour law instruments this framework is comprised of applies to migrants who reside and work in EU Member States, while they provide for the human rights and labour rights norms that constitute a framework overarching EU law on labour migration. This examination will solely focus on the personal scope of four of the core United Nations human rights treaties, European human rights instruments and international labour standards to divulge whether they prohibit discrimination based on nationality. The material scope of these instruments will not be examined in detail.

1 Skogly, S. 1999. Article 2, in *The Universal Declaration of Human Rights*, edited by G. Alfredsson and A. Eide. The Hague, Boston and London: Martinus Nijhoff Publishers, 75.

2 Grant, S. 2005. *International migration and human rights: A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration.* Global Commission on International Migration, 16.

This inquiry includes exploring how the personal scope of these instruments has been interpreted in recommendations, comments and conclusions of committees and treaty bodies of the United Nations (UN), the International Labour Organization (ILO) and the Council of Europe (CoE), as well as in key judgments of the European Court of Human Rights and the Court of Justice of the European Union on discrimination based on nationality and rights of non-nationals.

2.2 INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL LABOUR STANDARDS

2.2.1 United Nations Covenants and Conventions

The principle of equality first appeared as a general principle at the international level with the adoption of the Charter of the United Nations in 1945.[3] The UN Charter calls for the various activities and programmes of international cooperation to be implemented without distinction as to race, sex, language, or religion[4] and universal respect for, and assistance in the realization of human rights and fundamental freedoms for all.[5] In 1948, three years after the founding of the United Nations, the Universal Declaration of Human Rights (UDHR) was adopted by the General Assembly. The personal scope of the UDHR is 'everyone' and its non-discrimination clause provides that everyone is entitled to all the rights and freedoms set forth in the declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[6]

International human rights instruments adopted by the United Nations have been developed based on the principles enshrined in the UDHR. In a final report on the rights of non-citizens put forth in 2003, behind which was a review of all United Nations human rights law, Weissbrodt who was temporarily appointed a Special Rapporteur on the rights of non-citizens, concluded that the instruments provided that 'all persons should by virtue of their essential humanity enjoy all human rights unless exceptional distinction, for example between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective.'[7] Furthermore, that 'while all human beings are entitled to equality and dignity and rights, States may narrowly draw distinctions between citizens and non-citizens with respect to political rights explicitly guaranteed to citizens and freedom of movement.'[8] Four of the United Nations core human rights instruments are of particular relevance for non-citizens and migrants, those are, in the order of when they entered

3 Skogly, S. 1999. Article 2, in *The Universal Declaration of Human Rights*, edited by G. Alfredsson and A. Eide. The Hague, Boston and London: Martinus Nijhoff Publishers, 76.
4 See Article13(1)(b) of UN Charter in the Annex to Chapter 2.
5 See Article 55(c) UN of Charter in the Annex to Chapter 2.
6 See Article 2 of UNDHR in the Annex to Chapter 2.
7 Commission on Human Rights, Prevention of Discrimination, The rights of non-citizens, Final report of the Special Rapporteur, Mr. David Weissbrodt, UN Doc E/CN.4/Sub.2/2003/23. New York: United Nations, 2003, 2.
8 *Ibid.*

into force, the International Convention on the Elimination of All forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Protection and Rights of all Migrant Workers and their Families (ICRMW). Their personal scope, as it relates to non-citizens, and how the prohibition of discrimination on grounds of nationality has been interpreted on the basis of these instruments will be discussed here.

2.2.1.1 The International Convention on the Elimination of All forms of Racial Discrimination (ICERD)

The ICERD entered into force on 4 January 1969 and has been ratified by all EU Member States. Article 1[9] of the ICERD defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. The Article provides further that the Convention shall not apply to distinction, exclusion, restrictions or preferences made by a State party between citizens and non-citizens and that nothing in the Convention may be interpreted as affecting in any way the legal provisions of States parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality. This construction of what can be considered justifiable distinctions based on nationality under the Convention provides important safeguards in cases where discrimination that is in fact based on race or a particular nationality is being justified as legitimate discrimination based on nationality or citizenship.

The Committee on the Elimination of Racial Discrimination (the Committee) has provided some clarification regarding the scope of this non-discrimination clause in the Convention and its relation to discrimination based on nationality in declaring that it excepts from the definition of discrimination provided therein 'actions by a State party which differentiate between citizens and non-citizens,' that this exemption is however qualified by 'declaring that, among non-citizens, States may not discriminate against any particular nationality.'[10] In relation to this formulation, the Committee stated that the exemption of actions that differentiate between citizens and non-citizens 'must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[11] In General Recommendation No. 30 on discrimination against non-citizens, the Committee elaborates on differential treatment based on citizenship or immigration status and concludes that such treatment 'will constitute discrimination if the criteria for such dif-

9 See Article 1 of ICERD in the Annex to Chapter 2.

10 Committee on the Elimination of Racial Discrimination, *General Recommendation No. XI on non-citizens* (1993), paragraph 1.

11 *Ibid.*, paragraph 3.

ferentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.'[12] The Committee also encourages States to ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin,[13] as well as safeguarding that 'legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens.'[14] The issue the Committee is addressing in these recommendations, where it outlines the possible intersection between legitimate differences in treatment based on nationality on the one hand, in particular with regard to immigration control, and discrimination based on race on the other hand, is to clarify that when discrimination based on nationality is used as a proxy for discrimination based on race or certain selected nationalities, that such conduct will constitute unjustifiable discrimination under the Convention.

The Committee has considered discrimination based on nationality in its jurisprudence, for example in a complaint against Australia regarding discrimination based on nationality in access to education. No violation was found in this case, but commenting on the State party's argument that the allegations of the complainant 'do not fall *ratione materiae* within the scope of the definition of racial discrimination' while the 'definition does not recognise nationality as a ground of racial discrimination.' The Committee concluded that taking into account Article 1(2) of the Convention which provides that it shall not apply to distinctions, exclusions, restrictions or preferences between citizens and non-citizens in light of Article 5, which obliges States parties to undertake and prohibit and to eliminate racial discrimination in all its forms and to guarantee the rights of everyone without distinction as to race, colour, or national or ethnic origin, that the communication is not as such '*prima facie* incompatible with the provisions of the Convention.'[15] This view of the Committee indicates that complaints of discrimination on the grounds of nationality will be considered by the Committee, given the possible interplay between race and nationality in cases concerning discrimination against migrants.

2.2.1.2 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR, which entered into force on 3 January 1976 and has been ratified by all Member States of the EU, recognizes the 'right of everyone' to among other factors, the right to work, which includes the right to the opportunity to gain a living by work freely chosen or accepted, the enjoyment of just and favourable conditions of work, to form trade unions and join a trade union of own choice. The right to social security, including social insurance, to an adequate standard of living for himself and his

12 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30 on discrimination against non-citizens* (2004), paragraph 4.

13 *Ibid*., paragraph 9.

14 *Ibid*., paragraph 7.

15 Committee on the Elimination of Racial Discrimination, Opinion, Communication No. 42/2008, UN Doc CERD/C/75/D/42/2008, paragraph 6.3.

family, to the enjoyment of the highest attainable standard of physical and mental health, to education and to take part in cultural life. Article 2(2)[16] of the Covenant provides that the States parties undertake to guarantee that the rights enshrined in the Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In General Comment No. 20 addressing non-discrimination in economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights (the Committee), discussed the grounds of discrimination prohibited by the ICESCR. In reviewing and commenting on these various grounds, the Committee observed that national and social origin are among the express grounds found in the Covenant and that nationality is listed in a grouping of 'other status', that is additional grounds which 'are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.'[17] The Committee interprets 'national origin' as referring 'to a person's State, nation, or place of origin,' and notes that 'individuals may face systematic discrimination in both the public and the private sphere in the exercise of the Covenant rights,'[18] due to these factors or personal circumstances. In addressing the personal scope of the Covenant in relation to non-nationals, the Committee established that the Covenant 'applies to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.'[19] Additionally, as regards a person's economic and social situation, the Committee confirmed that 'individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society.'[20]

The Committee addressed the right to work in General Comment No. 18, therein it is provided that the right to work, as defined by Article 6 of the Covenant is 'general and non-exhaustive,' and includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts. To achieve this right, the steps taken by States parties shall include 'technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment.'[21] The definition of the right to work enshrined in the Covenant is interpreted by the Committee as underlining the fact that 'respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the importance of work for personal development as well as for social and economic inclusion.'[22] In regard to the principle of non-discrimination as it relates to migrants, the

16 See Article 2(2) of ICESCR in the Annex to this chapter.
17 Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-discrimination in economic, social and cultural rights* (2009), paragraph 20.
18 *Ibid*., paragraph 24.
19 *Ibid*., paragraph 30.
20 *Ibid*., paragraph 35.
21 Committee on Economic, Social and Cultural Rights, *General Comment No. 18, The right to work (Art, 6)*, (2005), paragraph 2.
22 *Ibid*., paragraph 4.

Committee provides that it 'should apply in relation to employment opportunities for migrant workers and their families.'[23]

The right to adequate housing is considered by the Committee in General Comment No. 4. It is stated to be 'derived from the right to an adequate standard of living,' and to be of 'central importance for the enjoyment of all economic, social and cultural rights.'[24] In relation to the personal scope of the right to adequate housing, the Committee concludes that it applies to everyone and that the enjoyment of this right must, in accordance with Article 2(2) of the Covenant, 'not be subject to any form of discrimination.'[25]

As regards the right to education, the Committee provides in General Comment No. 13, that educational institutions and programmes, which include primary education, secondary education, technical and vocational training and higher education, 'have to be accessible to everyone, without discrimination, within the jurisdiction of the State party,' especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds.[26] The Committee does not address discrimination based on nationality directly, except as regards children, where it confirms that the principle of non-discrimination, as set forth in the Convention on the Rights of the Child and the UNESCO Convention against Discrimination in Education, 'extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.'[27]

In General Comment No. 19 on the right to social security, the Committee elaborated on the obligation of States parties to guarantee the enjoyment of social security without discrimination and stipulated that the obligation to 'guarantee that the right to social security is enjoyed without discrimination' pervades all of the obligations under Part III of the Covenant. The Covenant thus prohibits any discrimination, 'whether in law or in fact, whether direct or indirect,' on the grounds listed in Article 2, 'which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.'[28] The Committee declared further that States parties have an obligation to remove de facto discrimination on prohibited grounds, where individuals are unable to access adequate social security, and that they should 'ensure that legislation, policies, programmes and the allocation of resources facilitate access to social security for all members of society.'[29] To ensure that everyone can enjoy the right to social security States parties 'should give special attention to those individuals and groups who traditionally face difficulties in exercising this right,' including the unemployed, workers inadequately protected by social security, persons working in the informal economy, sick or injured workers, refugees, asylum-

23 *Ibid*., paragraph 18.
24 Committee on Economic, Social and Cultural Rights, *General Comment No. 4, The right to adequate housing (Art, 11(1))*, (1991), paragraph 1.
25 *Ibid*., paragraph 6.
26 Committee on Economic, Social and Cultural Rights, *General Comment No. 13, The right to education (Art, 13)*, (1999), paragraph 6(b).
27 *Ibid*., paragraph 34.
28 Committee on Economic, Social and Cultural Rights, *General Comment No. 19, The right to social security (Art, 9)*, (2008), paragraph 29.
29 *Ibid*., paragraph 30.

seekers, internally displaced persons, returnees and non-nationals.[30] As regards non-nationals the Committee noted in particular that Article 2(2), 'prohibits discrimination on grounds of nationality,' and that the 'Covenant contains no express jurisdictional limitation.' Thus, 'non-nationals, including migrant workers' who have 'contributed to a social security scheme, should be able to benefit from that contribution or retrieve their contribution if they leave the country.'[31] In relation to non-contributory schemes for income support, affordable access to health care and family support, the Committee stated that non-nationals should be able to access those. That any restrictions, 'including a qualification period, must be proportionate and reasonable,' and that all persons, 'irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.'[32]

So far, there is no jurisprudence addressing discrimination based on nationality stemming from an individual communication under the optional protocol to the ICESCR.

2.2.1.3 The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR which has been ratified by all Member States of the European Union entered into force on 23 March 1976. The Covenant provides for a catalogue of civil and political rights including the right to life, freedom from torture, cruel, inhuman or degrading treatment or punishment, liberty and security of person, prohibition of arbitrary arrest or detention and establishes the right to liberty of movement and freedom to choose own residence for persons lawfully within the territory of a State. Furthermore, it calls for equality before the courts and tribunals, the right to be presumed innocent until proved guilty according to law, recognition everywhere as a person before the law, freedom of thought, conscience and religion and freedom of association. The personal scope of the Covenant extends to everyone within the territory of a State party. In Article 2(1)[33] it is stipulated that each State party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Covenant does not include a definition of what constitutes discrimination, but the Human Rights Committee (the Committee), provided a definition in General Comment No. 18 on non-discrimination, that is largely based on the definition of discrimination in the ICERD. It provides that the term 'discrimination' as 'used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.'[34] In its Gen-

30 *Ibid*., paragraph 31.
31 *Ibid*., paragraph 36.
32 *Ibid*., paragraph 37.
33 See Article 2(1) of ICCPR in the Annex to Chapter 2.
34 Human Rights Committee, *General Comment No. 18, Non-discrimination* (1998), paragraph 7.

eral Comment No. 15 on the position of aliens[35] under the Covenant, the Committee has provided an interpretation of the principle of non-discrimination as it relates to non-citizens. Referring to Article 2(1) on the personal scope of the Covenant, the Committee established that 'the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens,' and that aliens 'receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant.'[36] In relation to the fact that although the Covenant does not 'recognize the rights of aliens to enter or reside in the territory of a State party', the Committee has reiterated that however, 'once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.'[37]

The right to freedom of association is one of the rights listed by the Committee in General Comment No. 15, as a right that 'aliens receive the benefit of the right of.'[38] The right to freedom of association enshrined in Article 22 of the Covenant,[39] addresses in particular the right to form and join trade unions for the protection of personal interests and makes a reference to ILO Convention 87 on Freedom of Association and Protection of the Right to Organize, prohibiting States Parties to the ICCPR, who are also members of the ILO, to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in ILO Convention 87. The freedom of association has been interpreted by the Committee as applying to migrant workers, requiring that States Parties ensure to migrant workers enjoyment of rights without discrimination and that particular attention should be paid to, among other, the right to form and join trade unions and the provisions of adequate forms of redress in cases of discriminatory treatment and abuse in the workplace.[40]

The ICCPR contains some exceptions to the general rule of the fully inclusive personal scope. These are for example found in Article 12[41] which restricts the right to liberty of movement and freedom to choose own residence to those lawfully within the territory of a State and Article 25[42] which limits to citizens, the right to take part in public affairs, to vote and be elected and have equal access to public services. The Committee in its General Comment No. 25, stated that Article 25, while it protects the rights of 'every citizen', is in 'contrast with other rights and freedoms recognized by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State).'[43] With respect to the personal scope of Article 12, the Committee proclaimed that 'once an alien is lawfully within a territory,

35 The Human Rights Committee uses the term 'alien' in its General Comments, this term is however not used in the Covenant itself or other UN human rights instruments.

36 Human Rights Committee, *General Comment No. 15, The Position of Aliens under the Covenant* (1986), paragraph 2.

37 *Ibid*., paragraphs 5 and 6.

38 *Ibid*., paragraph 7.

39 See Article 22 of ICCPR in the Annex to Chapter 2.

40 See for example HRC observations on the Republic of Korea (2006), paragraph 12.

41 See Article 12 of ICCPR in the Annex to Chapter 2.

42 See Article 25 of ICCPR in the Annex to Chapter 2.

43 Human Rights Committee, *General Comment No. 25, Participation in public affairs and the right to vote* (1996), paragraph 3.

his freedom of movement within the territory and his right to leave that territory may only be restricted' if such restrictions are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others. Additionally, that 'differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified' in accordance with the above.[44] In relation to Article 13[45] of the ICCPR which provides for safeguards in the case of an expulsion of a lawfully resident non-citizen, the Committee stated that due to the personal scope of the provision, the measures for protection against expulsion only extend to lawfully resident aliens and that 'illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions.'[46] It is however highlighted in this regard, that 'discrimination may not be made between different categories of aliens in the application of article 13,' and that Article 13 is limited to regulating the procedural guarantees for expulsion and 'not the substantive grounds for expulsion.'[47] In General Comment No. 27, the Committee examines freedom of movement as it relates to the right of a person not to be arbitrarily deprived of the right to enter his/her own country.[48] The Committee provides that the wording of Article 12(4) of the Covenant does not distinguish between nationals and aliens as it states that 'no one' shall be deprived of the right, and thus 'the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own county".'[49] The Committee concludes firstly, that the scope of 'his own country' is broader than the 'country of his nationality', and is not limited to nationality in the formal sense but 'embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.' Secondly, that the language of the provision 'permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.'[50]

In addition to the general non-discrimination clause, the ICCPR contains a provision on equality before the law in Article 26[51] which provides that all persons are equal before the law and entitled to the equal protection of the law without any discrimination. In the explanation of the Committee on the meaning of Article 26, it stated that it 'not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination' on the

44 Human Rights Committee, *General Comment No. 15, The Position of Aliens under the Covenant* (1986), paragraph 8.
45 See Article 13 of ICCPR in the Annex to Chapter 2.
46 Human Rights Committee, *General Comment No. 15, The Position of Aliens under the Covenant* (1986), paragraph 9.
47 *Ibid*., paragraph 10.
48 See Article 12(4) of ICCPR in the Annex to Chapter 2.
49 Human Rights Committee, *General Comment No. 27, Freedom of movement* (1999), paragraph 20.
50 *Ibid.*
51 See Article 26 of ICCPR in the Annex to Chapter 2.

grounds enumerated in the Covenant's non-discrimination clause.[52] Article 26 is regarded as complimentary to the principle of non-discrimination which 'together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.'[53] The Committee provides further that Article 26 does not merely duplicate the guarantee already provided for in Article 2 but provides in itself an autonomous right, while it 'prohibits discrimination in law or in fact in any field regulated and protected by public authorities.' Article 26 thereby addresses 'the obligations imposed on State parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.'[54]

In the consideration of the case of *Mümtaz Karakurt v. Austria*[55] the Committee explained further the extent of the entitlement to equality before national law of a State party for non-citizens and the obligation it entails for the State. Mr Karakurt, a citizen of Turkey, alleged a violation of his rights to equality before the law and to be free of discrimination in breach of Article 26 of the Covenant. Specifically, Mr Karakurt challenged the lawfulness of a clause in the Austrian Industrial Relations Acts, which limited the entitlement to stand for election to work councils (for private employers) to Austrian nationals or nationals of members of the European Economic Area (EEA). In examining the case, the Committee took into account the function of a member of a work council, for example, to promote staff interests and to supervise compliance with working conditions and concluded that it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality. The Committee found that Mr Karakurt had been the subject of discrimination in violation of Article 26 and pointed out that pursuant to Article 2(3)(a) of the Covenant, the State party was under an obligation to provide the complainant with an effective remedy which in this case consisted of modifying the applicable law so that no improper differentiation is made between persons in the author's situation and EEA nationals.

2.2.1.4 The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW)

The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families entered into force on 1 July 2003, 13 years after it was adopted by the UN General Assembly. It has been ratified by 48 States, none of which are EU Member States. It is clear from the preamble of the ICRMW that it was developed based on the assessment that in spite of the existence of human rights treaties of universal applicability, that there is a need to further enhance the tools and mechanisms for the protection of the rights of migrant workers. This is well summa-

52 Human Rights Committee, *General Comment No. 18, Non Discrimination* (1989), paragraph 1.
53 *Ibid.*
54 *Ibid.*, paragraph 12.
55 Office of the United Nations High Commissioner for Human Rights, *Selected Decisions of the Human Rights Committee under the Optional Protocol (Volume 7), Sixty-sixth to seventy-fourth sessions (July 1999-March 2002),* New York and Geneva: United Nations 2006, 155.

rized in the preamble where it is declared 'that the rights of migrant workers and members of their families have not been sufficiently recognized everywhere and therefore require appropriate international protection.'[56] In the preamble, it is further noted that migrant workers and their families frequently find themselves in a vulnerable situation due, among other things, to 'the difficulties they may encounter arising from their presence in the State of employment,'[57] and that there is a 'need to bring about the international protection of the rights of all migrant workers and members of their families, reaffirming and establishing basic norms in a comprehensive convention which could be applied universally.'[58]

The ICRMW addresses all migrant workers; its personal scope outlined in Article 1(1)[59] stipulates that the Convention is applicable, except as otherwise provided, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status. Within the Convention, a distinction is made between regular and irregular migrants, but the core sections of the ICRMW that provide for the rights of migrant workers are two, part III which applies to all migrant workers and members of their families and part IV which provides for other rights of migrant workers and members of their families who are documented or in a regular situation. The non-discrimination clause in Article 7[60] enumerates the same grounds for prohibition of discrimination as Article 1(1) on the personal scope and applies to all parts of the Convention. Article 7 makes a reference to existing international instruments addressing human rights, and stipulates that by ratifying the Convention, States undertake to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the Convention without distinction on any of the grounds listed in the Article.

Among the rights guaranteed in part III of the Convention (applicable to all migrant workers) are equality of treatment with nationals regarding work conditions and pay, the right to participation in trade unions, access to social security on equal basis, right to emergency medical care, and the following civil and political rights: freedom to leave any country and enter their country of origin, the right to life, freedom from torture and ill-treatment, freedom from slavery and forced labour, freedom from arbitrary or unlawful interference with privacy, family and home, property rights, liberty and security of person and the right to a fair and public hearing by an independent and impartial tribunal. Enshrined in Articles 21-23 are, in the following order, the right not to have one's travel or identity documents destroyed, protection against expulsion on a collective basis or without fair procedures and the right to consular or diplomatic assistance. Those are all rights that are specific to the ICRMW and not included in general human rights instruments. Among the rights guaranteed in part IV (applicable to lawfully resident migrants) are the following: right to liberty of movement in the territory of the State of employment and equal access to education, voca-

56 Preamble of ICRMW, recital 10.
57 Preamble of ICRMW, recital 9.
58 Preamble of ICRMW, recital 15.
59 See Article 1(1) of ICRMW in the Annex to Chapter 2.
60 See Article 7 of ICRMW in the Annex to Chapter 2.

tional guidance, housing, social and health services. Equality of treatment with nationals regarding protection against dismissal and access to unemployment benefits, the right to vote, be elected, and participate in the public affairs of the State of origin and the right to have a family.

The Committee on the Protection of Migrant Workers (the Committee), that monitors the implementation of the Convention has in its General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, addressed discrimination based on nationality in relation to the differences in personal scope found in the Convention. Therein, the Committee articulated that Article 7 of the Convention 'explicitly includes nationality among the prohibited grounds of discrimination', and noted that other UN Treaty bodies have 'interpreted the prohibition of discrimination to include non-nationals, such as migrant workers, regardless of their legal status and documentation.' The Committee reiterated that the rights in part III of the Convention apply to all migrant workers and members of their families, including those in an irregular situation, therefore, 'any differential treatment based on nationality or migration status amounts to discrimination unless the reasons for such differentiation are prescribed by law, pursue a legitimate aim under the Convention, are necessary in the specific circumstances, and proportionate to the legitimate aim pursued.'[61] The Committee declared that Article 7 of the Convention requires States parties 'to respect and to ensure' to all migrant workers and members of their families without discrimination the rights provided for in the Convention. Noting that Article 7 does not provide an autonomous right, while its application is limited to those rights of migrant workers and members of their families that are protected in the Convention, and in particular part III and in that respect Article 7 covers both *de jure* and *de facto* discrimination.[62] Additionally, it is established that States parties are under an obligation to protect the rights under the Convention for all migrant workers by adopting positive measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate de facto discrimination against them.[63] In its observations on the initial report of Turkey under the ICRMW, the Committee recommended that Turkey take all measures necessary, including legislative amendments, to ensure that all documented and undocumented migrant workers and their families within their territory, or subject to its jurisdiction, enjoy without discrimination the rights recognized in the Convention, in accordance with Article 7 thereof, including by amending the Labour Code.[64]

61 Committee on the Protection of Migrant Workers and Members of Their Families, *General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families* (2013), paragraph 18.

62 *Ibid*., paragraph 1.

63 *Ibid*., paragraph 19.

64 Committee on the Protection of Migrant Workers and Members of Their Families, *Concluding observations on the initial report of Turkey*. UN DOC CMW/C/TUR/CO/1, New York: United Nations 2016, paragraph 38(a).

2.2.1.5 Summary – The Principle of Non-discrimination and Equal Treatment based on Nationality in UN Human Rights Instruments

The examination of four of the UN's core human rights instruments in this section establishes that discrimination on the grounds of nationality is one of the prohibited grounds of discrimination protected by those instruments. Although nationality is not one of the suspect grounds listed in the non-discrimination clauses of the ICESCR and the ICCPR, the monitoring committees overseeing the implementation of these instruments have declared that the prohibition of discrimination includes discrimination based on nationality. This development has occurred through the interpretation of the treaty bodies overseeing the implementation of these Conventions in the State parties and through individual complaints of discrimination made to the treaty bodies. Through consideration of these, the treaty bodies have determined that nationality is a prohibited ground of discrimination and that any discrimination between nationals and non-nationals has to serve a legitimate objective and be proportional to the achievement of that objective. As regards the ICERD, which material scope is limited to addressing racial discrimination in all its forms, the monitoring committee has elaborated a distinction between racial discrimination and discrimination based on nationality to ensure that legitimate differences based on nationality with regard to immigration control are not used as a proxy to discriminate on the basis of race or towards particular nationalities. It has concluded that a claim of discrimination based on nationality is not *prima facie* incompatible with the provisions of the Convention. The ICRMW is the only one of the four instruments that explicitly prohibits discrimination based on nationality and was adopted in particular to ensure that migrants enjoy protection of universally recognised human rights, it addresses migrants in regular and irregular situations separately. The material scope of the ICRMW is mostly consistent with general human rights instruments but the advantage of it as seen by Ryan, is 'precisely that many of its provisions aim at securing the equal treatment of foreign nationals.'[65]

2.2.2 International Labour Law

International labour law which has been developed within the International Labour Organization (ILO) covers a wide spectrum of rights related to employment and social conditions and the ILO has repeatedly confirmed that 'all international labour standards apply to migrant workers, unless otherwise stated.'[66] Furthermore the organisation has declared that the 'human rights of all migrant workers, regardless of their status, should be promoted and protected. In particular, all migrant workers should benefit from the principles and rights in the 1998 ILO Declaration on Fun-

65 Ryan, B. 2013. In Defence of the Migrant Workers Convention: Standard-Setting for Contemporary Migration, in *The Ashgate Research Companion to Migration Theory and Policy,* edited by J. Satvinder. Surrey: Ashgate, 495.

66 ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration. 2006. Geneva: International Labour Office, paragraph 9(a).

damental Principles and Rights at Work and its Follow-up, which are reflected in the eight fundamental ILO Conventions, and the relevant United Nations human rights Conventions.'[67] These fundamental conventions, all of which have been ratified by all 28 Member States of the EU, are the following: Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) and Right to Organize and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29) and Abolition of Forced Labour Convention, 1957 (No. 105); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Wage Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182).[68] Two of the fundamental ILO Conventions No. 87 and No. 111 will be discussed here as regards their personal and material scope along with Convention No. 118 Equality of Treatment (Social Security) and the two ILO Conventions that have been set forth specifically to protect the rights of migrant workers and enhance the protection of their rights in a host State where a migrant is residing and working. Those are the Migration for Employment Convention (Revised), 1952 (No. 97) and the Migrant Workers (Supplementary Convention), 1978 (No. 143). Although few EU Member States have ratified the two Conventions last listed, they are regarded as the main standards setting instruments of the ILO as concerns migrant workers and thereby of relevance to EU law on labour migration whereas all EU Member States are members of the ILO, the leading international organisation on labour rights.

2.2.2.1 ILO Conventions No. 87, No. 111 and No. 118

ILO Convention No. 87, Freedom of Association and Protection of the Right to Organize, entered into force on 4 July 1950 and has been ratified by all EU Member States. Article 2[69] of the Convention provides that workers and employers, without distinction whatsoever, shall have the right to establish and to join organisations of their own choosing without previous authorisation. The personal scope of the Convention has been interpreted by the Committee on Freedom of Association (the Committee), for example in a case against Spain concerning legislation on foreigners 'which restricted the trade union rights of foreigners by making their exercise dependent on authorization of their presence or residence in Spain.' In addressing the case, the Committee commented on how to determine the concept of 'workers' as used in the Convention and concluded that as regards the freedom of association no distinctions between workers are allowed except for those set out in Article 9 of the Convention concerning armed forces and the police. Thus, in the Committee's opinion, the Convention 'covers all workers, with only this exception.'[70] In relation to temporary workers, the Committee has concluded that the prohibition to make distinction between workers applies as well in regard to the type of contract a worker is holding, that all workers, 'whether they are employed on a permanent basis, for a

67 *Ibid*., paragraph 8.
68 *Ibid.*
69 See Article 2 of ILO Convention No. 87 in the Annex to Chapter 2.
70 Committee on the Freedom of Association. 2002. *327th Report of the Committee on Freedom of Association.* Geneva: International Labour Office, 189.

fixed term or as contract employees, should have the right to establish and join organizations of their own choosing.'[71]

ILO Convention No. 111, Discrimination (Employment and Occupation), entered into force on 15 June 1960 and has been ratified by all 28 EU Member States. The material scope of the Convention is defined in Article 1(3)[72] which provides that for the purpose of the Convention the terms of employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment. The Committee of Experts on the Application of Conventions and Recommendations (the Committee), has addressed the personal scope of Convention No. 111 and concluded that under the Convention all migrant workers, including those in an irregular situation, must be protected from discrimination in employment on the basis of the grounds set out in Article 1(1)(a).[73] Article 1(1)[74] provides that for the purpose of the Convention, the term discrimination includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity in employment or occupation. In commenting further on the personal scope and non-discrimination and equality clauses of the Convention as it relates to migrant workers, the Committee has observed, that 'in some countries persons belonging to racial and ethnic minorities mainly consist of foreign workers, immigrants or the descendants of immigrants.' That while the non-discrimination provision of the Convention does not refer specifically to nationality, 'both nationals and non-nationals should be protected from discrimination on the grounds covered by the Convention.'[75] Migrant workers are seen to be particularly vulnerable to prejudices and differences in treatment in the labour market on grounds such as race, colour and national extraction, often intersecting with other grounds such as gender and religion. The intersection between migration and discrimination should therefore be addressed in the context of the Convention.[76] Article 2[77] of the Convention stipulates, that each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof. Thereby obliging ILO members party to the Convention, to actively work against discrimination in relation to employment and occupation.

71 Freedom of Association: *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fifth (revised) edition 2006. Geneva: International Labour Office, paragraph 214.

72 See Article 1(3) of ILO Convention No. 111 in the Annex to Chapter 2.

73 International Labour Conference, 101st Session 2012. *Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Report III (Part 1B)*. Geneva: International Labour Office, paragraph 778.

74 See Article 1(1) of ILO Convention No. 111 in the Annex to Chapter 2.

75 International Labour Conference, 101st Session 2012. *Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Report III (Part 1B)*. Geneva: International Labour Office, paragraph 776.

76 *Ibid.*

77 See Article 2 of ILO Convention No. 111 in the Annex to Chapter 2.

ILO Convention No. 118 Equality of Treatment (Social Security) which entered into force on 25 April 1964 has been ratified by seven Member States of the EU.[78] The purpose of the Convention is to ensure equality of treatment of nationals and non-nationals in social security. The granting of social security rights in accordance with the Convention is however based on reciprocity between the States for which it is in force, as provided in Article 3(1).[79] Those States, shall grant within its territory to the nationals of any other Member for which the Convention is in force equality of treatment under its legislation with its own nationals, both as regards coverage and as regards the right to benefits, in respect of every branch of social security for which it has accepted the obligations of the Convention. The personal scope of the Convention thereby only extends to non-nationals if they are citizens of other States party to the Convention. As regards material scope, the Convention provides in Article 2[80] that each State may accept the obligations of the Convention in respect of any one or more branches of social security for which it has in effect legislation, covering its own nationals within its own territory. The branches of social security listed are medical care, sickness benefit, maternity benefit, invalidity benefit, survivor's benefit, employment injury benefit, unemployment benefit and family benefit.

2.2.2.2 Migration for Employment Convention (Revised) No. 97

ILO Convention No. 97 entered into force on 22 January 1952 and has been ratified by ten EU Member States.[81] Several of the provisions of Convention No. 97 can be described as assuming the existence of, or calling for a sophisticated system of management to facilitate migration for employment between States. This includes providing health checks at departure and arrival and ensuring medical attention and hygienic conditions at all stages of the migration process, services to assist migrants and provide them with accurate information and agreements between States on matters of common concern when the number of migrants moving between two States party to it is sufficiently large. The personal scope of the Convention is limited to migrants regularly admitted for employment, as provided for by Article 11(1)[82] the term 'migrant for employment', includes a person who migrates between States for employment purposes and who is regularly admitted as a migrant for employment. The central provision of the Convention in terms of protection of the rights of migrants is the non-discrimination clause set forth in Article 6(1).[83] It provides that States party to it undertake to apply, treatment no less favourable than that which it applies to its own nationals in respect to remuneration, including family allowances, hours of work, holidays and pay, minimum age for employment, women's work and the work of

78 EU Member States that have ratified ILO Convention 118 are Denmark, Finland, France, Germany, Ireland, Italy and Sweden. The Netherlands has denounced its ratification of the Convention.

79 See Article 3(1) of ILO Convention No. 118 in the Annex to Chapter 2.

80 See Article 2 of ILO Convention No. 118 in the Annex to Chapter 2.

81 EU Member States that have ratified ILO Convention 97 are Belgium, Cyprus, Denmark, France, Italy, the Netherlands, Portugal, Slovenia, Spain and the United Kingdom.

82 See Article 11(1) of ILO Convention No. 97 in in the Annex to Chapter 2.

83 See Article 6(1) of ILO Convention No. 97 in in the Annex to Chapter 2.

young persons, membership of trade unions and enjoyment of the benefits of collective bargaining and accommodation, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory. Furthermore, the discrimination clause applies to social security, including employment injury, maternity, sickness, invalidity, old age, death, unemployment, employment taxes and legal proceeding relating to the matters referred to in the convention, however, only in so far as these are regulated by national law or regulations.

In a report of the Committee of Experts on the Application of Conventions and Recommendations (the Committee), on the application of Convention No. 97 in Slovenia, the Committee addresses an agreement between Slovenia and Bosnia and Herzegovina which makes the enjoyment of unemployment benefits subject to permanent residence. The Committee provided that such distinction between workers with permanent and temporary residence, contravenes the principle of equal treatment as regards social security as enshrined in the Convention.[84]

2.2.2.3 ILO Convention No. 143 Migrant Workers (Supplementary Provisions), 1975

ILO Convention No. 143 which entered into force on 9 December 1978 has been ratified by five EU Member States.[85] Convention No. 143 which stipulates from the outset[86] that it applies to all migrant workers is comprised of two parts. Part I which addresses migration in abusive conditions and part II which calls for equality of opportunity and treatment. The majority of the provisions of part I aim at detecting and preventing irregular migration and Article 8 and 9 aim at the protection of migrants in irregular situation. In that respect Article 8(1)[87] provides that migrant workers, who have resided legally for the purpose of employment in the territory of a State, shall not be regarded as in an illegal or irregular situation solely due to loss of employment, which shall not in itself imply the withdrawal of authorization of residence or work permit. Furthermore, that a migrant shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining. Article 9(1)[88] addresses migrants who have been engaged in work without authorisation and provides that in cases in which laws and regulations to control movements of migrants for employment have not been respected, and where the irregular position of a migrant cannot be regularized, the migrant shall enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

84 International Labour Conference, 101st Session 2012. *Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Report III (Part 1A).* Geneva: International Labour Office, 911.

85 EU Member States that have ratified ILO Convention 143 are Cyprus, Italy, Portugal, Slovenia and Sweden.

86 See Article 1(1) of ILO Convention No. 143 in in the Annex to Chapter 2.

87 See Article 8 of ILO Convention No. 143 in in the Annex to Chapter 2.

88 See Article 9(1) of ILO Convention No. 143 in in the Annex to Chapter 2.

The personal scope of part II of the Convention extends to migrant workers who migrate or have migrated from one country to another with a view to being employed otherwise than on their own account and includes any person regularly admitted as a migrant worker. Article 10[89] calls for the adoption of a national policy to promote and guarantee equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory. In addition, Article 12(g)[90] requires states to guarantee equality of treatment, pertaining to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment.

2.2.2.4 Summary – The Principle of Non-discrimination and Equal Treatment based on Nationality in ILO Instruments

The ILO has declared that international labour law applies to migrant workers, unless otherwise stated and that ILO core instruments such as Convention No. 87 and No. 111 apply to all workers, irrespective of their immigration status and require that migrants, including those in irregular situations must be protected from discrimination. The two Conventions adopted by the ILO specifically to protect migrant workers, Convention No. 97 and No. 143, aim at ensuring equal treatment for regularly admitted migrant workers and protecting the rights of migrant workers in irregular situations, for example by providing for equal treatment with nationals as regards rights arising from past employment. The Committee of Experts concluded in regard to Convention No. 97 that discriminating between temporary and long-term migrants with respect to unemployment benefits contravenes the non-discrimination principle of the Convention. Concerning ILO Convention No. 143, the observation has been made, that respect for fundamental rights and principles at work is not limited by a worker's nationality or immigration status. That Article 1 of Convention No. 143 requires States parties 'to respect the basic human rights of *all* migrant workers.' The ILO Committee of Experts views this as referring to the fundamental human rights contained in the international instruments adopted by the UN in this domain, such as the UDHR, the ICCPR, the ICESCR, and the ICRMW which include some of the fundamental rights of workers. This assessment is seen by Olney and Cholewinski as particularly important because it reflects the interdependence between international labour standards and human rights law.[91]

89 See Article 10 of ILO Convention No. 143 in in the Annex to Chapter 2.

90 See Article 12(g) of ILO Convention No. 143 in in the Annex to Chapter 2.

91 Olney, S. and Cholewinski, R. 2014. Migrant Workers and the Right to Non-discrimination and Equality, in *Migrants at Work: Immigration and Vulnerability in Labour Law,* edited by C. Costello and M. Freeland. Oxford: Oxford University Press, 275.

2.3 EUROPEAN HUMAN RIGHTS FRAMEWORK

2.3.1 The Council of Europe Framework on Human Rights

The two main human rights instruments of the Council of Europe (CoE), of which all EU Member States are members, are the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the European Social Charter (ESC). The ECHR provides for a variety of civil and political rights and the ESC provides for social rights. The personal scope of these two instruments as they apply to non-nationals is at the opposite ends of the spectrum from inclusion to exclusion and they will be examined here in turn. The European Convention on the legal status of migrant workers, the personal scope of which is limited to nationals of Member States of the Council of Europe, will be discussed here as well while it is relevant to EU law on labour migration as it provides for the standards CoE Member States have adopted for the treatment of their nationals who migrate between CoE States for employment.

2.3.1.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

The ECHR entered into force on 3 September 1953. The Convention which has been ratified by all EU Member States is comprised of the main Convention and sixteen protocols. The material scope of the Convention includes the right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, to no punishment without law, right to respect for family life, freedom of thought, conscience and religion, as well as of expression, assembly and association, the right to marry and the right to an effective remedy. Article 1[92] of the ECHR stipulates that the personal scope of the Convention extends to everyone within the territory of a State party, that shall secure to everyone within their jurisdiction the rights and freedoms of the Convention. In *Hirsi Jamaa and others v. Italy*, the European Court of Human Rights (the Court/ECtHR) explained the meaning of jurisdiction of a State Party to the Convention, stating that 'although the jurisdiction of a State, within the meaning of Article 1, is essentially territorial,' that is limited to the physical territory of the State Party, that 'whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual.'[93]

Article 14[94] of the ECHR provides that the enjoyment of the rights and freedoms enshrined in the Convention shall be secured without discrimination on any grounds. It enumerates in particular sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth and

92 See Article 1 of ECHR in the Annex to Chapter 2.
93 ECtHR, *Hirsi Jamaa and others v. Italy* (No. 27765/09), 23 February 2012, paragraphs 71 and 74.
94 See Article 14 of ECHR in the Annex to Chapter 2.

other status. This provision entails a general prohibition against discrimination in relation to the rights guaranteed by the Convention and its Protocols. Protocol 12 to the Convention which entered into force on 1 April 2005 and has been ratified by eight[95] and signed by thirteen[96] Member States of the EU, provides for a general prohibition of discrimination in any law. Article 1[97] of the Protocol prescribes that the enjoyment of any right set forth by law, shall be secured without discrimination on the same grounds as provided for in Article 14 of the Convention itself. While the Protocol does not limit the prohibition of discrimination to the rights provided for in the ECHR, but includes all rights set forth by any law in a State party, the emphasis moves from a prohibition of discrimination to recognition of the right to equality. The preamble to the Protocol refers to all persons being equal before the law and being entitled to the equal protection of the law, and expresses a commitment to the promotion of the equality of all persons through the collective prohibition of discrimination.[98] Thus the Protocol 'contains an independent, self-standing prohibition of discrimination and applies to all situations in which a difference in treatment arises under national law.'[99]

The ECtHR has interpreted the scope of the principle of non-discrimination in its case law on Article 14 of the ECHR, including numerous cases on discrimination based on nationality, several of which will be discussed below. In Article 14 cases, the first question of the Court is whether the case is within the ambit of one of the substantive provisions of the Convention. The follow up approach taken by the ECtHR has been outlined as involving 'the equality maxim as the central tenant of the provision,' that 'refers to the establishment of different treatment of relatively similar situations' or 'the same treatment of (highly) relevantly different situations.'[100] An 'additional facet' which is 'intended to capture instances when difference in treatment is discriminatory' and when it is not, is that the Court requires an 'objective and reasonable justification test under Article 14.' That is, 'the principle of equal treatment is violated if relevantly similar situations are treated differently or if (highly) relevantly different situations are treated equally without an objective and reasonable justification.'[101]

There is not much jurisprudence on Protocol 12 so far, but in its existing case law the ECtHR has stated that whereas the same term for discrimination is used in Article 14 of the ECHR and Article 1 of Protocol 12 that 'notwithstanding the differences in scope between those provisions, the meaning of this term in Article 1 of Protocol 12 was intended to be identical to that of Article 14.' Therefore, the Court

95 Croatia, Cyprus, Finland, Luxembourg, the Netherlands, Romania, Slovenia and Spain.

96 Austria, Belgium, the Czech Republic, Estonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Portugal and Slovakia.

97 See Article 1 of Protocol 12 to the ECHR in the Annex to Chapter 2.

98 Preamble to Protocol 12 to the ECHR, paragraphs 2 and 3.

99 Gerards, J. 2009. *Protocol No. 12 to the European Convention on Human Rights, A Report prepared for the Commission to Propose a Comprehensive Anti-Discrimination Legislation in Norway*. Oslo: NOU 2009:4, 3.

100 Arnardóttir, O. 2003. *Equality and Non-Discrimination under the European Convention on Human Rights*. The Hague/London/New York: Martinus Nijhoff Publishers, 14.

101 *Ibid*., 14-15.

does not alter 'the settled interpretation of 'discrimination', as developed in the jurisprudence concerning Article 14 in applying the same term under Article 1 of Protocol No. 12.'[102] The added value of Protocol 12 and the analogues approach of the Court in addressing discrimination lies in that should the issue before the Court fall outside of the material scope of the ECHR, the Court will examine national legislation of a State party in the same manner as where the subject matter falls within the scope of the ECHR.

The fact that the Court requires the use of a comparator to establish whether a person has been discriminated against has been criticized among other reasons for the fact that 'conditioning equal treatment on "likeness", however defined, functions so as to grant less privileged actors access to the benefits enjoyed by the more privileged only to the extent that the former can prove "sameness" with the latter.'[103] In a research paper entitled 'The Wrongs of Unequal Treatment', Moreau explores different conceptions of the wrong underlying unequal treatment which consist of the denial of a benefit which wrongs individuals. She sees these as possibly occurring due to three factors, firstly, based on prejudice or stereotyping, secondly that it perpetuates oppressive power relationships and thirdly that it leaves some individuals without access to basic goods. Moreau maintains that the 'wrong' is essentially comparative, and that 'what is relevant about the comparator group is not their receipt of the benefit denied to others, but their oppression of those who have been denied it.'[104] She thus suggests an alternative approach to examining claims of discrimination which is particularly relevant to claims of discrimination in enjoyment of rights between nationals and non-nationals, having regard to her argument that in relation to claims of discrimination 'the relevant comparator group is not the group that has been given the benefit in question' but 'the group or groups who exercise oppressive amounts of power over those who have been denied the benefit.' As Moreau provides further, that in order to ascertain whether the denial of a benefit genuinely perpetuates oppressive power relations, one needs to focus on whether 'there is indeed some group that exercises an undue amount of power over those who are denied the benefit, and on whether the denial of the benefit will perpetuate these unacceptable power relations.'[105] As was discussed in the sections above, United Nations and ILO monitoring bodies have put a special emphasis on the protection of the right to equal treatment for non-nationals with nationals in the State where they reside and work. This is of particular importance due to what is often defined as a situation of vulnerability and lack of power caused by having an administrative status as a non-national/foreigner/ alien, which can in many instances result in situations of unacceptable power relations between the non-national and authorities of the host State where he/she resides.

102 ECtHR, *Zornić v. Bosnia and Herzegovina* (No. 3681/06), 15 December 2014.

103 McColgan, A. 2006. Cracking the Comparator Problem: Discrimination, 'Equal' Treatment and the Role of Comparisons, *European Human Rights Law Review* 11(6), edited by J. Cooper. London: Sweet and Maxwell, 656.

104 Moreau, S.R. 2004. *The Wrongs of Unequal Treatment*, University of Toronto, Public Law Research Paper No. 04-04, 17. Available at SSRN: http://ssrn.com/abstract=535622 (accessed on 5 September 2015)

105 *Ibid.*

2.3.1.2 European Court of Human Rights Case Law on Discrimination based on Nationality

The European Court of Human Rights (ECtHR/the Court) has in its case law addressed complaints of violations of Article 14 of the ECHR in conjunction with different Articles of the Convention. The first such case was the *Belgian Linguistics* case in 1968 where the Court considered discrimination in access to education. In this case the Court developed criteria to assess whether discrimination has occurred under the principle of equal treatment enshrined in Article 14 which is still applied by the Court. In addressing the complaint, the Court held that the principle of equality of treatment is violated if the distinction made between persons has no objective and reasonable justification. That a difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim and that Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[106]

Among the cases on discrimination based on nationality that the Court has addressed are cases on Article 14 in conjunction with Article 6(1)[107] on the right to a fair trial, Article 8(1)[108] on the right to respect for private and family life, home and correspondence, Article 1 of Protocol No. 1[109] on the right of natural and legal persons to peaceful enjoyment of their possessions and Article 2 of Protocol No. 1[110] on the right to education. Several of these cases are summarised below along with a case concerning an irregularly resident worker where the Court found a violation of Article 1 of Protocol No. 1.

2.3.1.2.1 Article 6(1) in conjunction with Article 14

Anakomba Yula v. Belgium.[111] Anakomba Yula, a Congolese national residing irregularly in Belgium was refused legal aid to cover the cost of the process to establish the paternity of her recently born child. Her residence permit had expired shortly after the birth of the child and she was in the process of applying for a renewal. The legal aid was refused on the basis that such funding was only available to third-country nationals in relation to claims to establish the rights of residence. The Court found that in these circumstances, the applicant had been deprived of her right to a fair trial based on her nationality. The State was found not justified in differentiating between those who did or did not possess a residence permit in a situation where serious issues of family life were at stake, where there was a short time-limit to establish paternity, and where the individual was in the process of renewing a permit. The Court found that there had been a violation of Article 6(1) in combination with Article 14 of the Convention, stating that differences in treatment between foreigners based on

106 ECtHR, *Case 'Relating to Certain Aspects of the Laws on the use of Language in Education in Belgium v. Belgium* (Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), 23 July 1968, paragraph 31.

107 See Article 6(1) of ECHR in in the Annex to Chapter 2.

108 See Article 8(1) of ECHR in in the Annex to Chapter 2.

109 See Article 1 of Protocol 1 to the ECHR in the Annex to Chapter 2.

110 See Article 1 of Protocol 1 to the ECHR in in the Annex to Chapter 2.

111 ECtHR, *Anakomba Yula v. Belgium* (No. 45413/07), 10 March 2009.

their right to be present on the territory of a State may be discriminatory in particular in the exercise of the right of access to justice. That includes differences in treatment between irregular migrants on the one hand and nationals or lawfully present migrants on the other.

2.3.1.2.2 Article 8 in conjunction with Article 14

Niedzwiecki v. *Germany.*[112] Ms Niedzwiecki, who applied for asylum in Germany and was rejected, was residing there on a limited residence permit for exceptional purposes from 1991. In 1995 after the birth of a child, she applied for child benefits which were denied to her on the basis of the type of residence permit she held. The relevant law in Germany provided that only aliens[113] with an unlimited residence permit or with a provisional residence permit were entitled to be paid child benefits. The Court found that there had been a violation of Article 14 in conjunction with Article 8 of the Convention, while the Court did not discern sufficient reasons justifying the difference in treatment with regard to child benefits between aliens who were in possession of stable residence permit on one hand and those who were not.

Okpisz v. Germany.[114] The applicants, were a married couple, Polish nationals who immigrated to Germany in 1985 and were residing there along with their two children on residence titles for exceptional purposes which had been regularly renewed. In 1993 they were informed that from 1 January 1994, they would no longer receive the child benefits they had been receiving since 1986, due to change in legislation. The new legislation stipulated that a foreigner was only entitled to child benefits if in possession of a residence permit or a provisional residence permit and it was provided that the new legislation had only intended to grant child benefits to aliens living in Germany on a permanent basis, not those with a limited residence title. The Court found that there had been a violation of Article 14 in conjunction with Article 8 of the Convention while it did not discern sufficient reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit on one hand and those who were not, on the other.

Bah v. the United Kingdom.[115] Ms Bah, a Sierra Leonean national arrived in the United Kingdom (UK) as an asylum seeker and was granted an indefinite leave to remain in 2005, after which she applied to have her son join her in the UK. In 2007 her son was granted a conditional leave to remain in the UK on the condition that he did not have recourse to public funds, and he was considered as being 'subject to immigration control.' Shortly after her son's arrival Ms Bah lost the housing she was lodging at while her landlord refused to accommodate her son, and applied for public assistance as a person who had become unintentionally homeless. According to the law in force at the time, an unintentionally homeless person with a minor child would ordinarily qualify as being in priority need for housing and be provided with suitable housing. As Ms Bah's son was not eligible for housing assistance due to being subject to immigration control she was not considered to have a priority need and did not

112 ECtHR, *Niedzwiecki v. Germany* (No. 58453/00), 25 October 2005.
113 The term 'alien' is used in the case law of the ECtHR.
114 ECtHR, *Okpisz v. Germany* (No. 59140/00), 25 October 2005.
115 ECtHR, *Bah v. The United Kingdom* (56328/07), 27 September 2011.

receive public housing. Ms Bah complained of a violation of Article 14 in conjunction with Article 8, stating that she was discriminated against on the basis of her nationality although the official reason that she did not receive assistance was her son's immigration status. The Court found that there had been no violation of Article 14 in conjunction with Article 8, while it considered that it was the conditional legal status of her son, and not the fact that he was of Sierra Leonean national origin, which resulted in his mother's differential treatment under the housing legislation and noted in particular that Ms Bah's son was granted entry to the UK on the express condition that he would not have recourse to public funds, a condition that Court noted the applicant had accepted. The Court found that the differential treatment was not disproportionate to the legitimate aim pursued, that of allocating a scarce resource fairly between different categories of claimants, and that it was justifiable to differentiate between those who rely for priority need status on a person who is in the UK unlawfully or on the condition that they have no recourse to public funds, and those who do not. Commenting on the position of the ECtHR in *Bah*, where the Court found it justified that the UK government restricted access to 'resource hungry' public services, Dembour assesses that the conclusion reached by the Court is demonstrative of that it was not prepared to oppose 'the idea that resources, due to their inherent scarcity, can and must be denied to some people on a basis which does not attempt to ensure that basic equality.' Thereby the Court did not uphold the 'human rights perspective which requires that policies be based on the equality of all people and that fairness in distribution is not simply taken for granted.'[116]

Dhahbi v. Italy.[117] Mr Dhahbi was at the time relevant to the case a Tunisian national who had entered Italy on the basis of a lawful residence and work permit and was insured by the National Social Security Agency. His family consisted of himself, his spouse and four minor children. In 2001 he applied to the NSSA for family allowance which was paid to families made up of Italian nationals living in Italy with at least three minor children, whose annual income was below a certain amount defined by a legislative decree. At the time of application Dhahbi's annual income was below the amount set out for a family of five members. He applied for the family allowance which he considered due to him under an association agreement between the European Union and Tunisia but was refused. The Court found that the refusal was a violation of Article 14 taken in conjunction with Article 8 of the Convention while the refusal by the national authorities to grant Mr Dhahbi the family allowance was based solely on the fact that he was not a national of a EU Member State. The Court considered it beyond doubt that the applicant was treated differently compared with workers who were nationals of the EU and who, like him, had large families and that his nationality was the only criterion for the distinction.

Osungu and Lokongo v. France.[118] Mr and Mrs Osungu and Ms Lokongo are Congolese nationals lawfully resident in France. In 2002 Osungu's two children joined them in France and in 2008 Lokongo's daughter joined her in France, in both cases the

116 Dembour, M.B. 2012. Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality Agenda, *Human Rights Law Review* 12(4), 715.

117 ECtHR, *Dhahbi v. Italy* (17120/09), 8 April 2014.

118 ECtHR, *Osungu and Lokongo v. France* (Nos. 78860/11 and 51354/13), 8 September 2015.

children joined their parents without complying with family reunification procedures. Upon application for family benefits for their children, both families were refused as they were unable to produce the necessary documents that are given following the family reunification procedure. In their complaints to the Court the applicants contented that the refusal to grant them family benefits amounted to unlawful discrimination based on their nationality. In considering the case the Court found that the difference in treatment they were subject to was not based exclusively on their nationality but because their children had deliberately entered France unlawfully. The Court concluded that the refusal had not been founded solely on their nationality or any other criterion covered by Article 14, but on their non-compliance with the rules governing family reunification which in the Courts assessment constituted a difference in treatment based on objective and reasonable grounds. The Court rejected the complaint as manifestly ill-founded.

2.3.1.2.3 Article 1 of Protocol No. 1 in conjunction with Article 14

Gaygusuz v. Austria.[119] Gaygusuz, a Turkish national who had worked in Austria from 1973 to 1984 was refused an advance on his pension in the form of emergency assistance on the ground that he did not have Austrian nationality. Gaygusuz claimed that he was a victim of discrimination based on national origin, contrary to Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1. The Austrian Government however argued that the difference in treatment was based on the idea that the State has a special responsibility for its own nationals and can give them favourable treatment. The Court did not find the argument of the Austrian Government persuasive and found that the difference in treatment based on nationality was not based on any objective and reasonable justification, that very weighty reasons would have to be provided to make discrimination based on nationality acceptable and that there had been a breach of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1.

Koua Poirrez v. France.[120] Koua Poirrez, a national of the Cote d'Ivoire who had been adopted by a French national but had failed to obtain French nationality because he had applied after reaching the age of 18 years, was denied disability benefits for adults. His application for benefits was rejected on the ground that he was neither a French national nor a national of a country which had entered into a reciprocity agreement with France in respect to these benefits. In examining the case, the Court noted that the applicant was legally resident in France, where he received the minimum welfare benefit, which is not subject to nationality condition and that the refusal of the benefits in question was based exclusively on the fact that the applicant did not have the requisite nationality. The Court found that the differences in treatment regarding entitlement to social benefits between French nationals or nationals of a country having signed a reciprocity agreement and other foreign nationals was not based on any objective and reasonable justification and that there had been a breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

119 ECtHR, *Gaygusuz v. Austria* (No. 17371/90), 16 September 1996.
120 ECtHR, *Koua Poirrez v. France* (No. 40892/98), 30 September 2003.

2.3.1.2.4 Article 2 of Protocol No.1 in conjunction with Article 14

Ponomaryovi v. Bulgaria.[121] The Ponomaryovi brothers were Russian nationals born in 1986 and 1988 in Kazakhstan who moved with their mother to Bulgaria in 1994 after she married a Bulgarian national. The brothers were entitled to reside in Bulgaria on the basis of their mother's permanent residence permit but in 2004 when the older brother turned 18 years old he started procedures to obtain an independent permit in order to continue residing in Bulgaria lawfully. In 2005 both brothers were requested to pay school fees as aliens without permanent residence permits in order to continue the secondary education they were pursuing. The Court found, that 'in the specific circumstances' of this case, requiring the brothers to pay school fees due to their nationality and immigration status was not justified and that there was a violation of Article 14 taken in conjunction with Article 2 of Protocol No.1. In addressing the case, the Court limited its inquiry to whether once a State has voluntarily decided to provide the education in question free of charge, it may deny that benefit to a distinct group of people, stating that the notion of discrimination includes cases where a person or group is treated, without proper justification, less favourably than another. The Court observed that a State may have legitimate reasons for curtailing the use of resource-hungry public services, such as welfare programmes, public benefits and health care, by short-term and illegal immigrants, who as a rule, do not contribute to their funding and that it may in certain circumstances justifiably differentiate between different categories of aliens residing in its territory. In this case the Court primarily had regard to the applicants' personal situation and observed that the applicants were not in the position of individuals arriving in the country unlawfully and then laying claim to the use of its public services, rather that they found themselves in the situation of aliens lacking permanent residence permits, that the authorities had no substantive objection to their remaining in Bulgaria and apparently never had any serious intention of deporting them. In this context, the Court stated that any consideration relating to the need to stem or reverse the flow of illegal immigration clearly did not apply to the applicants' case, that it was not their choice to settle in Bulgaria and pursue their education there. They however came to live in the country at a very young age because their mother had married a Bulgarian national and they could not realistically choose to go to another country and carry on their secondary studies there.

2.3.1.2.5 Article 1 of Protocol No. 1

Paulet v. The United Kingdom.[122] Paulet resided and worked in the United Kingdom on the basis of a false French passport from 2003 to 2007. When his circumstances were discovered by the authorities, a trial judge, in addition to imposing a prison sentence and a deportation order, imposed a confiscation order in the sum of £ 21,949.60 which amounted to Paulet's entire savings over nearly four years of work. The confiscation order was based on the argument that his earnings were a benefit from criminal conduct within the meaning of the Proceeds of Crime Act 2002 while he had deceived his employers into thinking that he was entitled to obtain employment with them, which was considered a crucial element of his criminality. The Court concluded

121 ECtHR, *Ponomaryovi v. Bulgaria* (No. 5335/05), 21 June 2011.
122 ECtHR, *Paulet v. The United Kingdom* (No. 6219/08), 13 May 2014.

that the domestic courts did not seek a 'fair balance' inherent in the second paragraph of Article 1 of Protocol No. 1 in confiscating his savings and that there had been a violation of Article 1 of Protocol No. 1 to the Convention.

A separate opinion of two judges, raised the issue of the failure of the Court to address the grounds of the confiscation of the savings. They maintained that by limiting the scope of the case to only some of its procedural aspects, the majority had failed to express any views on whether the applicable legislation was sufficiently precise as to the conditions for forfeiture, whether the domestic courts were required to analyse the link between the assets proposed for forfeiture and the specific crime, and whether they did so in the present case. Furthermore, they argued that it had not been contended that the applicant's work caused any public or private harm rather than contributing to the public welfare. Notwithstanding this situation, the applicant's genuinely earned savings were defined and confiscated as the 'proceeds of the crime' of using a false passport, an act for which the applicant was punished in separate proceedings. The dissenting judges were unable to agree that the confiscated amounts could be clearly and necessarily defined as the proceeds of crime and pointed out that such an assumption was apt to regard any irregular migration as criminal, with the result that any earnings from such employment would be subject to confiscation in the exercise of 'the right of a State to enforce such law as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties' within the meaning of the second paragraph of Article 1 of Protocol No. 1 to the Convention.

2.3.1.3 The European Social Charter (ESC/Charter)

The European Social Charter (ESC/Charter) was first adopted in 1961 and revised in 1996. The initial ESC was ratified by all EU Member States and the revised ESC which entered into force in 1999 has been ratified by twenty[123] EU Member States and signed by eight.[124] The Charter provides for a broad spectrum of economic and social rights including the right to work, just conditions of work, safe and healthy working conditions, fair remuneration, the right of employed women to protection of maternity and the right to vocational guidance and training. Additionally, it addresses the right to protection of health, right to social and medical assistance, right to social security and to benefit from social welfare services. The personal scope of the Charter is limited to nationals of the Member States of the Council of Europe who can be States parties to the Charter. Article 1 of the Charter's Appendix extends its application only to foreigners who are nationals of a States party to the Charter who are lawfully resident or working regularly within the territory of another State party to it. That interpretation is however stated not to preclude States parties from extending its scope to other persons.[125] Accordingly, persons who are not nationals of one of the

123 Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal, Romania, Slovenia, Slovakia, Sweden and Luxembourg.

124 Croatia, the Czech Republic, Denmark, Germany, Greece, Poland, Spain and the United Kingdom.

125 See Article 1 of Appendix to the ESC in the Annex to Chapter 2.

States party to the Charter are not entitled to the rights provided by it unless the State in which they are residing decides that other foreign nationals are also covered by the Charter.

2.3.1.3.1 The Personal Scope of the ESC as regards Migrants Irregularly Present in a State Party

The European Committee of Social Rights (the Committee), which monitors the implementation of the Charter has in its General Conclusions on the scope of the Charter and when addressing complaints concluded that the limited personal scope of the Charter does not absolve the States parties from the duty to provide for the most basic rights to irregular migrants. The Committee has among other areas specifically addressed the right to medical assistance, the right to shelter for children and the right to shelter, food and clothing for adults irregularly resident in a State party. As regards medical assistance the Committee concluded that 'legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter,'[126] and that according to Article 13(1)[127] of the Charter, State parties are under an obligation to provide irregularly present migrants 'with urgent medical assistance and such basic social assistance as is necessary to cope with an immediate state of need (accommodation, food, emergency care and clothing).'[128]

In addressing a complaint of *Defence for Children International v. the Netherlands*, which concerned a situation where 'children not lawfully present in the Netherlands' were 'excluded by law and practice from the right to housing,'[129] the Committee concluded that 'the right to shelter is closely connected to the right to life and it is crucial for the respect of every person's human dignity.' It further observed that 'growing up in the streets leaves a child in a situation of outright helplessness,' and that 'children would be adversely affected by the denial of the right to shelter.'[130] Having regard to that, the Committee held the opinion that children, whatever their residence status, come within the personal scope of Article 31(2)[131] of the ESC,[132] and that State parties are required 'to provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction,' that other practices 'would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children.'[133]

In a consideration of a complaint from the *Conference of European Churches v. the Netherlands* regarding denial of unconditional access to adult migrants in an irregular

126 European Committee of Social Rights, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, Decision on the Merits, 8 September 2004, paragraph 32.
127 See Article 13(1) of the ESC in the Annex to Chapter 2.
128 European Committee of Social Rights, General Conclusions (2013), General Introduction, 8.
129 European Committee of Social Rights, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, Decision on the Merits, 20 October 2009, paragraph 1.
130 *Ibid*., paragraph 47.
131 See Article 31(2) of the ESC in the Annex to Chapter 2.
132 European Committee of Social Rights, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, Decision on the Merits, 20 October 2009, paragraph 48.
133 *Ibid*., paragraph 64.

situation to food, clothing and emergency shelter based on legislation and policy in force in the Netherlands,[134] the Committee considered the issues 'to be closely linked to the realisation of the most fundamental rights of these persons, as well as to their human dignity.'[135] The Committee further declared that persons in such a situation 'undeniably find themselves at risk of serious irreparable harm to their life and human dignity when being excluded from access to shelter, food and clothing,' that access to such basic needs 'are necessary for the basic subsistence of any human being.'[136] Furthermore, that 'practical and legal measures denying the right to emergency assistance accordingly restrict the right of adult migrants in an irregular situation and without adequate resources in the Netherlands in a disproportionate manner.'[137] The Committee considered that these laws and practices in the Netherlands violated Article 13(4)[138] and 31(2) of the ESC and concluded that according to its 'established case-law, shelter must be provided also to adult migrants in an irregular situation, even when they are requested to leave the country and even though they may not require that long-term accommodation in a more permanent housing be offered to them.'[139]

In consideration of a complaint from the *European Federation of National Organisations working with the Homeless v. the Netherlands*, the Committee concluded that the limited personal scope of the Charter should not result in depriving 'migrants in an irregular situation of the protection of the most basic rights enshrined in the Charter, or to impair their fundamental rights, such as the right to life or physical integrity or human dignity.'[140] However, that the application of the rights in the Charter to irregularly resident migrants 'is justified solely' when excluding them from protection 'would have seriously detrimental consequences for their fundamental rights, and would consequently place the foreigners in question in an unacceptable situation regarding the enjoyment of these rights, as compared with the situation of nationals or foreigners in a regular situation.'[141]

In spite of the limited personal scope of the Charter, the Committee has thus interpreted the Charter as requiring Member States of the CoE to protect the basic rights of foreigners within their territory, irrespective of their administrative status.

134 European Committee of Social Rights, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, Decision on the Merits, 1 July 2014, paragraph 131.
135 *Ibid.*, paragraph 74.
136 *Ibid.*, paragraph 122.
137 *Ibid.*, paragraph 124.
138 See Article 13(4) of ESC in the Annex to Chapter 2.
139 European Committee of Social Rights, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, Decision on the Merits, 1 July 2014, paragraph 144.
140 European Committee of Social Rights, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, Decision on the Merits, 2 July 2014, paragraph 58.
141 *Ibid.*

2.3.1.4 The European Convention on the Legal Status of Migrant Workers (ECMW)

The ECMW which entered into force on 1 May 1983 has been ratified by six[142] EU Member States and signed by four.[143] The purpose of the Convention is to regulate the legal status of migrant workers who are nationals of Council of Europe Member States 'so as to ensure that as far as possible they are treated not less favourably than workers who are nationals of the receiving State in all aspects of living and working conditions.'[144] The definition of a 'migrant worker' for the purposes of the Convention is a national of a party to it that has been authorised by another contracting party to reside in its territory in order to take up employment.[145]

The Convention is divided into six chapters that address among other issues recruitment, travel and rights of exit and admission, a variety of social and economic rights of workers and return to country of origin. Several of the provisions of the Convention set forth standards that are relevant to EU law on labour migration as regards work permits, residence permits, education and vocational training, conditions of work and use of employment services. As regards work permits, the Convention provides that a work permit that is issued for the first time, may not bind the worker to the same employer or the same locality for a period exceeding one year.[146] In the provision on residence permits, it is stipulated that, where it is required by national legislation a migrant worker who has been permitted to take up paid employment shall be issued a residence permit[147] and that in case of temporary unemployment a worker shall be allowed to remain in the country where he/she is working for five months before the residence permit is revoked.[148] On conditions of work, the Convention provides that migrant workers authorised to take up employment shall not be treated less favourably than national workers by virtue of legislative or administrative provisions, collective labour agreement or custom and that it shall not be possible to derogate from the principle of equal treatment as concerns working conditions by individual contract.[149] As regards education and vocational training, the Convention requires that migrant workers and members of their families shall be entitled, 'on the same basis and under the same conditions as national workers, to general education and vocational training and retraining and shall be granted access to higher education according to the general regulations governing admission to respective institutions in the receiving State.'[150] Equal treatment of migrant workers and their families is also provided for in respect to use of employment services, subject to

142 France, Italy, the Netherlands, Portugal, Spain and Sweden.
143 Belgium, Denmark, Greece and Luxembourg.
144 Preamble to the European Convention on the Legal Status of Migrant Workers, paragraph 2.
145 See Article 1 ECMWC in the Annex to Chapter 2.
146 See Article 8 ECMWC in the Annex to Chapter 2.
147 See Article 9(1) ECMWC in the Annex to Chapter 2.
148 See Article 9(4) ECMWC in the Annex to Chapter 2.
149 See Article 16(1) and (2) ECMWC in the Annex to Chapter 2.
150 See Article 14 ECMWC in the Annex to Chapter 2.

the legal provisions and regulations and administrative practice, including conditions of access, in force in that State.[151]

2.3.1.5 Summary – The Principle of Non-discrimination and Equal Treatment based on Nationality in Council of Europe Instruments

The principle of non-discrimination enshrined in the ECHR has been interpreted through the case law of the ECtHR as it relates to nationality and residence status. As was discussed in section 2.3.1.2 above, the Court found in *Gaygusuz v. Austria*, *Koua Poirrez v. France* and *Dhahbi v. Italy*, that differences in treatment based on nationality violated Article 14 of the Convention and that 'very weighty reasons' have to be provided to make discrimination based on nationality acceptable under the Convention. In its decisions in *Niedzwiecki v. Germany* and *Okpisz v. Germany*, the Court found difference in treatment in granting child benefits between foreigners who were in possession of a stable residence permit and those who were not, violated Article 14. In *Osungu and Lokongo v. France* however, the Court found the State's refusal to pay such benefits justifiable on the ground the children of the complainants had not complied with family reunification rules. In *Anakomba Yula v. Belgium* the Court concluded that differences in treatment between irregular migrants on the one hand, and nationals or lawfully present migrants on the other hand may be discriminatory in particular in the exercise of the right of access to justice. In *Bah v. the United Kingdom* and *Ponomaryovi v. Bulgaria*, the Court discussed in particular whether a State had legitimate reasons for limiting access to 'scarce resources' or 'resource hungry public services' in the form of housing and education based on the applicant's administrative status. In the former case, the State was found to be justified in limiting access to housing based on the administrative status of the applicant's son, as a person subject to immigration control. In the latter the State was found not to be justified to limit access to secondary education based on the personal situation of the applicants who had resided in Bulgaria since they were children and temporarily found themselves in the situation of aliens lacking permanent residence permit.

The conclusion that can be drawn from the case law so far is that discrimination based on nationality that cannot be justified before the Court violates Article 14 of the Convention and that in cases where nationality and residence status both come into play, the Court will examine the personal circumstances and administrative status of the applicant and assess whether the particularities of his/her circumstances and/or status can justify the State's actions in limiting access to public goods and services. Discussing the *Gaygusuz* judgement, Dembour maintains that the case did not set a standard as regards the prohibition of discrimination based on nationality for the ECHR, while the Court 'did not give any inkling as to why the difference in treatment in this particular case constituted a prohibited discrimination, let alone some general guidance as to where a difference of treatment on ground of nationality might be acceptable and where it would be unacceptable.'[152] What the Court found not justified

151 See Article 27 ECMWC in the Annex to Chapter 2.

152 Dembour, M.B. 2012. Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality Agenda, *Human Rights Law Review* 12(4), 703-704.

during its examination of the case, 'was the practice whereby a state, having exercised its legitimate privilege to control immigration by specifically admitting non-nationals to its territory, then discriminated against them,' and in reaching that conclusion examined Gaygusuz's legal status, his work conducted in Austria and the fact that he had contributed to the employment insurance fund.[153] Although the *Gaygusuz* judgement does not provide standards on what constitutes discrimination based on nationality for the Court, Dembour's assessment highlights the general approach of the Court in cases related to discrimination based on nationality. As was outlined in the above, in these cases the Court examines the legal status of the applicants and considers their personal circumstances to assess whether it considers the State is justified or not, in denying them access to 'resource hungry public services.' The consistency in this approach so far, indicates that in cases concerning discrimination based on nationality, the Court takes into account the applicants administrative status as was well as their nationality.

The European Social Charter does not prohibit discrimination based on nationality other than for nationals of the Member States of the Council of Europe who can be States parties to the Charter. The European Committee of Social Rights has however concluded that the limited personal scope of the Charter does not absolve the States parties from the duty to provide for the most basic rights to irregular migrants, such as the right to life or physical integrity or human dignity. The access to those rights is however justified solely when excluding irregularly present migrants from protection would have seriously detrimental consequences for their fundamental rights.

The European Convention on the legal status of migrant workers only applies to migrant workers who are nationals of Council of Europe Member States. The standards put forth by it, in particular on work permits, residence permits, terms of unemployment, conditions of work, education and vocational training, and use of employment services, are however highly relevant to EU law on labour migration as they are standards adopted by the CoE for the treatment of CoE Member State nationals who move from employment purposes from one Member State to another.

2.3.2 European Union Law – The Treaty on the Functioning of the European Union and the European Union Charter of Fundamental Rights

2.3.2.1 The Treaty on the Functioning of the European Union (TFEU)

The Treaty on the Functioning of the European Union (TFEU) sets forth an overall framework for the protection of human rights in the EU. Title I of the TFEU provides in Article 2[154] that respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights are values that the Union is founded on and that these values are common to the Member States in a society in which pluralism,

153 *Ibid.*, 703.

154 See Article 2 TFEU in the Annex to Chapter 2.

non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. With regard to the establishment of the internal market of the Union, the Treaty also provides in Article 3(3)[155] that the Union shall combat social exclusion and discrimination, promote social justice and protection as well as promote economic, social and territorial cohesion, and solidarity among Member States.

Article 6(1)[156] of the TFEU stipulates that the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights which is by the Treaty granted the same legal value as the Treaties. In Article 6(3)[157] it is declared that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. Thus Article 6 of the TFEU is the 'only explicit rule with reference to the protection of fundamental rights in AFSJ matters' and it 'reinforces the centrality of fundamental rights protection in EU law.'[158] Among the Treaty Articles that fall under the Area of Freedom, Security and Justice (AFSJ), is Article 79 on which basis EU law on labour migration has been developed. Iglesias concludes that the fact that the Charter has been granted the status of primary law has radically changed the situation concerning human rights protection of third-country nationals within the EU, while it is 'now widely acknowledged that one of the fields in which the impact of EU law is most relevant in terms of fundamental rights is the Area of freedom, security and justice,' and that the Charter is therefore 'destined to play the role of minimum floor for the enactment of the rights of foreigners under the common immigration policy, and the breadth of the endeavour to regulate the status of TCN is likely to engage many Charter rights.'[159] Furthermore, it is significant in relation to EU law on labour migration that with the incorporation of the Charter into the Constitutional Treaty, the 'Charter must be respected by EU institutions when adopting and implementing legislation as well as by Member States when they act within the scope of the EU law.'[160]

Part II of the TFEU which addresses non-discrimination and citizenship of the Union and grants specific rights with respect to freedom of movement of citizens in Articles 20-25, contains a provision on non-discrimination based on nationality in Article 18.[161] It provides that any discrimination on grounds of nationality shall be prohibited within the scope of application of the Treaties, and without prejudice to any special provisions contained therein. Scholars have expressed diverging views on whether this prohibition of discrimination based on nationality extends to third-country nationals or is limited to EU citizens. In that respect, De Schutter has maintained

155 See Article 3(3) TFEU in the Annex to Chapter 2.

156 See Article 6(1) TFEU in the Annex to Chapter 2.

157 See Article 6(3) TFEU in the Annex to Chapter 2.

158 Konstadinides, T. and O'Meara, N. 2014. Fundamental Rights and Judicial Protection, in *EU Security and Justice Law: After Lisbon and Stockholm*, edited by D.A. Arcarazo and C.C. Murphy. Oxford and Portland, Oregon: Hart Publishing, 83.

159 Iglesias, S. 2013. Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles of Enhancing Coherence, *European Journal of Migration and Law* 15, 142.

160 Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of Regions, An open and secure Europe: Making it happen, COM(2014) 145, 11 March 2014, 3.

161 See Article 18 TFEU in the Annex to Chapter 2.

that Article 18 is limited to discrimination between EU citizens because it is 'in principle' limited to them and 'covers neither differences of treatment between EU citizens and third-country nationals nor differences of treatment between nationals from different third countries.[162] Additionally, Bell observes that the scope of the Article has so far only been extended to EU citizens in practice,[163] and Morano-Foadi and De Vries claim that the fact that the provision is placed in Part II of the Treaty 'seems to suggest that it covers EU nationals only.'[164] As will be discussed in section 2.3.2.3, the CJEU stated in the *Vatsouras and Koupatantze* judgement that Article 12 TEC (now Article 18) 'is not intended to apply to cases of possible differences in treatment between nationals of Member States and of non-member countries.' On the other hand, it has been argued that this 'exclusionary interpretation fails to consider that third-country nationals have *always* expressly fallen within the scope of the Treaty to some extent' whichever approach is adopted in interpreting its personal scope, and that if 'the Treaty drafters had wanted to exclude third-country nationals from Article 12 (now Article 18 TFEU) altogether or subject its application to them to the Council's discretion, they could have done so expressly as they did with Articles 42 and 39 EC (now Articles 48 and 45).'[165] Furthermore, Jesse pointed out that 'the wording of the Article itself does not confine application to EU citizens because the only condition for the ban on any discrimination on grounds of nationality is that the matters are within the scope of application of the Treaty.'[166] Several scholars, such as Groenendijk,[167] Guild and Peers,[168] De Witte[169] and Hublet have put forth analogous arguments, expressed here in Hublet's formulation, that given that immigration law and policy, which solely addresses third-country nationals, now falls under the scope of the Treaty, the material scope of the Treaty has been extended which

162 De Schutter, O. 2009. *Links between migration and discrimination*. Report prepared for the European Commission. Luxembourg: Publication Office of the European Union, 26.

163 Bell, M. 2003. The Right to Equality and Non-Discrimination, in *Economic and Social Rights under the EU Charter of Fundamental Rights-A Legal Perspective*, edited by T.K. Hervey and J. Kenner. Oxford – Portland Oregon: Hart Publishing, 98-99.

164 Morano-Foadi, S. and De Vries, K. 2012. The equality clauses in the EU directives on non-discrimination and migration/asylum, in *Integration for Third-Country Nationals in the European Union: The Equality Challenge*, edited by S. Morano-Foadi and M. Malena. Cheltenham: Edgar Elgar Publishing, 8-9.

165 Guild, E. and Peers, S. 2006. Out of the Ghetto? The Personal Scope of EU Law, in *EU Immigration and Asylum Law Text and Commentary*, edited by S. Peers and N. Rogers. Leiden and Boston: Martinus Nijhoff Publishers, 111.

166 Jesse, M. 2009. Missing in Action: Effective Protection for Third-Country Nationals from Discrimination under Community Law, in *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, edited by E. Guild, K. Groenendijk and S. Carrera. Surrey: Ashgate, 198.

167 Groenendijk, K. 2006. Citizens and Third Country Nationals: Differential Treatment or Discrimination?, in *The Future of the Free Movement of Persons in the EU*, under the supervision of J.Y. Carlier and E. Guild. Brussels: Bruylant, 85.

168 Guild, E and Peers, S. 2006. Out of the Ghetto? The Personal Scope of EU Law, in *EU Immigration and Asylum Law Text and Commentary*, edited by S. Peers and N. Rogers. Leiden and Boston: Martinus Nijhoff Publishers, 112.

169 De Witte, B. 2013. Nationals, EU Citizens and Foreigners: Rethinking Discrimination on Grounds of Nationality in EU Law, in *Liberae Cogitationes, Liber amicorum Marc Bossuyt*, edited by A. Alen, V. Joosten, R. Leysen and W. Verrijdt. Cambridge-Antwerp-Portland: Intersentia, 238.

provokes 'an extension of its personal scope of application.' The classical interpretation of now Article 18 can therefore not stand as before, while 'legally speaking, how could one justify a position where the principle of non-discrimination on the basis of nationality', contained in the Article 'which states that it is to apply within the scope of the Treaty, should not apply to this matter?'[170]

2.3.2.2 The European Union Charter of Fundamental Rights (EUCFR/Charter)

The EU Charter of Fundamental Rights is divided into seven chapters which address Dignity, Freedoms, Equality, Solidarity, Citizen's Rights, Justice and General Provisions. The personal scope of the Charter is not uniform between the different chapters but as has been observed by Peers, it can be deduced from the text and context of the Charter that, aside from a handful of provisions that limit the scope, in full or partially to EU citizens, it applies in principle to all persons 'whether or not they are EU citizens' although it is not stated expressly.[171] Examples of Charter provisions that have a limited scope as regards non-citizens are Article 15 and 34. Article 15[172] provides for the freedom to choose an occupation and right to engage in work which extends to everyone, but limits the freedom to seek employment, to work, to exercise the right of establishment and to provide services to citizens of the Union. Article 34[173] on social security and social assistance, provides that the Union recognises and respects the entitlement to social security benefits and social services in various aspects and extends the entitlement to everyone residing and moving legally within the Union. It also recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in order to combat social exclusion and poverty. These rights are to be granted in accordance with rules laid down by national laws and practices, which in the assessment of the European Union Agency for Fundamental Rights is a concern with respect to equal treatment between third-country nationals and nationals of EU Member States, while these rights can be restricted according to national laws and practices.[174]

Chapter III of the Charter on Equality consists of Article 20[175] which declares that everyone is equal before the law, and Article 21[176] which is divided into two parts. Firstly, it prohibits discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age

170 Hublet, C. 2009. The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?, *European Law Journal* 15(6), 770.

171 Peers, S. 2001. Immigration, Asylum and the European Union Charter of Fundamental Rights, *European Journal of Migration and Law* 3, 146.

172 See Article 15 of Charter in the Annex to Chapter 2.

173 See Article 34 of Charter in the Annex to Chapter 2.

174 The European Union Agency for Fundamental Rights. 2011. *Fundamental rights of migrants in an irregular situation in the European Union.* Vienna: The European Union Agency for Fundamental Rights, 24.

175 See Article 20 of Charter in the Annex to Chapter 2.

176 See Article 21 of Charter in the Annex to Chapter 2.

or sexual orientation. Secondly, it prohibits discrimination based on nationality within the scope of application of the Treaties and without prejudice to the special provisions of those Treaties. The scope of the prohibition of discrimination on the basis of nationality enshrined in the Charter as regards non-EU nationals is disputed, given the design of Article 21. In this regard, Caseley maintains that although the Charter is likely to advance the protection against discrimination in many ways by placing it as a fundamental principle of EU law, the Charter 'does not remedy the deficiencies in the EU treaty but instead confirms the status quo', whereas Article 21(1) covers a wide range of discrimination but leaves out 'national origin.' Additionally, in her assessment, Article 21(2) does not provide a higher level of protection for third-country nationals because it confines 'a significant form of discrimination within its own law' and 'its remit is conditioned on EU citizenship.'[177] In a similar vein, Thym has argued that when it comes to migration, the Charter 'emphasizes the privileged position of Union citizens and sanctions a lesser degree of constitutional protection for third-country nationals.'[178] Groenendijk however draws attention to the fact that 'Article 21(2) is placed under the heading "Non-discrimination" in the title on "Equality" in a Charter granting its fundamental rights to "everyone".' That in the Charter only a few rights are explicitly restricted to Union citizens or the lawfully resident third-country nationals and that Article 21(2) contains no such restriction of its personal scope. Based on this, he rightly concludes that it is 'difficult to accept an interpretation of Article 21 Charter that provides less protection than Article 14 ECHR.'[179] He further maintains, that 'where in the application of Union law third-country nationals are treated differently solely on the basis of their nationality, Article 20 Charter and the general principle of equal treatment or non-discrimination require that the difference in treatment is objectively justified. In case no such justification is possible the difference is a form of discrimination and incompatible with Union law.'[180]

The Charter's prohibition of discrimination based on nationality has also been discussed in the context of Article 52 of the Charter which defines the scope of guaranteed rights and provides firstly that any limitation on the exercise of the rights and freedoms recognised by it must be provided for by law and respect the essence of those rights and freedoms. These limitations are subject to the principle of proportionality and may only be made if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[181] Secondly, the rights recognised by the Charter, which are based on the Community Treaties or the Treaty on the European Union, shall be exercised under the conditions and within the limits defined by those Treaties.[182] Thirdly, Arti-

177 Caseley, S. 2012. The Effectiveness of the Charter of Fundamental Rights and Third Country Nationals, Vol. I *LSEU*, 110.

178 Thym, D. 2013. EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook, *Common Market Law Review* 50, 719-720.

179 Groenendijk, K. 2012. Are third-country nationals protected by the Union law prohibition of discrimination on grounds of nationality?, in *Den Fremden akzeptieren: Festschrift für Gisbert Brinkmann*, edited by K. Barwig and R. Dobbelstein. Baden-Baden: Nomos, 135.

180 *Ibid.*, 138.

181 See Article 52(1) of Charter in the Annex to Chapter 2.

182 See Article 52(2) of Charter in the Annex to Chapter 2.

cle 52 provides that for rights in the Charter which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the latter.[183] The Charter thus provides the ECHR as a minimum standard of protection.[184] Caseley sees Article 52(2) as leaving no scope for an interpretation by the Court of Justice of the European Union (CJEU) that would equalise rights of third-country nationals with nationals.[185] A sounder assessment by Bell to the contrary, provides that Article 21 must be read in conjunction with Article 52(1) EUCFR which 'indicates that the underlying concept of discrimination bears a great similarity to Article 14 ECHR. Differential treatment will only be discriminatory if it cannot be objective justified.'[186] Additionally, Peers has drawn attention to the fact that it is well established that the European Court of Human Rights has made clear by its case law that 'there is an international legal obligation binding the Member States as regards *all* third-country nationals, which also dates from a pre-existing international treaty.'[187] Given the status of the ECHR and non-discrimination as a fundamental principle of human right law, Peers has observed in relation to case law on social security that it is 'arguable that the general principle of equality in EC law requires an application of the non-discrimination principle' particularly in light of 'Strasbourg judgments and the broad non-discrimination obligation in Article 26 of the International Covenant on Civil and Political Rights.'[188] In this context it is of particular relevance that the case law of the CJEU for the past decades has been 'characterized by numerous references to individual Articles of the ECHR' and it is now over 30 years since the CJEU made its first specific reference to the ECHR as a source of guidance to be followed within the framework of community law.[189]

Chapter V of the Charter provides for Citizens' Rights such as the right to vote and stand in elections to the European Parliament and municipal elections, right to good administration, access to documents and regarding freedom of movement and residence. Article 45[190] on freedom of movement limits the right to move and reside freely within the Union to its Citizens, but provides that those freedoms may be granted to nationals of third countries legally resident in the territory of a Member State. The rights and freedoms put forth in Article 45 are therefore exclusively for

183 See Article 52(3) of Charter in the Annex to Chapter 2.

184 Morano-Foadi, S. and Andreadakis, S. 2011. The Convergence of the European Legal System in Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence, *The European Journal of International Law* 22(4), 1073.

185 Caseley, S. 2012. The Effectiveness of the Charter of Fundamental Rights and Third Country Nationals, Vol. I *LSEU*, 110.

186 Bell, M. 2003. The Right to Equality and Non-Discrimination, in *Economic and Social Rights under the EU Charter of Fundamental Rights-A Legal Perspective*, edited by T.K. Hervey and J. Kenner. Oxford – Portland Oregon: Hart Publishing, 97.

187 Peers, S. 2006. Social Security, in *EU Immigration and Asylum Law Text and Commentary*, edited by S. Peers and N. Rogers. Leiden and Boston: Martinus Nijhoff Publishers, 760.

188 *Ibid*., 759.

189 Morano-Foadi, S. and Andreadakis, S. 2011. The Convergence of the European Legal System in Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence, *The European Journal of International Law* 22(4), 1073.

190 See Article 45 of Charter in the Annex to Chapter 2.

Union citizens but can be extended to legally resident third-country nationals by individual Member States of the European Union.

2.3.2.3 Case Law of the Court of Justice of the European Union relevant to Discrimination based on Nationality

The *Tümer*[191] case concerned the application of Directive 80/987/EEC relating to the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74/EC (now codified in Directive 2008/94/EC). Mr Tümer, a Turkish national irregularly resident in the Netherlands had been working for a company that became insolvent and claimed payment of salary owed to him. The Dutch authorities did not consider him to be an 'employee' under the national law on unemployment since he was irregularly resident. He was however, due to his employment contract with his former employer, considered a worker under the civil law of the Netherlands. In its judgment, the Court found that the legal basis for the Directive, now Article 153 TFEU, which provides for worker's rights for example with regard to working conditions, worker's health and safety and social security and social protection of workers, is not limited so as to concern only the living and working conditions of nationals of Member States to the exclusion of third-country nationals. As Mr Tümer was a worker, the Court concluded that the Directive at issue must be interpreted as precluding national legislation on the protection of employees in the event of the insolvency of their employer, such as that at issue in the main proceedings, under which a third-country national who is not legally resident in the Member State concerned is not to be regarded as an employee with the right to an insolvency benefit.

In the *Kamberaj*[192] case which concerned entitlements of a long-term resident third- country national to housing benefits, Mr Kamberaj, an Albanian national and a holder of a residence permit for an indefinite period in Italy, was refused housing benefits on the ground that the funds for third-country nationals were exhausted for the year that he applied for. The Court found that, in so far as the benefit in question in the main proceedings fulfils the purpose set out in Article 34 of the Charter, it cannot be considered, under European Union law, as not being part of core benefits within the meaning of Article 11(4) of Directive 2003/109, while Article 34 of the Charter extends to everyone residing and moving legally within the European Union. Article 11(1)(d) of Directive 2003/109 must be interpreted as precluding national or regional law, such as that at issue in the case, which provides, with regard to the granting of housing benefits, for different treatment for third-country nationals enjoying the status of long-term residents conferred pursuant to the provisions of that Directive compared to that accorded to nationals residing in the same province or region where the funds for the benefit were allocated. Commenting on the case, Peers found it to be 'striking, in light of the equal treatment context of the *Kamberaj* judgment, that the Court focused solely on the absolute standard of social protection that third-country nationals could expect pursuant to the Charter, rather than the relevant

191 Case C-311/13 *Tümer* [2014].
192 Case C-571/10 *Kamberaj* [2012].

standard as compared to EU citizens, i.e. the Charter rule on non-discrimination on grounds of nationality.'[193] Had the latter approach however been applied, that 'would have raised the awkward question as to whether the relevant Charter rule (Art. 21(2) of the Charter) applied to third-country nationals at all.'[194]

In its case law so far, the CJEU has not answered the question whether Article 21 of the Charter prohibits discrimination based on nationality against third-country nationals, it has however in joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*[195] given an interpretation of the analogous Article 18 TFEU (former Article 12 EC). In the case, the Court was asked to address the question whether Article 18 TFEU (former Article 12 EC) precludes national rules which exclude nationals of Member States of the European Union, who are unemployed workers in a Member State other than of their own nationality, from receipt of social assistance which are granted to irregular migrants. In answering the question, the Court provided some clarification of its interpretation of the scope of Article 18 TFEU (former Article 12 EC). The Court stated that the first paragraph of Article 18 TFEU (former Article 12 EC) prohibits, within the scope of application of the TFEU (former EC Treaty), and without prejudice to any provisions contained therein, any discrimination on grounds of nationality. Furthermore, that the provision concerns situations coming within the scope of Union law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and of non-member countries. Peers has noted, that this interpretation, now applicable to Article 18 TFEU, which excludes third-country nationals from the ambit of the non-discrimination clause of the TFEU and presumably also the Charter, does not correspond well with the fact that for over 'thirty years, the Court of Justice has stated that human rights are protected within the EU legal order as 'general principles of law."[196]

2.3.2.4 Summary – The Principle of Non-discrimination and Equal Treatment based on Nationality in the TFEU, EUCFR and CJEU Case Law

The prohibition of discrimination based on nationality enshrined in the TFEU and the EUCFR is not limited to discrimination between EU citizens while it does not explicitly exclude discrimination based on nationality against non-EU nationals. EU law on immigration, including labour migration, now falls within the scope of the TFEU. It is therefore logical to conclude, as several scholars cited above have argued, that although Article 18 of the TFEU and Article 21 of the EUCFR have not traditionally been interpreted as applying to non-EU nationals that this principle now extends to them. Such an interpretation is also consistent with the fact that for rights guaranteed

193 Peers, S. 2013. Case Law, *Common Market Law Review* 50, 542-3.

194 *Ibid.*

195 Joined Cases C-22/08 and C-23/08 *Vatsouras* and *Koupatantze* [2009]

196 Peers, S. 2006. Human Rights in the EU Legal Order, in *EU Immigration and Asylum Law Text and Commentary*, edited by S. Peers and N. Rogers. Leiden and Boston: Martinus Nijhoff Publishers, 116.

in the EUCFR which correspond to rights guaranteed by the ECHR, the meaning and scope of these rights shall be the same as laid down by the ECHR. As was discussed in the section above, the ECtHR has interpreted the prohibition of discrimination to encompass discrimination based on nationality. For the interpretation of the principle of non-discrimination to be consistent between the two instruments, as well as to be in accordance with general principles of international human rights law, the TFEU and the EUCFR have to be interpreted as prohibiting discrimination based on nationality against third-country nationals.

2.4 CONCLUSIONS

This chapter has examined international human rights law, international labour law, European human rights law and international and European instruments specific to labour migrants, in particular in relation to the prohibition of discrimination based on nationality. The examination has established that according to these instruments migrants have the right to equal treatment with nationals in the State where they reside and work. This examination has revealed that international and European human rights instruments prohibit discrimination based on nationality with very limited exceptions related to political rights and the freedom of movement and that international labour law applies to everyone, unless it is expressly stated otherwise. Although most of the instruments discussed herein do not include nationality as a prohibited ground of discrimination in their catalogues of grounds of discrimination, nationality has become a suspect ground based on the interpretations of the scope of these instruments by UN treaty bodies and monitoring and expert committees of the CoE and the ILO and the case law of the ECtHR. The only instruments for which the scope of the prohibition of discrimination based on nationality is still disputed are the TFEU and the EUCFR, as regards exclusion or inclusion of non-EU nationals. Several distinguished scholars specialised in EU law have however interpreted the principle as extending to non-EU nationals in cases where the matter at issue falls within the scope of the Treaty, as is the case with EU law on labour migration which is the main focus of this study. The case law of the ECtHR, the CJEU and conclusions of monitoring committees reviewed in this chapter also confirm that 'a basic principle of human rights is that entering a country in violation of immigration laws does not deprive an irregular migrant of his or her most fundamental human rights, nor does it erase the obligation of the host state to protect these individuals.'[197] Not only are irregular migrants by all human rights instruments entitled to basic and fundamental human rights, they also enjoy employment related rights, for example based on the EUCFR as we saw in the case law of the CJEU discussed above.

Conventions adopted by the UN, the CoE and the ILO that specifically address the rights of labour migrants may be regarded as anomalies in the context of the instruments studied here, due to low numbers of ratifications. These instruments, in

197 Grant, S. 2005. *International migration and human rights: A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration*. Global Commission on International Migration, 18.

particular the ICRMW, the ECMW and ILO Conventions No. 97 and No. 143 provide, with very limited exceptions, for the same rights as are enshrined in general human rights and labour law instruments. The major difference is that they explicitly recognise that human rights should be afforded to labour migrants, including irregularly present migrants, although all these instruments grant more limited rights to irregular migrants than to regularly present migrants.

3. Policy Developments on Migration Management leading to a Sectoral Approach to Labour Migration into the European Union

3.1 INTRODUCTION

The origins of the development and adoption of European Union (EU) law on labour migration based on a sectoral approach lie in the policy discussions and developments on migration management into the EU that took place between the years 2001 and 2005. Herein the policy developments and discourses that lead to the adoption of a sectoral approach to managing migration of regular and irregular migrants in the EU will be outlined and discussed. The purpose of tracing these policy developments is firstly, to disclose how the right to equal treatment of third-country nationals with nationals is addressed and constructed in EU policy on labour migration management. As well as uncovering the effect of the sectoral approach on the right to equal treatment of third-country nationals and whether rights granted to migrants are a part of migration management strategies.

This analysis will reveal the main determinants behind the policy developments on labour migration management, which include the need identified by the Commission to act proactively to attract the labour migrants identified as 'needed' to further the economic goals of the EU, the reluctance of EU Member States to adopt common measures on labour migration under the horizontal approach and the one-sided approach to irregularly present migrants in employment. The examination provided herein will include a short overview of common measures on migration before the EU gained competences on legislating on migration with the Amsterdam Treaty in 1999 and the policy priorities behind, and the failure of, the horizontal approach to labour migration suggested by the Commission in 2001. Most of the focus will however be on outlining the developments that lead to the sectoral approach, starting in 2003 with a heightened emphasis on the economic benefits of labour migration in the Communication on immigration, integration and employment.

3.2 FROM 'ZERO' MIGRATION TO A PROACTIVE IMMIGRATION POLICY

Although the EU did not gain competences on legislating on migration until 1999, initiatives of coordination on migration issues between EU Member States can be traced as far back as to the 1970s. In 1976, for example, the Council adopted a Resolution on an action programme for migrant workers and members of their families.[1]

Among other issues, the Resolution was based on the need identified 'to improve the circumstances of workers who are nationals of third countries and members of their families who are allowed into the Member States, by aiming at equality between

1 Council Resolution of 9 February 1976 on an action programme for migrant workers and members of their families, OJ C34/2, 14 February 1976.

their living and working conditions, wages and economic rights and those of the workers who are nationals of the Member States.'[2] The Resolution did not call for coordination of measures on treatment of migrant workers among Member States, it did however provide that the Council considered it important to 'strengthen co-operation between Member States in the campaign against illegal immigration of workers who are nationals of third countries and ensure that appropriate sanctions are laid down to repress trafficking and abuses linked with illegal migration.'[3] Later that year, the Commission set forth a proposal for a Council Directive on the harmonization of laws in the Member States to combat illegal migration and illegal employment[4] which articulated among other things that 'in view of the growing interdependence and integration of the national labour markets' of the Member States, a Community action was 'needed to combat the illegal employment of non-Community workers.'[5] This Directive was however not adopted by the Council. In 1985 the Council adopted a Resolution on guidelines for a Community policy on migration[6] that addressed the importance of developing a Community policy on migration but it did not call for it explicitly, only for information sharing and consultation. The same year, the Commission adopted a Decision on setting up a prior communication and consultation procedure on migration policies in relation to non-member countries,[7] which required the Member States to give the Commission and other Member States information for example about measures that they intended to take on entry, residence and employment of third country workers.[8] The Decision set up a consultation procedure between the Commission and individual Member States to discuss these measures,[9] the objective of which included to ensure that the measures a Member State intended to take, were in conformity with Community policies and actions in the relevant fields.[10] Parts of the Decision were declared void by the Court of Justice of the European Union due to the Commission's lack of competence based on the EEC Treaty in joined cases brought by Germany, France, the Netherlands, Denmark and the United Kingdom against the Commission.[11] During 1994 to 1996, the Council adopted four instruments on migration management in to the Member States, those were two Council Resolutions providing for 'harmonizing principles' to restrict

2 *Ibid.*, paragraph 6 of preamble.
3 *Ibid.*, Article 5(b)
4 Proposal for a Council Directive on the harmonization of laws in the Member States to combat illegal migration and illegal employment, OJ C277/2, 23 November 1976.
5 *Ibid.*, paragraph 4 of the preamble.
6 Council Resolution of 16 July 1985 on guidelines for a Community policy on migration, OJ C 186/3, 26 July 1985.
7 Commission Decision 85/381/EEC of 8 July 1985 on setting up a prior communication and consultation procedure on migration policies in relation to non-member countries, OJ L 217/25, 14 August 1985.
8 *Ibid.*, Article 1(1)
9 *Ibid.*, Article 2
10 *Ibid.*, Article 3
11 Joined Cases C-281, 283, 285 and 287/85, *Germany and others v Commission of the European Communities* [1987]

the admission of third-country nationals for employment[12] and self-employment,[13] and two Council Recommendations to harmonize means of combating illegal immigration and improving means of control[14] and to combat the illegal employment of third-country nationals.[15]

It is against the backdrop of these measures that the plans for the formulation of a common migration policy for the EU started, when the European Union gained competences on legislating on immigration with the entry into force of the Amsterdam Treaty and directly related to the creation of an Area of Freedom, Security and Justice (AFSJ) in the European Union for its citizens. The Tampere European Council saw the creation of the AFSJ as requiring 'the Union to develop common policies on asylum and immigration,'[16] and the development of these common policies was identified as one of the priority policy areas to make the AFSJ a reality.[17] In relation to developing common policies on migration, the Tampere Council identified a 'need for approximation of national legislation on the conditions for admission and residence of third country nationals,' which was based on a shared assessment 'of the economic and demographic developments within the Union, as well as the situation in the countries of origin.'[18] In addressing the rights of third-country nationals, the Tampere Council concluded that the EU 'must ensure fair treatment of third-country nationals who reside legally on the territory of its Member States,' and that the 'legal status of third-country nationals should be approximated to that of Member States' nationals.'[19] In the three following sections, the policy and legislative developments that occurred in response to the call of the Tampere Council for the development of measures to approximate national legislation on admission and residence of third-country nationals will be addressed.

3.2.1 First Attempt on a Policy Plan for Common Labour Migration Measures

To follow up on the call from the Tampere Council, on addressing access of labour migrants to the EU, the Commission launched a discussion with a Communication on a Community immigration policy, wherein it is stated, that 'it is clear from an analysis of the economic and demographic context of the Union and of the countries

12 Council Resolution of 20 June 1994 on limitations on admission of third-country nationals to the territory of the Member States for employment, OJ C 274/3, 19 September 1996.

13 Council Resolution of 30 November 1994 relating to the limitations on the admission of third-country nationals to the territory of the Member States for the purpose of pursing activities as self-employed persons, OJ C 274/7, 19 September 1996.

14 Council Recommendation of 22 December 1995 on harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control, OJ C 5/1, 10 January 1996.

15 Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals, OJ C 304/1, 14 October 1996.

16 Presidency Conclusions, Tampere European Council, 15-16 October 1999, paragraph 3.

17 *Ibid.*, paragraph 2 of Introduction.

18 *Ibid.*, paragraph 20.

19 *Ibid.*, paragraphs 18 and 21.

of origin, that there is a growing recognition that the "zero" immigration policies of the past 30 years are no longer appropriate.'[20] This conclusion was arrived at having regard to the assessment of the situation then current in the EU, that large numbers of third-country nationals had entered the Union in the preceding years and that these migratory pressures were going to continue 'with an accompanying increase in illegal immigration, smuggling and trafficking.' Furthermore, it was noted that there was a growing shortage of both skilled and unskilled labour migrants in the Member States, as a result of which, a number of Member States had already begun to actively recruit third-country nationals from outside the Union.[21] Based on this situation analysis, the Commission declared that a choice had to be made 'between maintaining the view that the Union can continue to resist migratory pressures and accepting that immigration will continue and should be properly regulated.' Moreover, the Commission stated that the Member States should aim at working together to try to maximize the positive effects of migration on the Union, as well as for the migrants themselves and the countries of origin. To achieve that, it considered that the EU's response must be a proactive one.[22] To contextualize its suggested approach, the Commission also drew attention to the expected demographic decline in the EU over the following 25 years and the current strong economic prospects and growing skills shortages in the labour market.[23] Based on these assessments, the Commission voiced its belief that 'channels for legal immigration to the Union should now be made available for labour migrants,'[24] and suggested that a common legal framework for admission of third-country nationals 'should be developed, in consultation with the Member States.'[25]

In discussing the appropriate legislative framework to meet the needs of the EU Member States in relation to managing labour migration, the Commission suggested that the legislation should 'provide for a flexible overall scheme based on a limited number of statuses designed so as to facilitate rather than create barriers to the admission of economic migrants'[26] and that the admission of economic migrants 'should clearly address the needs of the market place particularly for the very highly skilled, or for lesser or unskilled workers or for seasonal labour.'[27] Additionally, the Commission provided that such admission policies enabled 'the EU to respond quickly and efficiently to labour market requirements at national, regional and local level,' because they recognized the complex and rapidly changing nature of labour market requirements and 'consequently of the need for greater mobility between Member States for incoming migrants.'[28] The Commission declared that in presenting its proposals for a Directive addressing admission of labour migrants, it intended

20 Communication from the Commission to the Council and the European Parliament, on a Community Immigration Policy, COM(2000) 757, 22 November 2000, 3.
21 *Ibid.*
22 *Ibid.*
23 *Ibid.*, 21.
24 *Ibid.*, 3.
25 *Ibid.*, 22.
26 *Ibid.*, 17.
27 *Ibid.*, 15.
28 *Ibid.*

to establish a coherent legal framework that would 'take into account concepts which have already been successfully applied in the Member States,' that such an instrument would determine the basic conditions and procedures to be applied 'whilst leaving it up to each Member State to adopt *national measures* on the admission of third-country nationals based on the criteria set out in the Directives.'[29] This framework legislation the Commission addressed, was to be based on the principles of transparency and rationality and by it, third-country nationals would be granted rights according to their length of stay in a Member State, which was declared to uphold 'a long tradition in the Member States' which was reaffirmed in the Tampere conclusions.[30] With regard to the rights granted to third-country nationals by common EU legislation, the Commission proclaimed that the 'underlying principle of an EU immigration policy must be for different purposes, that persons admitted should enjoy broadly the same rights and responsibilities as EU nationals but that these may be incremental and related to the length of stay provided for in their entry conditions.'[31] What is most noteworthy about the approach of the Commission in explaining its suggested legislative measure for the admission of labour migrants is the emphasis put on that the measures would build on the principles already applied by the Member States, in particular as regards the rights granted to third-country nationals.

3.2.2 Irregular Migration

The Communication on a Community immigration policy discussed above, only addressed irregular migration in a general sense by stating that a 'coherent and co-ordinated approach to illegal immigration will be an essential part of a more open immigration policy at the European level.'[32] In a Communication on a Common Policy on Illegal Migration that the Commission set forth in 2001, irregular migration was discussed in more detail and therein it was provided that addressing 'illegal migration' was considered as covering the 'missing link' of a comprehensive immigration and asylum policy having regard to the fact that some proposals for Directives on migration and asylum had already been submitted to the Council.[33] The Communication provided for a situation analysis regarding irregular migration stating that a 'significant number of illegal migrants' had entered EU Member States legally, but overstayed the time limits for residence because of the possibility to continue working. In this context, the Commission drew attention to the fact that since the Council Recommendation from 1996 on combating the illegal employment of third-country nationals was adopted, 'the sensitive issue of illegal employment of third-country nationals' had not been tackled by the Council. Noting that, it declared that 'the illegal employment of illegal residents should be put back on the political agenda.'[34] Fur-

29 *Ibid.*, 17.
30 *Ibid.*
31 *Ibid.*, 15.
32 *Ibid.*, 12.
33 Communication from the Commission to the Council and the European Parliament, On a Common Policy on Illegal Immigration, COM(2001) 672, 15 November 2001, 3.
34 *Ibid.*, 22.

thermore, the Commission provided its assessment in regard to causes of irregular migration finding that the 'demand for illegal workers is especially caused by their employers,' and suggested that to address employment of irregularly present third-country nationals in employment, sanctions against employers of third-country nationals in such situations should be 'harmonised for the elimination of all competitive advantages.'[35] Having regard to the above, the Commission announced that it would 'examine the opportunity of tabling a proposal for a Directive on the employment of illegal residents from third countries which would focus on the specific requirements to tackle this issue.'[36] The discussion in this policy document does not address the human rights of irregularly present third-country nationals in employment and thereby continues the one sided approach of the EU adopted first during the 1970s to 'combat' employment of irregularly present third-country nationals by sanctioning employers.

3.2.3 Proposal for a Directive on Labour Migration

Based on the principles laid down in the Communication on a Community immigration policy, the Commission submitted a proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed activities to the Council in 2001. The objectives of the proposed Directive were stated to be firstly, to lay down common definitions, criteria and procedures regarding the conditions of entry and residence of third-country nationals for the purpose of employment and self-employed economic activities and that these were based on concepts, which had already been successfully applied in Member States. Secondly, to lay down common criteria for admitting the workers referred to above, such as an economic needs test and beneficial effects test and options for demonstrating compliance with these criteria. Additionally, the Directive was set out to provide for a single national application procedure leading to one combined title, encompassing both a residence and work permit within one administrative act, in order to simplify and harmonise the diverging rules currently applicable in Member States. As regards the rights granted to third-country nationals, the Directive was to address those, whilst respecting Member States discretion to limit economic migration, but stipulated that if third-country nationals fulfil all the conditions set out in the Directive they should be admitted unless the Member States impose quotas or limitations. Finally, the Directive was meant to provide for a flexible framework allowing all interested parties, including Member States, to react quickly to changing economic and demographic circumstances, and to acknowledge Member States' right to limit admission of third-country nationals. In relation to that, Member States were, if they considered it necessary, permitted to use ceilings or quota to that end.[37]

35 *Ibid.*, 23.

36 *Ibid.*

37 Proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purpose of paid employment and self-employed economic activities, COM(2001) 386, 11 July 2001, 3-4.

The purpose of the Directive was largely in line with the factors outlined above, to determine the conditions of entry and residence of third-country nationals and to determine standards and procedures for the issue by a Member State of permits to third-country nationals to enter and reside in its territory and to exercise activities as an employed or self-employed person.[38] The explanatory memorandum for the proposal provided in regard to the right to equal treatment for third-country nationals admitted under the proposed Directive that they should 'enjoy the same treatment in substance as citizens of the Union at least with regard to certain basic rights (working conditions, access to vocational training, recognition of diploma, social security, including healthcare, access to goods and services which are available to the public, including housing and trade union rights.)' The catalogue of rights set forth was stated to be aligned with the catalogue of rights proposed for the Long Term Residents Directive, but that 'in line with the principle that rights of third-country nationals should be incremental with their length of stay – less exhaustive.'[39] In addition to being less exhaustive than the right to equal treatment provided for long term residents, the proposed Directive also permitted the Member States to derogate from equal treatment in access to vocational training and public housing based on the length of stay.[40] Under the horizontal approach to labour migration, the right to equal treatment of third-country nationals legally residing and working in a Member State was characterised by two factors, firstly that all labour migrants from third countries were entitled to the same catalogue of rights and secondly, the granting of those rights depended to some extent on their length of stay in a Member State.

In the explanatory memorandum provided for the proposal, the Commission commented on the purpose of the Directive and explained that in 'the interest of clarity and legal certainty, the proposal follows a horizontal approach and covers the conditions of entry and residence of any third-country national exercising employed or self-employed economic activities in the territory of a Member State.' Furthermore, that the broad horizontal approach is considered as a general starting point[41] for the development of EU law on labour migration. In the preamble of the proposed Directive some issues related to the economic situation within the EU at the time and the political context of adopting legislation on immigration on the EU level are highlighted. One of these refers to the 'needs based' situation of the EU, assessing that 'in an increasingly global labour market and faced with shortages of skilled labour in certain sectors of the labour market, the Community should reinforce its competitiveness to recruit and attract third-country workers, when needed.' Another one focused more on the situation internal to the EU and the sensitive issue of developing common measures on labour migration and protection of national labour markets of the Member States, stating the chief criterion for admitting third-country nationals to activities as an employed person should be a test demonstrating that a post cannot be filled from within the domestic labour market. Additionally that the criteria for admitting third-country nationals to activities as a self-employed person

38 *Ibid.*, 23.
39 *Ibid.*, 14.
40 *Ibid.*, 29.
41 *Ibid.*, 6.

should be a test demonstrating an added value for employment or the economic development of the host Member State.[42] The approach suggested by the Commission mainly focused on facilitation of the procedures to admit labour migrants that were identified as needed to fill gaps in the national labour markets of the Member States, it did not deprive Member States of the right to control admission into their territory and as stated by the Commission in the above, largely built on traditions and measures already applied in the Member States.

Commenting on the proposal for the Directive and the policy plans on which it was based, Apap maintained that it was 'obvious that the approach defended in these texts represents a clear rupture with former immigration policies on EU-level.' This, she saw as raising the question whether the Member States would agree with the Commission's approach 'considering the sensitivity of the question at the national level as well as the differences of approaches and policies in this field.'[43] Although her observation is accurate as regards that the proposal takes a new approach in being strategic and proactive in terms of managing labour migration into the EU, core elements of the proposal, such as the 'economic needs test' as a prerequisite for admitting a person and the discretion to apply measures such as 'ceilings or quotas' to limit 'the admission of third-country nationals'[44] would have left the Member States ample power to control the admission of labour migrants into their territory. Apap was however correct in doubting that the Member States would agree with the approach chosen by the Commission. The reception of the proposal has been described as that the negotiations on it 'were frozen as soon as the Council concluded the first reading of the text,'[45] as a 'sad one',[46] and that it was 'dead on arrival'.[47] Theorizing about the reasons for the negative reception of the proposed Directive, Bertozzi argued that the most serious doubts of the Member States 'centred around the fact that the directive proposed common rules for practically all categories of workers, be they highly qualified, seasonal workers, employed or self-employed,' that it was a 'one size fits all' procedure regardless of the type of worker. Had the Member States accepted it, in his assessment, 'there would have been no way for them to offer 'facilitated' employment channels in the event that their employment markets signalled shortages in certain

42 *Ibid*., 22.

43 Apap, J. 2001. *Shaping Europe's Migration Policy. New Regimes for the Employment of Third Country Nationals: A Comparison of Strategies in Germany, Sweden the Netherlands and the UK*, CEPS Working Document No. 179, Brussels: Centre for European Policy Studies, 7.

44 Proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purpose of paid employment and self-employed economic activities, COM(2001) 386, 11 July 2001, 22.

45 Papagianni, G. 2006. *Institutional and Policy Dynamics of EU Migration Law*. Leiden Boston: Martinus Nijhoff Publishers, 170.

46 Oosterom-Staples, H. 2008. Regulating Labour Migration; The EU Saga on Third Country Nationals Seeking Access to the European Labour Market, in *Migration Law and Sociology of Law: Collected Essays in Honour of Kees Groenendijk,* edited by A. Böcker, T. Havinga, P. Minderhoud, H. van de Put. Nijmegen: Wolf Legal Publishers, 3.

47 Peers, S. 2009. 'Legislative Update: EC Immigration and Asylum Law Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directives', *European Journal of Migration and Law* 11, 410.

professions.'[48] This assessment is only accurate to a limited extent while there was nothing in the proposal for the Directive that would have prevented each individual Member State from facilitating admission for the workers that were most needed in their national labour market, although it did provide for horizontal criteria for admission, it left it up to the Member States to decide which 'types' of migrants it would admit for employment and self-employment. The more plausible explanation for the rejection of the proposal by the Member States might lie in the fact that the Commission and the Member States did not share the same objectives in regard to harmonizing legislation on labour migration into the EU. In that regard, Carrera argued that while the establishment of a harmonised framework on labour immigration was constantly re-emphasised at the official level as a priority for the EU, the Member States 'practiced a fierce strategy of resistance in relation to any sign of 'communitarisation' or liberalisation in this field at the transnational level.'[49] In a similar vein, Papagianni notes that the establishment of a common policy at the European level on this issue has proved extremely difficult, while the 'competence of the Community on the matter has been strongly contested and a series of practical and political reasons have rendered the formation of a common agenda a rather difficult task.'[50]

These analyses of the reasons for the failure of the proposal for the Directive are interesting in relation to the fact that the Commission displayed a high level of sensitiveness towards the Member States in relation to admission of labour migrants by constructing a legislative instrument that was built on the practices in place in the Member States as regards granting rights to migrants, and did not limit their authority to control admission to territory or the labour market. The reluctance of the Member States to agree on the horizontal approach, based on the developments on EU policy on labour migration that will be discussed below, were perhaps best explained by Bertozzi in that they did not agree on a 'one size fits all' approach. Most likely, as Wiesbrock argues, because the 'comprehensive approach and the absence of a distinction between highly and semi- or low-skilled migrants,' of the proposed Directive differed 'from the labour market oriented labour migration policies of the Member States.'[51]

48Bertozzi, S. 2007. *Legal Migration: Time for Europe to Play Its Hand.* CEPS Working Document No. 257. Brussels: Centre for European Policy Studies, 6.

49Carrera, S. 2007. *Building a Common Policy on Labour Migration: Towards a Comprehensive and Global Approach in the EU?* CEPS Working Document No. 256. Brussels: Centre for European Policy Studies, 1.

50Papagianni, G. 2006. *Institutional and Policy Dynamics of EU Migration Law*. Leiden Boston: Martinus Nijhoff Publishers, 170.

51Wiesbrock, A. 2010. *Legal Migration to the European Union*. Leiden Boston: Martinus Nijhoff Publishers, 146.

3.3 TOWARDS A COMMON POLICY ON LABOUR MIGRATION MANAGEMENT

3.3.1 Discussion and Exploration of a Common Approach on Legal Migration

After the proposal for the Directive 'tabled in 2001 received no support from the Council,' the Commission established that some 'basic questions need to be addressed in order to understand whether or not the admission of economic migrants should be regulated at the EU level.'[52] Among the issues identified in that respect, were a clarification of the degree of harmonisation to aim at, the scope of the proposal that should be put forth and whether or not the principle of Community preference for the domestic labour market should be maintained. In relation to this, the Commission provided that as far as it was concerned, the answers to these questions have to build upon two basic principles. That is, the draft Constitutional Treaty which confirms European competence on migration policy, but leaves the determination of the number of migrants to be admitted to the Member States, and the necessity that any measures taken in this field has to be based on one exclusive criterion which is the added value of taking the measure at the EU level.[53] The question of whether or not admission of economic migrants should be regulated at the EU level alludes to the underlying reasons why the Member States rejected the proposal and how much cooperation they were interested in establishing. As Papagianni points out, European history shows that when strong political will existed, legal and practical problems could be overcome,[54] and having regard to that, she considers it 'tempting to argue that the decisive factor in the establishment of a common, coherent and effective Community migration policy lay less with the sovereignty concerns in the area and more with the lack of a clear political will due to the deep divergence of views over a series of vital issues.' Those issues included the considerable differences in 'socio-economic situation, labour market needs, internal organisation and differences in approach to immigration among Member States' national policies,' which render finding a common ground and promoting common goals consistently and efficiently 'no easy task.'[55]

The Commission resumed the exploration for a policy approach on labour migration in 2003, with its Communication on immigration, integration and employment. From that Communication and onwards there is a visibly heightened focus on the positive economic benefits of labour migration into the EU and on an approach to strategically manage migration into the territory, both addressed with a certain level of urgency. In this regard, the Communication focused on the possible benefits of labour migration, an analysis of the situation the EU is facing in relation to labour migration and the strategic approach necessary to address these. The situation in 2003

52 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Study on the links between legal and illegal migration, COM(2004) 412, 4 June 2004, 16.

53 *Ibid.*, 16-17.

54 Papagianni, G. 2006. *Institutional and Policy Dynamics of EU Migration Law*. Leiden Boston: Martinus Nijhoff Publishers, 271.

55 *Ibid.*, 271-272.

was assessed as that in an overall economic and social context characterised by a number of skill and labour shortages, competition for the highly skilled in a globalised economy and accelerating demographic ageing, immigration is taking on a new profile in the EU.[56] Furthermore, that immigration 'is caused by 'pull' as well as 'push' factors and it is therefore important to relate it to the employment outlook and the profile of future labour market needs.' Suggesting that more sustained immigration flows will be increasingly likely it was considered necessary and important to anticipate these changes.[57] In highlighting the positive economic aspects of migration it was stated that its economic impact on employment and growth is significant as it increases labour supply and helps to cope with bottlenecks and that immigration tends to have an overall positive effect on product demand and therefore on labour demand.[58] With regard to recruitment of additional workers, it goes on to state that the primary 'challenge will be to attract and recruit migrants suitable for the EU labour force to sustain productivity and economic growth.' Additionally, that in the context of increasing skills gaps and mismatches, which require time to be overcome, economic immigration can play a role in tackling labour market imbalances, provided the qualifications of immigrants are appropriate.[59] The Communication thereby places an important emphasis on the EU taking a strategic approach to labour migration and the need for the 'appropriate' type of migrants and comes to the conclusion that the 'migrants most likely to help match demand and supply are those adaptable enough to face changing conditions, in view of their qualifications, experience and personal abilities.' The Commission considers that to achieve this, the selection mechanisms must be geared towards these would-be migrants and offer them sufficiently attractive conditions and assesses that this is likely to result in increased competition within the Union and between OECD countries which calls for co-ordination to ensure a level playing field[60] among EU Member States.

As a follow up to this assessment of the situation in the labour markets of EU Member States and the definition of the overall strategic approaches to address those, the Commission set forth a Green Paper on an EU approach to managing economic migration in 2004. The Green Paper had the particular aim of launching a discussion, involving EU institutions, Member States and civil society actors, 'on the most appropriate form of Community rules for admitting economic migrants and on the added value of adopting such a common framework.'[61] Therein it is reiterated that at the political level, the Thessaloniki European Council in 2003 and the Brussels European Council in 2004 stressed the need for the development of a common immigration policy for the Union and it then goes on to address the importance of developing such a policy in relation to the circumstances the Union is facing and to meet the

56 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment, COM(2003) 336, 3 June 2003, 9.

57 *Ibid.*

58 *Ibid.*, 10.

59 *Ibid.*, 15.

60 *Ibid.*, 16.

61 Green Paper on an EU approach to managing economic migration (presented by the Commission), COM(2004) 811, 11 January 2005, 3.

goals of the Lisbon strategy. In regard to that, the Green Paper provided that 'recognising the impact of demographic decline and ageing on the economy, the Commission highlighted the need to review immigration policies for the longer term particularly in the light of the implications which an economic migration strategy would have on competitiveness and, therefore, on the fulfilment of the Lisbon objectives.' Furthermore, it makes the assessment that even if the Lisbon employment targets are met by 2010, overall employment levels will fall due to demographic change in the EU. That it is estimated that at the then current immigration flows, the decline in the EU-25 (now 28) working age population will entail a fall in the number of employed people of some 20 million between 2010 and 2030, which is considered to 'have a huge impact on overall economic growth, the functioning of the internal market and the competitiveness of EU enterprises.'[62]

To frame the discussion on the appropriate approach to management of labour migration, the Green paper outlined the options available to the EU in bringing forward the development of a common immigration policy and discussed the advantage each of the approaches had been assessed to bring. It starts out by considering the horizontal approach put forward by the 2001 proposal and suggests that it could be complemented by specific provisions to cover the particular needs of certain groups, such as seasonal workers and intra-corporate transferees. The advantage of this approach was considered to be the establishment of a comprehensive common framework on economic migration, with a high degree of flexibility.[63] The second approach put forth is following the example of the proposal for a Directive on the admission of students and of researchers, and developing a series of sectoral legislative proposals such as on seasonal workers, intra-corporate transferees and specially skilled migrants, although not necessarily only highly qualified, and setting aside for the time being any overall common framework for the admission of third-country workers. The advantage of this was noted being that it would be easier as regards adoption of common rules.[64] Finally it lists several other approaches that could 'be explored' such as the establishment of a common fast track procedure to admit migrants in cases of specific labour and skills gaps. This was presented as a procedure that could be activated if a certain number of Member States obtained Council authorisation to do so, and was assessed as helping avoid unnecessary and potentially harmful competition between Member States in the recruitment of certain categories of workers.[65] Addressing the rights of third-country nationals, the Green paper declared that 'migrant workers must have a secure legal status, irrespective of whether they wish to return to their countries of origin or obtain a more permanent status.' Additionally, that 'third country workers should enjoy the same treatment as EU citizens in particular with regard to certain basic economic and social rights before they obtain a long-term resident status,' and that 'this status implies more extensive set of rights, in line with the principle of the differentiation or rights according to length of stay.'[66]

62 *Ibid.*
63 *Ibid.*, 5.
64 *Ibid.*
65 *Ibid.*
66 *Ibid.*, 10.

As a follow up to the dialogue based on the Green Paper, the European Council in the Hague Programme, having taken into account the outcome of the discussion, as well as 'best practices in Member States and its relevance for implementation of the Lisbon Strategy,' invited the Commission to present a policy plan on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market before the end of 2005.[67] The Council further provided that five years after the European Council's meeting in Tampere, it was 'time for a new agenda to enable the Union to build on the achievements and to meet effectively the new challenges it will face,' while legal migration was considered to 'play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy.'[68] Addressing the rights of third-country nationals, the Hague Council concluded that 'while recognising the progress that has already been made in respect of the fair treatment of legally resident third-country nationals in the EU,' it 'calls for the creation of equal opportunities to participate fully in society,' and stressed the importance of 'actively' eliminating obstacles to integration.[69] There is no definition provided by the Council on what constitutes 'fair treatment' and the Hague programme did not elaborate further on its call for equal opportunities, such as on the strategies to be used to ensure equal opportunities or the links between ensuring equal treatment for third-country nationals with nationals and equal opportunities.

3.3.2 Policy Plan on Legal Migration

In a Communication to the European Council, entitled *Working together for growth and jobs – A new start for the Lisbon Strategy*, President Barroso called for the continuation of the work on developing EU migration policy, while acknowledging that in the face of a shrinking labour force, a well-developed approach to legal migration is needed.[70] The need to achieve the goal of the Lisbon Council meeting held in 2000, which was set as that of the European Union becoming 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion,'[71] is frequently referred to in policy documents on a common policy for EU labour migration. In a similar vein as in the above, the Policy Plan on Legal Migration put forth in 2005 reiterated that with 'regard to economic immigration, the current situation and prospects of EU labour markets can be broadly described as a "need" scenario' that 'some Member States

67 European Council, Note from General Secretariat to Delegations, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 13 December 2004, document number: 16054/04, 10.

68 *Ibid.*

69 *Ibid.*

70 Communication to the Spring European Council: Working together for growth and jobs -A new start for the Lisbon Strategy: Communication from President Barroso in agreement with Vice-President Verheugen, COM(2005) 24, 2 February 2005, 10.

71 Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, paragraph 5.

already experience substantial labour and skills shortages in certain sectors of the economy, which cannot be filled within the national labour markets,'[72] and asserts that labour immigration is basically vital to the sustenance and growth of the EU economy. Additionally, that in the short and mid-term, labour immigration as a part of the Lisbon Strategy's comprehensive package of measures aimed at increasing the competitiveness of the EU economy, can positively contribute to tackling the effects of the demographic situation, 'and will prove crucial to satisfying current and future labour market needs and thus ensure economic sustainability and growth.'[73] Although the issue of labour migration and the employment market of EU Member States are directly related in policy documents addressing the issue, the development of EU law on labour migration has taken place under the auspices of the Directorate General on Justice and Home Affairs (now DG Migration and Home Affairs), with noticeably limited consultation with DG Employment. There is also precious little mention of labour migration in EU documents addressing employment policies and economic policies, such as the above mentioned Lisbon Strategy, the Communication Europe 2020 – A strategy for smart, sustainable and inclusive growth,[74] Council Decision on guidelines for the employment policies of the Member States,[75] and the 2012 Communication entitled 'Towards a job-rich recovery'.[76] In these policy documents, migrants are almost solely addressed as regards their better integration into the work force,[77] most likely referring to migrants already resident within the EU, these policy documents do not address proactive labour migration policies as a contributing factor to meet economic and labour market needs.

One of the determining factors for the policy presented by the Commission in its Policy Plan on Legal Migration in 2005 was the finding that although the public consultation on preferences as regards a common EU policy on labour migration drew attention to the 'possible advantages of a horizontal framework covering conditions of admission for all third-country nationals seeking entry into the labour market of the Member States,' the Member States 'themselves did not show sufficient support for such an approach.'[78] Taking into account the preferences expressed by the Member States, the legislative framework that the policy plan proposed to be developed was described as aiming for developing 'non-bureaucratic and flexible tools to offer a fair, rights-based approach to all labour immigrants on the one hand and attracting

72 Communication from the Commission: Policy Plan on Legal Migration, COM(2005) 669, 21 December 2005, 4.

73 *Ibid.*, 5.

74 Communication from the Commission, Europe 2020 – A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, 3 March 2010.

75 Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States.

76 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Towards a job-rich recovery, COM(2012) 173, 18 April 2012.

77 Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States, 10.

78 Communication from the Commission: Policy Plan on Legal Migration, COM(2005) 669, 21 December 2005, 5.

conditions for specific categories of immigrants needed in the EU, on the other.'[79] This approach diverts from the long upheld principle of the Member States referred to above, that rights are granted to third-country nationals based on their length of stay in a Member State and is further described as unlike the 2001 proposal while it only addresses the conditions and the procedures of admission for 'few selected categories of economic immigrants.' Additionally, it is stated to be intended to 'establish which rights a third-country national in employment shall enjoy once he/she has been admitted to the territory of a Member State.'[80] The policy plan thus proposes a selective approach in two ways, firstly with regard to which groups of migrants shall be given primacy and secondly, what rights shall be granted to migrants belonging to each group addressed by the framework. As in the earlier policy documents addressing the rights of third-county nationals residing and working within the EU, no references are made to the human rights framework on the right to equal treatment.

The groups of migrants that should be focused on in the development of legislative instruments based on the policy plan were identified through a public consultation, which 'clearly identified categories of workers for which common needs and interests exist.' Having regard to that, the Commission declared its intention to strike a balance between the interests of certain Member States more inclined to attract highly qualified workers, and of those needing mainly seasonal workers.[81] In spite of those intentions, the focus of the policy plan is largely on highly qualified migrants which is stated to be based on the assessment that the 'vast majority of Member States need these workers, because of shortfalls in the labour market pool of highly qualified workers.'[82] Carrera and Formisano suggested that rather than following through with this approach of focusing primarily on highly qualified migrants, 'the EU should try to reach an agreement on a regulatory skeleton that has ample room to breathe, providing a common policy framework on admission for the purposes of employment and self-employment activities,' given the divergent economic needs (as regards for instance sectoral shortages) and the strategies and priorities of each Member State.[83] The approach they suggested is reminiscent of the horizontal framework rejected by the Council in 2001, and although it was identified by many as the most appropriate approach to labour migration, it had become clear at this point that the Member States were not willing to follow it. In the analysis of Carrera and Formisano, abandoning the horizontal approach was considered to create several problems, while 'the choice of admitting one particular category of workers would automatically discriminate against others, creating disparities of treatment among third-country nationals.' Additionally, they considered that the emphasis on highly qualified workers might have the effect to close the door 'at the start to low-skilled workers who could have improved their skills in one of the EU member states and increased their pro-

79 *Ibid.*
80 *Ibid.*
81 *Ibid.*, 6.
82 *Ibid.*, 7.
83 Carrera, S. and Formisano, M. 2005. *An EU Approach to Labour Migration: What is the Added Value and the Way Ahead?* CEPS Working Document No. 232. Brussels: Centre for European Policy Studies, 12.

fessional capabilities while contributing to the welfare of the hosting country.'[84] These issues addressed in their assessment of the effects of the sectoral approach materialized in the proposals for the Directives examined in this study as will be discussed later in this inquiry. In particular in how the definition of the right to equal treatment varies for different 'types' of migrants and the divergent ways in which access to territory and the labour market is constructed to grant distinct statuses to migrants.

3.3.3 Irregular Migration

As in the first phase of development of EU policy on labour migration, the issue of irregular migration, although identified as integral to a comprehensive migration management policy, was mostly kept separate from regular migration in the policy discussions. An exception to this was the Commission's study on the links between legal and illegal migration put forth in 2004. The aim of the study was to explore 'whether or not legal avenues for the admission of migrants reduces incentives for illegal migration and, more specifically, to what extent policy on legal migration has an impact, first on the flows of illegal migrants and then on cooperation with third countries in fighting against illegal migration.'[85] Among the findings of the study were that 'some level of illegal migration is likely to take place whatever legal channels are put in place,' and based on that it was determined that 'fighting illegal migration' must remain an essential part of migration management.[86] One of the policy conclusions drawn from the study was that the 'common fight against illegal migration' and the development of a Community return policy were priorities and that in the context of migration management policy 'the only coherent approach to dealing with illegal residents was to ensure that they return to their country of origin.'[87] The conclusions also addressed countries of origin as cooperation partners of the EU in order to 'reduce illegal migration flows' having regard however to the fact that the relations between the EU and third countries 'cannot be based on unilateralism.'[88] Limited consideration was given to the possible complex situation behind irregular presence and irregular employment of third-country nationals and the human rights of irregularly present migrants when addressing the policy priorities.

Following up on this study, the Commission introduced a Communication on policy priorities in the fight against illegal migration in 2006 in which it is reiterated that the 'fight against illegal migration' forms 'an integral part of the EU's comprehensive and structural approach towards effective migration management and com-

84 *Ibid.*

85 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Study on the links between legal and illegal migration, COM(2004) 412, 4 June 2004, 1.

86 *Ibid.*, 18.

87 *Ibid.*, 19.

88 *Ibid.*

plements recent policy initiatives in this areas.'[89] Therein, a connection is made between irregular migration and the availability of regular migration channels, concluding that a 'firm policy to prevent and reduce illegal immigration could strengthen the credibility of clear and transparent EU rules on legal migration,' and that the 'existence of such rules may in itself reduce illegal immigration by offering perspectives to those who may otherwise migrate illegally.'[90] In this context the availability of irregular employment in EU Member States is considered an incentive that 'seriously undermines the credibility of legal migration channels and erodes Member States' tax revenues,'[91] and it is suggested that to address this, 'the employment of illegally present third-country nationals or persons working in violation of their residence status should be specifically targeted.'[92] It is on the basis of this suggestion, that the proposal for the Employers Sanctions Directive was developed and submitted to the Council in 2007.

3.4 IMPLEMENTATION OF THE COMMON MIGRATION MANAGEMENT AGENDA

In 2007, after three proposals for Directives based on the policy plans discussed above (that is the Directives providing for sanctions against employers of illegally staying third-country nationals, 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 the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment) were submitted to the Council, the Commission set forth a Communication entitled *Towards a Common Immigration Policy*. Therein, the Commission reiterated the need for labour migration into the EU and the necessity of a common approach of the Member States. In regard to this it stated that the 'needs of the labour market are clear' and that those 'will not be remedied by the sometimes contradictory policies of recruitment being pursued by the Member States.' Furthermore it provided that the 'category-by-category approach' called for in the Policy Plan on Legal Migration of 2005 seemed to be the only way to move out of the impasse and beyond the Member States' reservations regarding a matter they view as falling within national jurisdiction.[93] It also addressed the need to adopt legislation on highly qualified workers as being 'of special urgency,' and announced a forthcoming proposal for a Directive on 'unskilled workers' such as seasonal workers in the autumn of 2008 and stated that the 'category-by-category legislation should be rendered consistent by a Directive on a common set of rights for third-country work-

89 Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals, COM(2006) 402, 19 July 2006, 3.

90 *Ibid*., 4.

91 *Ibid*., 9.

92 *Ibid.*

93 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a Common Immigration Policy, COM(2007) 780, 5 December 2007, 4.

ers, to prevent social dumping and exploitation.'[94] This Directive referred to last, is the Single Permit Directive, the proposal for which had already been submitted to the Council.

What is most interesting about the views expressed by the Commission in this communication is how it highlights the tension between the Commission and the Member States regarding the development of a common policy on labour migration, by drawing out that the sectoral approach preferred by the Member States had already been adopted and that given that, the Member States had to discontinue their 'contradictory practices' in admission of migrants and their resistance to binding common measures on labour migration. It is also telling of the fact that even at this stage in the development the Commission and the Member States are not in agreement on priorities and that the Commission, unlike the Member States, considers admission of migrants into the territory of an individual Member State as affecting the Union as a whole, for why would their 'contradictory practices' in admission be detrimental to the EU if they serve the need of the Member State in question? In relation to this, the Council highlighted in the *European Pact on Immigration and Asylum* that the creation of a common area of free movement brings Member States new challenges, that the actions of one Member State 'may affect the interest of others,' that access to 'the territory of one Member State may be followed by access to the others.' It is therefore considered 'consequently imperative that each Member State take account of its partners' interests when designing and implementing its immigration, integration and asylum policies.'[95] The positions of the Commission and the Council in this regard are in accordance with the emphasis it has put on creating a system of migration management for facilitating entry of the labour migrants needed to enhance the competitiveness of the EU economy. For example set forth by the Council in calling on the 'Member States to implement an immigration policy that is both managed, particularly with respect to labour market needs, and concerted, given its impact on other Member States.'[96]

3.5 CONCLUSIONS

Considering the difficulties in adopting common EU measures on labour migration outlined in the above, the sectoral approach favoured by the Member States can be seen as a logical consequence of those difficulties. Both the horizontal approach which was under discussion at the outset of the policy processes, and the sectoral approach on which basis the Directives comprising EU law on labour migration were adopted, are frameworks of migration management. The main and most crucial differences between the two approaches is that the former addressed labour migrants without any distinctions based on 'type', provided for the same admission conditions to territory and the labour market for all labour migrants and called for granting

94 *Ibid.*

95 Council of the European Union, Note from the Presidency to Council, 24 September 2008, document number: 13440/08, 3.

96 *Ibid.*, 5.

third-country nationals the right to equal treatment with nationals based on length of stay in the territory of a Member State. The latter approach is based on distinguishing between 'types' of migrants and grants distinct statuses to each group of migrants as regards access to territory and the labour market, the right to family reunification and the right to equal treatment with nationals. The only factor that remains constant between the two approaches is that the sovereign right of Member States to control admission into their territory is upheld. Under both approaches irregularly present migrants in employment are addressed separately by focusing solely on sanctions of employers of those migrants and giving little consideration to the complexities that may have caused migrants to become irregularly present within a Member State.

While discussing how the right to equal treatment of third-country nationals is constructed in EU law on labour migration it is important to note how it is addressed in the EU policy documents on labour migration management discussed in this chapter. Therein, rights of third-country nationals are mostly addressed in general and often undefined terms such as 'legal status approximated to that of the Member States' nationals', 'broadly the same rights', 'the same treatment in substance as citizens of the Union at least with regard to certain basic rights', 'near equal rights', 'certain basic economic and social rights' and 'fair treatment'. An exception to this is the *European Pact on Immigration and Asylum*, which references international norms directly in stating that 'the European Council solemnly reaffirms that migration and asylum policies must comply with the norms of international law, particularly those that concern human rights, human dignity and refugees.'[97]

It may be that having a sectoral framework to manage labour migration will better enable the Member States to facilitate access of those migrants that are identified as most needed for their national labour markets. The choice to differentiate between types of migrants in the framework of EU law on labour migration has however to be assessed in relation to whether and how it affects principles and objectives that are related to EU overall migration policy, such as the principle of equal treatment, integration of migrants and social cohesion. Integration is most frequently addressed by the EU as an essential part of immigration, and from a human rights perspective granting third-country nationals equal treatment with nationals and being proactively inclusive towards migrants and providing them with equal access in the society where they live and work are fundamental tenants of a successful integration policy.

97 *Ibid.*, 3.

4. The Blue Card Directive

4.1 INTRODUCTION

This chapter examines four aspects of Directive 2009/50/EC on the conditions for entry and residence of third-country nationals for the purposes of highly qualified employment, hereafter the Blue Card Directive. Those are access to territory and access to the labour market, the right to equal treatment and the right to family reunification, including access of family members to the labour market. The purpose of the examination is to reveal how the right to equal treatment with nationals is constructed in the Directive for the third-country nationals that fall under its scope and disclose what is the right to equal treatment granted to EU Blue Card holders. Additionally, the status granted to Blue Card holders through access to territory and access to the labour market will be addressed in order to divulge the effect of the status granted to this group of third-country nationals under the EU's sectoral approach to labour migration, on the right to equal treatment and the right to family reunification.

The examination takes as a starting point the Commission's proposal for the Directive and outlines the discussion that took place on the four aspects listed above during the negotiations of the Directive. This discussion uncovers how the right to equal treatment was determined in the negotiations and focuses on the dialogue of the Member States within the Working Party on Migration and Expulsion (WPME), among the Justice and Home Affairs (JHA) Counsellors and in the Council as well as the opinion of the Parliament and the European Economic and Social Committee (EESC). To contextualize the issues discussed in this chapter, it will start by looking at the background to the Directive, its objectives, subject matter, scope and some relevant definitions.

4.2 BACKGROUND TO THE DIRECTIVE

The Commission submitted the proposal for the Directive to the Council on 23 October 2007 and it was adopted by the Council on 25 May 2009. The legal basis for the Directive is Article 63(3)(a) and (4) of the TEC (now Article 79(2)(a) and (b) TFEU), which entailed that the Directive was adopted according to the legislative procedure put forth in Article 251 of the TEC (now Article 294 TFEU), with the Council acting by qualified majority after obtaining the opinion of the Parliament. The negotiations on the Directive were ongoing at the same time as those for the Employers Sanctions Directive and partially the Single Permit Directive, but the proposal on the latter and the proposal for the Blue Card Directive were the first proposals on labour migration submitted by the Commission based on the 2005 Policy plan on legal migration.

The situation the Directive was introduced to address was an identified 'needs' scenario of EU labour markets with regard to economic immigration in general and in particular the finding that the EU as a whole seemed 'not to be considered attractive by highly qualified professionals in a context of very high international competi-

tion.'[1] EU enterprises were identified as 'confronted with increasing vacancy rates, especially for highly skilled workers' where patterns of employment showed greater employment growth in high education sectors for which attraction of labour migrants was deemed as important to 'compensate' demographic trends within the EU.[2] An impact assessment that was conducted before the proposal for the Directive was developed, examined 'policy options for increasing the EU capacity to attract and efficiently allocate' highly qualified workers 'by setting up common rules for their entry and residence.'[3] One of the conclusions 'based on the geographic situation in the EU' reached by the assessment was that 'the attraction and better utilization of highly qualified resources from third countries will remain a crucial challenge for the EU development perspective.'[4] Discussing the legal framework in EU Member States, current at the time when the impact assessment was conducted, it provided that all Member States have special schemes in place that cover specific categories of highly qualified third-country nationals, that however only ten of those cover other than scientists, artists, intra-corporate transferees and university professors. Furthermore, that 'definitions, entry and residence conditions differ, even though it was possible to identify some common grounds, notably that practically all systems are demand-driven.'[5]

These differences among the Member States were seen to have several consequences, among them that the situation does not convey the message that third-country highly qualified workers 'are needed to sustain the EU economy and competitiveness,' and that 'the vast differences in the definition and admission criteria' for highly qualified workers 'clearly limit their mobility throughout the EU, affecting the efficient re-allocation of human resources already legally resident and hampering the overcoming of regional imbalances.'[6] Additionally, the information gathered by the assessment provided that with a 'few exceptions, no Member State seems to have procedures promoting circular and return migration' of third-country highly qualified workers, but such schemes are seen as able to 'help to maximize benefits for all interested parties, i.e. responding to labour needs in Member States, while contributing, through eventual return, to the development of their countries of origin.' Lastly, the impact assessment identified lengthy and complex admission procedures as playing a 'fundamental role in limiting EU attraction,' and emphasised that the 'full social and economic integration' of highly qualified workers is 'capital for retaining needed' highly qualified workers.[7]

1 Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23 October 2007, 3.
2 Commission Staff Working Document, Accompanying document to the Proposal for a Council Directive on the conditions for entry and residence of third-country nationals for the purposes of highly qualified employment, Summary of the Impact Assessment, SEC(2007) 1382, 23 October 2007, 2 and 3.
3 *Ibid.*, 2.
4 *Ibid.*
5 *Ibid.*, 3.
6 *Ibid.*, 4.
7 *Ibid.*

The approach adopted by the Commission in proposing a Directive particularly focusing on highly qualified migrants, received mixed responses from the parties invited to give their opinion on the proposal. The Parliament affirmed that it 'welcomes unreservedly the Commission proposal to make the EU more attractive to highly qualified third-country workers by offering them accelerated, flexible admission procedures and more favourable conditions of residence.'[8] As well as considering that a 'system based on common criteria would send out a clear signal to highly qualified third-country workers that the EU has a serious interest in employing them on the Member States' labour markets and securing their services for the EU in the long term.' The Parliament believed that by attracting highly qualified workers, the EU would be taking steps to enhance its own competitiveness and boost its economic growth.[9] The European Economic and Social Committee (EESC) however reiterated its position that for 'new admission legislation, an overall, horizontal legislative framework is preferable to sectoral legislation.' The Committee considered that the proposal for a Directive on admission drawn up by the Commission in 2001, with a few changes, remained a good legislative proposal and articulated its opinion that if the Council 'were to opt for a sectoral approach', geared only towards the admission of highly qualified migrants, it 'would not apply to much of migration, and would also be discriminatory.' Additionally, the EESC considered that although this option might be easier for the Council, it does not respond to European needs.[10]

4.3 OBJECTIVES OF THE DIRECTIVE

In the explanatory memorandum for the proposal for the Directive it is established that the proposal aimed, in particular, to improve the EU's ability to attract and, where necessary, retain third-country highly qualified workers 'so as to increase the contribution of legal immigration to enhancing the competitiveness of the EU economy by complementing the set of other measures the EU is putting in place to achieve the goals of the Lisbon Strategy.' In this regard, the proposed Directive aimed specifically at effectively and promptly responding to fluctuating demands for highly qualified immigrant labour and to offset present and upcoming skills shortages by 'creating a level playing field at the EU level to facilitate and harmonise the admission of this category of workers and by promoting their efficient allocation and reallocation on the EU labour market.'[11] To achieve these overall objectives, the Com-

8 European Parliament, Working Document on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment Part 1, Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Ewa Klamt), PE405.726v01-00, 15 April 2008, 2.

9 *Ibid.*

10 European Economic and Social Committee, Opinion of the European Economic and Social Committee on the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, SOC/300, Skilled jobs/conditions of entry and residence of third-country nationals, 9 July 2008, 7-8.

11 Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23 October 2007, 2.

mission proposed to 'create a common fast-track and flexible procedures for the admission of highly qualified third-country immigrants, as well as attractive residence conditions for them and their family members, including certain facilitations for those who would wish to move to a second Member State for highly qualified employment.'[12] The rationale for suggesting common measures for the Member States was on the one hand that they are considered, if acting alone as possibly unable to 'face international competition for highly qualified third-country workers,' and that it would entail having a series of different entry and residence conditions for these workers with each national system being closed and in competition with the other.[13] Such a situation was considered to possibly lead to 'distortions in immigrants' choices, and more importantly would over-complicate the re-allocation of the necessary labour force as needs change on labour markets, with the possibility of losing a highly qualified workforce already present in the EU.'[14]

The impact assessment listed the global and specific objectives of developing legislation particularly focusing on highly qualified workers. Therein the global objectives are outlined as being firstly, to improve the ability of the EU to attract and retain third-country highly qualified workers as one of the conditions for increasing the contribution of economic immigration within the set of policies and measures aimed at enhancing the competitiveness of the EU economy and addressing the consequences of demographic ageing. Secondly, to effectively and promptly respond to existing and arising demands for highly qualified labour, and to offset skill shortages, by enhancing the inflows and circulation of third-country highly qualified workers between jobs and Member States and promoting their efficient allocation and reallocation on the EU labour market.[15] The specific objectives of the proposal were proclaimed to be those of developing a coherent approach and common integration policy on third-country highly qualified workers, to increase the number of those immigrating to the EU on a needs-based approach and to simplify and harmonize admission procedures for third-country highly qualified workers. Additionally, to promote their social and economic integration, to foster intra-EU mobility, remove unnecessary barriers and allow a more efficient allocation of third-country highly qualified workers within the EU.[16]

12 *Ibid.*
13 *Ibid.*, 7.
14 *Ibid.*
15 Commission Staff Working Document, Accompanying document to the Proposal for a Council Directive on the conditions for entry and residence of third-country nationals for the purposes of highly qualified employment, Summary of the Imparc Assessment, SEC(2007) 1382, 23 October 2007, 4.
16 *Ibid.*

4.4 DEFINITION OF HIGHLY QUALIFIED EMPLOYMENT AND SCOPE

4.4.1 Definition of Highly Qualified Employment

Draft Article 2(b) of the proposal[17] provided for a definition of 'highly qualified employment', where it is stated to mean the exercise of genuine and effective work under the direction of someone else for which a person is paid and for which higher education qualifications or at least three years of equivalent professional experience is required. The explanatory memorandum for the proposal provided that this definetion is 'based on two elements: the first is the requirement of exercising an economic activity in an employment capacity, therefore excluding third-country nationals wishing to carry out self-employed activity,' the second is the necessary 'higher qualfications requirements.'[18]

It emerged during the first discussion of the proposal in the Working Party on Migration and Expulsion (WPME) that the definition provided for highly qualified employment was controversial among the Member States. In regard to this, Austria, Bulgaria, the Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovakia and Spain entered scrutiny reservations on the provision, in particular the fact that it included a criterion that required 'at least three years of professional experience.'[19] Greece and Germany suggested deleting this requirement of three years of professional experience while Poland wanted to increase the period to five years and Austria suggested that both higher education qualifications and professional experience should be required, not only either of them.[20] The Parliament suggested deleting the requirement for three years of experience and having a general requirement for higher professional qualifications.[21] As a follow up to this discussion the Presidency put forth a compromise suggestion in which the three year requirement of professional experience had been deleted.[22] After this change in the provision, Austria, Belgium, Cyprus, Estonia, Germany, Greece, Italy, Latvia, Lithuania, Malta, the Netherlands and Sweden maintained a reservation to the provision 'in particular' in relation to the reference to the requirement of 'higher professional qualifications.'[23]

17 All references to 'proposal for the Directive', 'proposal' and 'draft Article' in this chapter are to Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23 October 2007.

18 Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23 October 2007, 9.

19 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 5.

20 *Ibid.*

21 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 11.

22 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 29 April 2008, document number: 8875/08, 3.

23 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 10.

To address this concern, Sweden suggested redrafting the provision so that higher qualified employment means 'the employment of any person who, in the Member State concerned, is protected as an employee under national employment law and/or in accordance with the national practice, for which either higher education qualifications or qualified professional experience is required.'[24] Parts of this reformulation were accepted, that is the reference to national law, but not that to higher educational qualifications[25] and the wording formulated by Sweden is reflected in the adopted Directive which refers to highly qualified employment of a person that 'has the required adequate and specific competence, as proved by higher professional qualifications'.[26] The Directive therefore neither requires higher education qualifications nor a certain number of years of professional experience, but contains rather vague criteria of 'adequate and specific competence' as proved by 'higher professional qualifications'. This definition lends itself easily to subjective interpretation and does not establish a commonly understood criteria applying to highly qualified employment among the Member States.

4.4.2 Scope

Draft Article 3 addressed the scope of the Directive and provided firstly, that it shall apply to third-country nationals who apply to be admitted to the territory of a Member State for the purpose of highly qualified employment. Secondly that the Directive shall not apply to third-country nationals that are (a) staying in a Member State as applicants for international protection under temporary protection schemes; (b) who are refugees or have applied for recognition as refugees and whose application has not yet given rise to a final decision; (c) applying to reside in a Member State as researchers within the meaning of Directive 2005/71/EC in order to carry out a research project; (d) who are family members of Union citizens who have exercised, or are exercising, their right to free movement within the Community; (e) who enjoy long-term residence status in a Member State in accordance with Directive 2003/109/EC and exercise their right to reside in another Member State in order to carry out an economic activity in an employed or self-employed capacity; (f) those entering a Member State under commitments contained in an international agreement facilitating the entry and temporary stay of certain categories of trade and investment-related natural persons; (g) whose expulsion has been suspended for reasons or facts of law.

In its opinion on the proposal, the Parliament suggested that 'third-country nationals already legally resident under other schemes in a Member State who apply for an EU Blue Card,' would also fall under the scope of the Directive. The justification for this suggestion was that 'in order to promote for instance students having completed their higher education within the territory of a Member State staying within the

24 *Ibid.*, 3.

25 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 1 August 2008, document number: 12320/08, 3.

26 See Article 2(b) of the Directive in the Annex to Chapter 4.

EU it would be logical to also apply the directive to those wishing to stay.'[27] This suggestion was not accepted and those already present within a Member State are excluded from the scope of the Directive.

In the discussion on the draft Article in the WPME, the Czech Republic wondered if it was necessary to exclude refugees and those who have applied for recognition as such and Latvia 'queried why persons who have obtained subsidiary protection are not excluded, like refugees.' Sweden, supported by Hungary, questioned why beneficiaries of international protection should be excluded 'if they fulfil the relevant requirements,' to which the Commission responded that this discussion needed to be taken 'at political level.'[28] In reply to Latvia's remark, the Commission 'clarified that its intention was to exclude all forms of international protection (temporary and subsidiary protection, refugee status).'[29] There were some amendments made during the negotiations to the effect that the Directive did not explicitly exclude refugees from the scope and this was supported by Hungary, Latvia, Sweden[30] and the Netherlands[31] but opposed by Austria, Cyprus and Greece.[32] In the adopted Directive all the groups addressed in this discussion are excluded,[33] which has been considered, 'hard to justify, given the under-use (as the impact assessment pointed out) of highly skilled resident third-country nationals, and that some of those forced to flee their home countries may have considerable skills to offer employers in various Member States.'[34] Indeed this approach disregards the highly qualified third-country nationals already present in the territory of the Member States and could be considered as having the effect of 'brain waste' which is equally detrimental to third-country nationals as individuals as the labour markets of the Member States. The only change to the list of persons/groups excluded from the scope that occurred during the negotiations was that at the suggestion of the Parliament seasonal workers and intra-corporate transferees[35] were also excluded from the scope of the Directive.[36]

The most substantial change made to the draft Article was that after the first reading of the proposal the Presidency in a compromise suggestion to the WPME,

27 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 15.

28 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 6.

29 *Ibid.*

30 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 5.

31 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, 5.

32 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 5.

33 See Article 3(2)(a),(b) and (c) of the Directive in the Annex to Chapter 4.

34 Peers, S., Guild, E., Acosta Arcarazo, D., Groenendijk, K., Moreno-Lax, V. (eds) 2012. *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Volume 2: EU Immigration Law*. Leiden – Boston: Martinus Nijhoff Publishers, 68.

35 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 15-16.

36 See Article 3(2)(h) and (j) of the Directive in the Annex to Chapter 4.

added a new clause to the scope that provided that 'Member States may issue residence permits other than an EU Blue Card for the purpose of employment on terms that are different than those laid down by this Directive.' That however, 'such residence permits shall not confer the right of residence in the other Member States as provided for in this Directive.'[37] In the following meeting of the WPME Austria, the Czech Republic, Finland, Germany, Greece, the Netherlands and Poland 'welcomed the flexibility offered by this provision to Member States,' but the Commission 'opposed the introduction' of it.[38] Later on, Bulgaria, Portugal and Sweden also expressed their support for that 'national schemes should co-exist with this proposal.' In the opinion of the Netherlands, supported by Bulgaria the wording of the provision did 'not ensure enough discretion to the Member States,' and suggested to reformulate it so that it stipulated that 'the provisions of this Directive shall be without prejudice to the right of the Member States to issue residence permits other than an EU Blue Card for any kind of employment.'[39] The reformulation made by the Netherlands was accepted[40] and the adopted Directive permits the Member States to simultaneously admit highly qualified migrants under the Blue Card scheme and their national schemes. Eisele's observation that the adopted Directive 'does not meet the Commission's original aim to do away with 28 different national systems for highly qualified migrant workers, and can therefore merely be regarded as an upgraded national residence and work permit,'[41] is accurate having regard to this change made during the negotiations which entails that only those highly qualified workers that fall under the scope of the Directive will be granted a Blue Card and can exercise intra-EU mobility, not the highly qualified workers admitted under nationals schemes.

4.5 ACCESS TO TERRITORY

Several provisions of the proposal addressed the conditions for access to territory. These are, draft Article 5 on conditions of admission, draft Article 7 on volumes of admission, draft Article 8 on the EU Blue Card, draft Article 9 on grounds for refusal, draft Article 10 on withdrawal or non-renewal of the EU Blue Card and draft Article 11 on applications for admission. They will all be discussed in this section.

37 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 29 April 2008, document number: 8875/08, 5.

38 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 7.

39 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, 7.

40 See Article 3(4) of the Directive in the Annex to Chapter 4.

41 Eisele, K. 2013. *Why come here if I can go there? Assessing the 'Attractiveness' of EU's Blue Card Directive for 'Highly Qualified' Immigrants*. CEPS Paper in Liberty and Security in Europe No. 60. Brussels: Centre for European Policy Studies, 2.

4.5.1 Conditions of Admission

Draft Article 5 set forth the criteria for admission for highly qualified employment. Those were (a) to present a valid work contract or a binding job offer of at least one year in the Member State concerned; (b) fulfil the conditions set out under national legislation for the exercise by EU citizens of the regulated profession specified in the work contract or binding job offer of work; (c) for unregulated professions, present the documents attesting the relevant higher professional qualifications in the occupation or sector specified in the work contract or in the binding job offer of work; (d) present a valid travel document, as determined by national law and, if appropriate, evidence of valid residence permit; (e) present evidence of having a sickness insurance for the applicant and his/her family members for all the risks normally covered for nationals of the Member State concerned for the periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or resulting from, the work contract and (f) not be considered to pose a threat to public policy, public security or public health. Additionally, it provided that the gross monthly salary specified in the work contract or binding job offer must not be inferior to a national salary threshold defined and published for the purpose by the Member States, which shall be at least three times the minimum gross monthly wage as set by national law.

4.5.1.1 Salary Threshold Required for Admission

During the discussion of the draft Article, the salary level requirement was the most controversial issue. In the explanatory memorandum for the proposal the Commission provided that the salary specified in the work contract must be at least equal to a certain threshold set at the national level and that the Member States are free to set this threshold at a level compatible with their labour market and immigration policies. However, it stated that it 'has been considered necessary to set a relative minimum threshold – linked *in primis* to the minimum wage set out in national laws – to ensure that Member States do not empty this criteria by setting a level which would be too low for a national or EU highly qualified worker to accept the vacancy, although corresponding to his/her qualifications.'[42] In the first discussion of the draft Article in the WPME, Germany, Hungary, Austria, Spain, Italy, Sweden, Greece, Estonia and Lithuania either entered reservations to it, or made suggestions for changes in the salary level, both that it should be higher and lower than three times the average gross annual salary, and several of the suggestions made references to the differences between Member States with regard to whether minimum wages are set by national law or not. In response to the comments of the Member States, the Commission 'underlined that this provision is a compromise resulting from extensive debates with the Member States in the framework of the preparatory works, where a relative salary threshold was considered to be the minimum criterion necessary for admission by the vast majority of Member States.' Furthermore, the Commission reaffirmed that in its

42 Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23 October 2007, 9.

view, a salary-based approach needs to be used, the level of which should be sufficiently high and in this context, it drew attention to the fact that, 'under this proposal, Member States remain free to set the national threshold at a higher level (but not at a lower one).'[43] During a follow up discussion in the WPME Austria, the Czech Republic, Cyprus, Germany, Finland, Italy, Latvia and Spain, maintained their reservation to the proposed salary level and suggestions were set forth to delete the reference to 'three times the minimum gross monthly wage,' to change the level to 'twice the average gross monthly salary' and to set it at '1.35 of the average gross monthly salary.'[44]

The Parliament in its opinion on the proposal suggested that the salary threshold be set at 'at least 1.7 times the gross monthly or annual average wages in the Member State concerned and shall not be inferior to the wages which apply or would apply to a comparable worker in the host country.'[45] In the opinion of the EESC, salary was 'not an appropriate criterion for consideration as a highly qualified worker.'[46] The Committee stated its belief that the 'concept of 'highly qualified' should be linked to higher education certificates and qualifications or equivalent vocational skills rather than the salary that the worker is to receive.'[47] Furthermore, that 'making salary one of the requirements for access to the EU Blue Card will make it hard to achieve a common policy in the EU,' that the 'major differences in national minimum wage levels that currently exist between the Member States hinder harmonisation.'[48] In a note from the Presidency to the WPME for the third reading of the proposal a compromise suggestion was made regarding the salary level that provided it should be 'at least 1.5 times the average gross monthly wage.'[49] Belgium, the Czech Republic, Germany, Greece, Hungary, Italy, Malta, the Netherlands, Poland, Slovenia, Spain and Slovakia still maintained their reservations and made suggestions both to reduce it and increase the salary level in the continuing discussion.[50] The provision however remained unchanged from the compromise suggestion by the Presidency and the salary level is set at 1.5 in adopted the Directive.[51]

43 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 13.

44 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 10.

45 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 49.

46 European Economic and Social Committee, Opinion of the European Economic and Social Committee on the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, SOC/300, Skilled jobs/conditions of entry and residence of third-country nationals, 9 July 2008, 8.

47 *Ibid.*

48 *Ibid.*

49 Council of the European Union, Note from the incoming Presidency to Working Party on Migration and Expulsion, 18 June 2008, document number: 10398/08, 6.

50 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, 9.

51 See Article 5(3) of the Directive in the Annex to Chapter 4.

4.5.1.2 Derogation in case of Third-country Nationals under 30 Years of Age

The proposal included in draft Article 6 a derogation from the conditions of admission in the case of third-country nationals younger than 30 years old. The draft Article stipulated that if the application for admission is submitted by a third-country national less than 30 years of age and holding higher education qualifications, the following derogations shall apply: (a) Member States shall consider fulfilled the condition set out in Article 5(2) if the gross monthly salary offered corresponds to at least two-thirds of the national salary threshold defined in accordance with Article 5(2); (b) Member States may waive the salary requirement provided for in Article 5(2) on condition that the applicant has completed higher education on site studies and obtained a Bachelor's and a Master's degree in higher education institution situated on the territory of the Community; (c) Member States shall not require proof of professional experience in addition to the higher education qualifications, unless this is necessary to fulfil the conditions set out under national legislation for the exercise by EU citizens of the regulated profession specified in the work contract or binding job offer of work.

During the first reading of the proposal in the WPME, Austria, Germany, Hungary, Italy, Cyprus, Spain, Finland, France and Sweden entered reservations to the draft Article, some of them on the grounds that it 'might raise concerns in terms of the principle of non-discrimination.' Austria, Germany and Hungary suggested deleting it and Malta and Finland took the view that 'the derogation listed in the article should not be compulsory,' and suggested changing it to a discretionary provision.[52] During the second reading of the proposal Cyprus, the Czech Republic, Spain, Finland, Italy, Malta, Austria and Sweden retained their reservation to the draft Article and Austria, Malta and Finland maintained the position they expressed during the first reading.[53] In a note from the Presidency submitted to the WPME for its third meeting, a compromise suggestion was put forth, stating that 'in view of their examination' by the WPME, Article 6 of the proposal had been deleted.[54] The Parliament had in its opinion suggested to delete the provision. In its comment on the proposal it had provided that easier 'access for highly qualified people under 30 is inconsistent with the EU's principle of equal treatment, according to which there must be no discrimination on the grounds of age.' In addition, the Parliament provided that 'easier access for highly qualified people under 30 brings with it the danger that investment in training young EU citizens will be neglected.' Arguing that this 'must not be allowed to happen, as the unemployment rate among young people under 30 throughout the EU is around 15% (Eurostat statistic for 2007) and as high as 20% in Greece,

52 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 14.

53 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 11.

54 Council of the European Union, Note from the incoming Presidency to Working Party on Migration and Expulsion, 18 June 2008, document number: 10398/08, 7.

France, Italy, Poland, Romania and Slovakia.'[55] This view is well justified on the reasoning given for not providing favourable access to the group addressed in the draft Article, the outcome is however inconsistent with the exclusion of highly qualified persons that are already present within the EU, such as third-country nationals that have entered as asylum seekers or been granted permits to stay on other grounds of protection, as was discussed in regards to the Article on scope above.

4.5.2 Volumes of Admission

The proposal contained a provision on volumes of admission in draft Article 7, which stipulated that the provision on conditions of admission shall be without prejudice to the competence of the Member States to determine volumes of admission of third-country nationals for highly qualified employment, which is in accordance with Article 79(5) of the TFEU.

During the discussion in the WPME, several Member States made comments on the clarity of the wording of the provision and among the suggestions set forth was that the word 'volumes' be replaced with the word 'quotas.'[56] During the second reading of the proposal in the Working Party, Germany and Hungary maintained a scrutiny reservation to the provision and Germany suggested that a clause be added to the preamble to the Directive as a recital, stipulating that regarding volumes of admission, Member States also have the possibility not to grant Blue Cards in general, for certain professions or economic sectors.[57] In a note from the Presidency to the WPME, a compromise suggestion was made to modify Germany's proposal so that it provided that 'Member States retain the possibility not to grant residence permits for employment for certain professions or economic sectors.'[58] In the end the recital addressing this is a mixture of the two amendments, stating that 'regarding volumes of admission, Member States retain the possibility not to grant residence permits for employment in general or for certain professions, economic sectors or regions,'[59] a formulation that does not exclude the use of a labour market test to arrive at the decision not to grant employment permits.

55 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 41.

56 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 15.

57 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 11.

58 Council of the European Union, Note from the incoming Presidency to Working Party on Migration and Expulsion, 18 June 2008, document number: 10398/08, 7.

59 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, recital 8.

4.5.3 The EU Blue Card

The EU Blue Card was addressed in draft Article 8 which provided among other things that the initial validity of an EU Blue Card shall be of two years and shall be renewed for at least the same duration. If the work contract covers a period less than two years, the EU Blue Card shall be issued for the duration of the work contract plus three months. Additionally, that during the period of validity, the EU Blue Card shall entitle its holder to enter, re-enter and stay in the territory of the Member State issuing the EU Blue Card and passage through other Member States. During the discussion in the WPME, Austria entered a scrutiny reservation on the period of validity of two years and the Netherlands and the Czech Republic expressed their opinion that the validity should not be two years 'but linked to the duration of the work contract.' While Spain wanted to provide for a period of 'at least one year,' Greece suggested maintaining a reference to two years and Poland suggested adding that it should be 'at least two years.'[60] In relation to the two year time limit, the Commission explained that it was set in order to 'allow possibilities of control and to ensure a gradual access of the person concerned to the labour market.'[61] The Parliament suggested that the initial validity of an EU Blue Card should be three years and that it should be renewed for at least another two, as well as that if 'the work contract covers a period of less than three years, the EU Blue Card shall be issued for the duration of the work contract plus six months.'[62] Belgium, Estonia and Slovakia however 'expressed concerns on the additional period of three months granted under this provision.' In order to ensure more flexibility, the Netherlands, supported by Greece, Poland and Sweden suggested changing the draft provision so that it provided that the EU Blue Card shall have the same validity as the validity of the labour contract plus three months and provided that the Member States may limit the validity of the first Blue Card to a period of two years and that the maximum validity of the Blue Card will be five years. As regards this proposed amendment, the Commission expressed concern about this wording 'insofar as it links the validity of the Blue Card with the duration of the work contract.'[63] As a compromise the Presidency suggested that the 'initial validity of an EU Blue Card shall be of two years and shall be renewed for at least the same duration with a maximum of four years,' and that if 'the work contract covers a period less than two years, the EU Blue Card shall be issued or renewed for the duration of the work contract plus three months.'[64] In the adopted Directive the provision allows for more flexibility than suggested by the Presidency and stipulates that the Member States shall set the standard validity of the EU Blue

60 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 16.

61 *Ibid.*

62 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 22.

63 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, 11.

64 Council of the European Union, Note from the Presidency to the Working Party on Migration and Expulsion, 22 July 2008, document number: 12050/08, 9.

Card between two to four years. In other aspects the final provision[65] is modelled after the last suggestion of the Presidency. The adopted Directive therefore leaves the Member States greater flexibility than intended by the Commission which diminishes the level of harmonisation regarding Blue Card schemes among the Member States.

4.5.4 Grounds for Refusal

Draft Article 9 outlined the grounds for refusal of an application. It provided firstly that Member States shall reject an application for an EU Blue Card whenever the applicant does not meet the conditions set out in Articles 5 and 6 or whenever the documents presented have been fraudulently acquired, or falsified or tampered with. Secondly, that before taking a decision on an application for an EU Blue Card, Member States may examine the situation of their labour market and apply their national procedures regarding the requirements for filling a vacancy. Additionally, the draft provision provided that for reasons of labour market policy, Member States may give preference to Union citizens and to third-country nationals, when provided for by Community legislation, as well as to third-country nationals who reside legally and receive unemployment benefits in the Member States concerned.

During the discussion in the WPME, Germany expressed the wish to establish a link between the present provision and that on volumes of admission, and suggested adding to the provision that Member States may also reject an application on the basis of volumes of admission.[66] This suggestion was accepted by the Presidency,[67] and a provision was added to the Article that provides that applications may be considered inadmissible on grounds of volumes of admission.[68] In a reply to a query from Sweden referring to labour market tests, the Commission noted that the 'assessment of the situation of the labour market will be made by the Member State,' that once the Blue Card is issued, the Member State will be allowed to check the situation of the labour market after two years, at the time of its renewal.'[69]As a follow up to this the Presidency[70] added a clarification to the draft Article that Member States may refuse to renew a permit based a labour market test, during the first two years of legal employment as a holder of an EU Blue Card.[71] In a similar vein, the Commission pointed out, with respect to a remark from Belgium, 'that a Member State could reject an application on the basis of the fact that there is no quota foreseen for a specific category of jobs or that the number of available places within the quota had al-

65 See Article 7(2) of the Directive in the Annex to Chapter 4.
66 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 13.
67 Council of the European Union, Note from the incoming Presidency to Working Party on Migration and Expulsion, 18 June 2008, document number: 10398/08, 9.
68 See Article 8(3) of the Directive in the Annex to Chapter 4.
69 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 17.
70 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 29 April 2008, document number: 8875/08, 9.
71 See Article 8(2) of the Directive in the Annex to Chapter 4.

ready been reached.'[72] In a discussion on the provision on preference for Union citizens, for third-country nationals, when provided for by Community legislation, as well as third-country nationals who reside legally and receive unemployment benefits in the Member States concerned, Austria, Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania and Poland wanted to make this provision obligatory and 'replace may with shall' as they believed the 'principle of 'Community preference' should be a compulsory one.' Sweden however preferred the provision to be voluntary,[73] and the Parliament wanted to delete it.[74] No changes were however made to the provision in order to accommodate the concerns raised by the Member States and it stands as a discretionary ground for rejection in the adopted Directive.[75]

Two additional grounds for rejection were introduced during the negotiations. Firstly based on a suggestion by Estonia, supported by Austria, that provided that 'the fact that the employer has been convicted for illegal employment should also be reason to reject an application.'[76] In compromise suggestion, the Presidency[77] added this as a discretionary ground for rejecting an application for admission, provided that the employer had been sanctioned in accordance with national legislation.[78] Secondly, a suggestion by the Parliament that an application for admission may be rejected 'in order to avoid a brain drain in sectors suffering from a lack of qualified personnel in the countries of origin,'[79] was accepted.[80] The provision in the adopted Directive does however refer to ethical recruitment, not brain drain.[81]

4.5.5 Withdrawal or Non-renewal of the EU Blue Card

Draft Article 10 laid down the conditions for withdrawal or non-renewal of the EU Blue Card. The mandatory conditions provided were firstly, when it has been fraudulently acquired, or has been falsified or tampered with, or whenever it appears that the holder did not meet or no longer meets the conditions for entry and residence laid down in Article 5 or 6 or is residing for purposes other than that for which he/she was authorised to reside. Secondly, when the holder has not respected the limita-

72 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 17.
73 *Ibid.*, 18.
74 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 24.
75 See Article 8(2) of the Directive in the Annex to Chapter 4.
76 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 17.
77 Council of the European Union, Note from the Presidency to the Working Party on Migration and Expulsion, 22 July 2008, document number: 12050/08, 11.
78 See Article 8(5) of the Directive in the Annex to this chapter.
79 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 23.
80 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 1 August 2008, document number: 12320/08, 11.
81 See Article 8(4) of the Directive in the Annex to Chapter 4.

tions pertaining to restricted access to the labour market and change in employment as well as the conditions concerning temporary employment, except as regards the notification of it. Additionally, the draft Article provided that Member States may withdraw or refuse to renew an EU Blue Card for reasons of public policy, public security or public health.

During the first discussion on the proposal in the WPME, Estonia suggested to make it obligatory rather than discretionary to withdraw or refuse to renew a permit based on the provision addressing public policy, public security or public health. The Presidency however felt that making it 'compulsory could have the effect of limiting the discretion of the Member States.' With respect to this provision Germany questioned the wording of 'for reasons of' rather than referring to 'threat to' public policy, public security or public health.[82] Taking this consideration further, the Parliament suggested the text to be revised so as to refer to 'only where there is a threat to the implementation of public policy, or to public security or public health which can be objectively demonstrated.' The justification for this amendment was with reference to that 'the question of whether a person constitutes a threat to public policy, public security or public health must not be determined by an arbitrary administrative decision.'[83] No changes were made to the draft provision based on these concerns raised about the open wording of it, and it is the same in the adopted Directive[84] as in the proposal.

Following up to the first discussion of the proposal, the Presidency made a compromise suggestion to add a new paragraph to the draft Article which provided that an EU Blue Card may be withdrawn or not renewed whenever the holder of an EU Blue Card does not have sufficient resources to maintain himself/herself and, where applicable, the members of his/her family, without having recourse to the social assistance system of the Member State concerned. The addition stipulated further that Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members and that such evaluation shall not take place during the period of unemployment referred to in Article 14.[85] The reason for this suggestion cannot be traced back to the earlier meetings of the WPME, but in a follow up discussion on the proposed addition, the Netherlands suggested deleting the last sentence of the addition provided by the Presidency and also to add a new provision 'allowing Member States to withdraw the Blue Card in case the holder applies for social assistance.'[86] The Presidency accepted the suggestion made by the Netherlands, 'provided that the Member State has informed him/her in writing in this re-

82 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 19.

83 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 25.

84 See Article 9(3)(a) of the Directive in the Annex to Chapter 4.

85 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 29 April 2008, document number: 8875/08, 11.

86 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, 14.

spect,'[87] and a provision permitting withdrawal or non-renewal of the Blue Card if the holder applies for social assistance was added to the Directive.[88] The Presidency did not however change the additional provision on lack of sufficient resources which is largely the same as the initial proposal above as a discretionary clause in the adopted Directive.[89]

4.5.6 Applications for Admission

Draft Article 11 of the proposal addressed applications for admission and provided among other things that Member States shall determine whether applications for an EU Blue Card are to be made by the third-country national or by his/her employer. Secondly, that the application shall be considered and examined either when the third-country national concerned is residing outside the territory of the Member State to which he/she wishes to be admitted or when he/she is already legally resident in the territory of the Member State concerned. Additionally, that by way of derogation from the paragraph above, Member States may accept, in accordance with their national legislation an application submitted when the third-country national concerned is not in possession of a residence permit but is legally present in its territory.

In the Discussion in the WPME, Italy and Poland 'expressed their fear' that permitting those legally present on the territory of a Member State but without a residence permit, to apply for a Blue Card 'could give illegally present persons the possibility of regularizing their situation.'[90] Greece and France opposed the derogation but the Netherlands, Portugal and Sweden supported it.[91] The Presidency deleted the provision in a compromise suggestion to the WPME[92] which Belgium, Hungary and Portugal expressed their regret over[93] so the provision was reinserted.[94] Greece and Italy voiced their disagreement with the possibility of submitting an application when the person is already legally resident in the territory of the Member State concerned, and Hungary suggested that the words 'already holds a residence permit or a long-term visa issued by the Member State concerned' would be added to the provision.[95] Hungary's suggestion was adopted and the provision was amended accordingly.[96] In a

87 Council of the European Union, Note from the Presidency to the Working Party on Migration and Expulsion, 22 July 2008, document number: 12050/08, 12.
88 See Article 9(3)(d) of the Directive in the Annex to Chapter 4.
89 See Article 9(3)(b) of the Directive in the Annex to Chapter 4.
90 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 20.
91 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 16.
92 Council of the European Union, Note from the incoming Presidency to Working Party on Migration and Expulsion, 18 June 2008, document number: 10398/08, 11.
93 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, 14.
94 See Article 10(3) of the Directive in the Annex to Chapter 4.
95 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 15.
96 See Article 10(2) of the Directive in the Annex to Chapter 4.

follow up discussion in the WPME, Austria, Estonia, Greece, Italy, Latvia and Spain maintained their reservations on the obligatory character of the provision allowing for applications to be submitted when already within the territory of a Member State and Greece and Italy pointed out that persons in such a situation 'should not be able to submit an application and change his/her status.'[97] To address these concerns the Presidency added a new provision to the draft Article[98] that provided that Member States may, by way of derogation from the provision under discussion, decide that an application can only be submitted from outside its territory.[99] This provision, in Article 10 of the adopted Directive, seems in opposition to the scope of the Directive which provides that it shall apply to third-country nationals who apply to be admitted to the territory of the Member State for the purpose of highly qualified employment under the terms of this Directive, and given how many groups of legally resident persons the scope excludes, it is not clear which third-country nationals this additional provision is set forth to address.

4.6 ACCESS TO LABOUR MARKET

Three Articles of the proposal addressed access of highly qualified third-country nationals to the labour markets of the Member States. Those are draft Article 13 on labour market access, draft Article 14 on temporary unemployment and draft Article 20 on access to the labour market of the second Member State.

4.6.1 Labour Market Access

Draft Article 13 on labour market access provided firstly, that for the first two years of legal residence in the Member State concerned as a holder of an EU Blue Card, access to the labour market for the person concerned shall be restricted to the exercise of paid employment activities which meet the conditions for admission set forth by the Directive. Secondly that after the first two years of legal residence in the Member State concerned as holder of an EU Blue Card, the person concerned shall enjoy equal treatment with nationals as regards access to highly qualified employment. Thirdly, that holders of the EU Blue Card who have been granted EU long-term resident status shall enjoy equal treatment with nationals as regards access to employment and self-employed activities. In addition, it addressed permissible restrictions pertaining to employment that involved the exercise of public authority and responsibility for safeguarding the general interest of the State and activities that are reserved for nationals, EU or EEA citizens.

The aspects of the draft Article that were most discussed by the WPME, were the time limits for restricted access to the labour market and the granting of equal rights

97 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, 14.

98 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 1 August 2008, document number: 12320/08, 13.

99 See Article 10(4) of the Directive in the Annex to Chapter 4.

to Blue Card holders as regards access to highly qualified employment. On the former issue, Member States set forth suggestions both to reduce the time of restricted access to the labour market to one year and increase it to three years.[100] Although the time period was not changed during the negotiations for the Directive, Italy maintained a reservation to the two year time limit throughout the discussion, while in 'its view the fact that the person concerned is not allowed to change job for a period of two years infringes the principle of free choice of the job.'[101] The Parliament suggested that change in employment should only be subjected to 'notification in advance' rather than 'subject to the prior authorisation,'[102] thereby suggesting not restricting access to the labour market. The EESC in its opinion on the draft Article pointed out that this 'requirement that the professional mobility of EU Blue Card holders be restricted during the first two years of legal residence does not comply with the provisions of the European Convention on the legal status of migrant workers,' Article 8 of which establishes a maximum period of one year. In this respect the Committee stated that the compatibility of the proposal with Member States' international legal obligations is debatable.[103] There are no records of the submission of the Parliament or the EESC being discussed in the WPME or by other parties to the negotiations.

As regards equal treatment for Blue Card holders in access to highly qualified employment, Belgium, Cyprus, Estonia, Finland, Malta, Spain and Sweden made reservations to the draft Article in the WPME. Cyprus for example stating that 'two years is too short a period to allow the person concerned to enjoy equal treatment,' while Spain wanted to reduce the deadline to one year and Malta to increase it to three years.[104] The change in the wording of this paragraph proposed by the Presidency was to delete the word 'residence' so the Article now refers to the period of employment as a Blue Card holder, and to make it discretionary, providing that 'after these first two years, Member States may grant to the persons concerned equal treatment with nationals as regards access to highly qualified employment.'[105] With these changes the granting of equal treatment of Blue Card holders as concerns access to highly qualified employment has become optional and at the discretion of the Mem-

100 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 23.

101 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 1 August 2008, document number: 12320/08, 14.

102 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 53.

103 European Economic and Social Committee, Opinion of the European Economic and Social Committee on the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, SOC/300, Skilled jobs/conditions of entry and residence of third-country nationals, 9 July 2008, 9.

104 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 18.

105 Council of the European Union, Note from the Presidency to the Working Party on Migration and Expulsion, 22 July 2008, document number: 12050/08, 14.

ber State rather than a right of the Blue Card holder that the Member State is obligated to grant.[106]

4.6.2 Temporary Unemployment

Draft Article 14 on temporary unemployment provided that unemployment in itself shall not constitute a reason for revoking an EU Blue Card, unless the period of unemployment exceeds three consecutive months. Secondly, that during this period the holder of the EU Blue Card shall be allowed to seek and take up employment under the conditions on labour market access provided by the Directive. Thirdly, that Member States shall allow the holder of the EU Blue Card to remain on their territory until the necessary authorisation in case of change of employment has been granted or denied and that notification of change in employment shall automatically end the period of unemployment.

In the exchange of views on the draft Article in the WPME, the Netherlands 'expressed concerns about the potential impact on the budget of this provision,' and suggested to add the condition that the Blue Card may be revoked if 'during the period of unemployment an appeal is made to the social assistance system of the host Member State.'[107] Spain suggested changing this into an optional clause, so that 'some discretion should be allowed to Member States in this area.' While in the context of the discussion, the Commission recalled that the logic of this provision is not to lose professionals who may still be needed in the labour market and underlined that three months of unemployment 'is a relatively short period of time.'[108] Estonia did not agree that unemployed persons should be able to retain their Blue Card for three months while looking for a new job and the Czech Republic wanted to reduce the period to two months.[109] During the second reading of the proposal in the WPME, Belgium, Greece, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Spain and Sweden maintained reservations on the first provision of the draft Article and many felt that the issue needed to be clarified, 'in particular with respect to the issue of whether multiple periods of unemployment would be allowed.' According to the Netherlands and Slovenia, the provision should 'exclude such a possibility' and Belgium felt that the period of unemployment allowed should be three months in two years.[110] In a compromise suggestion made by the Presidency to the WPME,[111] an addition was made to the draft Article that provided that the Blue Card could also be revoked if unemployment occurs more than once during the period of validity of

106 See Article 12(1) of the Directive in the Annex to Chapter 4.

107 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 26.

108 *Ibid.*

109 *Ibid.*

110 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 20.

111 Council of the European Union, Note from the incoming Presidency to the Working Party on Migration and Expulsion, 18 June 2008, document number: 10398/08, 13.

an EU Blue Card.[112] The Parliament however suggested that the permitted period of employment should be six months,[113] and also made an amendment that provided that the EU Blue Card holder shall have the right to remain on the territory for as long as he is engaged in training activities aimed at further increasing his/her professional skills or professional qualification.[114] In its opinion on the draft Article the EESC drew attention to the fact that the three-month limit for unemployment does not match the five months stipulated in the European Convention on the legal status of migrant workers (ECMW). The Committee suggested that a 'period of unemployment of six months be considered, in order to comply with international agreements and make it easier to find new employment.'[115] There are no records of the comments of the Parliament or the EESC being discussed by the WPME or other parties involved in the negotiations and no records of those Member States who have ratified the ECMW suggesting that the standards set forth by it regarding periods of unemployment be adhered to by the Directive.

4.6.3 Access to the Labour Market of a Second Member State

Draft Article 20 of the proposal addressed access to the labour market of a second Member State and provided firstly that Article 14(4) of Directive 2003/109/EC shall not apply to holders of the residence permit 'long-term resident – EC/EU Blue Card holder.' Article 14(4) of the Long-Term Residence Directive stipulates that Member States may limit the total number of persons entitled to be granted right of residence, provided that such limitations are already set out for the admission of third-country nationals in the existing legislation at the time of the adoption of this Directive.[116] Secondly, the draft Article stipulated that in cases where a Member State decides to apply the restrictions on access to the labour market provided for in Article 14(3) of Directive 2003/109/EC, it shall give preference to holders of the residence permit 'long-term resident – EC/EU Blue Card holder' over other third-country nationals applying to reside there for the same purposes. Article 14(3) of the Long-Term Residence Directive provides that Member States may examine the situation of their labour market and give preference to Union citizens, to third-country nationals, when provided for by Community legislation, as well as to third-country nationals who reside legally and receive unemployment benefits in the Member State concerned in

112 See Article 12(1) of the Directive in the Annex to Chapter 4.

113 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 28.

114 *Ibid.*

115 European Economic and Social Committee, Opinion of the European Economic and Social Committee on the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, SOC/300, Skilled jobs/conditions of entry and residence of third-country nationals, 9 July 2008, 10.

116 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Article 14(4).

filling vacancies in the labour market.[117] These derogations from the Long-Term Residence Directive which entail preferential access to the labour market of a second Member State for EU Blue Card holders with long-term residence status over other long-term residents of EU Member States, was not positively received by the Member States. In the dialogue in the WPME, Germany, Belgium, Latvia, the Netherlands,[118] Estonia and Hungary[119] entered reservations on it and the Czech Republic,[120] Belgium[121] and Estonia[122] suggested deleting it. The Parliament in its opinion on the draft Article voiced its opposition to its obligatory character and suggested that it be made optional.[123] The provision was not discussed in much substance by the WPME and was deleted during the consideration of the Justice and Home Affairs Counsellors of the proposal.[124] The Directive does not therefore provide for facilitated access to the labour market of a second Member State for EU Blue Card holders with long-term resident status, but that facilitation of intra-EU mobility was one of the objectives of the proposed Directive.

4.7 CONDITIONS FOR RESIDENCE IN OTHER MEMBER STATES

Draft Article 19 set out the conditions to be met for residence in Member States other than that to which the Blue Card holder was first admitted. It provided firstly that after two years of legal residence in the first Member State as a holder of an EU Blue Card, the person concerned and his/her family members shall be allowed to move to a Member State other than the first Member State for the purpose of highly qualified employment under the conditions of the Article. Secondly, that no later than one month after entering the territory of the second Member State, the holder of an EU Blue Card shall notify his/her presence to the competent authorities of that Member State and present all the documents proving that he/she fulfils the conditions of admission set forth in the Directive for the second Member State. Additionally that in accordance with the procedures set out regarding procedural safeguards, the second Member State shall process the notification and inform in writing the

117 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Article 14(3).

118 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 41.

119 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, 27.

120 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 41.

121 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 29.

122 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, 27.

123 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 23.

124 Council of the European Union, Outcome of proceedings of JHA Counsellors, 15 September 2008, document number: 13009/08, 23.

applicant and the first Member State of its decision to issue an EU Blue Card and allow the applicant to reside on its territory for highly qualified employment or to refuse to issue an EU Blue Card and oblige the applicant and his/her family members, in accordance with the procedures provided for by national law, including removal procedures, to leave its territory if the conditions set out in this Article are not fulfilled. Furthermore, the draft Article provided that the first Member State shall immediately readmit without formalities the holder of an EU Blue Card and his/her family members and that the applicant shall be responsible for the costs related to the return and readmission of him/herself and his/her family members. Finally, it was provided that in application of this Article, Member States may continue to apply volumes of admission as specified by the Directive.

The discussion on the draft Article in the WPME focused primarily on the length of time required for residence in the first Member State, before moving to a second Member State. In this regard, Sweden suggested reducing the deadline from two years to one year, and the Netherlands, 'which noted that the objective of this provision is to hinder as little as possible the internal mobility of a Blue Card holder, did not support the requirement of a period of two years of legal residence.' In response to these views raised, the Commission pointed out that this deadline is intended to avoid abuse, and provided that it 'preferred to stick to a time period of two years.'[125] During the second and third readings of the proposal in the WPME, Austria maintained a reservation on the provision and Spain 'suggested replacing the two year deadline with a time-period of one year.'[126] Belgium and the Netherlands were also 'in favour of not setting a deadline of two years, in order to favour and promote intra-Community mobility.'[127] To address these suggestions for shortening the time limit, the Presidency made a compromise suggestion to the WPME where the time period is reduced to eighteen months, accompanied by a statement that the 'main objective of this new deadline is to make mobility possible in practice once this period comes to an end.'[128] This compromise suggestion was accepted and the time limit provided by the adopted Directive is eighteen months.[129] The length of time required for residence in the first Member State is not a major issue with regard to intra-EU mobility in comparison to the provisions of the Article, listed above, that permit Member States to reject applications for moving to a second Member State and to apply volumes of admission concerning applications. In this regard, it has been noted that 'the possibility of moving between Member States even before obtaining long-term residence status should be attractive in principle, but the capacity to apply national employment quotas may prevent this movement altogether and the lack of clarity as to whether an application must be accepted if it meets the relevant criteria is obviously

125 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 38.

126 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 27.

127 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, 25.

128 Council of the European Union, Note from the Presidency to the Working Party on Migration and Expulsion, 22 July 2008, document number: 12050/08, 20.

129 See Article 18(1) of the Directive in the Annex to this chapter.

unhelpful.[130] Given this outcome, the objective of a common labour market for highly qualified migrants is not really achieved.[131] Eisele has referred to this as the 'most surprising outcome' of the negotiations for the Blue Card Directive, while it was considered to be one of the key elements for making it 'attractive'.[132]

4.8 EC LONG-TERM RESIDENCE STATUS FOR EU BLUE CARD HOLDERS

Draft Article 17 of the proposal set forth the criteria for a Blue Card holder to obtain long term resident status. With respect to this, the explanatory memorandum to the proposal provided that it 'aims to encourage the geographical mobility of highly qualified workers.' That the derogations from Directive 2003/109/EC provided for in the proposal, 'thus aim at not penalising mobile workers, by allowing them to cumulate periods of residence in two (or maximum three) Member States in order to fulfil the main conditions for obtaining the EC long-term residence status.' Furthermore, that 'the derogations on the periods of absence from the EU should be subject to strict conditions in order to sustain the circular migration policy and to limit possible brain drain effects.'[133] The main feature of draft Article 17 was that it provided for generous derogations from the Long-Term Resident Directive for Blue Card holders who have exercised mobility between EU Member States in stipulating that they should be allowed to cumulate periods of residence in different Member States in order to fulfil the requirement concerning the duration of residence. The conditions to be met were a period of five years of legal and continuous residence within the territory of the EU as holder of an EU Blue Card and legal and continuous residence as holder of an EU Blue Card within the territory of the Member State where the application for the long term resident permit is lodged, for two years immediately prior to the submission of the relevant application. Furthermore, it allowed for a period shorter than twelve consecutive months and not exceeding in total sixteen months, of absence from the territory of the EU during the five years of legal residence as an EU Blue Card holder.

During the discussion in the WPME, Austria, Belgium, Greece, Germany, Estonia and Hungary entered reservations on this provision. Austria suggested deleting the entire provision, the Czech Republic suggested either deleting it all together or just the derogations and Belgium to delete the derogations.[134] Germany, provided

130 Peers, S., Guild, E., Acosta Arcarazo, D., Groenendijk, K., Moreno-Lax, V. (eds) 2012. *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Volume 2: EU Immigration Law*. Leiden – Boston: Martinus Nijhoff Publishers, 68.

131 Guild, E. 2014. The EU's Internal Market and the Fragmentary Nature of EU Labour Migration, in *Migrants at Work: Immigration and Vulnerability in Labour Law*, edited by C. Costello and M. Freeland. Oxford: Oxford University Press, 108.

132 Eisele, K. 2013. *Why come here if I can go there? Assessing the 'Attractiveness' of EU's Blue Card Directive for 'Highly Qualified' Immigrants*. CEPS Paper in Liberty and Security in Europe No. 60. Brussels: Centre for European Policy Studies, 16.

133 Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007)637, 23 October 2007, 11.

134 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 14.

that 'while supporting the objective of fostering circular migration,' it preferred not to derogate from the periods of absence provided in the Long-Term Resident Directive which 'should be shorter than six consecutive months and not exceed in total 10 months.'[135] The Czech Republic felt that 'introducing these kinds of exceptions does not contribute to the clarity and simplicity of the system in general,' and considered that 'once they fulfil the conditions of Directive 2003/109/EC, Blue Card holders should enjoy the same treatment as long-term residents, with respect also to absences.'[136] As regards the deadline for continuous residence for two consecutive years in the Member State where the application is submitted, Germany,[137] and Latvia supported by Belgium suggested to increase the deadline to three years,[138] and so did the Parliament, stating that 'it might be considered advisable to increase the term to three years.'[139] These concerns expressed by the Member States and the Parliament did not lead to substantive changes in the draft Article and the Long-Term Resident Directive applies with multiple derogations to EU Blue Card holders in the adopted Directive.[140]

4.9 RIGHT TO EQUAL TREATMENT

The right of Blue Card holders to equal treatment with nationals of the Member State where they are residing was set forth in draft Article 15 of the proposal. In commenting on the draft Article, the explanatory memorandum provided that it 'states the areas where equal treatment must be recognised, the aim being to establish the most favourable conditions possible.' It also provided that only study grants, procedures for obtaining housing and social assistance are limited and that 'these are not rights to which the worker would be entitled on the basis of his/her contributions,' as well as that 'these workers are supposed to earn relatively high salaries, therefore they would most likely not be eligible under national rules.'[141]

Draft Article 15 stipulated that equal treatment should be granted at least as regards: working conditions, including pay and dismissal, as well as health and safety at the workplace; freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security; education and vocational training, including study grants in accordance with

135 *Ibid.*, 35.

136 *Ibid.*, 34.

137 Council of the European Union, Note from the Presidency to the Working Party on Migration and Expulsion, 22 July 2008, document number: 12050/08, 19.

138 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 34.

139 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 30.

140 See Article 16 of the Directive in the Annex to Chapter 4.

141 Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007)637, 23 October 2007, 11.

national law; and recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures. As regard social security the draft Article provided for equal treatment to branches of social security as defined in Council Regulation (EEC) No 1408/71 (now EU 883/2004) on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. That Council Regulation (EC) No 859/2003 (now EU 1231/2010) which extends the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 (now EU 883/2004 and EC 897/2009) to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality shall apply accordingly and equal treatment to social assistance as defined by national law and payment of acquired pensions when moving to a third country.

Furthermore, the draft Article provided that equal treatment should be granted as regards tax benefits; access to goods and services and the supply of goods and services made available to the public, including procedures for obtaining housing and the assistance afforded by employment offices; free access to the entire territory of the Member State concerned, within the limits provided for by national legislation for reasons of security. The draft Article allowed Member States the discretion to restrict equal treatment in respect to study grants and procedures for obtaining public housing. Equal treatment as regards these factors can be restricted to cases where the holder of the EU Blue Card has been staying, or has the right to stay in the territory of a Member State for at least three years. Member States were also permitted to restrict equal treatment as regards social assistance to cases where the holder of the EU Blue Card has been granted EU long-term resident status in accordance with the Directive.

4.9.1 Education and Vocational Training

The discussion on the right to equal treatment as concerns education and vocational training in the WPME was dominated by suggestions of Member States to provide for restrictions in this regard. Thus Germany entered a scrutiny reservation on the provision and referred to that 'Member States should be allowed to limit access to education, vocational training and study grants in accordance with national law.'[142] The Parliament amended the proposal so as to delete the restriction of equal treatment with regard to study grants to cases where they have permission to stay at least three years or have stayed that long,[143] while Malta suggested that the restriction on study grants be permitted until the EU Blue Card holder has been 'granted long-term resident status.'[144] Malta's suggestion was taken up by the Presidency and the provi-

142 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 28.

143 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 55.

144 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 31.

sion amended accordingly.[145] Later in the negotiations however, the reference to long-term resident status was deleted and the final version of the provision is without any reference to length of stay and permits Member States an open ended restriction to equal treatment pertaining to study grants[146] as well as maintenance grants and loans or other grants and loans regarding secondary education and vocational training.[147] In order to restrict access to university education, Austria suggested adding to the provision that 'access to university may be subject to specific prerequisites according to national law,' and Sweden suggested that access may be restricted 'to cases where the registered or usual place of business of the EU Blue Card holder, or that of family members for whom he/she claims benefits, lies within the territory of the Member State concerned.'[148] Both of these amendments were accepted, but a change was made to Sweden's formulation of the provision so that in the adopted Directive it refers to 'usual place of residence' of the Blue Card holder and his/her family, and not 'usual place of business.'[149]

4.9.2 Social Security

In the discussion on the provision on social security in the WPME, Germany and Finland suggested to list 'all the benefits to which a Blue Card holder may be eligible, rather than making a reference to Regulation 1408/71 (now 883/2004)' and the Czech Republic wanted the provision 'entirely deleted.'[150] Responding to these suggestions, the Commission 'underlined that Regulation 1408/71 (now 883/2004) is mentioned in order to clarify the material scope of the benefits in the areas of social security to which the third-country nationals concerned are eligible on the basis of equal treatment.'[151] Several suggestions for changes in the wording of the provision were made during the discussion and in a note to the WPME from the Presidency from 22 June 2008, the provision had been amended so that it provided that equal treatment should be provided to provisions in national legislations regarding the branches of social security as defined in Council Regulation (EEC) No 1408/71 (now EU 883/2004) on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as well as in Regulation (EEC) No 859/2003 (now EU 1231/2010).[152] A slightly

145 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 29 April 2008, document number: 8875/08, 16.
146 Council of the European Union, Note from General Secretariat of the Council to Permanent Representatives Committee, 22 September 2008, document number: 13163/08, 16.
147 See Article 14(2) of the Directive in the Annex to Chapter 4.
148 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 23.
149 See Article 14(2)(a) and (b) of the Directive in the Annex to Chapter 4.
150 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 29.
151 *Ibid.*
152 Council of the European Union, Note from the Presidency to the Working Party on Migration and Expulsion, 22 July 2008, document number: 12050/08, 16.

revised version of the provision was adopted.[153] During the fourth reading in the WPME, the Czech Republic and Spain still maintained a reservation to this provision and it was agreed to insert a recital in the preamble to the Directive that provided that the Directive 'should not confer more rights than those already provided in existing Community legislation in the field of social security for third-country nationals, who have cross-border elements between Member States.'[154]

4.9.3 Social Assistance

Draft Article 15 provided that EU Blue Card holders were entitled to equal treatment to social assistance as defined by national law, which could be restricted to cases where the EU Blue Card holder had been granted long-term resident status. During the first reading of the proposal in the WPME, Spain and Germany entered a scrutiny reservation to the provision, the Czech Republic and Hungary suggested deleting it[155] and Austria suggested permitting Member States to limit equal treatment to social security to 'core benefits.'[156] The Parliament in its opinion on the proposal suggested to delete the permission to restrict access to social assistance until the EU Blue Card holder has been granted long-term residence status,[157] but in a compromise suggestion to the WPME, the Presidency deleted the provision on social assistance already after the first discussion of the draft proposal in the WPME,[158] and the issue was not discussed further during the negotiations. EU Blue Card holders are therefore not entitled to equal treatment with respect to social assistance on the basis of the Directive.

4.9.4 Payment of Acquired Pensions

In respect to payment of acquired pensions, the proposal provided that they should be paid when an EU Blue Card holder moved to a third country. In the WPME, Spain and Germany entered scrutiny reservations on this provision, and Spain and Finland wanted it to be clarified that this referred to pensions 'based on work' while Sweden suggested that reference should be to 'income based' pensions. Greece drew attention to bilateral agreements that are in place between some Member States and

153 See Article 14(1)(e) of the Directive in the Annex to Chapter 4.

154 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 1 August 2008, document number: 12320/08, 17.

155 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 31.

156 *Ibid*., 32.

157 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 55.

158 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 29 April 2008, document number: 8875/08, 15.

third countries and Hungary and Austria suggested deleting the provision.[159] As a follow up to this the Presidency provided a clarification in the provision so it referred to 'pensions or annuities in respect of old age, death or of invalidity at a rate applied by virtue' of the law in the Member State where the pension was acquired.[160] Sixteen Member States made a scrutiny reservation to the revised version of the provision and Finland supported by Sweden insisted on including a reference to 'income related' pensions and Greece and Belgium on the reference to 'bilateral agreements.'[161] The adopted version of the provision only includes old age pension and contains a reference both to income related pensions and is without prejudice to existing bilateral agreements.[162] Austria was not satisfied with this solution and at the occasion of the adoption of the Directive, provided a statement declaring that 'under the principle applied by Austria in the field of international social security, pensions are compulsory exported to other States only if it is guaranteed that pensions are also exported from those States to Austria. That cannot be guaranteed under the present rules. Having regard to the specific nature of this category of persons, Austria is prepared to accept the arrangement in Article 15(1)(f) if it is made clear that no prejudice may thereby arise in respect of other categories of persons.'[163]

4.9.5 Tax Benefits

The draft Article provided for the right to equal treatment concerning tax benefits as well. During the first reading of the proposal in the WPME, Germany entered a scrutiny reservation on the provision and 'several delegations asked for clarification on the benefits which would fall under the provision and the link between tax benefits and agreements on double taxation.' Responding to that, the Commission explained that, 'in respect of EU citizens, there is a strict case-law of the Court of Justice of the European Union in the area of tax benefits, insofar as the equal treatment needs to be assessed, having regard to the situations which are fully comparable, on the basis of the fiscal residence of the person concerned,'[164] implying that if an EU Blue Card holder has fiscal residence within a Member State he/she is entitled to equal treatment as regards tax benefits. In a follow up discussion in the WPME, the Czech Republic, Germany, Estonia, Greece and the Netherlands maintained a reservation on the provision and Germany supported by Estonia and Slovakia suggested deleting it.[165] Reacting to that suggestion, the Presidency modified the provision with a quali-

159 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 30.

160 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 22.

161 *Ibid.*

162 See Article 14(1)(f) of the Directive in the Annex to Chapter 4.

163 Council of the European Union, 'I/A' Item Note from General Secretariat of the Council to Permanent Representatives Committee/Council, 7 May 2009, document number: 9057/09, 4.

164 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 30.

165 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, 20.

fication that equal treatment be granted in cases where EU Blue Card holders 'are considered as tax resident under national tax legislation or international tax agreements.'[166] Austria, Belgium, the Czech Republic, Germany, Greece, Italy, Lithuania, the Netherlands, Spain and Slovakia however maintained a reservation on the provision and now Germany, the Netherlands, Austria and Slovakia voiced their preference for deleting the provision.[167] The provision was not discussed further in the WPME but was deleted during an examination of the proposal by the Justice and Home Affairs Counsellors,[168] as a result of that, the adopted Directive does not provide for equal treatment for EU Blue Card holders with nationals of a Member State as regards tax benefits.

4.9.6 Goods and Services

Draft Article 15 provided for equal treatment as concerns 'procedures for obtaining housing' and that it could be restricted to cases were the EU Blue Card holder has been staying or has the right to stay for at least three years. In the dialogue in the WPME, several Member States asked for clarification with respect to the provision, Sweden and Slovenia entered a reservation on the provision and Slovenia 'pointed out that, according to its legislation, only EU citizens may have access to public housing.'[169] The Parliament in its opinion amended the proposal to the effect that the permissible restrictions on equal treatment with regard to procedures for obtaining housing were deleted.[170] After a discussion of the proposal in the Permanent Representatives Committee where Slovenia reiterated its reservation 'in relation to procedures for obtaining housing,'[171] the Presidency revised the provision so that the permissible restrictions do not have a reference to the length of stay of the EU Blue Card holder.[172] Thus the adopted Directive permits equal treatment to procedures for obtaining housing to be restricted for an unlimited period of time.[173]

166 Council of the European Union, Note from the Presidency to the Working Party on Migration and Expulsion, 22 July 2008, document number: 12050/08, 16.
167 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 1 August 2008, document number: 12320/08, 17.
168 Council of the European Union, Outcome of Proceedings of JHA Counsellors, 15 September 2008, document number: 13009/08, 17.
169 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 31.
170 European Parliament, Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Rapporteur: Ewa Klamt), PE409.459v03-00, 10 November 2008, 55.
171 Council of the European Union, Note from General Secretariat of the Council to Permanent Representatives Committee, 22 September 2008, document number: 13163/08, 16.
172 Council of the European Union, Note from Presidency to Permanent Representative Committee, 7 October 2008, document number: 13748/08, 16.
173 See Article 14(2) of the Directive in the Annex to Chapter 4.

4.9.7 Provisions on Equal Treatment Added during the Negotiations

During the first exchange of views on draft Article 15 in the WPME, the Netherlands proposed introducing a new provision to the Article that stipulated that the exercise of the right to equal treatment cannot lead to an extension of the right of residence for the holder of an EU Blue Card.[174] This suggestion was taken up by the Presidency and in a note to the WPME it presented the addition as a clause to be inserted in the preamble as a recital.[175] In the adopted Directive however the provision is located in Article 14[176] on equal treatment as suggested by the Netherlands.

In a document containing outcomes of the proceedings of a meeting of the Justice and Home Affairs Counsellors late in 2008, a new provision has been added to draft Article 15 providing that when the EU Blue Card holder moves to a second Member State in accordance with draft Article 19, and a positive decision on the issuing of an EU Blue Card has not yet been taken, Member States may limit equal treatment as provided by the provision, except for working conditions and recognition of diplomas. Additionally, that if, during this period, Member States allow the applicant to work, equal treatment with nationals of the second Member State in all areas addressed by the Article shall be granted.[177] There is no documentation on the draft Article being debated by the WPME or other bodies and a provision identical to the draft above is included in the adopted Directive.[178]

4.10 RIGHT TO FAMILY REUNIFICATION AND ACCESS OF FAMILY MEMBERS TO THE LABOUR MARKET

4.10.1 Right to Family Reunification

The rights of family members to join an EU Blue Card holder in the territory of a Member State were set forth in draft Article 16 of the proposal which provided that Directive 2003/86/EC on the right to family reunification shall apply with the following derogations:

> By way of derogation from Articles 3(1) and 8 of Directive 2003/86/EC, family reunification shall not be made dependent on the requirement of the holder of the EU Blue Card having reasonable prospects of obtaining the right to permanent residence and of he/she having a minimum period of residence.

174 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 27.
175 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 29 April 2008, document number: 8875/08, 15.
176 See Article 14(3) of the Directive in the Annex to Chapter 4.
177 Council of the European Union, Outcome of proceedings of JHA Counsellors, 15 September 2008, document number: 13009/08, 18.
178 See Article 14(4) of the Directive in the Annex to Chapter 4.

> By way of derogation from Article 5(4), first subparagraph, of Directive 2003/86/EC, residence permits for family members shall be granted at the latest within six months from the date on which the application was lodged.
>
> By way of derogation from Article 4(1), last subparagraph and Article 7(2) of Directive 2003/86/EC, the integration measures referred to therein may only be applied after the persons concerned have been granted family reunification.
>
> By way of derogation from Article 14(2) of Directive 2003/86/EC and in respect of access to the labour market, Member States shall not apply the time limit of twelve months.
>
> By way of derogation to Article 15(1) of Directive 2003/86/EC, for the purpose of calculation of five years of residence required for the acquisition of an autonomous residence permit, residence in different Member States may be cumulated.
> If Member States have recourse to the option provided for in paragraph 6, the provisions set out in Article 17 in respect of accumulation of periods of residence in different Member States by the holder of an EU Blue Card holder shall apply mutatis mutandis.
>
> By way of derogation from Article 13(2) and (3) of Directive 2003/86/EC, the duration of validity of the residence permits of family members shall be the same as that of the residence permits issued to the holder of the EU Blue Card insofar as the period of validity of their travel documents allows it.

In the explanatory memorandum to the proposal, it is stated that these derogations were 'considered necessary to set out an attractive scheme for highly qualified third-country workers' and that it 'follows a different logic from the family reunification directive, which is a tool to foster integration of third-country nationals who could reasonably become permanent residents.'[179] During the first discussion on the draft Article in the WPME, several Member States entered reservations to this provision and Germany, Austria, France and Greece thought 'the question of the facilitations to be granted to the family members of Blue Card holders should be more appropriately addressed once the issue of the scope of the proposal has been further considered.'[180] The most controversial provisions of the draft Article were those on granting of residence permits and time limits for granting access to the labour market to family members.

As regards the granting of residence permits, Austria, Belgium, Estonia, Finland, Germany, Greece, and Sweden 'expressed concerns on the deadline provided for in this provision' and Germany, supported by Sweden, 'preferred not to set any deadline at all and to simply state that the residence permit of the family members should be issued as soon as possible.'[181] In reply to these remarks from the Member States, the

179 Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23 October 2007, 11.

180 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 32.

181 *Ibid.*

Commission 'noted that the choice of setting a short deadline from the lodging of the application to the residence permit being issued for family members is a political one, based on the intention to attract highly skilled third-country nationals.'[182] The opposition of the Member States to a six month time limit did not lead to any changes in the draft Article which remains unchanged from the proposal to the adopted Directive.[183]

In relation to access to the labour market, several Member States 'queried the interpretation of this provision' during the first reading in the WPME, which they maintained could lead to 'granting a more favourable access to the labour market to family members vis-à-vis Blue Card holders.' In this context, the Netherlands pointed out that if the intention of the provision is that family members should be granted access to the labour market without any waiting period, this should be stated more clearly and for this reason suggested deleting the reference to a twelve month time limit.[184] The Commission 'drew attention to the fact that Member States are allowed to require family members to comply with a labour market test and also clarified that, if Member States intend to follow a more restrictive approach, they can require family members to comply with the same conditions as the sponsor, as set out in Directive 2003/86/EC. However, if Member States wish to be more attractive, 'they may grant to them full labour market access from the first day of the stay.'[185] Following up on this discussion, the Presidency presented a revised version of the draft provision to the WPME, which provided that 'by way of derogation from Article 14(2) second sentence of Directive 2003/86/EC and in respect to access to the labour market, Member States shall not apply any time limit.'[186] This proposition was accepted and the adopted Directive[187] does not allow for any time limit to be applied for access to the labour market for family members of EU Blue Card holders. Belgium and Germany maintained a reservation on the draft Article as a whole throughout the negotiations and Belgium suggesting deleting it.[188] Austria also maintained its position that the provision providing for derogations regarding integration measures be deleted,[189] but that proposal did not receive much discussion in the WPME and the derogation is included in the adopted Directive.[190]

The EESC raised its concern pertaining to family reunification in its opinion on the proposed Directive, observing that third-country nationals who have acquired long-term residence status 'will have a less favourable legal status than highly qualified migrant workers.' That thereby, the 'criterion of stable, permanent residence will be-

182 *Ibid.*
183 See Article 15(4) of the Directive in the Annex to Chapter 4.
184 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 33.
185 *Ibid.*
186 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 29 April 2008, document number: 8875/08, 17.
187 See Article 15(6) of the Directive in the Annex to Chapter 4.
188 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 23.
189 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 24.
190 See Article 15(3) of the Directive in the Annex to Chapter 4.

come a secondary factor when it comes to establishing legal certainty and integration in the EU.' Criticizing that the Directive will facilitate and increase family reunification rights, in comparison to other groups of migrants, the EESC stated its believe 'that the right to family life is a fundamental right which cannot be contingent on the type of economic activity or employment of a worker.'[191]

4.10.2 Residence in the Second Member State for Family Members

Draft Article 21 provided for the conditions family members of an EU Blue Card holder have to meet for residence in a second Member State. Those were firstly, that when the holder of the EU Blue Card moves to a second Member State in accordance with the provisions of the Directive and when the family was already constituted in the first Member State, the members of his/her family shall be authorised to accompany or join him/her. Secondly, that no later than one month after entering the territory of the second Member State, the family members concerned shall notify their presence to the competent authorities of that Member State and present an application for a residence permit. Additionally, that the second Member State may require the family member concerned to present with their application for a residence permit the following: their residence permit in the first Member State and a valid travel document; evidence that they have resided as members of the family of the holder of the EU Blue Card in the first Member State; evidence that they have a sickness insurance covering all risks in the second Member State, or that the holder of the Blue Card has such insurance for them. Finally, that where the family was not already constituted in the first Member State, the provision on the right to family reunification shall apply.

In the dialogue on the proposal in the WPME, Germany and Austria entered reservations on this provision. Austria wanted the authorisation for family members to accompany the Blue Card holder be dependent on that 'the family member have a residence permit in the first Member State,'[192] and Germany, Estonia and Spain suggested that 'the notification take place before the person concerned moves to another Member State.'[193] In relation to the requirement to provide documents and information with an application for a residence permit, Austria suggested adding that they provide evidence of having 'accommodation regarded as normal for a comparable family in the same region that meets the general health and safety standards in force,' and 'stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance of the Member State concerned.' Germany supported Austria's suggestion as regards requiring

191 European Economic and Social Committee, Opinion of the European Economic and Social Committee on the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, SOC/300, Skilled jobs/conditions of entry and residence of third-country nationals, 9 July 2008, 9.

192 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 42.

193 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 30.

that they show 'appropriate means of subsistence,'[194] and Poland also proposed a similar amendment.[195] The Presidency made amendments to the draft Article both regarding evidence for means of subsistence,[196] and accommodation,[197] and Article 19 of the adopted Directive contains two discretionary provisions[198] permitting Member States to request evidence of these.

4.11 CONCLUSIONS

The proposal for the Blue Card Directive set out to improve the EU's ability to attract third-country highly qualified workers to enhance the competitiveness of the EU economy. To achieve that, the aim was to effectively and promptly respond to fluctuating demands for highly qualified immigrant labour, or 'human resources' as this group of migrants was referred to in the objectifying term used in the impact assessment accompanying the proposal. Additionally, its purpose was to offset skills shortages by creating a level playing field at the EU level and to facilitate and harmonise the admission of highly qualified workers and promote their efficient allocation and re-allocation on the EU labour market. To achieve these overall objectives, the proposal was assessed as providing for flexible admission procedures and attractive residence conditions for highly qualified workers and their family members. This approach granted highly qualified migrants preferential status as they are seen as needed and valuable to the EU labour market and in many instances during the discussion of the proposal for the Directive the choice to grant EU Blue Card holders favourable treatment were described as 'political choices' and no reference made to principles that might be relevant to the issue at hand.

During the negotiations for the Directive, it became apparent that the Member States, although perhaps agreeing with the objective of the Directive in theory, considered the conditions set forth in the proposal for the Directive first and foremost from the perspective of their own national interest and not that of the EU as a common labour market in need of highly qualified workers who could easily move between the Member States to 'reallocate their skills' where needed. During the negotiations, in particular as regards access to territory, access to the labour market and intra-EU mobility, the Member States, at least the most vocal ones, displayed strong resistance to agreeing on a definitive set of common criteria for admission, grounds of rejection, withdrawal and renewal of a permit and for intra-EU mobility. Due to this, the changes made during the negotiations led to the result that in the adopted Directive all the provisions addressing access to territory, access to the labour market and

194 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 42.

195 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, 31.

196 Council of the European Union, Note from the incoming Presidency to Working Party on Migration and Expulsion, 18 June 2008, document number: 10398/08, 31.

197 Council of the European Union, Note from the Presidency to the Working Party on Migration and Expulsion, 22 July 2008, document number: 12050/08, 23.

198 See Article 19(4)(a) and (b) of the Directive in the Annex to Chapter 4.

intra-EU mobility include various discretionary clauses and references to national law in each of the Member States. The Directive therefore only achieves a low level of harmonization and is unlikely to reach the objectives that were set forth by the Commission. The multiple provisions added to the Directive during the negotiations that address the sovereign right of Member States to control admission into their territory, based on volumes of admission and other factors, display a high level of sensitiveness to ensuring that a common EU instrument on labour migration does not erode that as a means of ultimate control over access.

In a communication from the Commission on the implementation of the Blue Card Directive in the Member States published in 2014 it emerged that the transposition of the provisions concerning access to territory and the labour market vary to a considerable extent between the Member States. Although most Member States, aside from Romania and Lithuania, set the salary threshold for admission as a highly qualified worker at 1.5 the average gross annual salary, the methods the Member States used to arrive at that number varies greatly and in many of the Member States 'the salary threshold is not published or updated, difficult to find or only available in the national language.'[199] On the method of using volumes of admission as grounds for refusal, twelve Member States[200] transposed the option to perform a labour market test, while most Member States[201] chose to apply the option to verify whether the vacancy could be filled by a national or EU workforce.[202] The standard period of validity of the Blue Card varies between the Member States from being one year,[203] thirteen months,[204] two years,[205] two years and three months,[206] three years,[207] four years[208] and up to five years.[209] The option to withdraw or not renew an EU Blue Card whenever the EU Blue Card holder does not have sufficient resources to maintain himself/herself and members of his/her family has been applied by most Member States. Additionally, eight Member States[210] have applied the option to withdraw or not renew the EU Blue Card if the person has not communicated his/her address

199 COM(2014) 287, Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, 22 May 2014, 6.

200 Austria, Belgium, Bulgaria, Cyprus, Spain, Hungary, Italy, Luxembourg, Malta, Poland, Slovakia and Slovenia.

201 Except the Czech Republic, Germany, Spain, Finland, France, Latvia, the Netherlands and Portugal.

202 COM(2014) 287, Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, 22 May 2014, 7.

203 Bulgaria, Cyprus, Spain, Lithuania, Malta and Portugal.

204 Belgium.

205 Austria, the Czech Republic, Greece, Finland, Italy, Luxembourg, Poland, Romania, Sweden and Slovenia.

206 Estonia.

207 France and Slovakia.

208 Germany, Hungary and the Netherlands.

209 Latvia.

210 Belgium, Bulgaria, Cyprus, Estonia, Spain, Hungary, Malta and Poland.

and seven Member States[211] have opted to do so if the Blue Card holder applies for social assistance.[212] The possibility to restrict labour market access and only grant equal treatment with nationals as regards access to highly qualified employment after two years is applied by most Member States[213] and nearly all Member States[214] require authorisation by a competent authority to change an employer in the first two years.[215]

To attract highly qualified third-country nationals to the EU, the Directive provided for what were described as 'generous provisions' as regards the right to equal treatment and the right to family reunification. The latter mentioned provides for derogations from the Family Reunification Directive and thereby offers favourable treatment to EU Blue Card holders as concerns family reunification and access of family members to the labour market. As regards equal treatment with nationals, the Commission's proposal aimed to 'establish the most favourable conditions possible', but no reference was made to the human rights principle of equal treatment based on nationality in relation to that goal. The way in which the right to equal treatment was set forth in the proposal for the Directive did not provide for equal treatment with nationals of the host Member State and the right to equal treatment was restricted further than as provided by the proposal by the Member States during the negotiations. At the insistence of Austria, Germany, Malta and Sweden the right to equal treatment with respect to education was made more restrictive, as was access to procedures for obtaining housing, the restrictions for which were made completely open ended at the insistence of Slovenia with the support of Sweden. The right to payment of acquired pensions was controversial among the Member States which lead to the outcome that EU Blue Card holders are only entitled to payment of income related acquired old age pension when moving to a third country, a solution Austria was not satisfied with and made a statement that it was only prepared to accept this arrangement having regard to 'the specific nature of the category of persons' falling under the scope of the Directive. Additionally, the right to equal treatment concerning tax benefits and social assistance provided for by the proposal for the Directive were deleted during the negotiations. The former at the insistence of Austria, Estonia, Germany, the Netherlands and Slovakia and the latter based on a suggestion from the Czech Republic and Hungary. In its opinion on the equal treatment provisions of the draft Directive, the Parliament suggested deleting all restrictions on equal treatment with nationals that were permitted by the Commission's proposal. As the Blue Card Directive was adopted before the coming into force of the Lisbon Treaty, the Parlia-

211 Cyprus, the Czech Republic, Estonia, Greece, Malta, Romania and Slovakia.

212 COM(2014) 287, Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, 22 May 2014, 8.

213 Except Belgium, Bulgaria, Cyprus, the Czech Republic, Greece, Latvia, Malta, Poland and Sweden.

214 Except Finland and France.

215 COM(2014) 287, Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, 22 May 2014, 9.

ment was only consulted for its opinion which did not have any influence as regards the provisions on equal treatment. The Directive permits several derogations from the principle of equal treatment, for example with respect to education and goods and services, in addition to the fact that it does not provide for equal treatment regarding tax benefits and social assistance.

There is limited information on the implementation of Article 14 of the Directive on equal treatment in the Commission's Communication on the implementation of the Blue Card Directive. It only addresses access to education and vocational training and goods and services, providing that nine Member States[216] applied the option to restrict equal treatment in relation to these and that thirteen Member States[217] applied the option to make access to university and post-secondary education subject to specific prerequisites. Additionally it provides that most Member States[218] did not apply the option to restrict equal treatment when the EU Blue Card holder moves to a second Member State and a positive decision to issue a permit has not been taken.[219] As concerns the transposition of the provisions on equal treatment in general, it is stated in the Communication that the equal treatment provisions are applied by most Member States, although there are variations in the scope of application, explicit transposition of some is absent in some Member States and some Member States apply more favourable legislative provisions. Additionally, it provides that the Commission is analysing the issue further and seeking clarification from Member States.[220] This general statement indicates that there is limited detailed knowledge available so far on how the Member States have transposed Article 14 on equal treatment with nationals.

On 7 June 2016, the Commission set forth a proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, to repeal and replace the Blue Card Directive.[221] The proposal for the new Directive was introduced while the Blue Card Directive 'has demonstrated intrinsic weaknesses such as restrictive admission conditions and very limited facilitation for intra-EU mobility', which 'combined with many different sets of parallel rules, conditions and procedures for admitting the same category of highly skilled workers which apply across EU Member States, has limited the EU Blue Card's attractiveness and usage.'[222] The main changes introduced with the proposed Directive as regards access to territory and the labour market are a widening the definition of what constitutes highly qualified/highly skilled employment,[223] relaxing the require-

216 Cyprus, Germany, Greece, Spain, Finland, Luxembourg, Malta, Poland and Romania.

217 Austria, Belgium, Cyprus, the Czech Republic, Germany, Greece, Finland, Lithuania, Luxembourg, Malta, the Netherlands, Poland and Romania.

218 Except Cyprus, Greece, France, Malta and Slovakia.

219 COM(2014) 287, Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, 22 May 2014, 9.

220 *Ibid.*

221 Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378, 6 June 2016, 6.

222 *Ibid.*, 2.

223 Draft Article 2 of the proposed Directive

ments for admission, in particular lowering the salary threshold for highly skilled workers,[224] abolishing parallel national schemes for issuing permits to highly skilled migrants,[225] permitting changes in employer without prior authorisation,[226] and intra-EU mobility is facilitated further by waiving and relaxing conditions.[227] Additionally, all third-country national family members of EU citizens, beneficiaries of international protection and third-country nationals to be resettled under future EU schemes, will have access to the EU Blue Card to engage in highly skilled employment.[228] As regards the right to equal treatment of EU Blue Card holders with nationals, no substantive changes are made in the proposal[229] that would amend the exiting gaps in the Blue Card Directive in force.

At the time of this writing the negotiations for the proposed Directive have not started. Based on the various measures listed above that aim at facilitation of admission and intra-EU mobility and further harmonization between the Member States, and having regard to most controversial issues in the negotiations for the Blue Card Directive in force, it is likely that many of the measures introduced by the proposed Directive will be met by resistance by several Member States. In particular, given that the negotiations for the Blue Card Directive revealed that not all EU Member States agree with the Commission that the EU should act 'as a single player towards the outside world' to 'create economies of scale and hence better compete with other major destinations for the limited supply of highly skilled workers.'[230]

224Draft Article 5 of the proposed Directive
225Draft Article 3 of the proposed Directive.
226Draft Article 13 of the proposed Directive.
227Draft Article 19, 20 and 21 of the proposed Directive.
228Draft Article 3 of the proposed Directive.
229Draft Article 15 of the proposed Directive.
230Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378, 6 June 2016, 6.

5. The Employers Sanctions Directive

5.1 INTRODUCTION

In this chapter, Directive 2009/52/EC providing for minimum standards and measures against employers of illegally staying third-country nationals, or the Employers Sanctions Directive, will be discussed from two perspectives. Firstly, in relation to the EU's approach on migrants in employment who are irregularly present in EU Member States as a part of its policy on labour migration management and secondly, by examining the rights and protection granted by the Directive to third-country nationals that fall under its scope. The purpose of this chapter is to reveal the extent to which the Directive offers protection to irregularly present migrants in employment and establish if the Directive, which is the only EU instrument directly addressing third-country nationals in employment while irregularly present protects the human rights of this group of migrants.

The discussion is based on background documents to the Directive such as EU policy documents on irregular migration, the proposal for the Directive and the dialogue that took place during the negotiations on the Directive between the Member States acting within the Working Party on Migration and Expulsion (WPME), the Working Party on Social Questions (SQWP), the Permanent Representatives Committee (Coreper) and the Council as well as the Parliament as a co-legislator with the Council and the Commission. Having regard to the significant differences in opinion of the Parliament's Committees on Employment and Social Affairs and on Civil Liberties, Justice and Home Affairs on the one hand and of the Committee on Agriculture and Rural Development on the other, the views of the first two will be presented as those of the Parliament and those of the Committee last mentioned separately. The examination includes opinions of stakeholders, such as Business Europe and the European Trade Union Confederation (ETUC) who were consulted 'as interested parties'[1] for the impact assessment for the Directive and later gave their opinions on the proposal. The opinions of three non-governmental organisations working on rights of migrants, the European Network Against Racism (ENAR), Platform for International Cooperation on Undocumented Migrants (PICUM) and Advancing Social Justice in Europe and Worldwide (Solidar) who publicized their opinions on the draft Directive during the negotiations for it, will also be included in the discussion.

5.2 BACKGROUND TO THE DIRECTIVE

The proposal for the Directive was set forth by the Commission on 16 May 2007 and adopted on 18 June 2009. The negotiations on it were ongoing at the same time as those for the Blue Card Directive and for the first phase of the Single Permit Direc-

1 Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249, 16 May 2007, 4.

tive. Its legal basis is Article 63(3)(b) TEC (now Article 79 TFEU) and it was adopted on the basis of the legislative procedure laid down in Article 251 of the TEC (now Article 294 TFEU), which provided for a co-decision procedure between the Parliament and the Council and qualified majority voting in the Council.

In the Commission's policy documents on irregular migration preceding the introduction of the proposal for the Directive, it is asserted that 'illegal immigration of third-country nationals specifically has been a central part of the EU's common migration policy since its inception,'[2] that however this sensitive issue had fallen off the agenda of the Council since 1996.[3] The explanatory memorandum for the proposal states that it builds on the recommendations from the Council adopted during the 1990's[4] requiring Member States to prohibit illegal employment, to provide for sanctions, and to require employers to undertake preventative measures and other controls.[5] The Commission's Communication on a common policy on illegal migration from 2001 announced that it would examine the possibility to table a proposal for a Directive on illegal employment of migrants, arguing that it 'would seem clear that in order to address the problem of illegal immigration comprehensively, the illegal employment of illegal residents should be put back on the political agenda.' Furthermore, that in the context of the fact that the demand for illegal workers is especially caused by their employers, sanctions against illegal employment 'should be harmonized for the elimination of all competitive advantages,' which is affirmed to be a very basic principle of Community law.[6] The explanatory memorandum for the proposal established that the scale of the phenomenon of employment of irregularly present migrants 'is necessarily hard to qualify,' that 'estimates of the number of third-country nationals illegally staying in the EU vary between 4.5 to 8 million,' and that illegal employment is concentrated in certain sectors, such as construction, agriculture, cleaning and hotel/catering.[7] What is noteworthy about this information is that it uses a statistical estimate of 'illegally' present third-country nationals in relation to a legislative instrument that is supposed to tackle irregularly present migrants who are in employment, but does not offer any information as regards the scope of that particular group. In fact, none of the Commission's policy documents that address irregularly present third-country nationals in employment offer any information about the size of the population of those working within EU Member States while irregularly present, which indicates that there are no reliable estimates available.

2 Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals, COM(2006) 402, 19 July 2006, 3.

3 Communication from the Commission to the Council and the European Parliament on a Common policy on illegal migration, COM(2001) 672, 15 November 2001, 22.

4 See discussion in chapter 3.

5 Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249, 16 May 2007, 3.

6 Communication from the Commission to the Council and the European Parliament on a Common policy on illegal migration, COM(2001) 672, 15 November 2001, 23.

7 Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249, 16 May 2007, 2.

Commenting on the Commission's policy priorities to fight against illegal migration of third-country nationals, the Parliament declared that it believes that 'the adoption of measures against illegal employment has come late in the day, even though it is one of the main factors of attraction for illegal migrants.' It also provided that it welcomed 'the Commission's submission of a proposal for a directive providing for sanctions against employers of illegally staying third-country nationals,'[8] while it stressed that 'measures against illegal employment will reduce the incentive to emigrate to the EU and also help cut back the black economy.'[9] Discussing this, a link is made between 'this factor of attraction' and EU policy on labour migration concluding that 'a restrictive legal immigration policy can end up encouraging clandestine immigration.'[10] Furthermore, the Parliament considered, that if opportunities for regular migration in order to work within the EU are not increased at the same time as actions are taken to address unauthorized employment of migrants the 'psychological dimension' that the 'fight against illegal employment' is considered to include by seeking to reduce the attractiveness of Europe (i.e. a job, even in conditions that fail to respect fundamental rights),[11] it might not have the desired effect while the availability of work is probably a stronger factor. The Commission staff working document accompanying the proposal provides similar arguments with regard to 'unauthorized employment' of third-country nationals connected to 'the push and pull elements' seen to be at play, stating that 'employment of third-country nationals who are illegally staying' is 'the result of migrants seeking a better life and meeting the demand from employers willing to take advantage of workers who will undertake what are usually low-skilled, low-paid jobs.'[12] In this context, demand for workers is considered to be the stronger element and that 'employment of illegally staying third-country nationals does not necessarily crowd out locals from jobs.' On the contrary, it is claimed in the document, that 'there are signs that whole industries are already dependent on illegally staying third-country nationals, as the kinds of jobs they take would not be done by nationals at a wage level that would still maintain the international competitiveness of the sector concerned (e.g. horticulture).'[13]

The views presented by the Commission as regards the policy options to work against irregular migration have been criticized, for example in finding that 'using the pull factor argument as one of the main justifications for founding a European Policy is dubious,' while it oversimplifies a phenomenon that is by its very nature complex and multifaceted and that in addressing it, the 'general availability of labour and other

8 European Parliament, Draft Report on policy priorities in the fight against illegal immigration of third country nationals (Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Javier Moreno Sánchez), PE 380.872v01-00, 13 June 2007, 8.

9 *Ibid.*

10 *Ibid.*, 12.

11 *Ibid.*, 14.

12 Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249, 16 May 2007, 2.

13 Commission Staff Working Document, Accompanying document to the Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, Summary of the impact assessment, SEC(2007) 604, 15 May 2007, 3.

rationales, such as the socio-economic inequalities, structural conditions and political scenarios in the countries of origin and destination provide some illumination on cross-border human mobility,'[14] and have to be taken into account. Providing a similar view, but focusing more on the factors internal to the labour market of a country hosting irregular migrants, Kyrieri maintains that, 'illegal migration is a social fact that will always characterize national markets due to the interplay between supply and demand.' That on the one hand, 'demand for illegal activity is determined by the tolerance of crime in the host society.' On the other hand, the supply of irregular migrants is considered to depend on the expected profit that can be obtained from irregular migrants, that is low wages, no payment of taxes and social security contributions and competitive products, and 'consequently, when expected returns from irregular migration increase, the number of irregular migrants will also increase because they become more attractive to employers.'[15] In a document prepared by the Commission Services that accompanied the proposal, attention was drawn to the fact that undeclared work 'is in fact a complex phenomenon and may be a structural feature in specific sectors and areas of the EU due to a number of economic, institutional and historical factors which go well beyond individual choices.' Therefore, accompanying measures, 'which stimulate the transformation of undeclared work into declared employment (touching upon taxation, social security, labour law, provisions of specific services to interested workers/firms) need also to be envisaged.'[16] The concerns raised here, which constituted an encouragement to examine the issue of irregularly present third-country nationals who work without permission in a broader perspective than the proposal for the Directive did, were not discussed during the negotiations for the Directive.

In relation to the rationale underlying the Commission's proposal for the Directive and the statistical information provided by the background documents, it is interesting to discuss the findings of the Clandestino research project that was financed by the European Commission and was being conducted, and its findings published, during the time that the negotiations for the Directive were ongoing. As regards the estimate of the number of irregular migrants present in the EU, reports of the project proclaimed that the origin of the number, that is the estimates from 4.5 to 8 million that were quoted in the Commission's policy documents 'is not entirely clear,' but suggested that they have most likely been calculated as shares of the EU 25 popula-

14 Carrera, S. and Guild, E. 2007. *An EU Framework on Sanctions against Employers of Irregular Immigrants, Some Reflections on the Scope, Features and Added Value*. CEPS Policy Brief No. 140. Brussels: Centre for European Policy Studies, 4.

15 Kyrieri, K.M. 2008. Europe's Policy Options for Fighting Illegal Employment of Migrants Workers, *EIPASCOPE Bulletin Special Issue No. 2008/3*. Maastricht: European Institute of Public Administration, 7.

16 Commission Staff Working Paper accompanying document to Proposal for a Directive of the European Parliament of the Council providing for sanctions against employers of illegally staying third-country nationals: Measures to prevent and reduce the employment of third country nationals who are illegally staying or working in breach of their residence status, SEC(2007) 596, 16 May 2007, 3.

tion in 2005.[17] The Clandestino project arrived at a significantly lower estimate of the number of migrants irregularly present in the EU, providing that a 'dynamic aggregate estimate of the irregular foreign resident population' in the then 27 EU Member States in 2008 (now 28) was 'minimum 1.9 million, maximum 3.8 million.'[18] The Clandestino research project also made an analysis of country reports from twelve EU Member States (Austria, the Czech Republic, France, Germany, Greece, Hungary, Italy, the Netherlands, Poland, Slovakia, Spain and the United Kingdom) on the reasons behind irregular presence of third-country nationals in these countries. The findings demonstrated 'that legal entry and overstaying or legal entry and stay whilst working in breach of immigration regulations are the main paths into irregularity.'[19] These findings suggest that 'illegal entry' in order to obtain irregular work, that is the 'pull factor' that both the Commission and the Parliament maintained was the dominant cause for irregular migration and irregular work by third-country nationals is not a significant factor at all. Other important paths into irregularity according to the findings of Clandestino are 'related to the asylum system and to refused asylum seekers who either (a) do not return, (b) are not removed and/or (c) are *de facto* non-removable.' Additionally, and 'equally frequently reported are overly bureaucratic and therefore deterring residence and work permit applications, inefficient renewal and appeal procedures or withdrawal or loss of status for various reasons which result in irregular stay.' In conclusion based on examination of the various paths into irregularity, it is provided that 'clandestine entry – often of individuals who subsequently apply for asylum and thus regularize their status – is the least frequent path and rather the exception.'[20] In summary, third-country nationals irregularly present in EU Member States are mostly persons who used to fulfil the requirements for regular stay but have ceased to fulfil them.

5.3 OBJECTIVES, SUBJECT MATTER AND SCOPE OF THE DIRECTIVE

5.3.1 Objectives

As was discussed above, the rationale behind the proposal for the Directive is the assumption that the possibility of finding work is a dominant factor encouraging irregular migration into the EU. Directly related to that assumption, the aim of the Directive is firstly to reduce the pull factor 'by targeting the employment of third-country nationals who are illegally staying in the EU.' Secondly, by building on existing measures in the Member States, 'to ensure that all Member States introduce similar penalties for employers of such third-country nationals and enforce them effec-

17 Clandestino Research Project. 2009. *Size and Development of Irregular Migration to the EU, Counting the Uncountable: Data and Trends across Europe,* 2. Available at: http://clandestino.eliamep.gr (accessed on 5 July 2015)

18 *Ibid*., 4.

19 Düvell, F. 2011. Paths into Irregularity: The Legal and Political Construction of Irregular Migration, *European Journal of Migration and Law* 13, 288.

20 *Ibid.*

tively.'[21] At the time when the proposal was set forth, at least 26 of the then 27 EU Member States already had in place employers sanctions and preventative measures addressing employment of irregularly present migrants. As regards national legislation in Member States in force at the time, it was established that 19 Member States provided for criminal sanctions, that they however varied greatly in content and with respect to implementations measures. Moreover, it was observed in relation to this, that 'most Member States have high numbers of illegally staying third-country nationals in work despite having those sanctions in place.'[22] The wide variety of existing national measures is related to the objective of the proposed Directive to harmonize legislation at the EU level whereas these differences are seen as going 'against the creation of a level playing field for employers across the EU' and that this situation does 'not provide the picture that it is an EU common goal to fight the employment of illegally staying third-country nationals.'[23] In addition to the above, the explanatory memorandum for the proposal, provided that perhaps the most essential argument for common EU measures was that in 'an area without internal borders, action against illegal immigration needs to be undertaken on a common basis.' Furthermore, that a 'minimum level of sanctions on employers that were common in all of the Member States' will ensure that all Member States have sufficiently high sanctions to have deterrent value, that sanctions are not so different as to give rise to secondary movements of illegally staying third-country nationals, and that there is a level-playing field for businesses across the EU.[24]

Referring to the fact that the subject matter of the proposal is linked to labour and social policy, the Commission provided a clarification in the explanatory memorandum to the proposal, that it 'is concerned with immigration policy, not with labour or social policy.' Additionally, that according to the proposal, 'it is the employer who will be sanctioned, not the illegally employed third-country national,' however, the Returns Directive would, as a general rule, 'require Member States to issue a return decision to third-country nationals staying illegally.'[25] The overall objective of the proposal is stated to be 'to contribute to reducing illegal immigration,' and the specific objectives are 'to reduce employment of illegally staying third-country nationals, to create a level playing field for EU employers and to contribute to reduced exploitation of illegally staying third-country nationals.[26] With regard to the aim of reducing

21 Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249, 16 May 2007, 2.

22 Commission Staff Working Document, Accompanying document to the Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, Summary of the impact assessment, SEC(2007) 604, 15 May 2007, 3.

23 *Ibid*., 4.

24 Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249, 16 May 2007, 6-7.

25 *Ibid*., 2.

26 Commission Staff Working Document, Accompanying document to the Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employ-
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exploitation of illegally staying third-country nationals the Commission provided that although it 'does not fall within the scope of the relevant legal base, Article 63(3)(b) TEC', (now Article 79(2)(c) TFEU) 'it is appropriate to include it for assessing the option in view of the exploitative conditions which often exist in this area.'[27]

5.3.2 Subject Matter and Scope

Draft Article 1 of the proposed Directive[28] addressed its subject matter and scope and provided that the Directive lays down common sanctions and measures to be applied in the Member States against employers of third-country nationals who are illegally staying on the territory of the Member States, in order to take action against illegal immigration.

In the first exchange of views on the proposal in the Working Party on Migration and Expulsion (WPME), Estonia, Spain, Finland, France, Lithuania, Poland and Portugal, suggested expanding the scope of the proposal in order to cover third-country nationals who have legally entered the territory of a Member State but have been illegally employed. Responding to that, the Commission pointed out that this would not be possible because this category of persons falls under Article 63(3)(a) TEC (now 79(2)(a) TFEU) which provided for a different adoption procedure (unanimity and consultation of the European Parliament) from the legal basis used in the proposal and concluded that therefore, it would not be feasible to include two different procedures in the same proposal.[29] In its opinion on the scope provided to the WPME, the Working Party on Social Questions (SQWP) established that at least the delegations of Austria, Belgium, the Czech Republic, Spain, Estonia, France, Italy, Luxembourg, Hungary, Poland and Finland 'were of the view that the Directive should cover not only employees who were illegally resident, but also employees who were legally resident, but illegally employed (for example, those working on the basis of student or tourist visas).' Furthermore, that 'if such a widening of the Directive's scope required a parallel widening of the legal basis, so be it.'[30] In its observations on the proposed Directive, the Parliament also expressed regret over its narrow scope while it 'does not cover measures relating to TCNs who are legally staying in the EU but who may

ers of illegally staying third-country nationals, Summary of the impact assessment, SEC(2007) 604, 15 May 2007, 5.

27 *Ibid.*

28 All references in this chapter to 'proposal for the Directive', 'proposal' and 'draft Article' are to Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249, 16 May 2007.

29 Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 15 June 2007, document number: 10669/07, 2 and 4.

30 Council of the European Union, Contribution from the Working Party on Social Questions to Working Party on Migration and Expulsion, 19 September 2007, document number: 11764/2/07, 7.

also be victims of labour exploitation.'[31] These comments and considerations did not however result in widening the scope of the Directive.[32]

It was not only the limited scope of the proposed Directive that was criticized, but also the approach adopted by it. In regard to that, ENAR, PICUM and Solidar, concluded in their comments on the proposal that an 'effective approach to tackling the existence of the irregular labour market needs to start from the perspective of tackling the violation of rights of those affected and needs to ensure coherence and consistency with EU policy, including in the employment, social, anti-discrimination, gender equality, migration and integration fields.'[33] The European Trade Union Confederation (ETUC) also advocated for unauthorized employment of irregular migrants being addressed from a broader perspective than just tackling irregular employment as a pull factor for migration. In the opinion they put forth on the proposal, they cited a letter sent to Commissioners Frattini and Spindla in 2007, accompanying a joint statement of ETUC, Solidar and PICUM about the expected initiative of the Commission for the proposal for the Directive. In the letter the organisations maintain 'that it is an illusion' that the EU Member States 'can solve the problem of irregular migration by closing their borders and implementing repressive measures.' They suggested rather that the protection of human rights and enforcement of labour standards for migrant workers, whatever their nationality or legal status, should be a top priority.[34] In its commentary on the proposal itself ETUC provides that the proposal falls short of addressing the issue of illegal employment in a comprehensive manner and that the approach should be to develop proactive polices 'to combat labour exploitation, especially of irregular migrants, demanding recognition and respect of their trade union and other human rights, and providing them with bridges out of irregularity.'[35] As with the commentaries made by the partners to the negotiations referred to above, no heed was paid to these views and no consideration given to widening the scope of the Directive or to address the issue of irregular work in a more comprehensive manner.

5.4 SANCTIONS AGAINST EMPLOYERS AND OBLIGATION TO CONTROL RESIDENCE STATUS OF THIRD-COUNTRY NATIONALS

The central provision of the Directive, as regards its purpose and objective, is Article 3[36] which stipulates that Member States shall prohibit employment of illegally staying

31 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (Rapporteur: Claudio Fava), PE409.510v02-00, 27 January 2009, 22.

32 See Article 1 of the Directive in the Annex to Chapter 5.

33 ENAR, PICUM and Solidar. 2008. Employers' Sanctions Directive: Will migrant workers pay the price of their exploitation?, 8. Available at: http://picum.org/picum.org/uploads/file_/2008-04-15_employer_sanctions_directive.pdf (accessed on 5 November 2011).

34 European Trade Union Confederation. 2007. ETUC position regarding European Commission's proposals on legal and 'illegal' migration, 13. Available at: http://www.etuc.org/documents (accessed on 5 November 2011)

35 *Ibid.*

36 See Article 3 of the Directive in the Annex to Chapter 5.

third-country nationals and that infringements of this prohibition shall be subject to the sanctions and measures laid down in the Directive. These sanctions include financial sanctions provided for in Article 5[37] and criminal penalties addressed in Article 10.[38] Criminal penalties apply if the prohibition of employment of illegally staying third-country nationals is committed intentionally, when it is continuous or persistently repeated, when it is in respect to the simultaneous employment of a significant number of persons, when it is accompanied by particularly exploitative working conditions and when the workers are victims of trafficking in human beings or minors.[39] These provisions will not be addressed here in detail while the focus of the discussion is the rights and protection granted to irregularly present migrants who are working in an EU Member State.

Article 4[40] of the Directive obliges employers to check whether a prospective third-country national employee has a valid residence permit or other authorisation for his or her stay and to notify the competent authorities of the start of employment of the third-country national. This approach adopted by the Directive makes private businesses responsible for control of immigration status of individuals, which did not cause much debate among the Member States in the WPME, except as regards the 'administrative burden' it causes for the Member States' authorities.[41] Peers et al. have observed that this duty on employers is similar to that stipulated by the Carrier Sanctions Directive[42] in 'pushing outwards from the State functional responsibility for aspects related to the control of migration.' One significant difference however is that the consequences of the Employers Sanctions Directive 'touch every commercial actor in the EU, not merely those engaged in transport.'[43] Given the widespread effect of this approach it received very limited discussion. The Parliament in its comments on the proposal welcomed 'the preventative measures foreseen' by obliging 'employers to examine the residence permits or other authorisation for stay of potential employees before hiring them, and also to maintain records on the dates of the start and end of employment and to transmit these to the relevant authorities.'[44] It did however also suggest that it was 'appropriate to enable Member States to allow employers and employees a period of time in which to regularize the worker's employment situation (which would also be useful in the event of protracted administrative procedure).'[45] This suggestion was not taken into consideration and as will be

37 See Article 5 of the Directive in the Annex to Chapter 5.
38 See Article 10 of the Directive in the Annex to Chapter 5.
39 See Article 9 of the Directive in the Annex to Chapter 5.
40 See Article 4 of the Directive in the Annex to Chapter 5.
41 Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 15 June 2007, document number: 10669/07, 6.
42 Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.
43 Peers, S., Guild, E., Acosta Arcarazo, D., Groenendijk, K., Moreno-Lax, V. (eds) 2012. *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Volume 2: EU Immigration Law*. Leiden – Boston: Martinus Nijhoff Publishers, 433.
44 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (Rapporteur: Claudio Fava), PE409.510v02-00, 27 January 2009, 22.
45 *Ibid.*, 37.

discussed below, the consequence of being detected as an irregularly working third-country national is deportation which leaves no room for flexibility or consideration of slow administrative procedures or other factors that may have caused a person to become irregularly present.

5.5 PROTECTION FOR IRREGULARLY RESIDENT THIRD-COUNTRY WORKERS

Two provisions of the draft Directive addressed protection for irregularly resident third-country nationals working in a Member State. Those are draft Article 7 on back payments to be made by employers and draft Article 14 on facilitation of complaints. The negotiations on these Articles will be examined here to outline the protection offered by them for irregularly resident migrants who are employed.

5.5.1 Back Payments to be Made by Employers

Draft Article 7 of the proposal provided for an obligation of employers who have employed irregularly resident migrants to pay any outstanding remuneration that may be due to the employee, as well as any outstanding taxes and social security contributions, including relevant administrative fines. It imposed obligations on Member States to ensure the payments, and in order to apply the above Member States were obligated to enact mechanisms to guarantee that the necessary procedures to claim back outstanding remuneration are triggered automatically without the need for the third-country national to introduce a claim. The draft Article stipulated that the Member States should provide that a work relationship of at least six-month duration be presumed unless the employer can prove differently. Additionally, Member States shall take the necessary measures to ensure that illegally employed third-country nationals receive any back payment of remuneration recovered, including in cases in which they have, or have been returned and in respect to criminal offences Member States shall take the necessary measures to ensure that the execution of any return decision is postponed until the third-country national has received any back payment of their remuneration recovered.

During the discussion on the issue of back payments as a whole in the WPME, Austria, the Czech Republic, Germany, Greece, Hungary, Italy, the Netherlands, Poland and Sweden 'expressed concern on how feasible the implementation of this Article could be' and found that the intervention of the national authorities goes too far in a private-law-related issue.[46] Responding to this, the Commission 'emphasized that creating a divergence of interest between the employer (who will act illegally knowing the consequences in this Article) and the third-country national (who will benefit from these provisions breaking the silence on the illegality), would contribute towards the fight against illegal migration and therefore justifies the State interven-

46 Council of the European Union, Outcome of Proceedings –Working Party on Migration and Expulsion, 22 November 2007, document number: 14916/07, 8.

tion.'[47] This understanding of the importance of the provision is not primarily focused on the protection of migrants and assumes that the Directive provides benefits for migrants if they 'break the silence on the illegality'. As will be discussed below, the Directive does not address the human rights of migrants irregularly present and working in a Member States or provide for any general protection of their rights.

5.5.1.1 Duty to Ensure Payment of Back Pay

During the discussion in the WPME on the duty to ensure payment of back pay, Austria entered a reservation and Poland and Portugal expressed concern regarding the difficulties of providing evidence that the remuneration due was not paid. In particular, Poland supported by Lithuania and Latvia, 'underscored that it would be difficult to ascertain what the real remuneration was where there was no written contract and indicated that in such cases it might be advisable to establish a presumption for minimum wage or a percentage of the average wage in the specific occupation.' In response to this, the Commission provided 'that these issues should be dealt with by national legislation.'[48] In its comment related to the draft Article the Parliament provided that it 'is natural that employers pay the outstanding remuneration that is due to the illegally employed' third-country nationals and suggested that the 'provision should be extended to any other work-related financial entitlements and to all the costs resulting from transferring the remuneration and the entitlements abroad, in the case of the third-country national having returned to his/her country, in order not to penalise' the third-country national. Furthermore that when 'the agreed remuneration cannot be established, this can be determined with reference to the applicable laws on minimum wages, collective agreements or practices or to the minimum income under which citizens of the Member State concerned are entitled to social assistance.'[49] In its comment on this provision, ETUC stated that it finds it only logical to take from 'the employer *any illegal profit* that he has had by employing the worker on an irregular basis,' and that the basis for the back pay obligation should not be 'minimum wages but 'comparable wages' with similar legal workers, as well as all other benefits that the worker should have received.'[50] This view was not taken into consideration during the negotiations but the amendments made by the Parliament were accepted and the provision in the adopted Directive contains the parameters suggested by it.[51] In a statement by the Council around the end of the negotiations regarding this, it commented that the issue of back payments was 'sensitive' for which, in summary, the 'Parliament's approach is closer to an obligation of result requested from Member

47 *Ibid.*

48 *Ibid.*

49 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (Rapporteur: Claudio Fava), PE409.510v02-00, 27 January 2009, 23.

50 European Trade Union Confederation. 2007. ETUC position regarding European Commission's proposals on legal and 'illegal' migration, 16. Available at: http://www.etuc.org/documents (accessed on 5 November 2011).

51 See Article 6(1) of the Directive in the Annex to Chapter 5.

States rather than to an obligation to ensure the means (the mechanism) for such a result which has been Council's approach.'[52]

5.5.1.2 Duty to Provide for an Automatic Claim

The obligation on Member States to provide for an automatic claim for outstanding salaries was contested by several Member States. In the discussion in the WPME, the Czech Republic, Greece, Finland and Italy entered a scrutiny reservation on the automatic character of this mechanism,[53] whereas France suggested establishing a mechanism whereby an agency in the Member State in question would pay the back payment to the third-country national and then collect them from the employer in order to expedite the whole procedure.[54] In a discussion of the SQWP on the provision, the Commission representative explained 'that the aim of the automatically-triggered back payments was to protect vulnerable third-country nationals who may not have the linguistic ability and financial resources to claim any unpaid wages they may be entitled to in the EU, and who may in any case face deportation.' Additionally, that it 'was as much a question of administrative assistance as it was of a proper reward for work done.'[55] The delegations in the SQWP however made substantive reservations on the provision. Greece, Hungary, Poland, Finland and Sweden in particular to the 'automatically-triggered claims' and the Czech Republic, Latvia and Finland considered that 'an automatic, legally-enshrined right to unpaid remuneration might even constitute a 'pull' factor for further illegal migrants.'[56]

The Parliament in its opinion provided that while this duty on Member States 'could be seen as more favourable and discriminatory for EU workers who are required to lodge a complaint with the relevant bodies to secure outstanding payment' the logical backing of the Commission's proposal is that undocumented third-country nationals 'live underground, they fear detention and return, constitute an 'easily exploitable' workforce and are much more vulnerable than other workers.'[57] The Committee on Agriculture and Rural Development stated however that if the procedure for claiming back pay were triggered automatically 'illegal migrant workers and EU workers would be treated differently in the eyes of the law,' a distinction for which it saw no apparent justification.[58] Based on that assessment the Committee proposed that the provision be changed to provide that Member States shall 'take the steps required to ensure that a third-country national staying illegally may apply to claim

52 Council of the European Union, Note from the Presidency to the Permanent Representative Committee, 24 November 2008, document number: 15237/08, 3.

53 Council of the European Union, Outcome of Proceedings –Working Party on Migration and Expulsion, 22 November 2007, document number: 14916/07, 9.

54 *Ibid*., 8.

55 Council of the European Union, Contribution from the Working Party on Social Questions to the Working Party on Migration and Expulsion, 19 September 2007, document number: 11764/2/07 REV 2, 4.

56 *Ibid*., 11.

57 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (Rapporteur: Claudio Fava), PE409.510v02-00, 27 January 2009, 23.

58 *Ibid*., 51.

back outstanding remuneration in accordance with the national procedure provided for that purpose.'[59] Business Europe was also 'strongly opposed to the provision' on automatic payments on the basis that it would introduce a different system for third-country nationals which in their assessment 'would result in an unjustified difference in treatment of these workers compared with EU workers.'[60] The issue of the automatic claim was one of the outstanding issues between the Parliament and the Council towards the end of the negotiations, and the outcome of the negotiations was that the claim is no longer automatic.[61] Providing their analysis of this result, the Presidency maintained that it had sought to reflect the concern of the Parliament, however without including an obligation for Member States to go in that direction.[62]

5.5.1.3 Presumption of a Six-month Work Relationship

In the discussion in the WPME regarding the presumption of a six-month work relationship, Austria and Poland entered a reservation on this presumed length of time and Lithuania 'expressed its concern that this provision might be abused by third-country nationals.'[63] The Czech Republic, Germany and Greece considered 'six months as too long of a term' but provided that 'a term is needed anyway.' Finland, Hungary, Italy and Sweden also entered a reservation on the presumption of a six-month work relationship, and Austria suggested as an alternative to replace the six months with a reference to 'the duration of actual employment' or 'one month'. Additionally, Italy 'expressed its doubts whether the six-month principle could work for cases such as seasonal workers,' and Belgium stated that it could live with the current figure but in the spirit of compromise could accept a shorter period such as three to four months.[64] Having regard to these comments made by the Member States, the Presidency put forth a compromise suggestion that the period be lowered to three months.[65] Still Austria, the Czech Republic, Greece, Finland, Hungary, Italy, Latvia, Poland and Sweden 'maintained a scrutiny reservation on the presumption of a work relationship' as such. While Germany, Greece, France, Luxembourg, the Netherlands and Portugal supported by the Commission 'stressed that they preferred the six-month period (included in the original proposal), which could work as a stronger deterrent towards employers hiring illegally staying third-country nationals,'[66] indicat-

59 *Ibid.*, 56.

60 Business Europe. 2007. Position Paper, Summary: Commission Proposal for a Directive on Sanctions Against Employers of Illegally Staying Third-Country Nationals, 6. Available at: http://www.europarl.europa.eu/document/activities/cont/200807/20080716ATT34323/20080716ATT34323EN.pdf (accessed on 12 January 2012)

61 See Article 6(2)(a) and (b) of the Directive in the Annex to Chapter 5.

62 Council of the European Union, Note from the Presidency to the Permanent Representative Committee, 12 December 2008, document number: 17234/08, 2.

63 Council of the European Union, Outcome of Proceedings –Working Party on Migration and Expulsion, 22 November 2007, document number: 14916/07, 9.

64 Council of the European Union, Outcome of Proceedings –Working Party on Migration and Expulsion, 19 December 2007, document number: 16568/07, 11.

65 Council of the European Union, Note from the Presidency to the Working Party on Migration and Expulsion, 13 March 2008, document number: 7286/08, 11.

66 *Ibid.*

ing that the main aim of this provision was not necessarily to protect the interests of the workers.

The Parliament's Committee on Agriculture and Rural Development was opposed to assuming an employment period of six months and proposed that the provision be deleted while in its opinion a 'presumption to that effect imposes the burden of proof on the employer, who would have to show that a given worker had been employed for less than six months.'[67] Additionally, the Committee expressed the view that this would work to counter the aim of proposed Directive whereas it 'could have the unfortunate effect of encouraging illegal immigration by non-Community nationals, attracted by the prospect of receiving at least six months pay in any event, even if they worked for only a few days.'[68] Business Europe concurred with this view[69] on the same grounds as the Committee, while ENAR, PICUM and Solidar in their comments provided that the clause addresses a 'crucial difficulty of the burden of proof,' while the 'informal character of the employment relationship often makes it very difficult for these workers to prove their story.'[70] The Parliament defended the presumption of a six month employment relationship throughout the negotiations,[71] but the position of the Council to reduce it to three months is the time length provided for by the adopted Directive.[72]

5.5.1.4 Postponement of Execution of Return Decision

In the first exchange of views in the WPME on the issue of postponement of execution of return decision until back payments were made, Austria, Belgium, Germany, Finland, France, Hungary, Lithuania, Poland, Portugal, Slovenia and Slovakia made reservations to the provision and 'stressed that, in cases under the provision, if the execution of the return decision is linked with the award of back payments to the third-country national concerned, any possible (judicial) delays in the relevant process would make the return impossible for a unreasonably long time.'[73] In a discussion in the SQWP, the opinions of Belgium, Malta, Poland and Sweden focused on the considerable maintenance costs, including possibly for dependents, that the postponement of the third-country national's return, pending receipt of outstanding payments, might entail for the public authorities. Additionally they queried what the migrant's

67 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (Rapporteur: Claudio Fava), PE409.510v02-00, 27 January 2009, 52.

68 *Ibid.*

69 *Ibid.*

70 ENAR, PICUM and Solidar. 2008. Employers' Sanctions Directive: Will migrant workers pay the price of their exploitation?, 4. Available at: http://picum.org/picum.org/uploads/file_/2008-04-15_employer_sanctions_directive.pdf (accessed on 5 November 2011)

71 Council of the European Union, Note from the Presidency to the Permanent Representative Committee, 12 December 2008, document number: 17234/08, 2.

72 See Article 6(3) of the Directive in the Annex to Chapter 5.

73 Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 15 June 2007, document number: 10669/07, 2 and 9.

status would be in the meantime?[74] Alternatively, the Parliament in its amendment to the proposal suggested to widen the scope of the provision to any return decision and provided that 'Member States shall take the necessary measures to ensure that the execution of any return decision is postponed until the third-country national has received any back payments of their remuneration and other work related financial entitlements.'[75] Holding an opinion to the contrary, the Committee on Agriculture and Rural Development proposed that the provision be deleted.[76] In reaction to the views given on the provision, in particular the suggestions to delete it, the Commission expressed regret over 'the low level of ambition'[77] displayed by that. In their comment on the draft Directive, ENAR, PICUM and Solidar stated that the protection offered by postponement of return decision 'is crucial,' that without it, 'there is a real danger that workers will not be able to effectively address the relevant procedures, including those to enforce a court decision should an employer not comply immediately.'[78] During the negotiations, the provision was amended so that it is no longer obligatory to postpone return decisions and the adopted Directive provides that Member States have the discretion to define by national law cases under which a residence permit is granted until the procedures for recovering remuneration have been completed.[79] This is an outcome that the Presidency described as seeking to take into account the proposal of the Parliament above, 'to the extent that it did not create an obligation for Member States to postpone the return.'[80] This outcome does not lead to harmonization across Member States and does not provide for an obligation to safeguard the interests of migrants who have made a claim for back pay by ensuring that they can follow up on that claim and receive the remuneration due to them.

5.5.2 Facilitation of Complaints

Draft Article 14 which is complementary to the provision on back payments of remuneration and addresses facilitation of complaints in that respect, stipulated firstly, that Member States shall provide for effective mechanisms through which third-country nationals in illegal employment can lodge complaints against their employers,

74 Council of the European Union, Contribution from the Working Party on Social Questions to Working Party on Migration and Expulsion, 19 September 2007, document number: 11764/2/07, 11.

75 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (Rapporteur: Claudio Fava), PE409.510v02-00, 27 January 2009, 19.

76 *Ibid.*, 56.

77 Council of the European Union, Outcome of Proceedings –Working Party on Migration and Expulsion, 11 February 2008, document number: 6136/08, 11.

78 ENAR, PICUM and Solidar. 2008. Employers' Sanctions Directive: Will migrant workers pay the price of their exploitation?, 4. Available at: http://picum.org/picum.org/uploads/file_/2008-04-15_employer_sanctions_directive.pdf (accessed on 5 November 2011)

79 See Article 6(5) of the Directive in the Annex to Chapter 5.

80 Council of the European Union, Note from the Presidency to the Permanent Representative Committee, 12 December 2008, document number: 17234/08, 2.

directly or through designated third parties. Secondly, that sanctions shall not be imposed against designated third parties providing assistance to the third-country national to lodge complaints, on the grounds of facilitation of unauthorized residence. Thirdly, that in case of criminal offences in which the infringement is accompanied by particularly exploitative working conditions, Member States shall grant under the conditions provided for in Directive 2004/81/EC[81] a residence permit of limited duration linked to the length of the relevant national proceedings against an employer.

5.5.2.1 Effective Mechanism

In the exchange of views in the WPME, on the duty of Member States to provide for effective mechanisms, Italy expressed its concern about the risk of abuse of this mechanism by the third-country nationals, and Poland queried whether a time-limit to lodge a complaint should be provided in order to eliminate the threat of abuses.[82] Additionally, Poland asked what type of complaints could be made and whether a time limit should be included to which the Commission 'indicated that the time limitation and contents of complaints should be defined by national law.'[83] Although the reason is not obvious from the records from the discussion in the WPME, the Presidency made a suggestion to change the draft Article very early on in the negotiations so that rather than Member States being obliged to 'provide for effective mechanisms' for the complaints, they shall ensure that 'there are effective mechanisms in place.'[84] The provision did not receive much discussion after that and the provision[85] in the adopted Directive is modelled after the Presidency's amendment.

5.5.2.2 Designated Third Parties

During the discussion in the WPME on the provision addressing designated third parties that provide assistance to third-country nationals who lodge complaints, Germany and Luxembourg 'entered reservations (asking its deletion).' Furthermore, Greece, Lithuania and Sweden 'entered scrutiny reservation,' questioning 'the rationale and the message conveyed from it as regards the third parties aiding illegally staying third-country nationals.' In reply to which the Commission pointed out that 'the provision refers only to *designated third parties*, which allows Member States to filter them, through inspection of their activities.' In addition, the Commission acknowledged 'that exempting from sanctions these third parties has been deemed necessary in the impact assessment for this proposal, along the lines of other instruments where

81 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued third-country nationals who are victims of trafficking or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

82 Council of the European Union, Outcome of Proceedings –Working Party on Migration and Expulsion, 31 January 2008, document number: 6136/08, 20.

83 Council of the European Union, Outcome of Proceedings –Working Party on Migration and Expulsion, 22 November 2007, document number: 14916/07, 15.

84 Council of the European Union, Outcome of Proceedings –Working Party on Migration and Expulsion, 19 December 2007, document number: 16568/07, 19.

85 See Article 13(1) of the Directive in the Annex to Chapter 5.

this principle exists.'[86] The Parliament in its amendment to the draft Article proposed to add a new point that aims to ensure that migrant workers have access to support from 'designated third parties' while making claims for payment of salaries due to them. The amendment provided that Member States shall ensure that legal entities, associations, non-governmental organisations, local authorities, and other bodies such as trade unions, which have, in accordance with the criteria laid down in the relevant national law, a legitimate interest in ensuring that the provisions of the Directive are complied with, may either on behalf of or in support of an irregularly employed third-country national, intervene in any judicial, administrative and/or criminal proceedings provided for with the objective of implementing the Directive.[87] This amendment of the Parliament was one of the outstanding issues between the Council and the Parliament towards the end of the negotiations and in a note to the Permanent Representatives Committee (Coreper), the Presidency outlined the differences between the parties as being that the Council could agree to the Parliament's amendment, 'provided that the adopted wording excludes criminal proceedings and is better targeted.'[88] In the adopted Directive the provision[89] only addresses administrative and civil proceedings and is largely corresponding to the amendment made by the Parliament, except that the 'designated third parties' are more narrowly defined.

5.5.2.3 Granting of Temporary Residence Permit

The granting of temporary residence permits for migrants that have been subjected to particularly exploitative working conditions and cooperate in proceeding against their employer, was the most controversial provision of the draft Article. In the discussion in the WPME, Germany 'entered a reservation on the provision due to the extra administrative burden which could be created by the assessment mechanism established by it.' The Czech Republic and Lithuania both suggested deleting the reference to the 2004/81/EC Directive in the provision and Italy and Latvia suggested leaving the issue to national legislation. Belgium, Luxembourg and Sweden entered a reservation and Germany, Greece, Spain, France, Hungary, Lithuania and Poland entered scrutiny reservation. The Netherlands however 'commented that this paragraph is in line with the UN Treaty on Transnational Organized Crime and its Protocol on Trafficking in Human Beings.'[90] Following up on these comments, the Presidency put forth a compromise suggestion that changed the provision into a discretionary clause, and provided that the granting of permits should only be in 'specific cases."[91] The Neth-

86 Council of the European Union, Outcome of Proceedings –Working Party on Migration and Expulsion, 22 November 2007, document number: 14916/07, 15.

87 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (Rapporteur: Claudio Fava), PE409.510v02-00, 27 January 2009, 45-46.

88 Council of the European Union, Note from the Presidency to Permanent Representatives Committee, 24 November 2008, document number: 15237/08, 4.

89 See Article 13(2) of the Directive in the Annex to Chapter 5.

90 Council of the European Union, Outcome of Proceedings –Working Party on Migration and Expulsion, 22 November 2007, document number: 14916/07, 15.

91 Council of the European Union, Outcome of Proceedings –Working Party on Migration and Expulsion, 19 December 2007, document number: 16568/07, 20.

erlands and the Commission 'expressed disappointment at the replacement of 'shall' with 'may" in the provision and Greece, France and Austria who wondered about the meaning and scope of the term 'specific cases' suggested replacing it with reference to national legislation or, France alternatively deleting it. In reply to that, the Commission suggested that the provision should be implemented in accordance with national law but opted for the deletion of the reference to specific cases for reasons of clarity.[92]

When the proposal was being discussed by Coreper, the Presidency suggested that outstanding issues related to the Article should be taken up in relation to the compromise suggestion made by the Parliament which the Presidency described as 'much more moderate than its original position,' and that the Council could 'through an adjustment of wording, live with it because it gives Member States great flexibility.'[93] The compromise suggestion by the Parliament provided that the provision should stipulate the following: 'In respect of criminal offences covered by Article 10(1)(c), Member States shall define the conditions under which they may grant case by case permits of limited duration linked to the length of the relevant national proceedings, to third-country nationals who are or have been subjected to particularly exploitative working conditions or who are victims of trafficking, in accordance with Council directive 2004/81/EC, or who are minors and who cooperate in proceedings against the employer.'[94] The provision on granting of temporary residence permits in the adopted Directive is largely modelled on the compromise suggestion of the Parliament, the only substantive change is that it only includes a reference to migrants who have been subjected to particularly exploitative working conditions and infringements related to the illegal employment of minors.[95] During the negotiations, the provision changed from being an obligatory one to a discretionary clause where the granting of residence permits shall be examined on a case by case basis with reference to national law in each of the Member States. This outcome does not meet the requirement for harmonization across the EU and it does not offer widespread protection to migrants as it only focuses on those who cooperate with the authorities in criminal proceedings and then only for the duration of these proceedings. Neither does it meet the standards that ETUC put forth in its position on the proposal where it concluded that 'legal space in which irregular workers can complain about exploitative working conditions without immediately being threatened by expulsion,' should be provided for.[96] There are no guarantees in the Directive that prevent deportation in such cases, and as observed by ENAR, PICUM and Solidar, the Directive does not 'explicitly protect those who complain and does not make provisions for anonymous or collective complaints.' It does not make it clear that 'complaints' go 'beyond the collection of payment to include for example, discrimination claims or other com-

92 *Ibid.*

93 Council of the European Union, Note from the Presidency to Permanent Representatives Committee, 24 November 2008, document number: 15237/08, 4.

94 *Ibid.*, 14.

95 See Article 13(4) of the Directive in the Annex to Chapter 5.

96 European Trade Union Confederation. 2007. ETUC position regarding European Commission's proposals on legal and 'illegal' migration, 13. Available at: http://www.etuc.org/documents (accessed on 5 November 2011).

plaints related to working practices, violence and exploitation,' or provide that 'vulnerable migrants are able to access support through organisations that they trust and that have a mandate to provide such support,' which these organisations consider vital[97] for the group of migrants that the Directive addresses.

5.6 ACCESS TO TERRITORY AND THE LABOUR MARKET

The Directive does not provide for any access to territory and the labour market for irregular migrants. As was discussed in section 5.3 above, the Commission affirmed that as regards detection of irregularly present migrants the Returns Directive applies as a rule in relation to the Employers Sanctions Directive. The Returns Directive requires Member States to issue a return decision to third-country nationals staying illegally,[98] and provides for some safeguards for migrants pending a return.[99] Those safeguards are that family unity with family members present in their territory is maintained, emergency health care and essential treatment of illness are provided, that minors are granted access to the basic education system subject to the length of their stay and that special needs of vulnerable persons are taken into account.

During the negotiations for the Directive, ideas set forth to provide for some measures to address regularization of the status of irregularly present migrants working without authorisation were rejected. In the impact assessment that accompanied the proposal it was stated in regard to that, that the 'option of regularizing illegally staying third-country nationals was rejected at an early stage, due to a lack of data on current practices and effects of regularization measures.' Moreover, 'regularization is argued by many to be a pull factor for illegal immigration and therefore unhelpful in this exercise.'[100] This position, to reject wholesale measures on regularization does not take into consideration the complex and varied reasons that may have caused a third-country national to become irregularly present in the territory of a Member State. As the findings of the Clandestino project showed, the most common reason for irregular status is that persons 'no longer fulfil' the criteria for being lawfully present, not 'illegal' entry. The Parliament in its comments on the proposal suggested that a recital be added to the preamble to the Directive stating that it 'should not prevent Member States from adopting measures designed to convert undeclared employment relationships into declared employment relationships or from bringing within

97 ENAR, PICUM and Solidar. 2008. Employers' Sanctions Directive: Will migrant workers pay the price of their exploitation?, 4-5. Available at: http://picum.org/picum.org/uploads/file_/2008-04-15_employer_sanctions_directive.pdf (accessed on 5 November 2011).

98 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Article 6.

99 *Ibid*., Article 14.

100 Commission Staff Working Document, Accompanying document to the Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, Summary of the impact assessment, SEC(2007) 604, 15 May 2007, 5.

the law the situation of undeclared work.'[101] This suggestion was not accepted, but permitting such measures to be taken is in the opinion of ETUC important for the protection of migrant workers where without bridges out of irregularity 'those undocumented workers who need employment most to survive will turn to sectors with the most dangerous forms of work in terms of health and safety and rogue employers.'[102] In this context it is important to draw attention to the fact that according to statistical information from Frontex, less than half of the third-country nationals that are detected 'as illegal stay' per year within the EU are 'effectively returned' on an annual basis. Having regard to that, the conclusion can be drawn that there is a significant number of migrants that have not been returned and according to the Directive should not be regularized. That in any situation can only lead to increasing the vulnerability of migrants. According to Frontex the number of irregular migrants detected in the EU in 2009 was 412,125, in 2011 the number was 350,948 and in 2014 it was 441,780. In 2011 the number of third-country nationals effectively returned was 149,045, in 2013 it was160,418 and 161,309 in 2014.[103] In a minority opinion of the Parliament on the proposal, the Directive was regarded as an instrument that 'will enable Member States to punish migrants very severely, without safeguarding them from expulsion and without providing in general for the regularization of persons reporting cases of exploitation,'[104] an opinion that seems accurate at least with regard to how the Directive addresses, or rather does not address, the access of irregular migrants to the territory of EU Member States where they are, nota bene, already present.

5.7 HUMAN RIGHTS OF IRREGULARLY RESIDENT MIGRANTS

The Directive does not address the human rights of irregularly present migrants. In the explanatory memorandum to the proposal it was declared that it 'complies with fundamental rights,' and that 'it does not affect third-country nationals' rights as workers, such as the rights to join a trade union, to participate in and benefit from collective bargaining and to enjoy working conditions that come up to health and safety standards.'[105] This text is not included in the adopted Directive, or reflected in any of the provisions of it. There is however a recital in the preamble to it that provides that the Directive 'respects the fundamental rights and observes the principles

101 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (Rapporteur: Claudio Fava), PE409.510v02-00, 27 January 2009, 32.

102 European Trade Union Confederation. 2007. ETUC position regarding European Commission's proposals on legal and 'illegal' migration, 14. Available at: http://www.etuc.org/documents (accessed on 5 November 2011).

103 Frontex, Annual Risk Analysis 2015, Warsaw: Frontex, 12.

104 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (Rapporteur: Claudio Fava), PE409.510v02-00, 27 January 2009, 25.

105 Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249, 16 May 2007, 3-4.

recognised in particular by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union.' In regard to the Charter it is stated that specifically, 'it should be applied with due respect for the freedom to conduct a business, equality before the law and the principle of non-discrimination, the right to an effective remedy and to a fair trial and the principles of legality and proportionality of criminal offences and penalties, in accordance with Articles 16, 20, 21, 47 and 49 of the Charter.'[106] Having regard to the objective of the Directive, to sanction employers of third-country nationals working while irregularly resident, and the provisions that are mentioned in particular as regards the Charter indicate that it is addressing employers rather than third-country nationals. The absence of acknowledgement of the human rights of irregularly present third-country nationals anywhere in the Directive is not surprising given the approach to irregular migrants adopted by the EU. But as Peers observes, although 'the Directive is silent on the application of labour law rules other than pay to irregular migrants, to the extent that labour law has been harmonised by EC law then it follows from the EC law principle of effectiveness as regards EC social policy that irregular migrants should be covered by the relevant legislation.' As irregular migrants are 'not expressly excluded from any EC social legislation,' reference to their rights, and their explicit inclusion within the scope of the legislation would have supported the objectives of the Directive to avoid 'unfair competition as between Member States and ensuring a high level of protection for employees.'[107]

There is nothing in the records from the negotiations for the Directive that indicates that the human rights of irregularly present third-country nationals were discussed, other than that in the report of the Parliament on the proposal the view was expressed that 'although the protection of the rights of illegally employed immigrants is not the main aim of the Commission proposal, it should nevertheless be included in the proposal's definitions.'[108] This comment was set forth in relation to the objective of the Directive stating that the 'fight against illegal immigration is a key component of the EU's strategy on immigration' and that in 'this field, the main aim of this directive should be to stop the exploitation of illegal migrants and not have the side effect of reducing possibilities for TCN to find work.' The Parliament considered that the Directive would be very useful in that sense, and therefore thought it necessary that it 'introduce measures aimed at protecting the rights of migrant workers, including illegal migrants, who have been exploited by their employers.'[109] ETUC, PICUM and Solidar in their comments concluded that the lack of recognition and implementation of human rights of migrant workers in the Directive 'contributes to the level of

106 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, recital 37.

107 Peers, S. 2009. Legislative Update: EC Immigration and Asylum Law Attracting and Deterring Labour Migration: The Blue Card and Employers Sanctions Directives, *European Journal of Migration and Law* 11, 417-418.

108 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (Rapporteur: Claudio Fava), PE409.510v02-00, 27 January 2009, 21.

109 *Ibid.*, 24.

exploitation of undocumented migrant workers,' and reiterated their opinion that respect for 'human rights can never be seen as a 'pull factor' for irregular migration.'[110] The Employers Sanctions Directive, which assumes the return of migrants who have been detected as working while irregularly present within the EU and is silent on the human rights of migrants, has been described as 'interesting' while it is a good example of the place of undocumented migrants within the police order and thus reveals 'how policies on undocumented migrants are focusing on a very specific understanding of the issue of undocumented migration.'[111]

5.8 CONCLUSIONS

The objective of the Employers Sanctions Directive is to sanction employers of irregularly resident third-country nationals who work, in order to tackle irregular migration into the EU. This approach was chosen while the availability of work is considered a major pull factor and the main reason for irregular entry. As was discussed in the above, research for example from the Clandestino project and commentaries from various actors show that in fact the issues of both irregular entry in to EU territory, and employment of irregularly resident third-country nationals are more complex than that. By choosing such a narrow focus with the Directive, which is the only EU legislative instrument that directly addresses irregular migrants working within EU Member States, and by not addressing the human rights of irregular migrants, the opportunity to tackle exploitation of irregular migrants was missed.

When the Directive was adopted, the only EU instrument in force on labour migration was the newly adopted Blue Card Directive. Taking into consideration the assumptions that third-country nationals working while irregularly present are mostly lower skilled or seasonal workers and that the availability of work is a pull factor and the most common reason for irregular entry, there was no EU wide instrument on labour migration addressing these groups in force at the time. Having regard to the fact that the Commission estimated that the population the Directive was set forth to address was between 4.5 to 8 million irregularly present third-country nationals, the approach chosen for the Directive is severely lacking as regards protection of third-country nationals. It does not provide them with access to territory or address their human rights, and while a large number of third-country nationals cannot be returned/deported judging from the statistics provided by Frontex, the Directive does little to address the vulnerability of the group of migrants that fall under its scope.

The limited protection offered to irregular migrants by the proposal for the Directive, that is back payment of remuneration and facilitation of complaints, was significantly weakened during the negotiations for the Directive. The discussion that took place during the negotiations revealed the reluctance of numerous Member

110 ETUC, PICUM and Solidar. 2007. Joint Comments on Expected Commission Proposal to Fight 'Illegal' Employment and Exploitative Working Conditions. Available at: http://picum.org/picum.org/uploads/file_/joint_comments_ETUC_PICUM_SOLIDAR_2604507_EN_final.pdf (accessed on 15 January 2012).

111 Gunnelfo, M. with Selberg, N. 2010. Discourse or Merely Noise? Regarding the Disagreement on Undocumented Migrants, *European Journal of Migration and Law* 12, 178.

States such as the Czech Republic, Finland, Greece, Hungary, Latvia, Poland and Sweden to undertake obligations to guarantee that back payment of remuneration is received by ensuring an automatic claim and resistance by Austria, Belgium, Germany, Finland, France, Hungary, Lithuania, Poland, Portugal, Slovenia and Slovakia to postpone execution of return decision until back payments were made. Interestingly, the dialogue among the Member States on the two provisions addressing protection focused largely on the administrative burdens that they created for national authorities in the Member States and whether or not the protection offered based on past employment constituted pull factors for irregular migration, rather than focusing on the protection for irregularly present third-country nationals. The Parliament in its role as a co-legislator with the Council did not manage to change the limited focus of the Directive or remedy the absence of addressing the human rights of migrants. It did however with its amendments succeed to increase somewhat the protection offered to irregular migrants in the provisions addressing back pay and complaints mechanism. However, the outcome is that the provisions under discussion here are mostly discretionary and many of their components shall be defined by national law in each of the Member States. That outcome of the negotiations does not provide for harmonization within the EU and will leave Member States, who are reluctant to address exploitation of irregularly present migrants in employment, with the competitive advantage that was one of the objectives of the Directive to eradicate.

6. The Single Permit Directive

6.1 INTRODUCTION

This chapter examines four aspects of Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, hereinafter the Single Permit Directive. Those are access to territory and access to the labour market, the right to equal treatment and the right to family reunification, including access of family members to the labour market. The purpose of the examination is to reveal how the right to equal treatment with nationals is constructed in the Directive for the third-country nationals that fall under its scope and disclose what is the right to equal treatment granted to Single Permit holders. Additionally, the status granted to Single Permit holders through access to territory and access to the labour market will be addressed in order to divulge the effect of the status granted to this group of third-country nationals under the EU's sectoral approach to labour migration, on the right to equal treatment and the right to family reunification.

The examination takes as a starting point the Commission's proposal for the Directive and outlines the discussion that took place on the four aspects listed above during the negotiations of the Directive. This discussion uncovers how the right to equal treatment was determined in the negotiations and focuses on the dialogue of the Member States within the Working Party on Migration and Expulsion (WPME), the Social Questions Working Party (SQWP), the Strategic Committee on Frontiers and Asylum (SCIFA), the Permanent Representatives Committee (Coreper) and among the Justice and Home Affair (JHA) Counsellors as well as the trilogue between the Parliament, the Council and the Commission. It will also include the opinions of the European Economic and Social Committee (EESC) as well as commentaries made by the International Labour Organization (ILO) and the European Trade Union Confederation (ETUC) on the draft proposal. To contextualize the issues discussed in this chapter, it will start by looking at the background to the Directive, its objectives, subject matter, scope and some relevant definitions.

6.2 BACKGROUND TO THE DIRECTIVE

The Proposal for the Single Permit Directive was submitted by the Commission to the Council on 23 October 2007 on the same day as that for the Blue Card Directive, and was adopted on 13 December 2011. The negotiations for it, which took a little over four years, were ongoing partially at the same time as those for the Employers Sanctions Directive, the Blue Card Directive, the Seasonal Workers Directive and the Intra-Corporate Transfer Directive. The negotiations for the Single Permit Directive were divided into two phases. In the first phase which took place before the entry into force of the Lisbon Treaty, the legal basis of the Directive which was Article 63(3)(a) TEC was challenged. This occurred during the start of the negotiations in

2008 when the Council Legal Service as well as Germany and Austria maintained that provisions of Chapter III of the proposal, draft Article 12 which addressed the rights of third-country nationals to equal treatment, went beyond the relevant legal basis provided for by Article 63(3)(a) of the TEC.[1] The Council Legal Service gave its opinion on the issue from the perspective of the beneficiaries or subjects of the Directive and in its assessment, Article 12 of the proposal applied 'to workers who are nationals of third countries who are covered by the scope of the proposal.' That scope, as defined by draft Article 3(1), included 'the nationals of third countries who *'apply'* to reside for the purpose of work in the territory of a Member State.'[2] Due to the fact that Article 12 of the proposal 'applies to categories of workers who are not, or are not yet, resident in a Member State as holders of single permits' the Legal Service considered that the proposal could not be based on Article 63(3)(a) of the EC Treaty.[3] This challenge to the legal basis brought the negotiations to a halt and they were not resumed until the coming into force of the Lisbon Treaty as consequences of which for 'ongoing inter institutional decision-making procedures' the Treaty basis for the proposed Directive changed from Article 63(3)(a) TEC to Article 79(2)(a) and (b) of the TFEU.[4] Another consequence of the entry into force of the Lisbon Treaty was a change in the legislative procedure for the adoption of the Directive from the co-decision procedure based on Article 251 TEC where the Parliament was consulted and gave its opinion on the draft Directive, to the ordinary legislative procedure set forth in Article 294 TFEU which entails qualified majority voting in the Council and the Parliament becoming a co-legislator with the Council.[5] The Single Permit Directive was the first Directive on labour migration where the Parliament enjoyed the status of co-legislator with the Council.

The Single Permit Directive was introduced on the basis of the Commission's Policy Plan on Legal Migration, as 'a general directive on the rights of third-country workers' that is, a horizontal legislation to cover rights of third-country workers at the EU level. The purpose of it was 'to serve as framework for the specific directives' that is the Blue Card, the Seasonal Workers and the Intra-Corporate Transfer Directives, while 'no horizontal legislation' would be introduced to cover all groups of labour migrants.[6] In the Commission Staff Working Document that accompanied the proposal for the Directive, it was provided that the main rationale for it was that in the absence of a general horizontal Union legislation addressing the rights of third

1 Council of the European Union, Note from Presidency to JHA Counsellors, 5 December 2008, document number: 16871/08, 3.

2 Council of the European Union, Opinion of the Legal Service, 28 January 2009, document number: 5795/09, 6.

3 *Ibid.*, 7.

4 Communication from the Commission to the European Parliament and the Council, Consequences of the Entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures, ANNEX 4, COM(2009) 665, 2 December 2009, 25.

5 *Ibid.*

6 Commission Staff Working Document accompanying document to the Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and a common set of rights for third-country workers legally residing in a Member State, Summary of the Impact Assessment, SEC(2007) 1393, 23 October 2007, 2.

country workers, their 'rights may vary significantly depending on their nationality and on the Member State in which they stay.' This situation was considered to create 'legal uncertainty for third-country workers' and put them on an unequal footing with workers whose rights have been explicitly defined.[7] As will be discussed below, one of the objectives of the proposal for the Directive was to remedy this situation. Unlike the other three EU Directives on labour migration referred to above, the Single Permit Directive was not set forth to facilitate admission of third-country nationals while it does 'not touch upon admission conditions but concentrates instead on a common set of rights to be granted to all third-country workers already legally residing in a Member State,' as well the procedural aspect of granting of a residence and work permit to third-country nationals in a 'single application procedure', to simplify administrative requirements for 'third-country workers and employers throughout the EU.'[8]

6.3 OBJECTIVES AND PURPOSE OF THE DIRECTIVE

6.3.1 Objectives

In the explanatory memorandum to the proposal it was explained that the Directive has a twofold objective. Firstly, to provide for a single application procedure for third- country nationals seeking to enter the territory of a Member State to work, and establish that if granted the permit to stay and work, the permit should be issued in a single act. In relation to this, it articulated 'a general obligation for Member States to provide for a 'one stop shop' system and to comply with certain safeguards and standards when handling the application,' and provided for a general prohibition on additional permits.[9] Secondly, the objective was to 'grant rights to third-country nationals legally working in the territory of a Member State by defining fields, in particular related to employment, where equal treatment with nationals of Member States should be provided. Furthermore, it provided that 'equal treatment with own nationals in principle would apply to all third-country workers legally residing and not yet holding long-term resident status.'[10] This was referred to as 'addressing the rights gap' between third-country workers and Member State nationals and was seen to have a twofold effect. Firstly, that granting 'employment-related rights' to third-country workers 'comparable to own nationals,' recognizes that third-country workers contribute to the European economy through their work and tax payments.[11] Secondly, it was considered to have the effect to 'help reduce unfair competition emanating from this rights gap, thus serving as a safeguard for EU citizens by protecting them from cheap

7 *Ibid.*, 2-3.

8 Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638, 23 October 2007, 3.

9 *Ibid.*, 6.

10 *Ibid.*

11 *Ibid.*, 3.

labour and migrants from exploitation.' In addition, granting a common set of rights in Union law was to create a level playing field within the EU for all third-country nationals legally working, irrespective of the Member State in which they stay.[12] In relation to this objective, it was provided that if the Member States act alone there is a risk that differences in treatment of third-country nationals in different Member States will be maintained. This was considered to possibly leading 'to distortion of competition within the single market' and that it might result in secondary movements of third-country nationals to those Member States which grant more rights than others.[13]

The impact assessment accompanying the proposal for the Directive addressed in particular the policy objectives of the rights aspects of the Directive. Therein it is stated that one of the 'global policy objectives' is to respond to 'the request first expressed in Tampere to grant comparable rights, establishing the principle of equal treatment for third-country workers across the EU, improving the functioning of the EU labour market and protecting Union citizen workers from unfair competition in the labour market.'[14] Among the 'specific and operational objectives' of the proposed Directive were to 'have a common understanding at EU level of the group of third-country worker that legally resides in the EU but has not yet acquired long-term resident status,' and to 'determine a set of rights' for them.[15] In relation to these objectives, the question was raised in the impact assessment of 'how far EU intervention should go' in respect to the rights gap in the Member States between third-country workers and other workers. But the rights gap was stated to be 'most pronounced in access to labour market, access to social security (especially, unemployment benefits, family benefits, and social assistance), the possibility of transfer of pension savings and restitution of security benefits, access to public services (access to placement services and to other public services, including public housing).'[16] The draft Directive addressed all of the above except access to the labour market. Interestingly in relation to the stated goal to 'determine a set of rights' for third-country nationals falling under the scope of the Directive, it is provided that the proposal 'grants rights through equal treatment in employment related fields as a minimum requirement,' and 'does not interfere with Member States' right to define the content of the actual rights,'[17] which seems inconsistent with the goal to grant a common set of rights to third-country nationals across the EU based on the Directive.

12 *Ibid.*

13 *Ibid.*, 7.

14 Commission Staff Working Document accompanying document to the Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and a common set of rights for third-country workers legally residing in a Member State, Summary of the Impact Assessment, SEC(2007) 1393, 23 October 2007, 3-4.

15 *Ibid.*, 3-4.

16 *Ibid.*, 4.

17 Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638, 23 October 2007, 7.

6.3.2 Purpose

Draft Article 1 of the proposal[18] provided that the purpose of the Directive was firstly to determine a single application procedure for issuing a single permit for third-country nationals to reside and work in the territory of a Member State, in order to simplify their admission and facilitate the control of their status. Secondly, to determine a common set of rights to third-country workers legally residing in a Member State.

During the preliminary exchange of views on the proposal in the Working Party on Migration and Expulsion (WPME), Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Hungary, Malta, Slovakia, Austria and Poland entered a scrutiny reservation to the entire proposal and Austria entered a reservation on Article 1.[19] In relation to the purpose of the Directive, Germany and Poland wanted it clarified in the provision that the proposal 'does not affect the competence of the Member States with respect to the access of third-country nationals to the labour market.'[20] To address the request of Germany and Poland for clarification, the Presidency suggested in a note to the WPME to add a recital to the preamble of the Directive that provided that the 'provisions in this Directive are without prejudice to the competence of Member States to define admission criteria or to determine volumes of admission for third-country nationals for the purpose of employment.'[21] While discussing this compromise proposal of the Presidency in the WPME, Austria maintained its reservation on draft Article 1 and Germany 'felt that the wording of the recital should be further considered.' Austria wanted an additional condition added to the recital, so that a 'reference to the labour market test should be included in the recital.'[22] In the adopted Directive the clause on the competence of the Member State to determine access to the labour market is both included in the preamble as well as a special provision of Article 1, stipulating that the Directive 'is without prejudice to the Member States' powers concerning the admission of third-country nationals to their labour market.'[23] It will emerge during the discussion provided in this chapter that this is one of several provisions in the Directive that address the power of Member States to

18 All references to 'proposal for the Directive', 'the proposal' and 'draft Article' in this chapter are to Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638, 23 October 2007.

19 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 5 March 2008, document number: 6212/08, 4.

20 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 2.

21 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 22 July 2008, document number: 12054/08, 2.

22 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 2 October 2008, document number: 12342/08, 2.

23 Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, Recital 6 and Article 1(2).

determine the number of persons admitted to their territory on the basis of the Directive.

6.4 DEFINITIONS AND SCOPE

6.4.1 Definition of Third-country Worker

Draft Article 2(b) provided for a definition of third-country worker in which it was stated to mean any third-country national who has been admitted to the territory of a Member State and is allowed to work legally in that Member State.

In the discussion in the WPME, the definition was considered too broad and the Netherlands wanted the definition only to include persons who have been admitted to the territory of a Member State for work. The Commission was opposed to this, while the objective of the proposal was to confer a series of rights on the third-country nationals falling within its scope, irrespective of the initial reasons for which they entered the territory of a Member State.[24] Germany, supported by Austria, suggested that it be clarified that the provision only refers to 'employed persons' and that 'self-employed persons are excluded from its scope,' and in order to achieve that suggested adding to the definition that the person is allowed to work in an 'employment relationship.'[25] With regard to this, the Commission expressed its view that the 'word *work* was exclusively intended to refer to employed persons'[26] and did not oppose to clarifying the provision. The Presidency proposed a change to the Article to this effect which made reference to 'work legally in the context of an employment relationship'[27] and 'paid relationship under national law.'[28] In the adopted Directive, the definition provides that a 'third-country worker' means a third-country national who has been admitted to the territory of a Member State and who is legally residing and is allowed to work in the context of a paid relationship in that Member State in accordance with national law and practice,[29] thereby excluding self-employed persons from the definition without explicitly providing that in the provision and also making the definition of a 'third-country worker' dependent on national law in each of the Member States.

24 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 5 March 2008, document number: 6212/08, 5.
25 *Ibid.*
26 *Ibid.*
27 Council of the European Union, Note from the Presidency to Working Party on Migration and Expulsion, 13 October 2008, document number: 14002/08, 2.
28 Council of the European Union, Note from the Presidency to JHA Counsellors, 15 December 2008, document number: 16871/08, 2.
29 See Article 2(b) of the Directive in the Annex to Chapter 6.

6.4.2 Definition of a Single Permit

The definition of a single permit was given in draft Article 2(c) of the proposal, where it was established as meaning any authorisation issued by the authorities of a Member State allowing a third-country national to stay and work legally in its territory. In the discussion in the WPME, the Czech Republic provided that it 'considered this definition too broad, insofar as it refers to any authorisation,' and expressed the view that the 'definition should be redrafted in the sense that the person concerned has been authorised to reside and work in the Member States.'[30] In a compromise suggestion from the Presidency addressing this, the provision was changed so that it referred to 'any residence permit issued by the authorities of a Member State allowing a third-country national to reside legally in this territory for the purpose of work.'[31] This formulation was accepted and is in Article 2(c) of the adopted Directive.[32] In a Communication to the Parliament the Commission provided an explanation of the consequences of this change in the provision and concluded that by replacing the reference to 'any authorisation' with 'a residence permit' in Article 2(c), the common position allows Member States to keep their long-term visa system. Furthermore, that the 'Commission's objective with the proposal was to have the single permit as the exclusive authorisation to work, but given the developments in that field (Regulation 265/2010 Article 1(1)(2) limits the duration of long-term visas to a year and recognises such documents for travel purposes within the Schengen area in the EU), the Commission can agree to allow Member States to issue long-term visas parallel to single permits, provided the existence of long-term visas would not result in a difference of rights for migrant workers holding such a paper.'[33] The issue raised here by the Commission, that a person can work on a visa for one year and not enjoy the rights of a single permit holder, will come up with regard to some of the specific provisions of the Directive in the discussion below.

6.4.3 Scope

The scope of the Directive was set forth in draft Article 3, which provided that it shall apply to third-country workers seeking to reside and work in the territory of a Member State, and third-country workers legally residing in a Member State. Excluded from the scope were third-country nationals who are: family members of

30 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 5 March 2008, document number: 6212/08, 6.

31 Council of the European Union, Note from the Presidency to Working Party on Migration and Expulsion, 13 October 2008, document number: 14002/08, 3.

32 See Article 2(c) of the Directive in the Annex to Chapter 6.

33 Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the Position of the Council on the adoption of a Directive of the European Parliament and the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2011) 832, 25 November 2011, 3-4.

Union citizens who have exercised, or are exercising the right to free movement within the Union; covered by Directive 96/71/EC; entering a Member State under commitments contained in an international agreement facilitating the entry and temporary stay of certain categories of trade and investment-related natural persons in particular to intra-corporate transferees, contractual service suppliers and graduate trainees under the EU's GATS commitments; who have been admitted to the territory of a Member State for a period not exceeding six months in any twelve month period to work on a seasonal basis; who have applied for recognition as refugees and whose application has not yet given rise to a final decision; who are staying in a Member State as applicants for international protection or under temporary protection schemes; who have acquired long-term resident status in accordance with Directive 2003/109/EC; and whose expulsion has been suspended for reasons of fact or law.

During the discussion on the draft Article in the WPME, the Netherlands provided the opinion that the scope should be restricted to persons who have come for the purpose of work, and exclude those who were admitted for other purposes, such as refugees and family members, but were granted access to the labour market. In response to this, the Commission pointed out 'that the objective of the proposal is to create a horizontal framework, guaranteeing a minimum set of rights to all third-country workers irrespective of the reasons for their initial admission.'[34] Additionally, in a reply to a query from Germany, the Commission provided 'that third-country nationals who are already in the territory of a Member State may also apply for a single permit, if the Member State concerned allows them to submit the application.'[35] No changes were made to the draft Article based on the comments from the Netherlands, the concern it raised as regards refugees was however addressed later on in the negotiations when the definitions of the groups excluded were refined more clearly so as to ensure that the scope of the Directive excludes persons that enjoy any type of international or national protection.

Several additions were also made to exclude groups from the scope during the negotiations, which in the WPME focused mostly on short term workers. As regards seasonal workers, Italy was of the opinion that they should not be excluded from the scope, but the Netherlands, the Czech Republic, Estonia, Finland, Latvia and Austria 'felt that not only seasonal workers, but other categories of third-country nationals who stay on a temporary basis should be excluded from the scope of the proposal as well.' The reasoning for the suggestion given by Germany and supported by Belgium and Greece was that the groups of those excluded from the scope of the Directive should be aligned with those excluded from the scope of the Long-Term Residents Directive.[36] The Commission agreed that this should be considered further but 'drew attention to the need to examine this question with special caution, in order not to weaken the legal status of the persons concerned.' In its view, excluding all the cases of temporary stay might risk jeopardizing the objective of this horizontal instru-

34 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 5 March 2008, document number: 6212/08, 7.

35 *Ibid.*

36 *Ibid.*, 9.

ment.[37] In a follow up discussion, Germany addressed the suggestion to exclude all short term stays from the scope of the Directive and along with Austria proposed to take the Long Term Residents Directive as a model and exclude third-country nationals who reside solely on temporary grounds such as au pairs or seasonal workers, or cases where their residence permit has been formally limited. With regard to this, the Commission 'pointed out that it would oppose an approach consisting of a general exclusion of temporary stays from the scope of the proposal or in making recourse to the method of the long-term residents Directive, which is an enumerative one and therefore not specific enough.'[38] In a compromise suggested by the Presidency those 'who have been authorised to work on the territory of a Member State for a period not exceeding six months'[39] were added to the list of groups that fall outside the scope of the Directive. This was however deleted again but in the trilogue between the Parliament, the Council and the Commission, the Parliament and the Council agreed to add to the list of those excluded from the scope, seasonal workers, without any reference to length of stay as in the proposal and au pairs. Other groups that were excluded from the scope[40] are intra-corporate transferees, beneficiaries of international protection, beneficiaries of protection in accordance with national law, self-employed persons, seafarers and those who work in any capacity on board a ship registered or sailing under the flag of a Member State and persons, and their family members, who enjoy freedom of movement equivalent to those of Union Citizens.[41]

In a compromise suggestion from the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), a new provision was added to draft Article 3 that provided that Chapter II of the Directive, on single application procedure and single permit, shall not apply to third-country nationals who have been authorised to work on the territory of a Member State for a period not exceeding six months.[42] In a follow up discussion on the proposed addition in the WPME, Belgium, Bulgaria, Germany, Estonia, Greece, Spain, Finland, Italy, the Netherlands, Portugal, Slovenia and Slovakia made a scrutiny reservation and Portugal noted that this should be a reference to the Directive as a whole and apply to those who have been admitted on the basis of a long-term visa.[43] In a meeting of the Permanent Representatives Committee (Coreper), Portugal suggested deleting this provision while the Netherlands suggested adding third-country nationals who have been admitted

37 *Ibid.*

38 Council of the European Union, Outcome of Proceedings of Strategic Committee on Immigration, Frontiers and Asylum, 13 October 2008, document number: 13969/08, 5.

39 Council of the European Union, Note from Presidency to the Working Party on Migration and Expulsion, 13 October 2008, document number: 14002/08, 4.

40 See Article 3(2) of the Directive in the Annex to Chapter 6.

41 Council of the European Union, Note from Presidency to Permanent Representatives Committee, 2 May 2011, document number: 9186/11, 24-27.

42 Council of the European Union, Note from Presidency to the Strategic Committee on Immigration, Frontiers and Asylum, 23 October 2008, document number: 14665/08, 3.

43 Council of the European Union, Outcome of proceedings of Working Party on Migration and Expulsion and Strategic Committee on Immigration, Frontiers and Asylum, 29 October 2008, document number: 13668/08, 6.

for the purpose of study to those excluded by this provision.[44] During the trilogue, the Parliament and the Council agreed to a discretionary clause[45] that provides that Member States may decide that Chapter II of the Directive does not apply to third-country nationals who have been either authorised to work in a Member State for a period not exceeding three months or admitted for the purpose of study and a mandatory provision[46] stating that Chapter II shall not apply to third-country nationals who are authorised to work on the basis of a visa.[47]

In another discussion on this provision among the JHA Counsellors, the Czech Republic suggested adding Article 12 on the right to equal treatment with nationals of the Member State where the single permit has been granted to this exclusion so that it would not apply to those who are granted a permit for less than six months. The suggestion was supported by Bulgaria, Cyprus and Finland but opposed by Belgium, France, Italy, Luxembourg, the Netherlands, Poland, Portugal, Sweden and Slovenia as well as the Commission,[48] and was not adopted. Several Member States, namely, Austria, Bulgaria, the Czech Republic, Finland, Hungary, Lithuania and Malta 'according to which the proposal should have a more limited scope, maintained reservations on Article 3,'[49] towards the end of the negotiations.

6.5 ACCESS TO TERRITORY AND ACCESS TO THE LABOUR MARKET

Access to the territory of a Member State and access to the labour market are intertwined in the proposal while there is no access to the labour market independent from access to territory. The Articles that address access to territory, under Chapter II of the draft Directive, are draft Article 4 on the single application procedure, draft Article 8 on remedies, and draft Article 11 on rights on basis of the single permit. These draft Articles will be discussed in this section.

6.5.1 Single Application Procedure

Draft Article 4 of the proposal laid out the rules regarding the submission and handling of an application to reside and work in a Member State under the Directive. It provided that those shall be submitted in a single application procedure which the Member States shall examine and adopt a decision to grant, to modify, to withdraw or to renew the single permit if the applicant fulfils the requirements specified in national law. Furthermore, the decision granting, modifying or renewing the single per-

44 Council of the European Union, Note from General Secretariat of the Council to Council, 21 November 2008, document number: 16065/08, 5.
45 See Article 3(3) of the Directive in the Annex to Chapter 6.
46 See Article 3(4) of the Directive in the Annex to Chapter 6.
47 Council of the European Union, Note from Presidency to JHA Counsellors, 12 November 1010, document number: 15657/10, 31.
48 Council of the European Union, Report from the Presidency to JHA Counsellors, 23 February 2010, document number: 6492/10, 13.
49 *Ibid*., 11.

mit shall constitute one combined title encompassing both residence and work permit within one administrative act.

In the discussion in the WPME, the Netherlands made a reservation to the entire Chapter II and Austria, Slovakia and Belgium a reservation to draft Article 4. In the discussion on the provision Germany wanted to have it clarified that the procedure for the recognition of professional qualifications should be independent from that required for processing the application and Greece suggested to include a reference to the fact that the person concerned should comply with visa requirements.[50] Belgium expressed the view that it is not clear from the draft Article who has to submit the application, the person concerned or his/her employer, in response to which the Commission explained that this 'was done intentionally, since in its view it is up to the Member States to decide who will submit the application.'[51] On the same issue the Commission explained in relation to a query from Sweden 'that it is possible to submit an application before entering the territory of the Member State concerned.'[52] In a follow up to this discussion the Presidency sent a compromise suggestion to the WPME to add to the provision that an application for a single permit, 'may be examined either when the third-country national concerned is residing outside the territory of the Member State to which he/she wishes to be admitted or when he/she is already legally residing in that Member State.'[53] The Parliament made an amendment to the draft Article to the same effect,'[54] and these changes were accepted by the Member States who can decide whether to permit an application to be made by the third-country national, the employer or both of them, and to permit an application to be made while the third-country national is legally within the territory of the Member State, if provided for by national law.[55] The Parliament also suggested an addition to the draft Article which provided that 'Member States shall issue a single permit, when the conditions provided for are met, to those third-country nationals who apply for admission, and to those third-country nationals already admitted and who apply to renew or modify their residence permit after the entry into force of the national implementing provisions.'[56] This amendment was accepted and is found in Article 4(4) of the adopted Directive.[57]

50 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 9.

51 *Ibid.*

52 *Ibid.*

53 Council of the European Union, Note from the Presidency to Working Party on Migration and Expulsion, 13 October 2008, document number: 14002/08, 5.

54 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council 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 a common set of rights for third-country workers legally residing in a Member State (Rapporteur: Véronique Mathieu), PE439. 363v02-00, 5 October 2010, 22.

55 See Article 4(1) of the Directive in the Annex to Chapter 6.

56 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council 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 a common set of rights for third-country workers legally residing in a Member State (Rapporteur: Véronique Mathieu), PE439. 363v02-00, 5 October 2010, 23.

57 See Article 4(4) of the Directive in the Annex to Chapter 6.

6.5.2 Procedural Guarantees

The proposal for the Directive did not include any provisions that provided for criteria as regards rejection, withdrawal or non-renewal of a single permit and none were added during the negotiations, but these are to be determined by national law in accordance with Article 4(4) of the Directive discussed above. Draft Article 8 of the proposal however addressed procedural guarantees regarding the application for a permit, and renewal, non-renewal and rejection thereof. It provided firstly, that reasons shall be given in the written notification for a decision rejecting the application, not granting, not modifying or not renewing, suspending or withdrawing the single permit on the basis of criteria specified in national or community law. Secondly, that any decision rejecting the application, not granting, modifying or renewing, suspending or withdrawing a single permit shall be open to challenge before the courts of the Member State concerned and the written notification shall specify the possible redress procedures available and the time-limit for taking action.

In the examination of the WPME of the draft Article, which title was changed to 'procedural guarantees' during the negotiations, Germany entered a reservation on the draft Article as a whole and the Czech Republic, Hungary, Malta, Austria and Sweden entered reservations on the second provision while they wanted it to be up to the Member States to decide which authorities were competent to consider cases of appeal.[58] An amendment made by the Parliament to the draft Article that provided that the written notification 'shall specify the court or administrative authority where the appeal is to be lodged and the time-limit for so doing,' addressed this concern of the Member States.[59] This amendment was accepted by the Council,[60] and the draft Article amended accordingly.[61] A suggestion from the European Economic and Social Committee (EESC) which provided that the administrative decision rejecting a renewal, suspending or withdrawing a single permit should be postponed until the judgment in a legal challenge is final,[62] was however not accepted. The guarantees provided by this provision, while drafted broadly and giving Member States comfortable margins of manoeuvre, have been considered important because of the frame that they provide but that they 'will not ease the harmonisation process, and will cer-

58 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 13.

59 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council 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 a common set of rights for third-country workers legally residing in a Member State (Rapporteur: Véronique Mathieu), PE439. 363v02-00, 5 October 2010, 26.

60 Council of the European Union, Note from Presidency to the Working Party on Migration and Expulsion, 13 October 2008, document number: 14002/08, 8.

61 See Article 8(2) of the Directive in the Annex to Chapter 6.

62 European Economic and Social Committee, Opinion on the Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, SOC/307, 9 July 2008, paragraph 4.13.

tainly lead to divergences in the interpretation and implementation of the Directive.'[63] Furthermore, the provision has been criticized for not going far enough to ensure fair treatment 'as regards issues such as access to employment and grounds for the non-renewal of permits.' In particular while 'there is no provision on expanded access to employment after a certain period of lawful employment, or limited grounds for expulsion for the person concerned or a right to renewal of work permit.'[64]

The adopted Directive contains a new provision of Article 8 which stipulates that an application may be considered as inadmissible on the grounds of volumes of admissions of third-country nationals coming for employment and, on that basis, need not be processed.[65] This was put forth as a compromise suggestion by the Presidency in a note to the WPME[66] without the issue of volumes of admissions being discussed there in relation to draft Article 8. This additional provision corresponds to the power of Member States to decide on admissions of third-country nationals to their labour market provided for in Article 79(5) of the TFEU as well as in Article 1 of the Directive, an addition that was suggested by the Parliament as an amendment to the proposal.[67] In a statement of the Council's reasons on the position at first reading with a view to the adoption of the Directive, the Council stated its position with regard to this additional provision, that it 'specifically set out that Member States have the possibility to declare an application inadmissible on the grounds of volumes of admission in which case the application does not have to be processed.'[68]

6.5.3 Rights on the Basis of the Single Permit

Draft Article 11 of the proposal on rights on the basis of the single permit provided that the permit holder is as a minimum entitled to enter, re-enter and stay in the territory of the Member State issuing the single permit and passage through other Member States in order to exercise those rights. Furthermore, to have free access to the entire territory of the Member State issuing the single permit within the limits provided for by national legislation for reasons of security, to exercise the activities authorized under the single permit and to be informed about his/her own rights linked to the permit conferred by the Directive or by national legislation.

63 Pascouau, Y. and McLoughlin, S. 2012. *Policy Brief, EU Single Permit Directive: a small step forward in EU migration policy*. Brussels: European Policy Centre, 3.

64 Peers, S., Guild, E., Acosta Arcarazo, D., Groenendijk, K., Moreno-Lax, V. (eds) 2012. *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Volume 2: EU Immigration Law*. Leiden – Boston: Martinus Nijhoff Publishers, 229.

65 See Article 8(3) of the Directive in the Annex to Chapter 6.

66 Council of the European Union, Note from Presidency to the Working Party on Migration and Expulsion, 13 October 2008, document number: 14002/08, 7.

67 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council 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 a common set of rights for third-country workers legally residing in a Member State (Rapporteur: Véronique Mathieu), PE439. 363v02-00, 5 October 2010, 27.

68 Council of the European Union, Statement of the Council's Reasons, 25 November 2011, document number: 13036/3/11 REV 3 ADD 1, 6.

This provision changed considerably during the negotiations in the WPME. Firstly, while the right of single permit holders to pass through other Member States was deleted at Spain's suggestion while all Member States did 'not yet apply the Schengen acquis in full.'[69] Secondly, the right to exercise the activities authorized under the single permit was more narrowly defined. In relation to this, Germany suggested amending the provision so that it would provide for the right to 'exercise the concrete employment authorised under the single permit in the framework of national law.'[70] As a follow up to that proposition, the Presidency suggested in a note to the WPME to change the wording to provide for the right to 'exercise the employment activity authorised under the single permit.'[71] When discussing these alternative proposals, Sweden maintained a reservation on the provision and Germany insisted on having a reference to national law, as did Austria who agreed on the wording Germany had proposed.[72] The wording of the provision in the adopted Directive is based on the suggestions made by Germany and Austria and provides for the right to exercise the 'specific employment activity' authorised under the single permit in accordance with national law.[73] This change in wording of the provision provides for a narrower interpretation of the right to exercise employment activity than provided for by the proposal. It can be interpreted so as to restrict the employment of a third-country national to the specific employer the permit was granted for, and in any case always based on the national law in force in each of the Member States.

The restrictive approach taken by the Member States concerning this provision is interesting when compared to the amendments the Parliament made to it. In its comments on the proposal the Parliament suggested to add to draft Article 11 that 'Member States shall ensure that holders of single permits have the right to change employers, in the event that their contract is terminated for reasons independent of the employee's will.' Additionally, that in the case of a 'conflict between the employee and the employer, the holder of a single permit shall have the right to remain on EU territory for as long as necessary in order to finalize all legal issues involved.'[74] The Parliament made two other suggestions for amendments that would have greatly improved the rights of third-country nationals as regards access to the territory of not only the Member State they are working in, but the whole of the Union and their access to the labour market. The first of these amendments addressed temporary unemployment and suggested that unemployment 'in itself shall not constitute a reason for revoking a permit, unless the period of unemployment exceeds six consecutive months.' Furthermore, that during 'this period, third-country nationals shall be allowed to seek and take up employment, enjoying the same assistance in finding an em-

69 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 15.

70 *Ibid.*

71 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 22 July 2008, document number: 12054/08, 7.

72 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 2 October 2008, document number: 12342/08, 10.

73 See Article 11(c) of the Directive in the Annex to Chapter 6.

74 Council of the European Union, Note from Presidency to JHA Counsellors, 29 April 2010, document number: 9192/10, 35.

ployment as provided for citizens of that Member State.'[75] The second amendment relates to renewal of a single permit and suggests that at the end of the period of validity of the single permit, Member States may upon application grant a residence permit of a maximum duration of six months for the purpose of seeking employment. Additionally, that during this period third country workers shall enjoy the same assistance in finding employment as provided for citizens of that Member State.[76] None of these amendments suggested by the Parliament were accepted by the Council.

6.6 RIGHT TO EQUAL TREATMENT

The right to equal treatment for single permit holders was addressed in draft Article 12. It provided that third-country workers shall enjoy equal treatment with nationals at least with regard to working conditions, including pay and dismissal as well as health and safety at the workplace; freedom of association and affiliation and membership of an organization representing workers or employers; education and vocational training; recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures; branches of social security; payment of acquired pensions when moving to a third country; tax benefits; and access to goods and services and the supply of goods and services made available to the public including procedures for obtaining housing and the assistance afforded by employment offices. Additionally, it stipulated that Member States may restrict equal treatment with nationals in several ways: firstly, by requiring proof of appropriate language proficiency for access to education and training, that access to university may be subject to the fulfilment of specific educational prerequisites and by restricting the right to equal treatment to education in respect to study grants; secondly, by restricting the right to equal treatment as regards housing in respect to public housing to cases where the third-country national has been staying or has the right to stay in its territory for at least three years; thirdly, by restricting the right to equal treatment as regards working conditions, freedom of association and to tax benefits to those third-country workers who are in employment and fourthly, by restricting equal treatment to branches of social security to third-country workers who are in employment except for unemployment benefits.

During the first discussion on draft Article 12 in the WPME, Austria, Finland, Greece, Hungary, Malta, the Netherlands and Poland entered scrutiny reservations on it and Greece questioned 'why, under this proposal the third-country nationals concerned may be entitled to a series of rights which should be only granted to persons who have acquired long term resident status.'[77] In relation to these views the Presidency sent a note to the Social Questions Working Party (SQWP) asking it to address two questions. Firstly, 'what rights should the immigrant workers from the third

75 *Ibid*., 37.
76 *Ibid*., 36.
77 Council of the European Union, Outcome of Proceedings, working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 16.

countries, covered by Art. 12, be entitled to from the first moment of their stay in the EU, taking into account the personal scope of the proposal?' Secondly, is 'it proportionate at this stage to grant this large category full access from the first moment of stay, or should the range of rights be more aligned to the lengths of the stay or should their rights be ruled otherwise?'[78] In response to this, the SQWP provided that Austria, Spain, Sweden, Poland and Slovakia stated that they were in favour of granting the same rights to third- country workers as EU nationals 'under Article 12 as from the first moment of their legal residence in a hosting Member State as any system operating on the basis of the length of the residence would be too burdensome from an administrative point of view.'[79] The question was however not discussed in relation to the principle of equal treatment based on nationality. While participating in the discussion in the SQWP, the Commission stressed that the proposal 'did not, in itself, grant any new social security rights for third-country workers but rather aimed at providing for equal treatment, as compared with EU nationals, as far as the existing rights were concerned and as from the first day of their legal residence in the hosting Member State.'[80]

6.6.1 Working Conditions and Freedom of Association

During the discussion in the WPME on the provision on working conditions and freedom of association, the Netherlands 'queried if there is any provision in this Article which sets lower standards vis-à-vis those provided for in the relevant international instruments (European Convention on the Legal Status of Migrant Workers, ILO Migrant Workers Convention, European Social Charter).'[81] In response to this the Commission 'pointed out that the provisions of those applicable instruments of international law on the rights of migrant workers have been taken into account when drafting this proposal,' and that more favourable provisions should serve the purpose of guaranteeing that standards already set are kept.[82] This response by the Commission to the query from the Netherlands is noteworthy seeing that draft Article 12 granted Member States the discretion not to grant equal treatment as regards working conditions and freedom of association to workers who are not in employment. In the WPME, Portugal supported by Sweden expressed the opinion that no restrictions should be introduced on working conditions but Germany opposed the suggestion. To address the concerns of Portugal and Sweden, the Commission and the Presidency suggested envisaging a recital which would clarify that all the relevant restrictions should be applied in accordance with Union law and its principles such as the principle of non-discrimination, as well as in accordance with international obliga-

78 Council of the European Union, Note from the Presidency to Social Questions Working Party, 7 January 2009, document number: 5082/09, 4.

79 Council of the European Union, Outcome of proceedings from the Social Questions Working Party, 22 January 2009, document number: 5521/09, 5.

80 *Ibid.*

81 Council of the European Union, Outcome of Proceedings, working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 16.

82 *Ibid.*

tions and commitments.[83] As regards freedom of association, Germany, supported by Portugal and Sweden felt that this restriction should be deleted, 'insofar as the rights concerned are granted under the relevant ILO Convention and their exercise may not be the subject of limitations,' and the Commission agreed with the suggestion.[84] No such considerations were brought up however as regards working conditions in the WPME.

The Parliament in its amendment on the draft Article proposed deleting the permission for derogation with respect to both working conditions and freedom of association,[85] as did the EESC that stated its concern at, and disagreement with the possibility of the Directive to allow Member States to restrict the right to equal treatment, in relation to working conditions and as regards freedom of association. In its opinion such restrictions 'could contravene the principle of non-discrimination.'[86] The European Trade Union Confederation (ETUC) in its opinion on the proposal explicitly denounced the possibility for Member States to limit the right to equal treatment pertaining to working conditions and freedom of association to workers 'who are in employment'. Stating that this 'limitation is highly questionable from an international fundamental rights perspective,' that it does 'not exist in the long-term residents directive and raises several questions for instance about the protection of workers when applying for a job and being in the recruitment process,' and about their 'protection in, for instance, a dispute about dismissal that takes place after they have already lost their job.'[87] The permission to restrict the right to equal treatment as regards freedom of association was deleted in a compromise suggestion from the Presidency to the WPME,[88] and in a compromise suggestion sent by the Presidency to the SCIFA, the permission to restrict equal treatment as regards working conditions had been deleted from the draft proposal.[89] The adopted Directive therefore does not include a permission to derogate from the principle of equal treatment with nationals concerning working conditions and freedom of association.

83 Council of the European Union, Outcome of Proceedings of Strategic Committee on Immigration, Frontiers and Asylum, 13 October 2008, document number: 13969/08, 14.

84 Council of the European Union, Outcome of Proceedings, working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 19.

85 European Parliament, Report on the proposal for a Council directive on 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 (Rapporteur: Patrick Gaubert), PE409.737v03-00, 7 November 2008, 23.

86 European Economic and Social Committee, Opinion on the Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, SOC/307, 9 July 2008, paragraph 4.11.

87 European Trade Union Confederation. 2007. Annexes: ETUC position regarding European Commission proposals on legal and 'illegal migration', 12. Available at: https://www.etuc.org/documents/etuc-position-regarding-european-commission%E2%80%99s-proposals-legal-and-%E2%80%98illegal%E2%80%99-migration#.VjAGN7cveH (accessed on 15 January 2012).

88 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 22 July 2008, document number: 12054/08, 9.

89 Council of the European Union, Note from the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum, 23 October 2008, document number: 14665/08, 6.

6.6.2 Education and Vocational Training

While discussing the right to equal treatment in relation to education and vocational training in the WPME, Hungary, Lithuania, Austria and Poland entered a reservation to the provision and Hungary suggested 'deleting the word *education*,' from the provision.[90] The Parliament wanted to amend the provision so that it would address 'education in the broad sense of the term (language learning and cultural familiarisation with a view to improving integration) and vocational training.'[91] Neither the suggestion of Hungary nor the Parliament were considered during the negotiations but two specific suggestions made by France and Germany to restrict access to education were taken up. Firstly, in relation to access to education, France suggested that conditions for access to education were set as 'requiring proof of a satisfactory language proficiency in relation with the training proposed.' Moreover, access to university or to vocational training may be subject to the fulfilment of specific educational prerequisites.[92] The formulation of the provision based on the suggestion of France was changed several times during the negotiations and in the end an agreement was reached on a provision that permits Member States to lay down conditions in accordance with national law, for example as regards language proficiency and tuition fees, but not limited to those, with respect to access to university and post-secondary education and vocational training, which is not directly linked to the specific employment activity of the single permit holder.[93] Germany's suggestion was to restrict access to higher education in general,[94] to which the Commission responded that the suggestion was a legitimate one, 'insofar as the personal scope of the proposal is designed in a way to include students, if they work, and needs to be further considered.'[95] To address Germany's concerns, the Presidency made a proposition in a compromise proposal to restrict access to education and vocational training to 'those third-country workers who are in employment',[96] and to exclude those who have been admitted under Directive 2004/114/EC,[97] from enjoying equal treatment as regards the Direc-

90 Council of the European Union, Outcome of Proceedings, working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 17.

91 European Parliament, Report on the proposal for a Council directive on 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 (Rapporteur: Patrick Gaubert), PE409.737v03-00, 7 November 2008, 20.

92 Council of the European Union, Outcome of Proceedings, working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 18.

93 See Article 12(2)(a)(iv) of the Directive in the Annex to Chapter 6.

94 Council of the European Union, Outcome of Proceedings, working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 19.

95 *Ibid.*

96 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 22 July 2008, document number 12054/08, 9.

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

tive's provision on education.[98] This amendment was accepted and along with this restriction,[99] the adopted Directive provides that access to education cannot be restricted to those who are in employment, have been employed or are registered as unemployed,[100] an amendment that was made at the insistence of the Parliament.[101]

6.6.3 Branches of Social Security

As regards the right to equal treatment to branches of social security, Germany, Spain, Finland, France, Hungary, Italy, Lithuania, Austria and Poland 'entered scrutiny reservations on the provision and suggested using the wording of the corresponding provision contained in the Blue Card proposal.'[102] That suggestion was not taken up and the discussion on the draft provision focused mostly on the permission to restrict equal treatment to social security, except for unemployment benefits, to third-country workers who are in employment and on family benefits.

6.6.3.1 Restriction on Equal Treatment to Social Security to Those in Employment

Having regard to the reservations the Member States made to the provision in the WPME, the SQWP was asked by the Presidency to give its opinion on the proposed permission for restriction of rights to social security to third-country workers in employment and regarding the extent to which the Directive should 'regulate social security rights and in particular access to unemployment benefits of the third-country workers who lost employment within a MS?'[103] In the discussion in the SQWP, Austria 'felt that it would be preferable to exclude unemployment benefits from the scope of the social security rights while Poland, Portugal and Slovakia considered that the situation of the unemployed person, rather than his/her nationality, would be the determining factor as the principle of equal treatment would apply.' In relation to this, Sweden recommended that the rights granted under Article 12 be extended further as in the Blue Card Directive.[104] The SQWP suggested revising the provision 'in order to make the right to unemployment benefits conditional upon previous employment,' and providing that Member States may restrict equal treatment with nationals by granting the rights to social security with the exception of unemployment

98 Council of the European Union, Note from the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), 29 September 2008, document number: 13623/08, 6.

99 See Article 12(2)(a)(ii) of the Directive in the Annex to Chapter 6.

100 See Article 12(2)(a)(i) of the Directive in the Annex to Chapter 6.

101 Council of the European Union, Note from General Secretariat to Permanent Representatives Committee/Council, 29 March 2011, document number: 8130/11, 15.

102 Council of the European Union, Outcome of Proceedings, working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 17.

103 Council of the European Union, Note from the Presidency to Social Questions Working Party, 7 January 2009, document number: 5082/09, 4.

104 Council of the European Union, Outcome of proceedings from the Social Questions Working Party, 22 January 2009, document number: 5521/09, 6.

benefits for those whose entitlement is based on previous employment in the respective Member States, only to third-country workers who are in employment.[105] The Parliament in its comment on the provision stated that it 'finds unacceptable that a third-country worker, upon getting unemployed, should lose the equal treatment right to social security benefits (except for unemployment),' as provided in the proposal. Furthermore, the Parliament stated that 'while not in a position to accept the current Council wording,' it was 'prepared to allow for derogations in respect to those benefits that are not based on previous employment.'[106]

As a follow up to this, the Presidency proposed a compromise that aimed at meeting the concerns of both Member States and the Parliament, which provided that without prejudice to the right of Member States to adopt or maintain provisions that are more favourable to the persons to whom they apply, may restrict equal treatment by limiting the rights on social security to third-country nationals who are in employment, with the exception of rights of third-country workers receiving unemployment benefits, whose entitlement to social security benefits is based on previous employment.[107] The Parliament was not satisfied with this compromise suggestion, as it was described in a note from the Presidency to SCIFA, the Parliament 'strongly believes that the current Council wording is too restrictive.' The Presidency therefore expressed its will to propose a compromise which, 'while giving Member States a discretion not to apply the principle of equal treatment in social security in the case of third-country workers, includes a requirement for Member States to give equal treatment with nationals (a) to third-country nationals in employment and (b) in respect of benefits resulting from the fact of having been employed, or from contributions paid whilst in employment.'[108] This compromise was rationalized on the basis that 'many workers will have built up, as a result of work or social insurance contributions paid at work', firstly, certain acquired rights, such as the entitlement to an old-age pension or survivor's pension (such rights are protected under Article 1 of Protocol 1 of the ECHR), and secondly 'entitlement to certain out-of-work benefits such as invalidity, unemployment or accident at work benefits.' The limitation to the equal treatment principle proposed would therefore, 'not deprive workers of the benefits that can be paid as a result of work undertaken or resulting from contributions paid.'[109] The provision addressing this in the adopted Directive is largely identical to the last compromise suggestion and permits Member States to restrict equal treatment to social security except for third-country workers who are in employment or who have been employed for a minimum period of six months and who are registered as unemployed.[110]

105 Council of the European Union, Report from the Social Questions Working Party to the Working Party on Migration and Expulsion, 27 February 2009, document number: 6966/09, 4.

106 Council of the European Union, Note from Presidency to JHA Counsellors, 8 June 2010, document number: 10704/10, 3.

107 *Ibid.*

108 Council of the European Union, Note from the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum, 15 July 2010, document number: 12156/10, 4.

109 *Ibid.*

110 See Article 12(2)(b) of the Directive in the Annex to Chapter 6.

6.6.3.2 Family Benefits

The issue of family benefits was mainly discussed by Germany who provided that it could not accept that persons authorised to work for a period not exceeding six months or who were present for the purpose of study would be entitled to social security benefits as provided by the draft Article, and stated that it should be possible to exempt those who reside in the Member State for the purpose of study, on a visa, or for less than six months from the scope in terms of family benefits.[111] Germany articulated further, that it 'goes without saying that persons who meet the relevant requirements draw the benefits for which they paid contributions,' that in Germany, however, 'this also affects tax-funded family benefits (child benefits, parental allowance and similar benefits), which are based among other things on specific macroeconomic considerations not concerning third-country nationals.' In Germany, family benefits are designed as a long-term support for families, so that couples who want to start a family are not prevented from doing so on account of financial concerns.[112] The restriction suggested by Germany was accepted by the Council which inserted an amendment to this effect[113] permitting Member States to decide to limit equal treatment as regards family benefits to the three groups listed above by Germany.[114] The Commission was not content with the change and underlined 'its preference to apply the principle of equal treatment without any regard to the format of papers (visa or single permit) which the migrant workers possess.'[115]

6.6.4 Payment of Acquired Pensions

In the discussion on payment of acquired pensions when moving to a third country in the WPME, scrutiny reservations were entered by Austria, Finland, Germany, Greece, Hungary, Italy, Spain and Sweden. Germany and Austria, who opined that the provision should be deleted and Sweden and Finland underlined the need for adding to the provision a reference to the fact that the acquired pensions should be income related.[116] In a note to the SQWP, Austria expressed the fear 'that via indirect discrimination' the provision could be interpreted to also contain an obligation to export benefits 'even when their own nationals are not entitled to such an export' and

111 Council of the European Union, Note from German delegation to JHA Counsellors, 6 September 2010, document number: 13165/10, 2 and 3.

112 *Ibid.*, 3.

113 Council of the European Union, Note from Presidency to JHA Counsellors, 12 November 2010, document number: 15657/10, 46.

114 See Article 12(2)(b) of the Directive in the Annex to Chapter 6.

115 Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the Position of the Council on the adoption of a Directive of the European Parliament and the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2011) 832, 25 November 2011, 5.

116 Council of the European Union, Outcome of Proceedings, working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 18.

explained that 'nationals usually stay in the state of origin, foreign nationals usually go back to their home countries thus a restriction of the export of benefits is a disadvantage for foreigners compared to the own nationals.'[117] In reply to that, the SQWP stated that equal treatment with EU nationals, as regards export of pensions 'should only mean that these pensions should be paid to third-country nationals in third countries under the same conditions as they are paid to nationals of the Member State concerned.'[118]

In 2009, the SQWP was asked by the Presidency to consider the issue of payment of acquired pensions. After its examination the SQWP sent a note to the WPME providing that the draft provision on the issue should be deleted and a provision inserted that provided the following: 'Without prejudice to bilateral agreements, third-country workers falling within the scope of this Directive and moving to a third-country, or the survivors of such a worker residing in third countries as they derive their rights from the worker, shall receive, in case of old-age, invalidity and death, statutory pensions based on the worker's previous employment and acquired in accordance with the legislation defined in Article 3 of Council Regulation (EC) No 883/2004, under the same conditions and at the same rates as the nationals of the Member State concerned when they move to a third-country.'[119] As a follow up to this the Presidency sent a compromise suggestion to the Justice and Home Affairs Counsellors to formulate the provision in accordance with the suggestion made by the SQWP, with slight changes in wording in the first paragraph of the clause.[120] The Parliament however, wanted the provision amended so that payment of acquired pensions would be conditioned on reciprocity,[121] which was addressed by the ILO in its comments on the 'social security and equal treatment/non-discrimination dimension' of the proposal. It provided, with regard to reciprocity, that it should be borne in mind that most third countries of origin have no equivalent social security systems to those in EU Member States and that 'only a few Member States have concluded or are likely to conclude bilateral agreements, for example with African countries.' Furthermore, that 'migrant workers are contributing to the social security systems in EU Member States and therefore should obtain access to the benefits if these are also exported to third countries in respect of Member State nationals.'[122] There are no

117 Council of the European Union, Note from General Secretariat to Social Questions Working Party, document number: 6468/09, 2.

118 Council of the European Union, Report from the Social Questions Working Party to the Working Party on Migration and Expulsion, 27 February 2009, document number: 6966/09, 3.

119 *Ibid*., 4.

120 Council of the European Union, Note from Presidency to JHA Counsellors, 10 March 2009, document number: 7147/09, 12.

121 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council 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 a common set of rights for third-country workers legally residing in a Member State (Rapporteur: Véronique Mathieu), PE439. 363v02-00, 5 October 2010, 48.

122 International Labour Organisation. 2011. ILO comments on the EU single permit directive and its discussions in the European Parliament and Council: The social security and equal treatment/non-discrimination dimension, 3. Available at: http://www.ilo.org/wcmsp5/ →

records of the ILO note being discussed during the negotiations, but the amendment of the Parliament was not accepted and the wording of the provision in the adopted Directive[123] is largely identical to the suggestion made by the SQWP.

6.6.5 Tax Benefits

Draft Article 12 provided for equal treatment as regards tax benefits but permitted Member States to restrict it to third-country nationals in employment. During the discussion on the provision in the WPME, the Czech Republic, Germany, Lithuania and the Netherlands entered a scrutiny reservation.[124] For the following meeting of the WPME, the Presidency suggested as a compromise to add the condition that equal treatment be granted once single permit holders are 'considered as tax residents under national legislation or international tax agreements.'[125] The Parliament made a similar amendment to the provision that provided equal treatment to tax benefits was granted 'in so far as the worker is deemed to be resident for tax purposes in the Member State concerned.'[126] Germany, Lithuania, the Netherlands, Poland and Spain maintained reservations on this provision as amended,[127] and during further dialogue in the WPME it was deleted altogether.[128] At the insistence of the Parliament however it was reinserted as amended with reference to fiscal residence and in a note to the JHA Counsellors, the Presidency invited the 'Member States to consider whether they could accept' the amendment proposed by the Parliament, 'or give detailed reasoning behind any objection they might have to this amendment.'[129] The provision as amended was accepted by the Member States and the adopted Directive provides for equal treatment to tax benefits in so far as the worker is deemed resident for tax purposes in the Member State concerned.[130]

groups/public/---europe/---ro-geneva/---ilo-brussels/documents/genericdocument/wcms_168535.pdf (accessed on 6 February 2013).

123 See Article 12(4) of the Directive in the Annex to Chapter 6.

124 Council of the European Union, Outcome of Proceedings, working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 18.

125 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 22 July 2008, document number: 12054/08, 9.

126 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council 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 a common set of rights for third-country workers legally residing in a Member State (Rapporteur: Véronique Mathieu), PE439.363v02-00, 5 October 2010, 46.

127 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 2 October 2008, document number: 12342/08, 12.

128 Council of the European Union, Outcome of Proceedings of Strategic Committee on Immigration, Frontiers and Asylum, 13 October 2008, document number: 13696/08, 13.

129 Council of the European Union, Note from Presidency to JHA Counsellors, 8 June 2010, document number: 10704/10, 3.

130 See Article 12(1)(f) of the Directive in the Annex to Chapter 6.

6.6.6 Access to Goods and Services

The draft provision on access to goods and services provided for equal treatment to access to goods and services made available to the public, including procedures for obtaining housing and the assistance afforded by employment offices, as well as that access to public housing could be restricted to cases where the third-country national has been staying for three years or has the right to stay for at least three years. In the WPME, Germany, Finland, Hungary, Lithuania, Latvia, Malta, the Netherlands and Slovenia entered a scrutiny reservation to the provision 'linked in particular with the issue of the access to procedures for obtaining housing and to the assistance afforded by the employment offices.'[131] Malta and Slovenia entered a reservation regarding the three year time limit to grant equal treatment as regards public housing and Malta suggested restricting the access 'to public housing to cases where the third-country national has been granted EC long-term residence status.'[132] In a compromise suggestion sent by the Presidency after the first discussion of the provision in the WPME, the reference to assistance afforded by employment offices had been deleted from the provision on goods and services and a new provision inserted that provided for equal treatment to 'counselling services afforded by employment offices.'[133] This change was suggested by the Commission and was modelled on the draft provision of the Blue Card proposal.[134] During the negotiations, the three year time limit relevant to access to housing was deleted and a provision inserted that permitted restricting equal treatment as regards housing without any time limits.[135] An additional change to the provision, also made by the Council, provided that equal treatment concerning access to goods and services can be restricted to those in employment.[136] The adopted provision on access to goods and services[137] therefore gives significantly wider discretions to Member States to restrict equal treatment with nationals than provided for by the proposal for the Directive.

6.6.7 Provisions on Equal Treatment added during the Negotiations

During the negotiations a new provision was added to the draft Directive that stipulated that the right to equal treatment provided for by the Directive shall be without prejudice to the right of the Member State to withdraw or refuse to renew the residence permit issued under the Directive, the residence permit issued for purposes

131 Council of the European Union, Outcome of Proceedings, working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 18.
132 *Ibid.*, 19.
133 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 22 July 2008, document number: 12054/08, 9.
134 Council of the European Union, Outcome of Proceedings, working Party on Migration and Expulsion, 2 July 2008, document number: 10807/08, 18.
135 Council of the European Union, Note for Presidency to JHA Counsellors, 12 November 2010, document number: 15657/10, 45.
136 Council of the European Union, Note from Presidency to Working Party on Migration and Expulsion, 22 July 2008, document number: 12054/08, 9.
137 See Articles 12(1)(g),12(1)(h) and 12(2)(d) of the Directive in the Annex to Chapter 6.

other than work, or any other authorisation to work in a Member State. This addition to the Directive[138] which was not discussed by the negotiating partners corresponds to a provision that was added to the Blue Card Directive during the negotiations for it.

6.7 RIGHT TO FAMILY REUNIFICATION AND ACCESS OF FAMILY MEMBERS TO THE LABOUR MARKET

In the explanatory memorandum accompanying the proposal for the Directive it is stated that it does not touch upon conditions for the exercise of the right to family reunification.[139] Single permit holders are therefore not granted a right to family reunification in direct relation to a permit to reside and work in a Member State on the basis of the Directive. As for other migrants residing regularly in a Member State of the EU, single permit holders should be able to exercise their right to family reunification on the basis of the conditions set forth in Directive 2003/86/EC on the right to family reunification. Therein it is stipulated that the Directive applies 'where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.'[140] Additionally, the Member States may require, that the single permit holder, has 'stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.'[141] The prospects of having family members join the single permit holder could be determined on the basis of his/her prospects of obtaining the right of permanent residence, there is however nothing in the Single Permit Directive that foresees that as a consequence of being granted a single permit to work and reside in a Member State. As regards the access of family members of single permit holders to the labour market in a Member State where they have been allowed to join him/her, the Family Reunification Directive provides that 'Member States may decide according to national law the conditions under which family members shall exercise an employed or self-employed activity,' and they may decide to restrict the access for up to twelve months, based on 'the situation of their labour market before authorising family members to exercise an employed or self-employed activity.'[142] The access of family members of single permit holders to the labour market will therefore be decided on the basis of national law in each of the Member States if family reunification has been granted.

138 See Article 12(3) of the Directive in the Annex to Chapter 6.

139 Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638, 23 October 2007, 8.

140 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Article 3.

141 *Ibid.*, Article 8.

142 *Ibid.*, Article 14.

The issue of the right of single permit holders to family reunification or access of their family members to the labour market was not debated in the negotiations for the Single Permit Directive, nor commented on by any of the partners to the negotiations. It may be that there was a common unspoken understanding among the negotiation partners not to discuss the issue or assumed that the Family Reunification Directive will apply to single permit holders. Due to the fact that the Single Permit Directive is considered a 'framework' Directive for labour migrants and for the sake of consistency with other Directives on labour migration, it would however have been logical to 'touch upon' conditions of family reunification for single permit holders. Family reunification is generally regarded by the European Union as an important part of 'integration' of third-country nationals in the Member State where they reside, as is declared in the preamble to the Family Reunification Directive, family reunification is considered to be 'a necessary way of making family life possible. It is regarded as helping to create sociocultural stability facilitating the integration of third-country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.'[143] The absence of the right to family reunification in the Single Permit Directive, considered together with the restrictions binding a single permit holder to a specific employer, restrictions on access to education and vocational training, i.e. lack of mobility within the labour market and lack of opportunities for upward mobility, as well as no provisions on renewal of the permit and no provisions on the possibility of long-term residency might indicate a 'construction' of single permit holders more as temporary workers than prospective long term residents and participants in the labour markets of EU Member States.

6.8 CONCLUSIONS

Although the negotiations on the Directive took four years, the main issues of concern of the Member States and the Parliament were tabled already during the first phase of negotiations that took place before the coming in to force of the Lisbon Treaty and the change in the legal basis of the Directive. Two of the most pronounced aspects of the negotiations are those that pertained to access to territory and the labour market and the granting of equal treatment with nationals. The Directive does in fact not address access to territory and addresses access to the labour market to a very limited extent, but provides for a 'simplified procedure' to be used for issuing a residence and work permit if a third-country national is granted access to the territory and the labour market of a Member State in accordance with national law. The Directive is silent on criteria that have to be met for renewal or rejections of single permits, those factors are also dependent on national law of each of the Member States. Furthermore, it does not foresee any extension of the single permit in the long-term and it will be up to the Member States to address that in their national laws. The Parliament in its role as a co-legislator amended the proposal for the Directive in several ways to increase access to territory and labour market for third-country

143 *Ibid.*, Recital 4.

nationals. These amendments included the right to change employers, the right to stay in EU territory for up to six months while unemployed and look for, and take up employment and the right to receive assistance while searching for employment.[144] None of these amendments made by the Parliament were however accepted by the Council. The way access to territory and the labour market is constructed in the Directive only provides for harmonization among the Member States on a very limited aspect of the single permit, that is, only the procedural aspect of the initial admission. This is unfortunate while the Directive is bound to have wide application as it is a 'horizontal' Directive addressing all third-country nationals coming to the EU to work as well as those admitted for other purposes but granted a work permit, other than those that are explicitly excluded from its scope and those that fall under the scope of the specialized Directives such as the Intra-Corporate Transfer Directive and the Seasonal Workers Directive.

The discussion on the right to equal treatment in the WPME and the SQWP brought to light controversial views on whether the right to equal treatment should be granted to single permit holders at all. Some of the more interesting perspectives presented in that discussion were those of the SQWP that discussed the issue, not from the premises of equal treatment as a human rights principle, but from the perspective that not granting all single permit holders equal treatment with nationals from the first day of residence, and basing it on length of residence as suggested by some Member States, would be too complicated administratively. As noted by Brinkmann, Germany, like other Member States, while discussing the proposal for the Directive, 'did not want to create an equal or comparable status for' third-country nationals but 'intended to create a different status.'[145] Pertaining to that intention, Germany sent a suggestion to the JHA Counsellors that provided that the Member States 'should endeavour to grant to all third-country nationals who are lawfully residing and working in Member States the same common set of rights in the form of equal treatment with nationals of the respective host Member State.'[146]

The Commission's proposal did not provide for the right to equal treatment as regards working conditions and freedom of association while it permitted Member States the discretion to restrict these rights to third-country workers in employment. In discussing these restrictions, Portugal, Sweden and the Parliament wanted the restriction on equal treatment in working conditions to be deleted but Germany opposed that. Germany, Portugal and Sweden, as well as the Parliament suggested that the restriction permitted on freedom of association be deleted and in this case made a reference to the 'relevant ILO Convention' which does not permit restrictions of freedom of association. Both these permissible restrictions were deleted during the negotiations. The will of several Member States to restrict the right to equal treatment further than proposed by the Commission was reflected in the suggestions for example by France and Germany as regards education and vocational training, Austria in respect to unemployment benefits and acquired pensions, Germany in relation to

144 See section 6.5.3 above.

145 Brinkmann, G. 2012. Opinion of Germany on the Single Permit Proposal, *European Journal of Migration and Law* 14, 365.

146 Council of the European Union, Report from Presidency to JHA Counsellors, 23 February 2010, document number: 6492/10, 6.

family benefits, Germany, Lithuania, the Netherlands, Poland and Spain on tax benefits and Germany, Finland, Hungary, Lithuania, Latvia, Malta, the Netherlands and Slovenia pertaining to access to goods and services, housing in particular. In some cases, the restrictions suggested by the Member States were mitigated by the Parliament as a co-legislator and notably a large majority of the Member States was silent on the issue during the negotiations. As a result of the insistence of the Member States listed above to restrict the right to equal treatment for third-country nationals in various ways, the manner in which the right to equal treatment is constructed in the Directive only provides for minimum standards as regards equal treatment and permits Member States multiple derogations from the principle. Consequently, third-country nationals that fall under the scope of the Single Permit Directive will not be on 'equal footing' with national workers and the rights of third-country workers will continue to 'vary significantly' across the Member States, an issue that was one of the objectives of the Commission to address with the Directive.[147]

147 Commission Staff Working Document accompanying document to the Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and a common set of rights for third-country workers legally residing in a Member State, Summary of the Impact Assessment, SEC(2007) 1393, 23 October 2007, 2-3.

7. The Seasonal Workers Directive

7.1 INTRODUCTION

This chapter examines four aspects of Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, hereafter, the Seasonal Workers Directive. Those are access to territory and access to the labour market, the right to equal treatment and the right to family reunification, including access of family members to the labour market. The purpose of the examination is to reveal how the right to equal treatment with nationals is constructed in the Directive for the third-country nationals that fall under its scope and disclose what is the right to equal treatment granted to seasonal workers. Additionally, the status granted to seasonal workers through access to territory and access to the labour market will be addressed in order to divulge the effect of the status granted to this group of third-country nationals under the EU's sectoral approach to labour migration, on the right to equal treatment and the right to family reunification.

The examination takes as a starting point the Commission's proposal for the Directive and outlines the discussion that took place on the four aspects listed above during the negotiations of the Directive. This discussion uncovers how the right to equal treatment was determined in the negotiations and focuses on the dialogue among the Member States within the Working Party on Integration, Migration and Expulsion (WPIME), the Social Questions Working Party (SQWP), among the Justice and Home Affairs (JHA) Counsellors, and the trilogue between the Commission, the Council and the Parliament. Opinions of stakeholders such as the International Labour Organization (ILO) and the European Trade Union Confederation (ETUC) as well as those of European Network Against Racism (ENAR), European Federation of National Organisations working with the Homeless (FEANTSA) and Platform for International Cooperation on Undocumented Migrants (PICUM) who commented on the proposal for the Directive will also be included in the discussion. To contextualize the issues discussed in this chapter, it will start by looking at the background to the Directive, its objectives, subject matter, scope and some relevant definitions.

7.2 BACKGROUND TO THE DIRECTIVE

The proposal for the Directive was submitted by the Commission to the Council on 13 July 2010 and adopted on 26 February 2014 after three and half years of negotiations, which were ongoing at the same time as those for the Intra-Corporate Transfer Directive and partially the Single Permit Directive. The Directive was adopted on the basis of the ordinary legislative procedure set forth in Article 294 TFEU which with the coming into force of the Lisbon Treaty provides that the Parliament is a co-legislator with the Council on measures on legal migration.

In the explanatory memorandum to the proposal, it is affirmed that the proposal 'aims to contribute to the implementation of the EU 2020 Strategy and to effective

management of migration flows for the specific category of seasonal temporary migration,' that it sets out 'fair and transparent rules for entry and residence while, at the same time, it provides for incentives and safeguards to prevent a temporary stay from becoming permanent.'[1] From the impact assessment accompanying the proposal for the Directive it emerges that the situation the Directive is put forth to address is firstly, a structural need within EU economies 'for seasonal work for which labour from within the EU is expected to become less and less available.'[2] Secondly, exploitation and sub-standard working conditions which may threaten the health and safety of seasonal workers, and lastly the 'sectors of the economy that are characterised by a strong presence of seasonal workers' that have repeatedly been 'identified as the sectors most prone to work undertaken by third-country nationals who are staying illegally.'[3] Additionally the need for introducing the Directive was based on that EU Member States had 'rather divergent' rules concerning seasonal work, both in terms of admission schemes and 'definitions of seasonal work, criteria for and duration and contents of the work permit, as well as rights granted to seasonal workers.'[4] These differences among the Member States had been found to lead to 'competition among the Member States for the most attractive conditions,' which were seen to 'hinder efficient allocation of seasonal workers' as they 'may prefer to go where they are easily admitted or are more likely to remain both in a legal (by renewing their permit) or illegal (due to overstaying) situation, instead of where their work is most needed.'[5] As regards irregular migration in particular, the Directive was seen as filling a gap in the 'absence of meaningful opportunities in the EU for legal migration in the non- and low-skilled sectors,' where pressures from irregular migration were deemed to be high.[6] The Directive was set forth to address this by 'setting up swift and flexible admission procedures and securing a legal status for seasonal workers' to act as a safeguard against exploitation and also protect EU citizens who are seasonal workers from unfair competition.[7]

Right from the outset of the discussions, the proposal was challenged by a large number of Member States both on the grounds of subsidiarity and proportionality. In this regard the Commission explained that the proposal for the Directive had received the highest number of reasoned opinions from national Parliaments so far. In all, nine chambers expressed subsidiarity concerns, while they 'found that the subject matter is already sufficiently regulated at national level and that the EU cannot ade-

1 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 purpose of seasonal employment, COM(2010) 379, 13 July 2010, 2.

2 Commission Staff Working Document, Impact Assessment accompanying the 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 purpose of seasonal employment, SEC(2010) 887, 13 July 2010, 8.

3 *Ibid.*, 9.

4 *Ibid.*, 10.

5 *Ibid.*, 11.

6 *Ibid.*

7 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 purpose of seasonal employment, COM(2010) 379, 13 July 2010, 3.

quately address national specificities.' Furthermore, the Member States held the opinion that 'given that the Member States remain in control of the volumes of the admitted third-country nationals, the proposal may not achieve the goal of managing migration flows.'[8] Equally many national Parliaments gave their positive opinions on the proposal, noting that it 'helps to ensure uniform protection, common admission criteria and conditions of residence throughout the EU,' and they 'appreciated the fact that the Member States are given the right to set admission quotas.'[9] Some Parliaments, both those that questioned subsidiarity and those which did not, 'found the proposal to be in breach of the proportionality principle as it can have an impact on national social security systems,' and two of them 'formally opposed the proposal on these grounds.'[10] In its reply to those views, the Commission emphasized that the creation of a common EU framework is necessary to avoid distortion of migratory flows and irregular entries, to protect third-country seasonal workers and to prevent social dumping. It also stressed that the proposal includes provisions which should allow Member States to adjust it to their national labour market specificities.[11] In the explanatory memorandum for the proposal, the principle of subsidiarity was discussed in relation to the 'legitimacy of the EU action in this field' where it was stated to derive from the fact that 'the need for seasonal workers is a common occurrence in most Member States.' Additionally, that 'although third-country workers enter a specific Member State within the EU, a Member State's decision on the rights of third-country nationals could affect other Member States, and possibly cause distortions of migratory flows.'[12] Furthermore, it addressed the exploitation of seasonal workers, declaring that it needs 'to be overcome by granting certain socio-economic rights in a binding, and thus enforceable, EU-level instrument.'[13]

The legal basis for the Directive which is Article 79(2)(a) and (b) of the TFEU, was challenged during the negotiations by several Member States on two grounds. Firstly, while the Directive regulates short stays of seasonal workers, of up to three months as well as longer stays of up to nine months. In reply to this, the Presidency provided its 'opinion that Article 79(2)(a) allows for the adoption of conditions of entry and residence of third-country nationals regardless of the length of stay of the person concerned.' That since the Schengen acquis already sets out general conditions of entry to the territory of the EU for short stays, additional conditions of entry for the purpose of seasonal employment could be adopted under Article 79(2)(a).'[14] The second challenge to the legal basis was among other parties from the Parliament's Committee on Employment and Social Affairs, which, due to the fact that the

8 Report from the Commission on Subsidiarity and Proportionality, 8th report on Better Lawmaking covering the year 2010, COM(2011) 344, 10 June 2011, 7.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 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 purpose of seasonal employment, COM(2010) 379, 13 July 2010, 6.

13 *Ibid.*

14 Council of the European Union, Note from the Presidency to the Strategic Committee on Frontiers, Immigration and Asylum (SCIFA), 2 September 2012, document number: 13337/12, 2.

proposal for the Directive does not regulate only issues of migration, but also questions of employment rights of the categories of workers concerned, 'considered that the proposed legal basis is not appropriate for the directive and proposes adding Article 153(1)(a), (b) and (g) TFEU' to the legal basis.[15] In reply to this, with some additional arguments based on the subject matter of, and legislative procedure required for Article 153 TFEU, the opinion of the Committee on Legal Affairs was that while having regard to the fact that the aim and content of the proposal is to prescribe the conditions of entry and residence of third-country nationals for the purposes of employment as seasonal workers and to define the rights of that category of workers, Article 79(2)(a) and (b) TFEU constitute the appropriate legal basis.[16] No changes were made to the legal basis nor the content and purpose of the Directive as a consequence of these challenges by the Member States and the Parliament.

7.3 OBJECTIVES OF THE DIRECTIVE

A discussion on the objectives of the proposed Directive was put forth in the impact assessment that accompanied it. Therein, the objectives were presented both in the general context of 'the ultimate impact of an EU intervention'[17] as regards seasonal work and special and operational objectives 'expressed in terms of direct and short-term effects or outcomes'[18] of adopting an EU legislative instrument addressing seasonal work. Regarding the first aspect, the objectives were identified as being to respond to seasonal fluctuations in the economy and offset labour shortages faced in specific industries/economic sectors and regions, and to contribute to preventing exploitation and poor working conditions for third-country seasonal workers, to prevent illegal immigration and to contribute to the development of third countries.[19] The specific and operational objectives are listed as those of providing for flexible rules to facilitate the temporary legal migration of seasonal workers, to promote their circular migration and to provide for equal conditions for employers of third-country seasonal workers legally entering the EU labour market. Additionally, to ensure a secure legal status and protection against exploitation of third-country seasonal workers and to enhance cooperation with third countries in the management of seasonal migration.[20] The objectives identified in the impact assessment which was conducted during 2007-2008, and contained among other things a list of choices for an instrument to address seasonal work in the EU, are largely reflected in the preamble to the

15 European Parliament, Report on the 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 (Rapporteur: Claude Moraes), PE464.960v03-00, 3 December 2013, 50.

16 *Ibid.*, 54.

17 Commission Staff Working Document, Impact Assessment accompanying the 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 purpose of seasonal employment, SEC(2010) 887, 13 July 2010, 17.

18 *Ibid.*, 18.

19 *Ibid.*,17.

20 *Ibid.*, 18.

adopted Directive. The preamble provides that the 'Directive should contribute to the effective management of migration flows for the specific category of seasonal temporary migration and to ensuring decent working conditions for seasonal workers, by setting out fair and transparent rules for admission and stay and by defining the rights of seasonal workers.'[21] Additionally, it reaffirms a clear emphasis on preventing and addressing irregular migration in stipulating that at the same time as meeting the above objectives, it should provide for 'incentives and safeguards to prevent overstaying or temporary stay from becoming permanent' and that the rules laid down in Directive 2009/52/EC on Employer Sanctions will contribute to avoiding such temporary stay turning into unauthorised stay.[22]

7.4 SCOPE AND DEFINITIONS

7.4.1 Scope

Draft Article 2 of the proposal[23] stated firstly, that the Directive shall apply to third-country nationals who reside outside the territory of the Member States and apply to be admitted to the territory of a Member State for the purpose of employment as seasonal workers. Secondly that it shall not apply to third-country nationals who are carrying out activities on behalf of undertakings established in another Member State in the framework of a provision of services within the meaning of Article 56 of the Treaty on the Functioning of the European Union, including those posted by undertakings established in a Member State in the framework of provision of services in accordance with Directive 96/71/EC.

During the first exchange of views in the Working Party on Integration Migration and Expulsion (WPIME), the Netherlands, supported by Austria and Sweden, suggested that those who are already present in the territory of a Member State should also be included in the scope and Sweden additionally stated that it should be specified that family members of seasonal workers should be able to accompany them.[24] The Parliament in its draft opinion on the scope also wanted to include those already present,[25] and noted in the explanatory statement on the amendment, that 'in order to ensure a comprehensive approach to seasonal work, this Directive should also

21 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, Recital 7.

22 *Ibid.*

23 All references in this chapter to 'proposal for the Directive', 'proposal' and 'draft Article' are to 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 purpose of seasonal employment, COM(2010) 379, 13 July 2010.

24 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 1 December 2010, document number: 16772/10, 3.

25 European Parliament, Report on the 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 (Rapporteur: Claude Moraes), PE464.960v03-00, 3 December 2013, 21.

apply to third-country nationals already residing in the EU who are not entitled to work under existing legislation.' Furthermore, the Parliament provided that the current situation in the seasonal sector 'where many third-country nationals with an irregular status are employed in exploitative conditions' should not be ignored, and that 'third-country nationals in an irregular position should, for a transitional period, be able to apply for employment as a seasonal worker under this Directive.'[26] There was little discussion of the aspect of the Directive possibly being an instrument to address those workers already in an irregular situation as seasonal workers, but a compromise suggestion put forth by the Presidency in the beginning of 2011, provided that the 'Directive may also, if provided by national law apply to third-country nationals who are legally staying in the territory of a Member State and who apply for a seasonal worker permit in that Member State.'[27] In the trilogue between the Parliament, the Council and the Commission however, there was an agreement to delete the provision,[28] and the Directive only applies to those who reside outside the territory of the Member States and explicitly excludes those who reside within them.[29] This outcome entails that the Directive 'can do nothing to alleviate the position of those who are present without authorization but who cannot be returned.' That is, those who are in limbo, and is thereby considered giving 'Member States express *carte blanche* to deprive asylum-seekers of even the modest income which they were previously earning as seasonal workers.'[30] The compromise suggested by the Presidency referred to above, also addressed several new groups suggested to be excluded from the scope, these included beneficiaries of international protection and those who have applied for it, those authorised to reside in a Member State on the basis of temporary protection and family members of Union citizens who have exercised their right to freedom of movement and long-term resident status in a Member State. Only the last group mentioned in this list is in fact excluded from the scope in the adopted Directive[31] while there was an agreement during the trilogue 'not to take up' the amendment to explicitly exclude beneficiaries and applicants for international protection or those residing in a Member State on the basis of temporary protection.[32] It remains however that whereas the Directive only applies to persons who are residing outside of the territory of the Member States it does exclude these groups, although it is not explicitly stated in the text.

There are no records in the negotiations of a discussion of Sweden's suggestion to include family members in the scope of the Directive. It seems that it was not considered at all. Taking the opposite view to Sweden, the Czech Republic suggested in a

26 *Ibid.*, 47.

27 Council of the European Union, Note from Presidency to Working Party on Integration, Migration and Expulsion, 12 January 2011, document number: 5101/11, 2.

28 Council of the European Union, Note from Presidency to Permanent Representatives Committee (Part II), 25 October 2013, document number: 15033/13, 43.

29 See Article 2(1) of the Directive in the Annex to Chapter 7.

30 Peers, S. 2015. *Ending the exploitation of seasonal workers: EU law picks the low-hanging fruit.* Available at: http://eulawanalysis.blogspot.com.es/2015/02/ending-exploitation-of-seasonal-workers.html (accessed on 15 May 2015).

31 See Article 2(3)(b) of the Directive in the Annex to Chapter 7.

32 Council of the European Union, Note from Presidency to Permanent Representatives Committee (Part II), 25 October 2013, document number: 15033/13, 43.

note to the WPIME to include family members of seasonal workers in the list of those explicitly excluded from the scope.[33] During the discussions in the WPIME the Presidency sent a note to the Social Questions Working Party (SQWP) with a question regarding the scope. The Presidency asked, bearing in mind the aim of the Directive, whether the SQWP saw 'any potential problems with respect to the difference between the personal scope of this draft directive and other Directives covering other categories of migrant workers?'[34] The SQWP did not reply whether it saw any problems with the differences in scope between the Directives, but stated that, with reference to the fact that the Czech Republic considered that their exclusion from the scope of the Directive should be explicit, stating that 'it would also be important to clarify whether and how the family members of seasonal workers would be covered by the Directive.'[35] Neither the suggestion of Sweden to include, nor that of the Czech Republic to exclude, family members of seasonal workers from the scope were taken up during the negotiations, but during the discussions in the SQWP it was clarified by the Commission that 'as the family members were not referred to in the text, it would be left to the Member States to decide how to deal with them.'[36]

The Parliament suggested an addition to draft Article 2 that focused on employment sectors. It provided that the Directive 'shall apply to the agriculture, horticulture and tourism sectors,' and that Member States may, with the involvement of the social partners and in consultation with them, decide to extend its application to additional activities that are dependent on the passing of the seasons.[37] In a comment on the proposed provision during the trilogue, it was established that the Parliament 'insists on defining the specific sectors in this Directive stating that agriculture and tourism are the main relevant sectors' in all the Member States. The Presidency did however suggest deleting the amendment.[38] During the trilogue a compromise was reached addressing the employment sectors where seasonal work is needed in the scope of the Directive.[39] The agreed formulation of the provision is that when transposing the Directive 'the Member states shall, where appropriate in consultation with the social partners, list those sectors of employment which include activities that are dependent on the passing of the seasons.' The Member States are entitled to modify the list, in consultation with the social partners, where appropriate and are obliged to inform the

33 Council of the European Union, Note from General Secretariat of the Council to Working Party on Integration, Migration and Expulsion, 24 January 2012, document number: 5688/12, 2.

34 Council of the European Union, Note from the Presidency to the Social Questions Working Party, 18 February 2011, document number: 6680/11, 3.

35 Council of the European Union, Outcome of Proceedings from the Social Questions Working Party, 31 March 2011, document number: 7510/1/11 Rev 1, 2.

36 *Ibid.*, 4.

37 European Parliament, Report on the 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 (Rapporteur: Claude Moraes), PE464.960v03-00, 3 December 2013, 70.

38 Council of the European Union, Note from Presidency to JHA Counsellors, 21 March 2013, document number: 7627/13, 36.

39 See Article 2(2) of the Directive in the Annex to Chapter 7.

Commission of such modifications.[40] This open definition leaves each Member State free to designate employment sectors where seasonal work is conducted, the only restriction being that the work is 'dependent on the passing of the seasons', a concept that will be discussed in the following section.

7.4.2 Definitions

7.4.2.1 Seasonal Worker

Draft Article 3(b), set forth a definition of a 'seasonal worker' which was stated to mean a third-country national who retains a legal domicile in a third country but resides temporarily for the purposes of employment in the territory of a Member State in a sector of activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between the third-country national and the employer established in a Member State. During the discussions on the draft Article in the WPIME, the Member States made various remarks regarding the use of the terms 'legal domicile' and 'resides' in the provision. Lithuania for example suggested replacing 'resides' with 'enters' and Belgium suggested to use the concept of 'actual residence' instead of 'legal domicile'.[41] Latvia supported by Lithuania, the Netherlands and Sweden suggested to replace 'resides temporarily' with 'stays temporarily' arguing that it would 'make clear that seasonal workers are not considered residents in a MS.' Additionally, Latvia and the Netherlands 'stressed the importance of this issue in the context of entitlements for social security.' Germany pointed out in relation to this that legally there is no difference between 'stay' and 'reside',[42] and the Council Legal Services had provided at an earlier WPIME meeting that 'there is no clear-cut distinction between stay and reside in the Treaty' and that in 'the migration field the terms are used interchangeably.'[43] The proposal to replace 'resides' with 'stays' was however taken up by the Presidency as a compromise suggestion[44] and this term is used in Article 3(b) of the adopted Directive.[45] This discussion reveals the preoccupation of Member States with constructing the status and the presence of seasonal workers as temporary. In fact, they are not seen by the Member States as residing on their territory while working there while they are not granted a residence permit. This perspective is recurrent during the negotiations.

40 Council of the European Union, Note from Presidency to Permanent Representatives Committee (Part II), 2 July 2013, document number: 11612/13, 47.
41 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 29 September 2010, document number: 13693/10, 4.
42 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 13 July 2011, document number: 12363/11, 7.
43 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 27 May 2011, document number: 10571/11, 7.
44 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 9 November 2011, document number: 16466/11, 14.
45 See Article 3(b) of the Directive in the Annex to Chapter 7.

The definition of 'activities dependent on the passing of seasons' was also discussed in relation to the definition of seasonal worker but herein that discussion will only be addressed with regard to the definition of seasonal activity below.

7.4.2.2 Activity Dependent on the Passing of the Seasons

Draft Article 3(c) of the proposal provided for a definition of seasonal activity that stated that 'activity dependent on the passing of the seasons' means an activity that is tied to a certain time of the year by an event or pattern during which labour levels are required that are far above those necessary for usually ongoing operations. During the discussions in the WPIME, Austria, France and the Netherlands raised the concern that the definition was 'too broad and as such could cover also various non-seasonal activities.'[46] Spain considered it 'more appropriate to link seasonal activities to an increased need for labour rather than passing of the seasons.'[47] In a note to the WPIME the Netherlands suggested adding a sentence to the provision that provided that 'Member States may determine which activities they consider to be seasonal work.' The explanation for the suggestion was that the definition in the proposal 'is difficult to apply in practice and leaves considerable uncertainties as to which types of activities qualify as seasonal work.'[48] In relation to the dialogue with the SQWP, Germany raised the issue of the broad definition of 'seasonal activity' and stated it was 'a critical point', whereas a 'broad definition bears the risk that the Directive will not remain confined to work that is genuinely seasonal.'[49] Additionally, that if the 'definition is too broad the Directive moves away from its intrinsic purpose of helping to meet the markedly elevated demand for labour in certain sectors at specific times of the year.' In relation to these considerations, Germany however provided that it regarded it of 'crucial importance that the power to determine seasonal sectors or activities lies with the Member States and that this is explicitly enshrined in the operative part of the Directive.'[50] No compromise was reached on the proposal to define more concretely seasonal activities and Article 3(c)[51] in the Directive is virtually the same as in the proposal. In the impact assessment accompanying the proposal, it was stated that the phenomenon that regular, year-round occupations are filled with third-country national seasonal workers under often precarious conditions could be related to 'lax national legislation' that does not precisely define seasonal work and thus allows filling posts for permanent, ongoing operations with seasonal workers.[52] Having

46 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 29 September 2010, document number: 13693/10, 5.

47 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 13 September 2012, document number: 12792/1/12 REV 1, 14.

48 Council of the European Union, Note from General Secretariat of the Council to Working Party on Integration, Migration and Expulsion, 7 December 2010, document number: 17580/10, 3.

49 Council of the European Union, Note from Council General Secretariat to The Social Questions Working Party, 18 March 2011, document number: 7941/11, 2.

50 *Ibid.*

51 See Article 3(c) of the Directive in the Annex to Chapter 7.

52 Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and resi- →

regard to the definition of activity dependent on the passing of the seasons in the Directive, the opportunity to address this issue was missed by providing for a definition that is, as observed by the European Trade Union Confederation, 'far too broad and opens the door to abuse.'[53]

7.5 ACCESS TO TERRITORY AND ACCESS TO THE LABOUR MARKET

Eight provisions of the proposed Directive addressed access to territory and access to the labour market and those provisions are all bound together while there are no provisions providing for access to territory separately from access to the labour market. All of these provisions, draft Article 5 on admission, draft Article 14 on accommodation, draft Article 6 on grounds for rejection, draft Article 7 on withdrawal of the work authorisation, draft Article 11 on duration of stay, extension of contract and change of employer, draft Article 12 on facilitation of re-entry and draft Article 15 on rights on the basis of the seasonal workers permit, will be discussed in this section.

7.5.1 Admission

Draft Article 5 of the proposal outlined the criteria for admission as a seasonal worker. It provided that an application for admission under the terms of the Directive should be accompanied by the following documents: (a) a valid work contract or, as provided for in national law, a binding job offer to work as a seasonal worker in the Member State concerned with an employer established in the Member State that specifies the rate of pay and the working hours per week or month and, when applicable, other relevant working conditions; (b) a valid travel document as determined by national law. Member States may require the period of the validity of the travel document to cover at least the duration of the residence permit; (c) evidence of having or, if provided for by national law, having applied for sickness insurance for all the risks normally covered for nationals of the Member State concerned for periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or as a result of, the work contract; and (d) evidence of having accommodation as set out in Article 14. Furthermore, the draft Article provided that Member States shall require that the seasonal worker will have sufficient resources during his/her stay to maintain him/herself without having recourse to the social assistance system of the Member State concerned, and that third-country nationals who are considered to pose a threat to public policy, public security or public health shall not be admitted for the purposes of this Directive.

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dence of third-country nationals for the purpose of seasonal employment, SEC(2010) 887, 13 July 2010, 13.

53 European Trade Union Confederation. 2010. Executive Committee, Agenda item 9: Seasonal work and intra-corporate transfers, 4. Available at: http://www.etuc.org/documents (accessed on 5 August 2015)

The main issues that were discussed regarding the draft Article in the WPIME, concerned extending the list of threats that could be applied as grounds for rejection of a permit, the inclusion of pay and terms of employment among the admission criteria, whether the admission criteria listed should be an open or a closed list and the need to differentiate between seasonal workers staying for a term shorter than 90 days and those staying for a period longer than 90 days. The last issue resulted in admission criteria being set forth in two separate Articles in the adopted Directive. Article 5, which stipulates the criteria and requirements for admission for stays not exceeding 90 days, and Article 6 for stays exceeding 90 days.[54] Article 5 and 6 are largely identical, and both contain a criteria that was added during the negotiations which provides that when examining an application for an authorisation, Member States shall verify that the third-country national does not present a risk of illegal immigration and that he/she intends to leave the territory of the Member State at the latest on the date of expiry of the authorisation. The authorisations for the purpose of seasonal work on the basis of Article 12 of the Directive, which is issued if the applicant fulfils the conditions for admission, are not substantively different for long term and short term stays. The main difference is that for stays not exceeding 90 days a short-stay visa shall be granted and for stays exceeding 90 days a long-stay visa shall be granted, in both cases the Member State can choose whether to grant only a visa or a visa along with a seasonal worker permit.

During the discussion in the WPIME, on the provision of draft Article 5 stating that migrants who are considered to pose a threat to public policy, public security or public health shall not be admitted, Germany suggested adding to the list of threats, 'other essential interests of the admitting Member State.' The Commission queried what these interests might be, to which Germany gave the example of 'being a member of a terrorist organisation.' Poland shared the view of Germany and also suggested to add the possibility to refuse admission based on 'records of unwanted foreign persons and the SIS system,'[55] and Cyprus expressed the wish for Member States to 'be able to request evidence to verify the lack of threat.'[56] In a note from the Presidency to the WPIME discussing the 'essential interests of the Member State (public security)' and with reference to the wish of some delegations to add a further ground for refusal of admission, namely the 'other essential interests of the Member State',[57] the Presidency observed, that drafted that way, the additional grounds suggested are too vague and the formulation to uncertain. Furthermore, that the application of this criteria, 'at national level, where such a notion is not already formulated properly, could result in arbitrary rejection of an application.'[58] The Presidency also drew attention to the fact that including such a notion 'would hinder the harmonized implementation of the directive' and 'would not provide a fair treatment of third-country na-

54 See Articles 5 and 6 of the Directive in the Annex to Chapter 7.

55 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 1 December 2010, document number: 16772/10, 9.

56 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 10 January 2011, document number: 5051/11, 7.

57 Council of the European Union, Note from Presidency to Working Party on Integration, Migration and Expulsion, 17 May 2011, document number: 10164/11, 3.

58 *Ibid.*, 4.

tionals.'[59] The suggestions by Member States to extend the list of threats was not accepted and the provision in the adopted Directive is worded in the same manner as that of the proposal but only found in Article 6 on admission for stays longer than 90 days as discussed above.

The comments made by Member States regarding the inclusion of pay and terms of employment did not lead to any changes in the admission criteria, but an amendment made by the Parliament provided that a work contract should specify the following: i) the place and type of work; ii) the duration of employment; iii) the remuneration; iv) the working hours per week or month; v) the amount of paid leave; vi) where applicable, other relevant working conditions; and vii) if possible, the date of commencement of employment.[60] An agreement was reached on this text during the trilogue[61] and those specifications, which provide greater protection for seasonal workers than the proposal did, are listed in both Article 5 and 6 of the Directive.

During the negotiations in the WPIME Austria made a scrutiny reservation on draft Article 5, stating that the criteria provided in the draft Article 'should not be an exhaustive list of admission criteria,'[62] and Germany 'insisted that the introductory sentence' of the provision 'should state clearly that this is a list of minimum requirements and does not give the right for admission.'[63] In a note from the Presidency to the WPIME addressing these views, the Presidency concluded that the goals of 'efficient management of flows can only be achieved by creating a harmonized and transparent scheme for migrant workers' and that this goal 'can only be successfully achieved if the approximation of national laws of the Member States is carried out by laying down clearly defined lists of criteria for admission agreed at the EU level, thereby creating transparent and simplified legislative procedures and ensuring fair treatment of third-country nationals as well as an efficient management of migration flows.'[64] Additionally, the Presidency provided the assessment that unless the Directive contains 'an exhaustive list of criteria for admission and grounds of refusal, withdrawal or non-refusal,' it will result in extremely diverse implementation in the Member States and will not achieve the set objectives, thereby the Directive would basically be deprived of any effectiveness.' The opinion of the Presidency that the provision on admission should contain an exhaustive list of criteria,[65] was in the end accepted and is reflected in the adopted Directive where all but one provision on travel

59 *Ibid.*

60 Council of the European Union, Information Note from General Secretariat of the Council to Permanent Representatives Committee/Council, 6 February 2014, document number: 5942/14, 33.

61 Council of the European Union, Note from Presidency to Permanent Representatives Committee (Part II), 25 October 2013, document number: 15033/13, 53.

62 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 29 September 2010, document number: 13693/10, 7.

63 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 10 January 2011, document number: 5051/11, 6.

64 Council of the European Union, Note from Presidency to Working Party on Integration, Migration and Expulsion, 17 May 2011, document number: 10164/11, 3.

65 *Ibid.*

documents for seasonal workers staying longer than 90 days,[66] are mandatory provisions.

7.5.2 Accommodation

Draft Article 14 set forth a duty for Member States to require employers of seasonal workers to provide evidence that the seasonal worker will benefit from accommodation that ensures an adequate standard of living. The draft Article also stipulated that if seasonal workers are required to pay rent for the accommodation, its cost shall not be excessive in relation to their remuneration. During the first exchange of views on the draft Article in the WPIME, several Member States considered the obligation to be an administrative burden on the Member States and/or on the employers. Additionally, concerns were expressed regarding the criteria to assess 'an adequate standard of living.'[67] In response to these comments, the Commission 'stressed that it is very important to ensure that workers have proper accommodation and explained that it would be up to Member States to decide what constitutes adequate standard of living and excessive rent.' Furthermore, it was reiterated that this 'is a condition for admission and non-compliance by employer can result in the application being rejected.'[68] In further discussions on the draft Article Finland suggested that 'a point could be included prohibiting exploitation of seasonal workers by employers,'[69] and Sweden voiced its opposition to this 'being an obligatory provision as it would be difficult to apply in practice,' and considered that it would be 'enough to ensure that wages are sufficient to cover the costs of accommodation.'[70] The Parliament suggested amendments to the draft Article to give more details about the requirements applying to the seasonal worker and the employer as regards the accommodation. These amendments included the following: Where accommodation is arranged by or through the employer, the seasonal worker may be required to pay rent which shall not be excessive compared with his or her net remuneration and compared with the quality of the accommodation; the rent shall not be automatically deducted from the wage of the seasonal worker; the employer shall provide the seasonal worker with a rental contract or equivalent document in which the rental conditions of the accommodation are clearly stated; and the employer shall ensure that the accommodation meets the general health and safety standards in force in the Member State concerned.[71] All of the amendments made by the Parliament, which offer seasonal work-

66 See Article 6 7(a),(b),(c) of the Directive in the Annex to Chapter 7.

67 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 1 December 2010, document number: 16772/10, 18.

68 *Ibid.*

69 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 10 January 2011, document number: 5051/11, 16.

70 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 13 July 2011, document number: 12363/11, 24.

71 European Parliament, Report on the 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 (Rapporteur: Claude Moraes), PE464.960v03-00, 3 December 2013, 39.

ers greater protection against possible exploitation of an employer, were accepted and compliance with the requirements provided by the provision are mandatory conditions for admission.[72]

7.5.3 Grounds for Rejection

Draft Article 6 of the proposal listed four possible grounds for refusal of an application for admission. Only one of those grounds was obligatory and provided that an application shall be rejected whenever the conditions set out in the provisions on admissions are not met or whenever the documents presented have been fraudulently acquired, or falsified, or tampered with. The grounds on which refusal was discretionary were firstly, verification of whether the vacancy concerned could not be filled by a national or an EU citizen, or by third-country nationals lawfully residing in the Member State and already forming part of its labour market by virtue of EU or national law. Secondly, if the employer has been sanctioned in conformity with national law for undeclared work and/or illegal employment and thirdly, on the ground of volumes of admission of third-country nationals. During the discussions on the draft Article in the WPIME, Germany proposed an addition to the clause on rejection on the ground of volumes of third-country nationals which provided that the rejection could be based on the volumes of 'third-country nationals in general or from certain third countries determined by themselves.'[73] This suggestion was not accepted, but the provision on volumes of admission was made into a separate Article providing that the Directive shall not affect the right of a Member State to determine the volumes of admission of third-country nationals and that an application may be rejected on that ground.[74]

Several Member States, Austria, Cyprus, Hungary, the Netherland and Slovakia, suggested making the provision on giving preference to nationals, EU citizens and lawfully residing third-country nationals an obligatory clause,[75] and Germany stated its opinion that the list of grounds provided 'should not be an exhaustive list of grounds for refusal,'[76] but no changes to this effect were made on the provision during the negotiations. Slovakia suggested to add the condition that 'admission can be rejected if a third-country national has not fulfilled the obligations resulting from the decision on admission during his/her previous stay as a seasonal worker,'[77] and Austria proposed that admissions may be rejected 'if the employer does not meet legal

72 See Article 20 of the Directive in the Annex to Chapter 7.
73 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 1 December 2010, document number: 16772/10, 10.
74 See Article 7 of the Directive in the Annex to Chapter 7.
75 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 29 September 2010, document number: 13693/10, 9.
76 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 17 March 2011, document number: 7131/11, 12.
77 *Ibid.*

provisions regarding social security and taxation.'[78] Both of these suggestions were added as discretionary grounds for rejection in the Directive[79] along with a provision added by the Presidency during the dialogue among the Justice and Home Affairs Counsellors.[80] That amendment provided that admission may be rejected if within the twelve months immediately preceding the date of the application, the employer has abolished a full-time position in order to create the vacancy that the employer is trying to fill by use of this Directive. One additional change that was made to the draft Article made the discretionary provision on sanctions of employers mandatory.[81] It is worth comparing the outcome of the negotiations on this Article in light of the opinion of the Presidency cited above in connection to the dialogue on the provisions for admissions. There the Presidency expressed its opinion that the criteria should be an exhaustive list, among other things to achieve transparency and avoid divergent implementation by Member States.[82] Those considerations were not raised in the discussion on this draft Article, and the number of discretionary provisions found in Article 8[83] of the Directive is bound to work contrary to those objectives.

7.5.4 Withdrawal of the Authorisation for the Purpose of Seasonal Work

Draft Article 7 of the proposal on withdrawal or non-renewal of the permit, provided that Member States shall withdraw or refuse to renew the permit when it has been fraudulently acquired, or has been falsified, or tampered with, and where the holder is residing for purposes other than those for which he/she was authorised to reside. Additionally, it provided that Member States may withdraw or refuse to renew the permit whenever the conditions laid down in the provisions on admission were not met or are no longer met, or for reasons of public policy, public security or public health.

During the initial exchange of views on the draft Article in the WPIME, Estonia, supported by Spain, suggested to merge the two provisions of the Article to make all of the criteria obligatory and Lithuania made a similar comment.[84] These suggestions were not taken up and the reference to public policy, security and health was deleted from the draft Article while as pointed out by Germany it was redundant as it was already covered by draft Article 5.[85] During the discussion similar suggestions were made for additional grounds for withdrawal of the permit for seasonal work as had been discussed in relation to draft Article 6 on grounds for refusal. Thus Spain

78 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 29 September 2010, document number: 13693/10, 9.
79 See Article 8(4)(a),(b),(c) of the Directive in the Annex to Chapter 7.
80 Council of the European Union, Note from Presidency to Counsellors (Justice and Home Affairs), 20 September 2013, document number: 13885/13, 1.
81 See Article 8(1)(a) of the Directive in the Annex to Chapter 7.
82 See section 7.5.1 above
83 See Article 8 of the Directive in the Annex to Chapter 7.
84 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 1 December 2010, document number: 16772/10, 10.
85 *Ibid.*

wished to provide for the possibility to withdraw the permit if the employer does not meet his/her social security or tax obligations,[86] and in cases where an employer has within the last twelve months before applying for a permit for a seasonal worker, eliminated, by null or unfair dismissal, the position he is trying to fill.[87] These two and other additional grounds for withdrawal related to situations where an employer has been subjected to sanctions and if the employer has not fulfilled the obligation based on the work contract were added by the Presidency as discretionary provisions,[88] to what is Article 9 of the Directive.[89] In a note to the WPIME Germany suggested adding as an optional ground for withdrawal, and in fact also for refusal to extend the authorisation for seasonal work, if the third-country national applies for international protection under Council Directive 2011/95/EU.[90] The reasoning given for the suggestion was that although the Directive does not need to expressly exempt applicants or beneficiaries of international protection as its scope is limited to applicants residing outside the territory of the Member States, it has to be made sure that when a third-country national files an application for asylum or another request for protection after having been admitted as a seasonal worker, the different procedural rules can be kept strictly apart. Thus for this reason, Member States should have the option to determine that the authorisation issued for the purpose of seasonal employment, expires when seasonal workers apply for asylum or another form of protection.[91] This amendment was accepted and added as a discretionary provision. Many of the additional grounds added to the draft Article were made to create consistency between the provision on grounds for rejection and withdrawal and the same criticism applies to Article 9 of the Directive as Article 8, that due to several discretionary clauses the level of harmonization among EU Member States regarding access of seasonal workers to the territory and the labour market is diminished.

7.5.5 Duration of Stay, Extension of Contract and Change of Employer

7.5.5.1 Duration of Stay

The proposal defined the limits for duration of stay of a seasonal worker and possibility of extension of stay in draft Article 11. The provision provided that six months was the maximum time seasonal workers would be permitted to reside in a Member State in any calendar year, and that after this period they should return to a third

86 *Ibid.*

87 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 27 May 2011, document number: 10571/11, 16.

88 Council of the European Union, Note from Presidency to Counsellors (Justice and Home Affairs), 20 September 2013, document number: 13885/13, 3-4.

89 See Article 9 of the Directive in the Annex to Chapter 7.

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

91 Council of the European Union, Note from General Secretariat of the Council to the Working Party on Integration, Migration and Expulsion, 26 June 2012, document number: 11769/12, 2.

country. As regards extension of stay it stipulated that within this six-month period, seasonal workers should be allowed to extend their contract or to be employed as seasonal workers with a different employer provided that the criteria for admission are met. During the negotiations the provision on extension of stay was developed into a separate Article which will be discussed in the following section.

The views expressed by the Member States in the WPIME, regarding the permitted length of stay of seasonal workers varied considerably and were in most cases closely related to their efforts to have the Directive reflect their own national situation or provide a high degree of flexibility to accommodate all case scenarios. Firstly, as regards the maximum time a seasonal worker can stay in a Member State, the Netherlands found six months 'too long as after this, persons can claim unemployment benefits' and explained that a reference to the calendar year can open the door for abuse. Spain however, suggested that the maximum period should be nine months,[92] and Austria for example expressed a preference for a maximum stay of twelve months over a period of fourteen months as it has two seasons.[93] Early on in the discussion, the Netherlands proposed an alternative formulation, reasoning that the original formulation was 'too rigid' and suggested 'a period between 5 to 9 months in any 12-month period' and thus 'giving the Member States more flexibility in defining the period.'[94] This suggestion was taken up by the Presidency and the draft Article was amended accordingly.[95] Discussing this proposed change in the WPIME, Greece and Finland expressed regret over 'such an open formulation that does not lead to harmonization,'[96] and France voiced its preference for 'the maximum of 6 months' declaring that the '9 months is excessive and that this would no longer qualify as seasonal work.'[97] Belgium, in its comments on the proposed amendment submitted in the dialogue with the SQWP, established that it was 'not in favour of a *maximum* duration of stay consisting of 9 months on 12' while considering it 'in contradiction with the seasonal worker's obligation to keep his/her principal place of residence in a third country.'[98] The Parliament expressed a preference for a 'fixed period for all Member States but could accept a flexible period as a compromise,'[99] and the provision on duration of stay in the adopted Directive is modelled

92 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 1 December 2010, document number: 16772/10, 14.

93 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 4 July 2012, document number: 11895/12, 31.

94 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 10 January 2011, document number: 5051/11, 13.

95 Council of the European Union, Note from Presidency to Working Party on Integration, Migration and Expulsion, 10 February 2011, document number: 6026/11, 11.

96 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 4 July 2012, document number: 11895/12, 31.

97 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 27 May 2011, document number: 10571/11, 22.

98 Council of the European Union, Note from Council General Secretariat to the Social Questions Working Party, 18 March 2011, document number: 7929/11 REV 1, 3.

99 Council of the European Union, Note from Presidency to JHA Counsellors, 21 March 2013, document number: 7627/13, 65.

after the amendment provided by the Netherlands.[100] In a statement on the draft Directive the non-governmental organisations ENAR, FEANTSA and PICUM expressed regret over the extension of the maximum duration of stay to nine months in a twelve month period, 'as third-country seasonal workers would have a less favourable status than other workers, longer stays might empty the Directive from its 'seasonal' essence and increase the risk of social dumping.'[101]

During the discussion of the proposal, Sweden and Finland were the only Member States that expressed an opinion on the obligation of a seasonal worker to return home after the end of permitted stay. They maintained that it should be deleted or made optional for Member States to apply,[102] but that point did not receive much discussion and the Directive requires seasonal workers to leave the territory of a Member State at the end of the period for which they have granted a permit to stay unless the Member States issue a residence permit to them for purposes other than seasonal work.[103] It would be logical to assume that the fact that the maximum period of stay was extended from six months to nine months rather early on in the negotiations had an effect on the dialogue regarding many other aspects of the draft Directive, in particular those where the assumed temporary status of seasonal workers was an integral part of defining the parameters being discussed. That was however not the case and as will be discussed below, for example in the sections on the right to equal treatment and the right to family reunification, the negotiations proceeded as if a six month stay out of a twelve-month period was the maximum the Directive provided for.

7.5.5.2 Extension of Contract and Change of Employer

In the first exchange of views in the WPIME on the provision in draft Article 11 that provided for the possibility of seasonal workers to extend their contract and change employer, Austria, Estonia, Germany, Latvia, Lithuania and the Netherlands made a reservation to it. Germany declared that it was opposed to the mandatory character of the provision 'as it should be up to Member States to decide whether to extend the contract or allow for the change of employers,' and Austria proclaimed that it was opposed to the possibility to change employers. In response to this, the Commission explained that the provision is 'very important from the point of view of the protection of the workers against possible abuse.'[104] Cyprus and Malta also wanted the provision to be optional for Member States and the Czech Republic and Lithuania

100 See Article 14(1) of the Directive in the Annex to Chapter 7.

101 ENAR, FEANTSA and PICUM. 2013. Seasonal Workers Directive: Improvements for Treatment of non-EU Workers, But Not Enough to Prevent Exploitation. Available at: http://picum.org/en/news/picum-news/42304 (accessed 6 February 2015).

102 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 1 December 2010, document number: 16772/10, 14.

103 See Article 14(1) of the Directive in the Annex to Chapter 7.

104 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 1 December 2010, document number: 16772/10, 15.

supported Germany's proposal to make it optional.[105] Additionally, Greece was opposed to the 'automatic possibility' to change an employer without any criteria, while it found it raises serious concerns for reasons such as that seasonal workers are being admitted to cover the specific need of a specific employer and that the possible favourable provisions on changing employer might cause misuse of the provisions.[106] During the discussions of the draft provision, both in the WPIME and among the Justice and Home Affairs (JHA) Counsellors, several changes were made to the provision, such as making the possibility of extension of stay and change of employer optional for Member States[107] and removing the possibility to change employers altogether.[108]

In the dialogue with the JHA Counsellors, the Presidency made a suggestion to separate the issue from draft Article 11 and constructed a new draft Article addressing it. That draft Article (numbered 11a) provided that Member States, within the maximum period of stay permitted by the Directive a) shall allow seasonal workers one extension of their stay, where seasonal workers extend their contract with the same employer; b) may decide, in accordance with their national law, to allow seasonal workers to extend their contract with the same employer and their stay more than once; c) shall allow seasonal workers one extension of their stay to be employed with a different employer; and d) may decide, in accordance with their national law, to allow seasonal workers to be employed by a different employer and to extend their stay more than once. The draft Article also provided that Member States may refuse to extend or renew the authorisation for the purpose of seasonal work when the vacancy in question can be filled by nationals or third-country nationals legally resident in the Member State and Union citizens.[109] This new formulation still obliged Member States to permit seasonal workers one extension of their stay and to change employers and was not accepted by the Member States. In a note from the Presidency the lack of agreement between the Council and the Parliament on the provision was explain to be that 'some delegations in Council have expressed concern about the obligation for Member States to allow seasonal workers to extend their stay,' the Parliament however, 'is very much attached to the possibility for seasonal workers to extend their stay or renew their authorisation.'[110] During the trilogue, the Parliament insisted on providing for an obligation to permit seasonal workers to change an employer reasoning stating that 'it is very important for protecting seasonal workers

105 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 10 January 2011, document number: 5051/11, 13.

106 Council of the European Union, Note from General Secretariat of the Council to Working Party on Integration, Migration and Expulsion, 7 December 2010, document number: 17580/10, 11.

107 See for example Council of the European Union, Report of JHA Counsellors, 26 October 2012, document number: 15347/12, 32.

108 See for example Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 20 April 2011, document number: 9160/11, 20.

109 Council of the European Union, Note from Presidency to Counsellors (Justice and Home Affairs), 20 September 2013, document number: 13885/13, 4-5.

110 Council of the European Union, Note from Presidency to Permanent Representatives Committee (Part II), 11 October 2013, document number: 14683/13, 3-4.

from abuse.'[111] In the end the Council and the Parliament reached an agreement on a provision that is based on the proposal outlined above put forth by the Presidency, and in addition to that change, a provision was added to the draft Article that permits Member States to refuse extension or renewal of stay if the third-country national applies for international protection.[112]

7.5.6 Facilitation of Re-entry

The proposal addressed facilitation of re-entry for seasonal workers in draft Article 12 which provided that upon application Member States should either issue a 'multi-seasonal worker permit' for up to three seasons or provide a facilitated procedure for third-country nationals who were admitted as seasonal workers before and apply to be admitted again in a subsequent year. The draft provision also provided that a third-country national who has not complied with the admission obligations, in particular that of returning to a third-country on the expiry of the permit shall be excluded from admission for one or more subsequent years. The same type of exclusion was to apply to an employer who has not fulfilled the obligations arising out of the work contract. During the discussion on the draft Article in the WPIME, Austria made a reservation based on the fact that the provision was 'compulsory' for Member States and Estonia, Greece, Italy, Lithuania, the Netherlands, Portugal and Sweden voiced the opinion that the facilitated procedures should be optional for Member States.[113] Additionally, Germany made a reservation on the mandatory character of the paragraphs that provided for grounds for exclusion.[114] In response to these comments, the Commission explained that 'the provision is instrumental in ensuring circular migration and thus discouraging irregular overstays.'[115]

Facilitation of re-entry was one of the issues outstanding in the negotiations between the co-legislators and in a note on the issue the Presidency explained that on the one hand, some delegations took the position that facilitated re-entry for seasonal workers should be voluntary, both as regards the principle and the choice of measures. On the other hand, the Parliament wanted the principle and the measures to be mandatory. As a compromise, the Presidency suggested 'to require Member States to facilitate re-entry of *bona fide* third-country nationals who were admitted to that Member State as seasonal workers at least once, while leaving them the choice of the facilitation measure or measures.'[116] The Council's position was that this clause should not

111 Council of the European Union, Note from Presidency to JHA Counsellors, 21 March 2013, document number: 7627/13, 66-67.

112 See Article 15 of the Directive in the Annex to Chapter 7.

113 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 1 December 2010, document number: 16772/10, 16.

114 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 10 January 2011, document number: 5051/11, 14.

115 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 1 December 2010, document number: 16772/10, 16.

116 Council of the European Union, Note from Presidency to Permanent Representatives Committee (Part II), 4 October 2013, document number: 14150/13, 3.

be obligatory, but should provide that Member States 'may' facilitate re-entry of seasonal workers.[117] The approach suggested by the Presidency was however agreed upon during the trilogue and Article 16[118] of the Directive obliges Member States to facilitate re-entry of third-country nationals who have been admitted to that Member State as seasonal workers at least once within the previous five years, and who have fully respected the conditions applicable to seasonal workers under the Directive. This provision is notably a weak one, if considered in the context of the emphasis placed by the Commission on facilitating circular migration. This outcome has been attributed to the desire of Member States to maintain control over their territories for both 'political as well as economic, reasons' and that by failing to commit to a system of circular migration 'Member States have signalled that they prefer a disposable workforce to do Europe's dirty work, rather than providing an on-going commitment to seasonal migrants upon which sustainable development can be based.'[119]

7.5.7 Rights on the Basis of the Authorisation for the Purpose of Seasonal Work

Draft Article 15 of the proposal set forth rights granted to seasonal workers on the basis of a seasonal workers permit/visa. The list included as minimum the right to enter and stay on the territory of the Member State which has issued the permit, free access to the entire territory of that Member State and the right to exercise the concrete employment activity authorised under the permit. During the discussions on the draft Article the Netherlands, supported by Hungary suggested to add a reference to a concrete employer to the provision as well,[120] but that suggestion did not receive much support or discussion. A note from the Presidency to the JHA Counsellors outlined changes made to the draft Article by the technical group consisting of representatives of the Council, the Parliament and the Commission which suggested amending the draft Article by replacing the word 'permit' with 'authorisation'.[121] This amendment was adopted and counts for the only change that was made to the draft Article and Article 22 of the Directive refers to rights based on 'the authorisation for the purpose of seasonal work',[122] rather than a seasonal worker permit.

117 *Ibid.*, 101.

118 See Article 16 in the Annex to Chapter 7.

119 Fudge, J. 2015. Migration and Sustainable Development in the EU: A Case Study of the Seasonal Workers Directive, *The International Journal of Comparative Labour Law and Industrial Relations* 31(3), 349.

120 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 1 December 2010, document number: 16772/10, 19.

121 Council of the European Union, Note from Presidency to JHA Counsellors, 21 March 2013, document number: 7645/13, 13.

122 See Article 22 in the Annex to Chapter 7.

7.6 RIGHT TO EQUAL TREATMENT

Draft Article 16 provided for rights of seasonal workers. It stipulated that they should be entitled to working conditions, including pay and dismissal as well as health and safety requirements at the workplace, applicable to seasonal work as laid down by law, regulation or administrative provision and/or universally applicable collective agreements in the Member State to which they have been admitted according to the Directive. Furthermore the draft Article provided for equal treatment with nationals of the host Member State at least as concerns freedom of association and affiliation and membership of an organisation representing workers; provisions in national laws regarding the branches of social security as defined in Article 3 of Council Regulation (EC) No 883/2004; payment of statutory pensions based on the worker's previous employment under the same conditions as nationals of the Member State concerned when they move to a third country; and access to goods and services and the supply of goods and services made available to the public, except public housing and counselling services afforded by employment services.

7.6.1 Working Conditions and Terms of Employment

The fact that the Commission did not propose that seasonal workers be granted equal treatment with nationals as regards working conditions and terms of employment was controversial. Having regard to the Commission's 'claim that its goal was to establish a structure for avoiding the exploitation of third-country seasonal workers', Fudge and Herzfeld Olsson considered the substantive provisions of its original proposal 'so severely flawed that they call into question the sincerity of this ambition.'[123] The approach chosen by the Commission was challenged by Finland and Sweden during the discussion in the WPIME. Finland in its contribution to the discussion asked 'why Article 16 does not guarantee an equal treatment with nationals concerning working conditions,' and referred to their understanding of Article 15(3) of the EU Charter for Fundamental Rights, which ensures equal treatment for third-country nationals concerning working conditions and as well as many EU agreements with third countries which guarantee equal treatment to the citizens of the parties concerning working conditions, where no exception is made concerning seasonal workers. Finland maintained that 'the principle of equal treatment laid down in Article 16(2) must cover also terms and conditions of employment,' and that seasonal workers coming from a third country must be treated with respect to terms and conditions of employment in the same manner as EU and domestic seasonal workers. Finland also brought attention to the fact that equal treatment as regards terms and conditions of employment had been guaranteed to workers in the Single Permit Directive that was being discussed simultaneously and in the Blue Card Directive adopted the year be-

123 Fudge, J. and Herzfeld Olsson, P. 2014. The EU Seasonal Workers Directive: When Immigration Control Meets Labour Rights, *European Journal of Migration and Law* 16, 464.

fore the discussion took place.[124] Sweden voiced similar opinions on the draft Article and making a reference to Article 15(3) of the TFEU it suggested that the draft Article should provide for equal treatment rather than rights, also in the provision on working conditions.[125] Greece and the Netherlands also supported the argument that equal treatment should be granted with regard to working conditions,[126] as did Belgium,[127] Spain, France, Cyprus and Austria, while Germany emphasised that 'it should be ensured that a TCN seasonal worker does not receive greater subjective rights than an EU or national seasonal worker.'[128] The majority of delegations of the SQWP 'considered that seasonal workers should indeed be entitled to the same employment conditions as those applicable to other comparable workers.'[129]

The International Labour Organization (ILO) sent a note to the Council and the Presidency during the first year of the discussion of the proposal, 'which analysed the proposal in light of relevant international labour standards, and in particular of the core ILO Conventions, as well as of the specific conventions in the field of migration and social security.'[130] With the note the ILO wanted to 'underline the importance of a robust application in the proposed Directive of the key principles of equality of treatment in regard to working conditions and social security, in the light of relevant International Labour Standards and with reference to other applicable regional human rights instruments.' It reiterated the fact that 'International Labour Standards are in principle applicable to all workers irrespective of their nationality, length of employment and residence in a country, and immigration status, unless specified otherwise.'[131] In the note the ILO raised specific concerns with the draft Article which included the absence of 'reference to equal treatment with nationals of the host Member States as regards working conditions,' and brought attention to the discrepancy between the draft proposal for the directive and the Blue Card Directive and the proposal for the Single Permit Directive. Additionally, the note stated that 'ILO Conventions No. 97 and No. 143 espouse the equal treatment principle between migrant workers and nationals in respect of working conditions, and employment and occupation,' and that equal treatment in employment and occupation is also one of the ILO fundamental principles and rights at work, and the subject of core ILO legally

124 Council of the European Union, Note from General Secretariat of the Council to Working Party on Integration, Migration and Expulsion, 7 December 2010, document number: 17580/10, 13.

125 Council of the European Union, Note from General Secretariat of the Council to Working Party on Integration, Migration and Expulsion, 10 January 2011, document number: 5052/11, 6-7.

126 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 1 December 2010, document number: 16772/10, 20.

127 Council of the European Union, Note from Council General Secretariat to the Social Questions Working Party, 18 March 2011, document number: 7929/11 REV 1, 3.

128 Council of the European Union, Note from the Presidency to the Social Questions Working Party, 28 March 2011, document number: 8341/11, 5.

129 Council of the European Union, Outcome of Proceedings from the Social Questions Working Party, 31 March 2011, document number: 7510/1/11 Rev 1, 6.

130 Council of the European Union, Note from Council General Secretariat to delegations, 2 May 2011, document number: 9564/11, 1.

131 *Ibid*., 3.

binding instruments.[132] No references to a discussion of the ILO note are found in the records from the negotiations. The Parliament proposed amendments to draft Article 16 that stipulated that seasonal workers should be entitled to equal treatment with nationals of the host Member States at a minimum as regards terms of employment, including the minimum working age, and working conditions, including pay and dismissal, working hours, leave and holidays, as well as health and safety requirements at the workplace.[133] In a compromise suggestion to the WPIME, the Presidency amended the draft Article to grant seasonal workers equal treatment as concerns working conditions, including pay and dismissal as well as health and safety requirements at the workplace, as these are applicable to seasonal workers by national law. The Directive provides for equal treatment as regards working conditions[134] for seasonal workers in accordance with national law of each of the Member States and does thereby not address the fact that within the Member States the working conditions of seasonal workers may be exploitative.

7.6.2 Branches of Social Security

In the discussion on social security in the WPIME, the Czech Republic voiced its opposition to granting equal treatment with regard to branches of social security and suggested deleting the draft provision considering that 'such a provision on equal treatment in the whole field of social security systems' as interfering with national legislation, 'which contradicts with the Treaty.' The opinion further provided as reasoning that seasonal work is a temporary and irregular form of work and the access of seasonal workers to the labour market of one Member State does not necessarily affect the labour market of other Member States and therefore, it should be 'up to each Member State to stipulate conditions and entitlements regarding social security benefits.'[135] As regards residence based benefits in particular, the Czech Republic found 'no justified reason to ensure equal treatment in the field of residence benefits, for example family benefits for third-country nationals' while seasonal workers 'wouldn't fulfil two basic conditions for receiving family benefits' as they could stay maximum six months in a Member State.[136] This position was supported by Bulgaria, Germany, Italy, Latvia, Lithuania, Malta, Austria, Poland, Slovakia, Finland and the Netherlands.[137] In relation to the dialogue with the SQWP on the proposal, Germany provided its position on granting equal treatment to seasonal workers. In its note,

132 *Ibid.*, 4.

133 European Parliament, Report on the 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 (Rapporteur: Claude Moraes), PE464.960v03-00, 3 December 2013, 76-77.

134 See Article 23(1)(a) of the Directive in the Annex to Chapter 7.

135 Council of the European Union, Note from General Secretariat of the Council to Working Party on Integration, Migration and Expulsion, 10 January 2011, document number: 5052/11, 2.

136 *Ibid.*, 3.

137 Council of the European Union, Note from the Presidency to the Social Questions Working Party, 28 March 2011, document number: 8341/11, 6.

Germany related the discussion to the ongoing negotiations on the Single Permit Directive and stated that these discussions 'on rights to equal treatment in the areas of social security' for seasonal workers could only be 'preliminary in nature' while the 'approach of the Seasonal Workers Directive must be oriented towards that of the Single Permit Directive.' It had to be assumed that 'even the Single Permit Directive will not provide for full equality of treatment with regard to social security' and 'it is inconceivable for the Seasonal Workers Directive to grant more extensive rights with respect to social security than the Single Permit Directive.'[138] Germany further provided that it 'generally supports the principle that seasonal workers from third countries should be covered by the social security systems of the host states' that however 'some significant specific exceptions from this principle are needed,' and 'that the specific situation of seasonal workers warrants such exceptions from equal treatment. For the start their stay is known to be temporary and limited to a short period of time.'[139]

In a dialogue within the SQWP on the issue of residence based benefits, Bulgaria, the Czech Republic, Germany, Italy, Latvia, Lithuania, Malta, Austria, Poland, Slovakia and Finland considered the formulation of the provision problematic, stressing that 'family benefits as well as benefits based on residence' should be excluded. In particular, Malta considered that seasonal workers should not be entitled to unemployment benefits at the end of their contracts, Spain however stressed that if the family members of a seasonal worker were allowed to enter the host country, they should be entitled to family benefits, and Malta and the Netherlands noted that residence based benefits would not apply to seasonal workers who by definition were not resident in the Union.[140] In a continued dialogue on this issue, a note from the Presidency to the SQWP provided that 'benefits such as family benefits or unemployment benefits would not be relevant in practice' for seasonal workers and that 'equal treatment covers social security benefits and not social assistance.'[141] To accommodate the Member States the Presidency suggested that they were permitted to restrict the granting of family benefits and unemployment benefits[142] regardless of the length of stay of the seasonal worker in the Member State.[143] The Parliament did not agree with this amendment while it was of the 'opinion that although most seasonal workers would not qualify for these benefits' they should be entitled to them if they do,'[144] but no further changes were made to the draft Article to accommodate the Parliament's views. Having regard to the fact that the time period a seasonal worker is permitted to stay was extended to nine months out of twelve during the negotiations,

138 Council of the European Union, Note from Council General Secretariat to The Social Questions Working Party, 18 March 2011, document number: 7941/11, 6.

139 *Ibid.*

140 Council of the European Union, Outcome of Proceedings from the Social Questions Working Party, 31 March 2011, document number: 7510/1/11 Rev 1, 6.

141 Council of the European Union, Note from the Presidency to the Social Questions Working Party, 28 March 2011, document number: 8341/11, 6.

142 See Article 23(2)(i) of the Directive in the Annex to Chapter 7.

143 Council of the European Union, Note from Presidency to Permanent Representatives Committee (Part II), 11 October 2013, document number: 14683/13, 6.

144 Council of the European Union, Note from Presidency to Permanent Representatives Committee (Part II), 2 July 2013, document number: 11612/1, 115.

some of the arguments presented in this discussion above are not relevant. Seasonal workers may for example be entitled to receive unemployment benefits in accordance with national law of some Member States, after having worked for six months and paid mandatory social security contributions.

7.6.3 Goods and Services

The granting of equal treatment to counselling services afforded by employment services stipulated by the draft provision on goods and services, was not acceptable to several Member States. Finland suggested deleting the reference to counselling arguing that equal treatment regarding counselling services should not be granted to seasonal workers due to the fact that they are not entering the employment market. Greece, the Netherlands and Austria agreed with the suggestion, the last mentioned, providing that counselling services are meant for 'long-term workers.'[145] An agreement was reached during the trilogue[146] to amend the provision to the effect that it grants equal treatment to advice services on seasonal work afforded by employment offices.[147]

7.6.4 Provisions on Equal Treatment added during the Negotiations

Four amendments made by the Parliament to the draft Article were adopted by the Council.[148] Those additions were firstly, to grant seasonal workers equal treatment in recognition of diplomas, certificates and other professional qualifications.[149] Secondy, equal treatment regarding education and vocational training. To reach an agreement with the Council on education and vocational training,[150] the application of the principle of equal treatment is limited to education and vocational training that is directly linked to their specific employment activity and by excluding all forms of study and maintenance grants and loans.[151] Thirdly, to tax benefits, in so far as the seasonal worker is deemed to be resident for tax purposes in the Member State concerned. Member States are permitted to limit tax benefits to cases where the registered or usual place of residence of the family members of the seasonal worker for whom he/

145 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 27 May 2011, document number: 10571/1, 29.
146 Council of the European Union, Note from Presidency to Permanent Representatives Committee (Part II), 2 July 2013, document number: 11612/13, 114.
147 See Article 23(1)(f) of the Directive in the Annex to Chapter 7.
148 European Parliament, Report on the 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 (Rapporteur: Claude Moraes), PE464.960v03-00, 3 December 2013, 78 and 79.
149 See Article 23(1)(h) of the Directive in the Annex to Chapter 7.
150 Council of the European Union, Note from Presidency to Permanent Representatives Committee (Part II), 25 October 2013, document number: 15033/13, 113.
151 See Article 23(2)(ii) of the Directive in the Annex to Chapter 7.

she claims benefits, lies in the territory of the Member State concerned.[152] Lastly, the amendment provided for equal treatment as regards back payments to be made by the employers, concerning any outstanding remuneration to the third-country national.

As for the Blue Card and the Single Permit Directives a provision was added by the Presidency that provides that the right to equal treatment in the Article on equal treatment is without prejudice to the right of Member States to withdraw, or refuse to renew or extend an authorisation for seasonal work.[153]

7.7 FACILITATION OF COMPLAINTS

Draft Article 17 addressed an obligation regarding facilitation of complaints and stipulated that Member States shall ensure that third parties which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring compliance with this Directive, may engage either on behalf of or in support of a seasonal worker, with his/her approval, in any administrative or civil proceedings provided for, with the objective of implementing this Directive. During the initial exchange of views on the draft Article in the WPIME, Germany made a reservation referring to the principle of subsidiarity and Austria, Greece and Italy a scrutiny reservation. Germany, Lithuania and Finland asked for a clarification on what is meant by 'third parties' and Greece and Austria on what is meant by 'legitimate interest'. In response to this, the Commission explained 'that not only seasonal workers but also third parties such as unions or NGOs can lodge complaints and a legitimate interest does not mean that there has to be a direct link between a worker and a third party.'[154] In a continued discussion on this issue in 2012 Austria, Germany and Estonia voiced reservations to the draft Article and Finland suggested that it be clarified that the Article does not apply to short-stay visas.[155] Germany also made a reservation opposing the engagement of third parties. Greece suggested adding that 'third parties' should be those 'designated in accordance with national law' and also that the Article should concern specific rights of seasonal workers that are violated and not any administrative or civil proceedings.[156] None of the discussion that occurred in the WPIME concerned the purpose of the provision as a protective mechanism for seasonal workers but the Parliament in its amendment to the draft Article provided for an obligation of Member States to ensure effective mechanisms for seasonal workers to lodge complaints. The justification for the amendment given by the Parliament was that 'given the vulnerability of seasonal workers to exploitation it is essential that there are effective mechanisms in place for seasonal workers to complain themselves, or via third

152 See Article 23(1)(i) of the Directive in the Annex to Chapter 7.

153 See Article 23(3) of the Directive in the Annex to Chapter 7.

154 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 1 December 2010, document number: 16772/10, 21.

155 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 4 July 2012, document number: 11895/12, 41.

156 Council of the European Union, Report of JHA Counsellors, 4 December 2012, document number: 16976/12, 42.

party.'[157] During the trilogue an agreement was reached on the Article as amended by the Parliament,[158] and no changes were made that reflect the concerns of the Member States.[159]

7.8 RIGHT TO FAMILY REUNIFICATION AND ACCESS OF FAMILY MEMBERS TO THE LABOUR MARKET

The proposal for the Directive was silent on the right to family reunification for seasonal workers and there were no references made to it in the accompanying impact assessment. As outlined in the discussion above on the scope of the Directive, Sweden suggested in the first exchange of views in the WPIME, that it 'should be specified that family members of seasonal workers should be able to accompany them.'[160] This suggestion was judging from the records, not discussed at all during the negotiations. The Czech Republic sent a note to the WPIME, suggesting that an amendment be made to draft recital 22 of the preamble, providing that the 'directive should not confer any rights on family members of seasonal workers,' in addition to a suggestion that family members of seasonal workers would be explicitly excluded from the scope of the Directive by an amendment to draft Article 2.[161] This proposition was followed upon by the Presidency by making a compromise suggestion and adding to draft recital 22 of the preamble that the Directive 'does not provide for family reunification and accordingly does not confer rights on family members of seasonal workers.'[162] During the trilogue, an agreement was reached on reformulating this amendment,[163] and the wording of recital 46(3) of the adopted Directive states that 'this Directive does not provide for family reunification. Furthermore, this Directive does not grant rights in relation to situations which lie outside the scope of Union law such as for example, situations where family members reside in a third country.'[164] The restrictive approach towards family reunification and equal rights to family related benefits for seasonal workers was largely based on the argument that seasonal workers are not

157 European Parliament, Report on the 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 (Rapporteur: Claude Moraes), PE464.960v03-00, 3 December 2013, 80.

158 Council of the European Union, Note from Presidency to Permanent Representatives Committee (Part II), 2 July 2013, document number: 11612/13, 118-119.

159 See Article 25 in the Annex to Chapter 7.

160 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 29 September 2010, document number: 13693/10, 3.

161 Council of the European Union, Note from General Secretariat of the Council to Working Party on Integration, Migration and Expulsion, 24 January 2012, document number: 5688/12, 2.

162 Council of the European Union, Note from Presidency to Working Party on Integration, Migration and Expulsion, 22 February 2012, document number: 6686/12, 7.

163 Council of the European Union, Note from Presidency to Permanent Representatives Committee (Part II), 25 October 2013, document number: 15033/13, 33.

164 Directive 2014/36/EU of the European Parliament and of the Council on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, Recital 46(3).

residents and only permitted to stay for short periods of time with no prospects of gaining permanent residence in a Member State. In a conference on EU law on labour migration a former staff member of the Parliament who worked on the negotiations of the Directive stated, in response to a question why family reunification for seasonal workers was barely discussed during the negotiations, that it had been a common understanding in the Parliament that if it advocated for or insisted on providing for the right to family reunification for seasonal workers, the Directive would not have been adopted.[165]

7.9 CONCLUSIONS

The negotiations on the Seasonal Workers Directive centred in many aspects around an important factor that framed the status of seasonal workers as migrant workers in EU Member States in all regards. This is the construction of seasonal workers as temporarily contributing to the economy of a Member State by working. This assessment is based on several factors such as that seasonal workers are not considered resident in a Member State, although they can stay and work there for a period up to nine months out of twelve. Seasonal workers are not granted a residence permit on the basis of the Directive and they are to keep their residence in a third country while staying and working within the EU. Although there is no difference between 'stay' and 'residence' in the TFEU as discussed in the above, the Member States, in particular Latvia, Lithuania, the Netherlands and Sweden, were preoccupied with ensuring that the terminology used in the Directive, in addition to its content, constructed a status characterised by temporariness. This is also visible in respect to provisions requiring that seasonal workers leave the territory of a Member State after their authorisation has expired, the reluctance of Member States such as Greece to allow change of employer while in its view seasonal workers should only be admitted to 'cover a specific need of a specific employer', and the provisions on extension of an authorisation and facilitation of re-entry, which Austria, Estonia, Greece, Italy, Lithuania, the Netherlands, Portugal and Sweden did not want to be obligatory, as well as the absence of criteria for renewal of an authorisation. The Members States were reluctant to accept obligatory conditions as regards most of these aspects of access to territory and the labour market and most of the positive changes that were made in relation to those during the negotiations were made by the Parliament as a co-legislator, which input considerably improved the protection provided for seasonal workers for example as concerns admission, accommodation and change of employer.

The construction of temporary status influenced the extent to which the Directive grants seasonal workers the right to equal treatment with nationals. All the factors regarding equal treatment with nationals and the right to family reunification were discussed during the negotiations from the premises that in the proposal for the Directive seasonal workers were only permitted to stay in a Member State for six

165 Hélène Calers, Annual Conference on European Migration Law 2015, Academy of European Law, Brussels, 7 May 2015.

months in any twelve months period. The maximum time limit was however increased to nine months in 2011, only six months into the negotiations process, but that was never taken into account in relation to the rights aspect of the Directive. The Commission's proposal for the Directive had serious shortcomings in respect of equal treatment. Firstly, it did not provide for equal treatment as regards working conditions and terms of employment for seasonal workers. This was called into question by Sweden and Finland. Austria, Belgium, Cyprus, France, Greece and the Netherlands as well as the Parliament supported amending the provision to provide for equal treatment with nationals which resulted in an amendment to grant seasonal workers equal treatment with nationals as regards working conditions although Germany opposed it. Secondly, the issue areas that the draft Article on equal treatment addressed were limited to freedom of association, branches of social security, payment of acquired pensions and goods and services. The contribution of the Parliament to the negotiations substantially extended the scope of the right to equal treatment provided by Directive, although it allows for some questionable derogations such as restricting the right to unemployment benefits and family benefits in spite of social security contributions paid, as well as limiting the right to equal treatment relevant to education to any training or education except that which is directly linked to the specific employment activity. The Czech Republic was opposed to granting seasonal workers the right to equal treatment as concerns branches of social security in general and Austria, Bulgaria, the Czech Republic, Finland, Germany, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland and Slovakia were all opposed to granting seasonal workers equal treatment to residence based benefits. Although the Parliament in its role as a co-legislator opposed restrictions on ejqual treatment regarding residence based benefits, the adopted Directive permits them as outlined above. The way that access to territory and the right to equal treatment are provided for in the Directive addresses seasonal workers as temporary non-resident workers and uses that status to provide for limitations of their rights, as well as allocating them a status as third-country workers with no prospects of becoming permanent residents in EU Member States.

8. The Intra-Corporate Transfer Directive

8.1 INTRODUCTION

Herein, four aspects of Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, or the Intra-Corporate Transfer Directive, are examined. Those are access to territory and access to the labour market, the right to equal treatment and the right to family reunification, including access of family members to the labour market. The purpose of the examination is to reveal how the right to equal treatment with nationals is constructed in the Directive for the third-country nationals that fall under its scope and disclose what is the right to equal treatment granted to intra-corporate transferees. Additionally, the status granted to intra-corporate transferees through access to territory and access to the labour market will be addressed in order to divulge the effect of the status granted to this group of third-country nationals under the EU's sectoral approach to labour migration, on the right to equal treatment and the right to family reunification.

The examination takes as a starting point the Commission's proposal for the Directive and outlines the discussion that took place on the four aspects listed above during the negotiations of the Directive. This discussion uncovers how the right to equal treatment was determined in the negotiations and focuses on the dialogue among the Member States within the Working Party on Integration, Migration and Expulsion (WPIME), the Social Questions Working Party (SQWP), the Strategic Committee on Frontiers and Asylum (SCIFA) and the Permanent Representatives Committee (Coreper), as well as the trilogue between the Parliament, the Council and the Commission. To contextualize the issues discussed in this chapter, it will start by looking at the background to the Directive, its objectives, subject matter, scope and some relevant definitions.

8.2 BACKGROUND TO THE DIRECTIVE

The proposal for the Directive was submitted by the Commission to the Council on 13 July 2010, and adopted on 14 May 2014. The negotiations for the Directive which spanned over close to four years were ongoing at the same time as those for the Seasonal Workers Directive and partially those for the Single Permit Directive. The Directive was adopted on the basis of the ordinary legislative procedure set forth in Article 294 TFEU which with the coming into force of the Lisbon Treaty provides that the Parliament is a co-legislator with the Council on measures on labour migration. The legal basis of the Directive which is Article 79(2)(a) and (b) of the TFEU, was challenged by the Parliament's Employment Committee which considered that legal basis not appropriate and proposed 'adding Article 153(1)(a), (b) and (g) TFEU,

which falls under Title X on Social Policy of Part Three of the TFEU.'[1] The opinion of the Parliament's Committee on Legal Affairs on the legal basis provided that since the aim and content of the Directive is to firstly 'introduce a special procedure for entry and residence and standards for the issue by Member States of residence permits for third-country nationals applying to reside in the EU for the purpose of an intra-corporate transfer,' and secondly 'to define the rights of the above-mentioned category of third-country nationals,' Article 79(2)(a) and (b) TFEU would seem to constitute an appropriate basis for the proposal.[2] The issue of the legal basis was not discussed in further detail or substance during the negotiations and Article 79(2)(a) and (b) is the sole legal basis for the adopted Directive.

The impact assessment accompanying the proposal for the Directive provided that the relevance for the EU to adopt a legislative instrument on intra-corporate transfer was related to the EU's economic competitiveness and considered a tool to 'boost the competitiveness of the EU economy, and to complement the set of other measures the EU is putting in place to achieve the goals of the EU 2020 strategy.'[3] In relation to that it was stated that intra-corporate transferees are 'qualified workers whom the EU company crucially needs' and that the 'transfers usually concern senior executives needed to supplement resources in a context of skills shortages.'[4] Furthermore, that 'in recent years, needs for intra-corporate transfers across national borders have increased as a result of the globalization of business and skill shortages with respect to the highly skilled.'[5] The impact assessment described intra-corporate transferees as 'not only qualified workers,' but that one of 'their main characteristic is that they meet a demand in situations where there are no alternatives,' that 'they fill the posts that would otherwise be left vacant, since no substitute could be found to occupy a post requiring such a specific knowledge.'[6] Although intra-corporate transferees are considered highly qualified workers, they are by the Commission considered as different from highly qualified workers that fall under the scope of the Blue Card Directive. Intra-corporate transferees are seen as 'temporary workers' that 'meet specific short-term needs', brought into EU territory to 'carry out time-limited assignments usually followed by a return to the country where their permanent employer is based.' Additionally, it is considered of relevance 'that according to available data,' intra-corporate transferees 'are more likely to come from developed countries than from developing countries.'[7]

1 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Rapporteur: Salvatore Iacolino), PE464.961v02-00, 12 March 2014, 57.
2 *Ibid*., 61.
3 Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, SEC(2010) 884, 15 July 2010, 15.
4 *Ibid*., 13.
5 *Ibid*., 12.
6 *Ibid*., 14.
7 *Ibid.*

The problem the Directive sets forth to address is that companies outside the EU that 'need to send key members of staff, who are not EU nationals, to their subsidiary companies located within the EU,' need to be able to 'react rapidly to new challenges, to provide specialist knowledge or skills that are not available locally.' They are however faced with a 'lack of clear specific schemes in most EU Member States, complex requirements, costs, delays in granting visas or work permits and uncertainty about the rules and procedures,' governing intra-corporate transfer.[8] These factors along with a 'wide differentiation between EU Member States with respect to conditions of admission,' are considered obstacles to intra-corporate transfer in Europe and as limiting 'the possibility of international firms to rely on mobility' of intra-corporate transferees.[9]

The subject matter addressed by the Directive has several direct relations to the General Agreement on Trade in Services (GATS) developed under the auspices of the World Trade Organisation (WTO) and by which 25 EU Member States are bound. The Commission chose to frame the proposed Directive within the context of Directive 96/71/EC concerning the posting of workers by undertakings established in a Member State in the framework of provision of services and the Council of the European Union considers intra-corporate transferees as a 'special kind of posted workers.'[10] The Parliament expressed a fundamental disagreement 'with the Commission on what rules should be applied to the Intra Corporate Transferees,' and stated, that the 'reference to Posting of Workers Directive envisaged by the Commission does not seem to be appropriate in this Directive for several reasons.' Furthermore, that it 'has to be noted that it is not clear whether and to what extent the Posting of Workers Directive applies to third-country nationals,'[11] and that the aim of the Posting of Workers Directive is different from that of the Intra Corporate Transfer Directive, while the former is meant to ensure the free movement of services, the objective of the latter is to ensure the free movement of labour.[12] The difference between the posting of workers and an intra-corporate transfer is essentially that the former involves sending a worker for a short term period (maximum 24 months) to provide services in an EU Member State other than that in which he/she normally works on behalf of an undertaking that is located in the sending State and the posted worker is not considered as a part of the labour market of the host Member State. Intra-corporate transfer however is a secondment of a third-country national from an undertaking established outside an EU Member State, to work for that undertaking in an EU Member State under an employment contract with a company based outside the EU. Brieskova seconds the opinion of the Parliament discussed above and maintains that the two Directives belong to different legislative spheres, while the Posting of

8 *Ibid.*, 5.

9 *Ibid.*, 15.

10 Council of the European Union, Note from Presidency to Permanent Representatives Committee, 3 February 2014, document number: 5771/14, 3.

11 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Rapporteur: Salvatore Iacolino), PE464.961v02-00, 12 March 2014, 64.

12 *Ibid.*

Workers Directive functions within the EU single market in support of the provision of services, whereas 'intra-corporate transfers are aimed at allowing multinational companies to efficiently utilize their human capital.'[13] This issue of framing the proposed Directive within the context of the Posting of Workers Directive was a recurrent theme during the negotiations that is discussed in connection with several provisions of the draft Directive such as on its scope, criteria for admission and most importantly regarding the provision on equal treatment.

8.3 OBJECTIVES OF THE DIRECTIVE

The aims and objectives of the Directive were outlined in the impact assessment accompanying the proposal. Therein, the overarching aim of the Directive is defined as 'in particular to facilitate intra-corporate transfer of skills both to the EU and within the EU in order to 'boost the competitiveness of the EU economy, and to complement the set of other measures the EU is putting in place to achieve the goals of the EU 2020 strategy.'[14] Directly related to that, the 'global objective is to support economic development of EU businesses by better responding to their needs for intra-corporate transfers of skills, while guaranteeing fair competition,' which is considered to be 'consistent with the EU 2020 strategy which sets the EU the objective of becoming an economy based on knowledge and innovation, reducing administrative burden on companies and better matching labour supply with demand.'[15]

The specific and immediate objectives of an EU intervention in relation to intra-corporate transfer are however defined as the following:

> 1. To provide for a transparent legal framework including a set of common conditions of admission for third-country national ICTs entering into the EU.
> 2. To create more attractive conditions of stay for third-country national ICTs and their families.
> 3. To facilitate (intra-EU) mobility of third-country national ICTs.
> 4. To guarantee fair competition, including a secure legal status for third-country national ICTs.
> 5. To facilitate the fulfilment of EU international commitments in the context of the GATS.[16]

The discussion on the negotiations of selected provisions of the Directive that will be provided in what follows, will give some insight into how the Directive meets the stated objectives underlying the proposal of the Directive.

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13 Brieskova, L. 2014. *The new Directive on intra-corporate transferees: Will it enhance protection of third-country nationals and ensure EU Competitiveness?* Available at: http://eulawanalysis.blogspot.com.es/2014/11/the-new-directive-on-intra-corporate.html (accessed on 5 April 2015)

14 Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, SEC(2010) 884, 15 July 2010, 15.

15 *Ibid.*, 20.

16 *Ibid.*

8.4 SUBJECT MATTER, SCOPE AND DEFINITIONS

8.4.1 Subject Matter

The subject matter of the Directive is set out in Article 1 of the draft proposal[17] which provides that the Directive determines firstly, the conditions of entry to and residence for more than three months in the territory of the Member State of third-country nationals and of their family members in the framework of an intra-corporate transfer and secondly, the conditions of entry to and residence for more than three months of third-country nationals, referred to above, in Member States other than the Member State which first grants the third-country national a residence permit on the basis of this Directive. The provision did not receive much discussion during the negotiations and is largely the same in the adopted Directive.[18] What is important about the Article is that it provides that the Directive only regulates the status and rights of intra-corporate transferees who stay longer than 90 days in a Member State which entails that those who stay for less than 90 days, for example on a Schengen visa, fall outside of the scope of the Directive.

8.4.2 Scope

Draft Article 2 provided that it shall apply to third-country nationals who reside outside the territory of a Member State and apply to be admitted to the territory of a Member State in the framework of an intra-corporate transfer. Additionally that the Directive shall not apply to the following groups: third-country nationals who apply to reside in a Member State as researchers, within the meaning of Directive 2005/71/EC, in order to carry out a research project; third-country nationals who, under agreements between the Union and its Member States and third countries, enjoy rights of free movement equivalent to those of citizens of the Union or are employed by an undertaking established in those third countries; and third-country nationals carrying out activities on behalf of undertakings established in another Member State in the framework of a provision of services within the meaning of Article 56 of the TFEU including those posted by undertakings established in a Member State in the framework of a provision of services in accordance with Directive 96/71/EC.

During the exchange of views on the draft Article in the Working Party on Integration Migration and Expulsion (WPIME), Sweden suggested adding to the scope that the Directive shall also if provided for by national law, apply to third-country nationals who are legally staying in the territory of a Member State and apply for an intra-corporate transfer permit in that Member State.[19] Germany wanted a clarifica-

17 All references to 'proposal for the Directive', 'proposal' and 'draft Article' in this chapter are to Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, COM(2010) 378, 13 July 2010.

18 See Article 1 of the Directive in the Annex to Chapter 8.

19 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 3 December 2010, document number: 16281/10, 3.

tion to be added to the scope that provided 'that with regard to social security rights,' third-country nationals 'are not entitled to family and child benefits because of this proposal.'[20] Neither of these suggestions were taken up and are not reflected in the adopted Directive. Discussing the scope further in the WPIME, Austria, Finland and Cyprus suggested 'including explicitly that temporary work agencies are out of the scope of the draft Directive,'[21] and in its legislative proposal the Parliament suggested an amendment to include in the list of those excluded from its scope 'third-country nationals carrying out activities as temporary agency workers' for any type of agency or company 'engaged in making available labour to work under the supervision and direction of other undertakings.'[22] A new provision of Article 2 was drafted based on these amendments and this group of workers is excluded from the scope of the Directive.[23]

The two main issues related to the scope discussed during the negotiations were firstly, the link between the proposed Directive and the Posted Workers Directive and secondly, the possibility to grant national residence permits to intra-corporate transferees. As regards the link between the two Directives referred to above, the Presidency explained in a note to the Social Questions Working Party (SQWP) that 'delegations stressed that the scope of the draft Directive should be clear and further clarification was needed regarding a number of areas. In particular they called for more clarity regarding the relation between this draft Directive and Directive 96/71/EC.' In relation to this, Austria, Portugal, Finland, Spain and Lithuania supported rewording of the provision to provide an explicit reference to Directive 96/71/EC or its key provisions.[24] The Parliament on the other hand wanted to delete the reference to the Posted Workers Directive with the justification that it 'is not suited to handle Intra-Corporate Transferees from third countries,' and that 'these should not be mixed with the internal mobility of EU.'[25] Furthermore, the Parliament provided that the Posted Workers Directive is to 'be reviewed as it has been interpreted to provide for minimum rules of protection only'. In light of the *Laval* case, Member States 'would not be able to require working conditions going beyond the minimum protection provided in Directive 96/71/EC.'[26] In the *Laval* judgment the Court of Justice

20 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 22 December 2010, document number: 17781/10, 3.

21 Council of the European Union, Note from the Presidency to the Social Questions Working Party, 24 March 2011, document number: 8200/11, 3.

22 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Rapporteur: Salvatore Iacolino), PE464.961v02-00, 12 March 2014, 74.

23 See Article 2(2)(e) of the Directive in the Annex to this chapter.

24 Council of the European Union, Note from the Presidency to the Social Questions Working Party, 24 March 2011, document number: 8200/11, 3.

25 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Rapporteur: Salvatore Iacolino), PE464.961v02-00, 12 March 2014, 74.

26 Council of the European Union, Note from the Presidency to Counsellors (Justice and Home Affairs), 27 January 2014, document number: 5635/14, 10.

of the European Union concluded that the Posted Workers Directive only requires employers to observe 'a nucleus of mandatory rules for minimum protection' for posted workers.[27] Thus, if an explicit reference to the Posted Workers Directive is made in the Intra-Corporate Transfer Directive, the same will apply to intra-corporate transferees. Neither the opinion of the Parliament nor those of the Member States on this issue were taken into account, and no direct references are made to the Posted Workers Directive in Article 2, other than that posted workers in the framework of Directive 96/71/EC are explicitly excluded from the scope of the Intra-Corporate Transfer Directive.[28] The relationship between the two Directives is therefore not clarified as was called for by the Member States but as will be discussed below is a framework of reference for the right to equal treatment granted to intra-corporate transferees.

As concerns the second issue on residence permits, Sweden proposed, during the discussions in the WPIME, to add a new paragraph to draft Article 4 on more favourable provisions, which provided that the Directive 'shall be without prejudice to the right of Member States to issue residence permits other than an intra-corporate transferee permit for any purpose of employment,' and that 'such residence permits shall not confer the right of mobility between Member States as provided for in this Directive.'[29] Austria, Germany, the Netherlands and Sweden sent a joint suggestion to the WPIME on the same issue stating that 'absence of this provision in the ICT-directive could lead to an 'a contrario' argumentation that Member States are not allowed to issue national residence permits for ICT's', concluding that it 'could not be in the interest of Member States (and international concerns, established in the Member State concerned) which like to facilitate the admission of ICT's.'[30] This suggestion was later included by adding a paragraph to draft Article 2(3) of the Directive,[31] an amendment which permits the Member States to have a parallel national system for granting permits for intra-corporate transferees, but the Commission voiced 'a strong reservation' on the creation of such a system.[32]

This remained one of the outstanding issues until the end of the negotiations for the Directive. The differences between the parties regarding the issue were described as that 'several delegations want to maintain the possibility for Member States to operate national schemes to attract intra-corporate transferees to their territories.' These national schemes were seen as complementary to the EU-scheme (Article 2(3)) and that intra-corporate transferees that 'would not qualify on the basis of the criteria of the directive, could then be admitted to a Member State applying a less restrictive

27 Case C-341/05 *Laval* [2007], paragraph 108.

28 See Article 2(2)(c) of the Directive in the Annex to Chapter 8.

29 Council of the European Union, Note from the Czech and the Swedish delegations to the Working Party on Integration, Migration and Expulsion, 10 January 2011, document number: 5120/11, 7.

30 Council of the European Union, Note from General Secretariat of the Council to Working Party on Integration, Migration and Expulsion, 18 October 2011, document number: 15653/11, 2.

31 See Article 2(3) of the Directive in the Annex to Chapter 8.

32 Council of the European Union, Outcome of Proceedings of Permanent Representatives Committee, 6 June 2012, document number: 10618/12, 16.

national scheme. In this context it is noted that intra-corporate transferees who are admitted under a national scheme would not be entitled to intra EU-mobility.'[33] The Parliament supported by the Commission, opposed 'complementary national migration schemes fearing that they would undermine harmonisation at EU level.'[34] To solve the issue, the Presidency suggested specifying in Article 2(1) that the Directive applies in the framework of an intra-corporate transfer of managers, specialists or trainee employees. As a result, any third-country national who does not qualify as a manager, specialist or trainee employee, as defined in Article 3 of the Directive, will not fall under the scope of the Directive and will not be covered by its provisions. Therefore, such third-country nationals could still be admitted to the territory of a Member States under a national migration scheme.[35] During the trilogue, the Council and the Parliament reached an agreement based on this suggestion and an amendment was adopted with Article 2(3) of the Directive providing that Member States can issue residence permits to intra-corporate transferees who do not fall under the scope of the Directive,[36] thus permitting them to maintain two different schemes at the national level, applying to different groups of intra-corporate transferees and granting them different rights and access to territory and the labour market of the EU.

8.4.3 Definitions

Draft Article 3 provided for definitions of a third-country national, intra-corporate transfer, intra-corporate transferee, host-entity, manager, specialist, graduate trainee, higher education qualifications, family members, intra-corporate transferee permit, single application procedure, group of undertakings, first Member State, universally applicable collective agreements and regulated professions. During the negotiations for the Directive, the definition of an intra-corporate transfer received some discussion but most of the discussion focused on the definitions of manager, specialist and graduate trainee.

In summary, the discussion on the draft Article centred around the differences in opinion of the parties to the negotiations on how closely the definitions of 'manager', 'specialist' and 'graduate trainee' should be aligned with the definitions of these groups in the GATS agreement. In the WPIME**,** Greece expressed the view 'that the definitions should be as close as possible with their equivalent' in the GATS agreement 'for interpretation purposes,' to which the Commission replied that it could be clarified that the GATS framework 'is the point of departure for the definitions in this proposal, however, the legal consequences and the scope of each instrument' are

33 Council of the European Union, Note from Presidency to Permanent Representatives Committee, 8 November 2013, document number: 13436/13, 8 November 2013, 2.

34 *Ibid*., 3.

35 *Ibid.*

36 Council of the European Union, Note from Presidency to Permanent Representatives Committee, 17 January 2014, document number: 5336/14, 3.

different for each Member State.[37] From a discussion in the SQWP, it emerged that France, the Netherlands, Sweden and Slovakia 'stressed that, as the scope of the Directive was broader than that of the GATS, it would not always be appropriate to align the definitions of the proposal on those of the GATS.' Austria, the Czech Republic, Germany, Finland and Malta on the other hand 'considered that the definitions should be as far as possible identical with the relevant GATS definitions.'[38] The Commission pointed out 'that the definitions were close to those of the GATS and that the main differences concerned wording rather than the substance.'[39] After a further examination of the issue, the SQWP concluded in a note to the WPIME, that 'the terminology in the draft Directive should draw on already established and used notions, e.g. be in line with the GATS definitions and/or the Blue Card Directive's, though not necessarily the same and or identical to those. Irrespective of the 'model', the definitions should be precise, clear and fit for the purposes of the draft Directive.'[40] Additionally, the SQWP provided that several delegations of the working party, 'consider the definition of 'specialist' as crucial, because a tight enough definition can limit the possible abuses of the system as well as stresses the added value of the ICT workers to companies in the EU.'[41] During the dialogue between the WPIME and the SQWP, Austria sent a note to the latter in which it raised a concern about the legal basis of the Directive being Article 79 TFEU, seeing 'too much emphasis and influence of the draft Directive on the development of the national labour markets.' In their assessment, these 'labour market shaping provisions range from the definition of manager, specialist and graduate trainee which partly go beyond the labour market balanced GATS-definition.'[42]

In a note to the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), the Presidency explained that in the course of the negotiations at the meetings of the WPIME, 'several elements were introduced in the definitions' of the groups outlined above, 'that effectively render them broader.'[43] An example was provided of the definition of a specialist, which in the then current version of the draft Article did 'not contain a reference to the notion of 'uncommon knowledge' which is used in the GATS offer.' Furthermore that it emerges 'from the comparison that the GATS commitments contain a general requirement of previous employment for managers, specialist and graduate trainees although that it can be modified by national commitments, whereas the Commission and some Member States would like

37 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 29 October 2010, document number: 14788/10, 4.

38 Council of the European Union, Outcome of Proceedings from the Social Questions Working Party, 8 April 2011, document number: 8744/11, 3 and 14 April 2011, document number: 8744/11 COR 1, 1.

39 Council of the European Union, Outcome of Proceedings from the Social Questions Working Party, 8 April 2011, document number: 8744/11, 4.

40 Council of the European Union, Report from the Social Questions Working Party, 6 May 2011, document number: 9879/11, 4.

41 *Ibid.*

42 Council of the European Union, Note from Council General Secretariat to the Working Party on Social Questions, 21 March 2011, document number: 8013/11, 3.

43 Council of the European Union, Note from Presidency to Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), 25 November 2011, document number: 17514/11, 3.

to see this requirement as optional despite the EU mobility rights provided for in the Directive.'[44] As a part of the process of reaching an overall agreement between the Council and the Parliament on the Directive, a package of compromise suggestions was submitted by the Presidency to the Parliament. In addition to the legislative text, three statements were made, including one by the Commission on the definition of a 'specialist'. The statement provides that the 'Commission considers that the definition of 'specialist' in Article 3(f)[45] of this Directive is in line with the equivalent definition ('person possessing uncommon knowledge') used in EU's schedule of specific commitments to WTO's General Agreement on Trade in Services (GATS). The use of the word 'specialised' instead of 'uncommon' does not entail any change or extension of the GATS definition and is only adapted to the language now in use.'[46] What is most revealing about this discussion is the fact that although the Intra-Corporate Transfer Directive is seen as highly related to the GATS agreement, neither the Member States nor the Commission wish to be bound by the framework put forth by the GATS, on the one hand due to wishing to have flexibility pertaining to defining who can be considered a specialist, and on the other hand because of a lack of a common agreement among the Member States on the definitions.

8.5 ACCESS TO TERRITORY AND ACCESS TO THE LABOUR MARKET

Access to territory and to the labour market is governed by several provisions of the Directive that will be discussed here in succession. Those are draft Article 5 on criteria for admission, draft Article 6 on grounds for rejection, draft Article 7 on withdrawal or non-renewal of a permit, draft Article 11 on the permit granted for intra-corporate transfer, draft Article 13 on the rights on the basis of the permit, draft Article 16 on intra-EU mobility and a provision on volumes of admission that was added during the negotiations.

8.5.1 Criteria for Admission

Draft Article 5 of the proposal listed the criteria for admission that included that a third-country national who applies to be admitted under the terms of this Directive shall: provide evidence that the host entity and the undertaking established in a third country belong to the same undertaking or group of undertakings; provide evidence of employment within the same group of undertakings, for at least twelve months immediately preceding the date of the intra-corporate transfer, if required by national legislation, and that he/she will be able to transfer back to an entity belonging to that group of undertakings and established in a third country at the end of the assignment; present an assignment letter from the employer including: the duration of the transfer

44 *Ibid.*

45 See Article 3(f) of the Directive in the Annex to Chapter 8.

46 Council of the European Union, Note from Presidency to Permanent Representatives Committee, 25 February 2014, document number: 6795/14, 2.

and the location of the host entity or entities in the Member State concerned; evidence that he/she is taking a position as a manager, specialist or graduate trainee in the host entity or entities in the Member State concerned; the remuneration granted during the transfer; evidence that he/she has the professional qualifications needed in the Member State to which he/she has been admitted for the position of manager or specialist or, for graduate trainees, the higher education qualifications required.

Additionally, the third-country national was required to provide documentation certifying that he/she fulfils the conditions laid down under national legislation for citizens of the Union to exercise the regulated profession which the transferee will work in; having applied for sickness insurance for all the risks normally covered for nationals of the Member State concerned for periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or as a result of, the work contract; and be considered not to pose a threat to public policy, public security or public health. Furthermore, the Member States shall require that all conditions in the law, regulations or administrative provisions and/or universally applicable collective agreements applicable to posted workers in a similar situation in the relevant occupational branches are met with regard to the remuneration granted during the transfer. Due to the extensive list of criteria, only the most controversial ones will be addressed here.

During the first exchange of views on the draft Article in the WPIME, Austria made a reservation on the draft Article due to the 'exhaustive nature of the list of criteria' and Poland queried whether additional grounds for refusal of admission, such as figuring in the national list of alerts, or in the Schengen Information System[47] should be added. This was also discussed in the SQWP, where Austria and Germany were in favour of a non-exhaustive list of admission criteria, whereas France felt that it 'would run against the objective of a common framework.' The Netherlands 'also considered that the list should be exhaustive in order to make it possible for the undertaking to know in advance which criteria would need to be met.'[48] Although the arguments for a non-exhaustive list of criteria were not accepted, several discretionary clauses were added to the list during the negotiations,[49] some of these will be discussed below.

The requirement to provide evidence of twelve months of employment with a host entity prior to applying for intra-corporate transfer met some opposition from Member States, most of which considered it too long. In a common proposal Austria, Finland, Greece, Slovakia, Slovenia, Sweden, the Netherlands and Germany suggested that this period be reduced to six months for managers and specialists and three months for employees in training.[50] An amendment to this effect was made to the draft Article which provided that the required period should be at least six and up to

47 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 3 December 2010, document number: 16281/10, 10.

48 Council of the European Union, Outcome of Proceedings from the Social Questions Working Party, 8 April 2011, document number: 8744/11, 4.

49 See Article 5 of the Directive in the Annex to Chapter 8.

50 Council of the European Union, Note from General Secretariat of the Council to Working Party on Integration, Migration and Expulsion, 18 November 2011, document number: 17091/11, 7.

twelve months for managers and specialist and at least three up to twelve months, for graduate trainees.[51] In the adopted Directive, the requirement is to provide evidence of employment for at least 'three to twelve uninterrupted months immediately preceding the date of the intra-corporate transfer in the case of managers and specialists, and from at least three up to six uninterrupted months in the case of trainee employees.'[52]

Addressing the provision on remuneration in the draft Article, Germany suggested amending the criteria 'to ensure that the Member States can require, as a precondition for admission, that ICTs must not be employed under less favourable terms and conditions than comparable national workers.'[53] The Parliament made a similar amendment providing that it be required that 'the remuneration granted to the third-country national during the entire transfer is not less favourable than the remuneration granted to nationals of the host Member State concerned occupying comparable positions according to applicable laws or collective agreements or practices in the Member State where the host entity is established.'[54] This provision was one of the outstanding issues between the Parliament and the Council towards the end of the trilogue,[55] but the Parliament's amendment[56] was accepted and replaces the text in the draft Article which provided that Member States shall require that the remuneration is in accordance with 'conditions in the law, regulations or administrative provisions and/or universally applicable collective agreements applicable to posted workers in a similar situation in the relevant occupational branches' and calls for ICTs to be granted not less favourable remuneration than nationals where the work is carried out.

Several Member States suggested additional conditions to be added to the admission criteria, many of which are included in the adopted Directive as discretionary conditions. These include that Member States 'may require the applicant to provide at least at the time of the issue of the intra-corporate transferee permit, the address of the third-country national concerned in the territory of the Member State.'[57] This requirement was developed from a suggestion made by Slovakia that Member States should be able to 'request from the applicants to report the address of a place, in which they will be staying during their residence in the Member State.'[58] During the dialogue with the SQWP, Sweden set forth a proposal for an additional condition,

51 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 12 January 2012, document number: 5128/12, 25.

52 See Article 5(1)(b) of the Directive in the Annex to Chapter 8.

53 Council of the European Union, Outcome of Proceedings from the Social Questions Working Party, 23 March 2011, document number: 7866/11 COR 1, 2.

54 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Rapporteur: Salvatore Iacolino), PE464.961v02-00, 12 March 2014, 26.

55 Council of the European Union, Note from Presidency to Counsellors (Justice and Home Affairs), 27 January 2014, document number: 5635/14, 12.

56 See Article 5(4)(b) of the Directive in the Annex to Chapter 8.

57 See Article 5(3) of the Directive in the Annex to Chapter 8.

58 Council of the European Union, Note from General Secretariat to Working Party on Integration, Migration and Expulsion, 14 March 2011, document number: 7753/11, 21.

stating that it should be added so that it could be ensured 'that the person will not need to have recourse to the social assistance system.'[59] In the adopted Directive a criterion that reflects this provides that Member States 'may require that the intra-corporate transferee will have sufficient resources during his or her stay to maintain himself or herself and his or her family members without having recourse to the Member States' social assistance system.'[60]

The most important differences between the draft Article and the adopted Directive as regards criteria for admission is that the Directive requires that ICTs shall receive remuneration that is not less favourable than nationals in a comparable position and the several discretionary provisions added to the Article which have the effect of diminishing the level of harmonization of a common framework for admission of ICTs into the EU labour market.

8.5.2 Volumes of Admission

The proposal did not address volumes of admission or other means for the Member States to limit the number of ICTs working within their territory. In the discussion in the SQWP, Austria, Belgium, the Czech Republic, Malta and Slovakia 'underlined the importance of allowing Member States to apply the labour market test,'[61] and refuse admission on the basis of such a test. This was also discussed in the WPIME, where in a reply to Germany, the Commission clarified that no obligation for admission, even if all the criteria are met is imposed on a Member State, 'with which shall lie the discretion to regulate volumes of entries of TCN under this Directive.' Following up on that, Germany suggested changing the introductory paragraph to draft Article 5 on admission so that it would state that a third-country national who applies to be admitted under the terms of this Directive may be granted admission if he/she fulfils the conditions set forth in the Article.[62] As consequence of this discussion, the Presidency proposed as a compromise to add to the Directive a new Article on volumes of admission which became draft Article 5A and provided that the 'Directive shall not affect the right of a Member State to determine the volumes of admission of third-country nationals entering its territory,' and that an application for admission 'may be considered inadmissible' on these grounds.[63] The Parliament in its legislative proposal on the draft Directive had made a similar amendment, providing that an application

59 Council of the European Union, Note from Council General Secretariat to the Working Party on Social Questions, 21 March 2011, document number: 8035/11, 2.

60 See Article 5(5) of the Directive in the Annex to Chapter 8.

61 Council of the European Union, Outcome of Proceedings from the Social Questions Working Party, 8 April 2011, document number: 8744/11, 5.

62 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 3 December 2010, document number: 16281/10, 10.

63 Council of the European Union, Note from Presidency to Working Party on Integration, Migration and Expulsion, 25 May 2011, document number: 10602/11, 10.

'may either be considered inadmissible or be rejected' on the basis of volumes of admission.[64]

In the discussion on draft Article 5A in the WPIME, Austria, Germany, Greece, Cyprus and the Netherlands wanted to add a clarification to the Article that Member States 'retain the possibility to set a 0-quota in general or for certain sectors or regions.'[65] Additionally Greece inquired whether this provision enables a Member State 'to set a 0-quota for workers coming from a specific third country.'[66] Hungary made an observation that the wording of the draft Article 'diverges from that of Article 79(5) TFEU'[67] but in the final version of the Article, which is Article 6 in the adopted Directive a reference is made to Article 79(5) TFEU.[68] In addition to the possibility to reject an application based on volumes of admission, Austria, Germany and Slovenia suggested to add a sentence to the provision that provided that 'Member States retain the possibility not to grant residence permits for intra-corporate transferees in general and/or for certain professions, economic sectors or regions.'[69] None of the amendments calling for a labour market test or setting of quotas either in general or for specific groups of intra-corporate transferees were accepted. The provision does however permit Member States to limit the number of persons admitted based on volumes of admission, which does in fact not exclude the use of any of these rejected measures. Providing for a possibility for the Member States to refuse to grant a permit for intra-corporate transfer is not consistent with the approach that dominates so many aspects of the discussion on the draft Directive that intra-corporate transferees are not a part of labour market in the Member State where they are working.

8.5.3 Grounds for Rejection

Draft Article 6 provided for two obligatory and one optional ground for refusal in addition to requiring that where the transfer concerns host entities located in several Member States, the Member State where the application is lodged shall limit the geographical scope of validity of the permit to the Member State where the conditions set by the criteria for admission are met. The two obligatory grounds stipulated that Member States shall reject an application where the criteria for admission are not met or where the documents presented have been fraudulently acquired, falsified or tampered with and that Member States shall reject an application if the employer or the host entity has been sanctioned in conformity with national law for undeclared work

64 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Rapporteur: Salvatore Iacolino), PE464.961v02-00, 12 March 2014, 27.

65 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 11 October 2011, document number: 15045/11, 24.

66 *Ibid.*

67 *Ibid.*

68 See Article 6 of the Directive is in the Annex to Chapter 8.

69 Council of the European Union, Outcome of Proceedings of Permanent Representatives Committee, 6 June 2012, document number: 10618/12, 26.

and/or illegal employment. The optional ground provided that an application may be rejected on the ground of volumes of admission of third-country nationals.

In the discussions on the rejection of an application in the case where the employer or the host entity has been sanctioned that occurred in the WPIME, the Netherlands and Sweden suggested to 'make this provision optional' in order to have flexibility regarding 'further sanction to the employer/host entity.'[70] At a later stage in the negotiations, Sweden along with Germany reiterated the suggestion to make the clause optional and advocated that an application might also be rejected if the employer 'does not meet the legal obligations regarding social security or taxation.'[71] This suggestion was supported by Cyprus, the Czech Republic, Finland and the Netherlands.[72] Austria and Slovakia however preferred this to be a mandatory 'shall clause'.[73] The Parliament wanted the condition to be obligatory while it considered 'this a serious ground that should give rise to rejection,' the Presidency however suggested 'that this should not be an automatic ground for rejection but rather something that should be considered on a case by case basis.'[74] In the adopted Directive the provision is phrased as mandatory, however qualified in a way that makes it optional, while it provides that 'Member States shall, if appropriate, reject an application where the employer or the host entity has been sanctioned in accordance with national law for undeclared work and/or illegal employment.'[75] The provision addressing an employer or host entity that has failed to meet legal obligations regarding social security, taxation, labour rights or working conditions is a discretionary one.[76]

During the negotiations, two mandatory conditions for refusal were added, those provisions provide firstly that an application for admission shall be rejected where the host entity was established for the main purpose of facilitating the entry of intra-corporate transferees and secondly, where the maximum duration of stay as defined in Article 12(1) has been reached. Germany considered the second condition to be very important 'as it ensures that ICTs come for a limited period of time only.' On the other hand, 'a period of interruption could be provided for after which a person could reapply.' The Netherlands opined that some flexibility should be shown toward these much needed highly qualified migrants and a possibility to reapply should be given. In the context of this discussion, the Commission clarified 'that a third-country national cannot hold an ICT status for more than 3 years. After this period the ICT returns to the sending company located in a third country unless he qualifies for another status under national law.' Furthermore, that no specific provision prevents the ICT from returning to the EU provided he/she meets the conditions of admission.

70 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 3 December 2010, document number: 16281/10, 16.

71 Council of the European Union, Note from German and Swedish delegation to Working Party on Integration, Migration and Expulsion, 7 September 2011, document number: 13892/11, 2.

72 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 11 October 2011, document number: 15045/11, 25.

73 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 22 December 2010, document number: 17781/10, 16.

74 Council of the European Union, Note from Presidency to JHA Counsellors, 10 January 2013, document number: 5106/13, 66.

75 See Article 7(2) of the Directive in the Annex to Chapter 8.

76 See Article 7(3)(a) of the Directive in the Annex to Chapter 8.

However, the relevance of an ICT (temporary) status may be questioned in this case.'[77] This issue on the maximum duration of stay and possibilities for renewal was taken up later in the negotiations with regard to draft Article 11 and will be discussed below.

The issue of including a labour market test as a ground for rejection was raised in the discussion on draft Article 6, where Belgium,[78] Austria and Slovakia wanted to be able to use a labour market test as a ground for refusal for granting a permit. In that respect the two latter States suggested an additional ground that provided that 'Member States may verify whether the vacancy in question could be filled by nationals or by other EU citizens, or by third-country nationals lawfully residing in that Member State and already forming part of its labour market in accordance with national or Union law, or by EC long term residents wishing to move to that Member State in accordance with Chapter III of Directive 2003/109/EC, in which case they may reject the application.'[79] The Parliament suggested a similar amendment formulated to provide that the 'Directive shall not affect the right of Member States to set limits on the number of intra-corporate transferees in general and or for certain professions, economic sectors or regions. Member States may use such limits to entirely rule out the possibility of admitting third-country nationals as intra-corporate transferees. When appropriate alternatives for trainee employees can be found nationally, they have preference.'[80] This amendment by the Parliament was not accepted by the Council and the common suggestion by Belgium, Austria and Slovakia did not receive much support in the WPIME.

8.5.4 Withdrawal or Non-renewal of the Permit

Article 7 of the draft Directive that addressed withdrawal and non-renewal of the intra-corporate transferee permit put forth both mandatory and discretionary criteria. The mandatory ones stipulated that Member States shall withdraw or refuse to renew the permit where it has been fraudulently acquired, or has been falsified or tampered with and where the holder is residing for purposes other than those for which he/she was authorised to reside. The discretionary criteria concerned cases where the conditions for admission were not met, or are no longer met, and for reasons of public policy, public security or public health. In the examination of the draft Article in the WPIME, a few Member States wanted to add more grounds for withdrawal or non-renewal, and while the Commission stated that 'adding too many grounds should be

77 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 12 January 2012, document number: 5128/12, 28.

78 Council of the European Union, Note from Council General Secretariat to Delegations, 31 March 2011, document number: 8476/11, 3.

79 Council of the European Union, Note from General Secretariat of the Council to Working Party on Integration, Migration and Expulsion, 8 February 2012, document number: 6213/12, 3.

80 Council of the European Union, Note from Presidency to JHA Counsellors, 10 January 2013, document number: 5106/13, 67-68.

avoided,'[81] Germany suggested rephrasing the introductory sentence of the Article to state that it was 'an indicative list of grounds.'[82] The Czech Republic, Estonia, Lithuania and Latvia wanted the two discretionary grounds listed above to be made mandatory for withdrawal or non-renewal. The grounds of public policy, public security and public health were however deleted during the negotiations and non-compliance with admission criteria remains optional in Article 8(5)(a) of the Directive.[83] Commenting on the proposal to make this ground obligatory, the Commission 'recalled that the optional wording was preferred because the consequences of withdrawal/non-renewal may be more cumbersome than rejection' for the third-country national since he/she will be living in a Member State.[84]

The Czech Republic, Austria and Slovakia suggested in the discussion in the WPIME, to add a new ground which provided that the permit can be withdrawn or renewal refused, 'if the ICT has not sufficient funds and needs social services support.'[85] In a similar vein Austria suggested that 'when an intra-corporate transferee does not have sufficient resources to maintain himself and, where applicable, the member of his family, without having recourse to the social assistance system of the Member State concerned,'[86] the permit shall be withdrawn or renewal denied. Neither of these suggestions were taken up, but the Member States proposing the amendments maintained their suggestions throughout the negotiations.

In a note to the WPIME the Presidency made a compromise suggestion to make additions to the list of obligatory grounds for withdrawal or non-renewal that included the following: where the host entity was established for the main purpose of facilitating the entry of intra-corporate transferees; where the employer or the host entity has been sanctioned in accordance with national law for undeclared work and/or illegal employment; where the intra-corporate transferee is residing in the Member State concerned for purposes other than those for which he/she was authorised to reside; and where the maximum duration of stay has been reached. Many of these grounds had already been discussed in connection with grounds for rejection in draft Article 6, and did not receive much discussion in the WPIME as regards draft Article 7. All of these and some additional grounds for withdrawal or non-renewal are found in Article 8 of the Directive,[87] and the number of both mandatory and discretionary grounds for withdrawal is much higher than in the proposal.

Towards the end of the discussion in the WPIME, Germany and Sweden, supported by Cyprus, the Czech Republic, Finland and the Netherlands proposed to add an optional ground to the draft Article that provided that the permit could be with-

81 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 29 October 2010, document number: 14788/10, 16.

82 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 11 October 2011, document number: 15045/11, 26.

83 See Article 8 of the Directive in the Annex to Chapter 8.

84 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 22 December 2010, document number: 17781/10, 18.

85 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 11 October 2011, document number: 15045/11, 26.

86 Council of the European Union, Note from General Secretariat to Working Party on Integration, Migration and Expulsion, 14 March 2011, document number: 7753/11, 6.

87 See Article 8 of the Directive in the Annex to Chapter 8.

drawn or not renewed 'if terms of employment according to applicable laws, collective agreements or practices in the relevant occupational branches in the Member States where the host entity is established are not met.'[88] The same amendment was also proposed by these Member States for draft Article 6 as a ground for rejection. This amendment did not receive much discussion, nor was it taken up for either draft Article 6 or 7. This amendment was noticeably different from most of the grounds for rejection, withdrawal or non-renewal found in the draft and adopted Directive while it sought to protect the intra-corporate transferee and not serve as a tool for control for the Member State.

8.5.5 Intra-corporate Transferee Permit and Duration of an Intra-corporate Transfer

Draft Article 11 outlined the parameters for the permit that should be granted to intra-corporate transferees that fulfil the admission criteria. In paragraph 2, the period of validity is set as at least one year, or duration of the transfer to the territory of the Member State concerned, whichever is shorter, and that it may be extended to a maximum of three years for managers and specialists and one year for graduate trainees. The duration of the permit set forth in the draft Article did not receive much discussion during the negotiations other than Sweden suggested that each 'Member State shall set a standard period of validity of the intra-corporate transferee permit,' and proposed that the time period should be comprised between one and four years and the aggregated period of validity shall not exceed four years.[89] This amendment was not accepted and the adopted Directive provides for a period of validity between one to three years in Article 13(2).[90]

During the discussion in the WPIME Austria inquired whether the extension of the permit is obligatory or whether this could be at the discretion of the Member State, to which the Commission replied that 'the extension of the permit can only be refused' when the conditions for refusal are met or 'if the maximum duration has been reached.'[91] In a different vein, Germany queried 'whether a TCN could submit a new application and return to the EU after a 3-year stay,'[92] and Lithuania suggested to add to the provision a condition providing that 'Member States may determine the minimum period after the end of validity of the intra-corporate transferee permit after which a new intra-corporate transferee permit may be issued to the same per-

88 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 12 January 2012, document number: 5128/12, 28.

89 Council of the European Union, Note from the Czech and the Swedish delegations to the Working Party on Integration, Migration and Expulsion, 10 January 2011, document number: 5120/11, 9.

90 See Article 13(2) of the Directive in the Annex to Chapter 8.

91 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 12 January 2012, document number: 5128/12, 35.

92 *Ibid.*

son.'[93] An amendment to address these issues was made to the draft Directive and a new provision on the duration of the intra-corporate transfer was introduced which provided the following:

1. The maximum duration of the transfer to the European Union shall not exceed three years for managers and specialist and one year for graduate trainees after which they shall return to a third country unless they obtain a residence permit on another basis in accordance with national or Union legislation.[94]
2. Member States may require a certain time period of up to three years to pass between the end of a transfer and another application concerning the same third-country national for the purposes of this Directive in the same Member State.
3. An application for admission to a Member State for the purposes of this Directive may be considered inadmissible if the time period set in accordance with paragraph 2 has not passed.[95]

During a discussion on the new draft Article at a meeting of the Permanent Representative Committee, Germany and Austria proposed to delete the provision suggesting that it would be up to Member States 'to take these measures under the subsidiary principle,' Greece voiced its opposition to 'the possibility to change the purpose of stay after the end of an ICT term,' and Spain entered a scrutiny reservation on the possibility for a third-country national to stay on in the territory of a Member State.[96] No changes were made to the draft Article to address these concerns. During the trilogue, the Parliament suggested that the time period required to elapse before an intra-corporate transferee could apply for a new permit would be reduced from three years to six months, and the Council suggested rewording the provision.[97] An agreement was reached on these amendments as well as to delete paragraph 3 of the draft Article.[98] The revised provisions are in Article 12 of the adopted Directive,[99] which only provides for a maximum period of six months that may pass between the end of one intra-corporate transfer permit and the issuing of a new one. No minimum period is provided and there is no ceiling on how many times the same person can be granted an intra-corporate transfer permit. Given these conditions, the 'temporary nature' of an intra-corporate transfer, frequently referred to by the Commission, has become an irrelevant factor of reference for other parameters governing the stay of intra-corporate transferees, such as the right to equal treatment.

93 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 5 April 2011, document number: 8485/11, 24.

94 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 22 November 2011, document number: 16674/11, 30.

95 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 12 January 2012, document number: 5128/12, 34.

96 Council of the European Union, Outcome of Proceedings of Permanent Representatives Committee, 6 June 2012, document number: 10618/12, 33.

97 Council of the European Union, Note from Presidency to Counsellors (Justice and Home Affairs), 21 November 2013, document number: 16578/13, 87-88.

98 Council of the European Union, Note from Presidency to Counsellors (Justice and Home Affairs), 10 December 2013, document number: 17178/13, 97 -98.

99 See Article 12 in the Annex to Chapter 8.

Paragraph 5 of draft Article 11 stipulated that Member States shall not issue any additional permits, in particular work permits of any kind. In the discussion on this paragraph and having regard to the fact that the scope of the Directive is limited to intra-corporate transferees that are managers, specialists and trainee employees, Sweden suggested that a clarification be added to the paragraph stating that Member States 'shall not, *for persons who have been granted an intra-corporate transferee permit*, issue any additional permits, in particular work permits of any kind.'[100] The clarification was not adopted and the provision is unchanged in the Directive.[101] A provision that reflects the issue raised by Sweden and provides for the right of Member States to grant residence permits for intra-corporate transferees that fall outside of the scope of the Directive is however found in Article 2(3) of the adopted Directive as discussed in section 8.4.2 above.

8.5.6 Rights on the Basis of the Intra-corporate Transferee Permit

Draft Article 13 of the proposal set forth the minimum rights which an intra-corporate transferee should enjoy during the period of validity of the permit. These rights were as follows: the right to enter and stay in the territory of the Member State issuing the permit; free access to the entire territory of the Member State issuing the permit within the limits provided for by national law; the right to exercise the specific employment activity authorised under the permit in accordance with national law in any other entity belonging to the group of undertakings the intra-corporate transferee was admitted to work for; and the right to carry out his/her assignment at the sites of clients of the entities belonging to the group of undertakings the he/she was admitted to work for, as long as the employment relationship is maintained with the undertaking established in a third country.

The last of these rights listed, to work on the sites of clients, was rather controversial among the Member States and Germany for example stated that the 'provision is not compatible with the freedom to provide services.'[102] The Czech Republic, Finland and France made a scrutiny reservation on the paragraph, 'having concerns about abuse related to illegal hiring of labour.'[103] In a note submitted to the WPIME, France provided that the provision 'may raise the issue of transferral of the legal subordination of the seconded worker to the host undertaking. Indeed, the host entity could use an intra-corporate transfer to send seconded workers to its clients' sites, even to fill permanent posts, whilst claiming that such workers do not belong to it and that it is not their employer.' Furthermore, that the 'key concern is to prevent the host entity from operating as an "empty shell" and focusing solely on bringing in seconded workers whilst the original undertaking acts exclusively, within this transfer

100 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 12 January 2012, document number: 5128/12, 36.

101 See Article 13(5) of the Directive in the Annex to Chapter 8.

102 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 12 July 2011, document number: 12637/11, 28.

103 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 5 April 2011, document number: 8485/11, 29.

procedure, as a recruiter of workers for "secondment".'[104] Austria, Finland and Slovakia sent a common proposal to the WPIME to delete the provision providing for the right to work at the sites of clients while that would cover 'not typical or real ICT cases' but apply to a situation where the 'ICT is just used as a medium through which a service is provided.'[105] The provision was deleted and is not found in Article 17[106] of the adopted Directive on rights on the basis of the intra-corporate transferee permit.

8.5.7 Intra-EU Mobility

Draft Article 16 provided for the rules governing mobility of intra-corporate transferees between EU Member States. In the explanatory memorandum accompanying the proposal for the Directive, the purpose of the provision is stated to be to enable intra-corporate transferees 'to work in different entities of the same transnational corporation located in different Member States and on their clients' premises.'[107] The draft Article stipulated that third-country nationals who have been granted an intra-corporate transferee permit in a first Member State, who fulfil the criteria for admission and who apply for an intra-corporate transferee permit in another Member State, shall be allowed to work in any other entity established in that Member State and belonging to the same group of undertakings, as well as at the sites of clients of that host entity on the basis of the residence permit issued by the first Member State. The period of transfer in Member States other than the first, could not exceed twelve months and the applicant had to provide evidence that he/she had received an intra-corporate transferee permit in the first Member State. In case the duration of the transfer exceeded twelve months, the other Member State had the discretion to require a new application for a residence permit as an intra-corporate transferee in that Member State.

During the initial discussion of the draft Article in the WPIME, the Czech Republic, Germany, Estonia, Greece, Spain, Finland, Lithuania, Latvia, Austria, Poland, Portugal, Sweden, Slovenia and Slovakia voiced 'general scrutiny reservations on all the provisions related to intra-EU mobility,' and Austria, Poland Slovenia and Slovakia found the proposed procedures 'too complex and difficult to implement in practice.'[108] Concerns were raised regarding particular issues such as the intra-corporate transferee being able to work at the sites of clients, how the right to family reunification would apply, that each Member State 'should have the right to take a final deci-

104 Council of the European Union, Note from French delegation to Working Party on Integration, Migration and Expulsion, 12 January 2011, document number: 5255/11, 2-3.

105 Council of the European Union, Note from General Secretariat to Working Party on Integration, Migration and Expulsion, 1 December 2011, document number: 17979/11, 7.

106 See Article 17 of the Directive in the Annex to Chapter 8.

107 Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, COM(2010) 378, 13 July 2010, 12.

108 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 3 December 2010, document number: 16281/10, 35.

sion regarding the applicants' access to its territory,' that the procedure entailed that each Member State will have to assess actions taken in another Member States, and a question was posed whether the second Member State 'can challenge the decisions taken by the first one.'[109] The length of stay proposed was considered excessive and both Austria and Lithuania proposed it should be reduced to three months.[110] The permitted length of stay for intra-EU mobility changed several times during the negotiations of the Directive and in the end the Directive provides for different sets of conditions for short-term mobility (up to 90 days in any 180 day period per Member State)[111] and long-term mobility (for more than 90 days per Member State).[112]

The negotiations on this provision of the Directive were complex and raised various issues such as 'the relation between intra-EU mobility of intra-corporate transferees and the Schengen acquis.'[113] This was a particular consideration in relation to the stated need to 'strike a balance between, on the one hand, the benefits of highly qualified third-country national workers easily moving within the EU and, on the other hand, the risk of unfair competition and exploitation of workers,' while providing for a 'regime for intra-EU mobility, enabling intra-corporate transferees to work in entities established in different Member States but belonging to the same undertaking established outside the EU.'[114] The main difficulties encountered in the negotiations were explained in a note from the Presidency to the Strategic Committee on Integration, Frontiers and Asylum in the following way:

> 'The intra-EU mobility of the ICTs is considered as the main added value of the proposal. However, it has proved difficult to find a balance between a simple and efficient scheme and the possibility for the Member States to exercise control and supervision. In the course of the ongoing negotiations two schemes of mobility have emerged – one for short-term and another for long-term mobility.'[115]

> 'While the long-term mobility scheme does not cause major problems for Member States as it entails full control over the admissions of ICTs to their territories, the short-term mobility scheme entails waving the right of the second Member State to make an admission decision for the sake of avoiding administrative burden on the one hand and providing for a flexible and easy to use scheme for ICTs on the other.'[116]

After the Presidency introduced the mixed model for intra-EU mobility, Member States continued to voice concerns in the WPIME regarding control over short-term mobility. Thus Germany, supported by Austria and Finland, wished to give Member

109 *Ibid.*
110 *Ibid.*, 36.
111 See Article 21 of the Directive in the Annex to Chapter 8.
112 See Article 22 of the Directive in the Annex to Chapter 8.
113 Council of the European Union, Note from Presidency to Permanent Representatives Committee, 17 January 2014, document number: 5336/14, 6.
114 *Ibid.*
115 Council of the European Union, Note from Presidency to Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), 31 October 2011, document number: 16056/11, 4.
116 *Ibid.*

States the 'option of requiring that a TCN applies for a permit at any time' during the short-term mobility. Austria supported using the 'Blue Card Model' while insisting on the possibility for the second Member State 'to check all the admission criteria and to refuse admission,' and Austria and Finland 'found ex-post checks an unsatisfactory solution and insisted on the checks to be carried out before' a third-country national is admitted. Additionally, Austria, Belgium Germany and Greece insisted on the possibility for a second Member State to refuse entry.[117] Among the outstanding issues in the trilogue were differences between the Parliament and the Council described as that on the one hand, 'several delegations consider that an intra-corporate transferee should not start working in the second Member State after that State has been notified or pending the decision on a request for long-term mobility. On the other hand, Parliament would like to allow the intra-corporate transferee to work in such circumstances.'[118] As regards the solution of these differences, the position of the Parliament was adopted and is reflected in Article 22 of the Directive. Another disagreement in the trilogue concerned that the Presidency considered 'that abuse of access to the second Member State without *ex ante* checks' can be adequately tackled through the safeguards and sanctions contained in the Article. Therefore, it suggested as a compromise, 'to allow intra-corporate transferees short-term mobility to a second Member State without any *ex ante* check,' and to 'allow long-term mobility until a decision on the request for long-term mobility has been taken, provided that the relevant time periods have not expired.'[119] An agreement was reached on the comprise suggestion of the Presidency concerning this issue.[120]

Article 20[121] of the adopted Directive addressing mobility, provides that third-country nationals who hold a valid intra-corporate transferee permit issued by the first Member State may, on the basis of that permit and a valid travel document and under the conditions laid down in Article 21 and 22 and subject to Article 23, enter, stay and work in one or several second Member States. The conditions put forth in Article 21[122] on short-term mobility and Article 22[123] on long-term mobility, are dominantly comprised of discretionary clauses. These include the option of Member States to reject short-term mobility if certain conditions set out in Article 5 on grounds for admission are not complied with, if evidence that the host entity in the second Member State and the undertaking established in a third country belong to the same undertaking or groups of undertakings is not provided and if a work contract or assignment letter which were provided to the first Member State are not provided.[124] The only mandatory clauses in these two provisions of the Directive are in Article 22(2) which addresses the handling of an application for long-term mobility.

117 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 12 January 2012, document number: 5128/12, 45.

118 Council of the European Union, Note from Presidency to Permanent Representatives Committee, 8 November 2013, document number: 13436/13, 8 November 2013, 5.

119 *Ibid.*

120 See Articles 21 and 22 of the Directive in the Annex to Chapter 8.

121 See Article 20 of the Directive in the Annex to Chapter 8.

122 See Article 21 of the Directive in the Annex to Chapter 8.

123 See Article 22 of the Directive in the Annex to Chapter 8.

124 See Article 21(6) of the Directive in the Annex to Chapter 8.

Therein it is provided among other things, that the second Member State shall take a decision on the application for long-term mobility and notify the decision to the applicant in writing as soon as possible but not later than 90 days from the date on which the application and the documents required by the provision were submitted to the competent authorities of the second Member State.[125] Moreover, the intra-corporate transferee shall not be required to leave the territories of the Member States in order submit the application and shall not be subject to a visa requirement,[126] and the intra-corporate transferee shall be allowed to work in the second Member State until a decision on the application for long-term mobility has been taken by the competent authorities, provided that certain conditions are complied with.[127]

The discussion on the draft Article addressing intra-EU mobility reveals the lack of trust between the Member States as regards permitting a third-country national granted residence in one Member State to move to another. It also suggests that the Member States consider their national labour market, not as an integral part of an EU labour market, where there is a mutual benefit of intra State mobility, but indeed as individual national labour markets in competition.

8.6 RIGHT TO EQUAL TREATMENT

The explanatory memorandum to the proposal stated the following with regard to draft Article 14 entitled 'Rights':

> 'In order to ensure equality of treatment with posted workers covered by Directive 96/71, the rights granted to intra-corporate transferees as regards working conditions are aligned on the rights already enjoyed by posted workers. This Article also states the areas where equal treatment must be recognised. Due to the temporary nature of the intra-corporate transfer, equal treatment with regard to education and vocational training, public housing and counselling services from employment services were considered irrelevant. Existing bilateral agreements continue to apply, in particular in the area of social security. In case of mobility between Member States, Regulation (EC) No 859/2003 applies as a rule. The residence permit granted to intra-corporate transferees enables them to work, under certain conditions, in all the entities belonging to the same group of undertakings.'[128]

During the first reading of the draft proposal in the WPIME, Germany and Austria entered a reservation on draft Article 14 as a whole stating that Member States 'should retain the power to decide on what rights should be allocated' and that 'additional costs should be avoided.' Cyprus, the Czech Republic, Finland and Latvia made a reservation on the draft Article and Poland a scrutiny reservation 'due to concerns

125 See Article 22(2)(b) of the Directive in the Annex to Chapter 8.
126 See Article 22(2)(c) of the Directive in the Annex to Chapter 8.
127 See Article 22(2)(d)(i) and (ii) of the Directive in the Annex to Chapter 8.
128 Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, COM(2010) 378, 13 July 2010, 11.

about the effect on their social security system.'[129] In addition, Sweden suggested that paragraph 1 of the draft Article which addressed terms and conditions of employment should be entitled 'working conditions' and that paragraph 2, which addressed several issues including freedom of association, recognition of diplomas, social security and access to goods and services, would be entitled 'equal treatment'.[130] In the spirit of this suggestion, and having regard to the construction of draft Article 14, terms and conditions of employment and the provisions set forth under paragraph 2 of draft Article 14 will be discussed separately.

8.6.1 Terms and Conditions of Employment

Paragraph 1 of draft Article 14 provided that whatever the law applicable to the employment relationship, intra-corporate transferees shall be entitled to the terms and conditions of employment applicable to posted workers in a similar situation, as laid down by law, regulation or administrative provisions and/or universally applicable collective agreements in the Member State to which they have been admitted pursuant to this Directive. It also included a paragraph on collective agreements which will not be discussed here while it was deleted during the negotiations.

In the discussion in the WPIME, Finland supported Sweden's suggestion to divide the draft Article into two sections and also suggested referring to Directive 96/71 on the posting of workers, in the provision on terms and conditions of employment.[131] In a note to the WPIME, Finland followed up on this by proposing to reformulate draft Article 14(1) so that it provided that intra-corporate transferees 'shall enjoy at least the terms of employment and working conditions provided in Article 3 of Directive 96/71/EC applicable to posted workers in a similar situation in the Member State where the work is carried out.'[132] These conditions include maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay, including overtime rates, the conditions of hiring-out of workers and health, safety and hygiene at work.[133] This suggestion was a reply to an amendment that had been made to the draft Article during the discussion in the WPIME which suggested that intra-corporate transferees should enjoy 'equal treatment with nationals occupying a comparable position.' In Finland's assessment this amendment 'went too far' while it considered that 'the correct reference group would be temporary posted workers instead of national employees.'[134] Finland provided further reasoning

129 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 3 December 2010, document number: 16281/10, 29.

130 *Ibid.*

131 *Ibid.*

132 Council of the European Union, Note from General Secretariat of the Council to Working Party on Integration, Migration and Expulsion, 23 January 2012, document number: 5627/12, 3.

133 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Article 3.

134 Council of the European Union, Note from General Secretariat of the Council to Working Party on Integration, Migration and Expulsion, 23 January 2012, document number: 5627/12, 3.

for its position, stating that a proposal providing for the 'maximum level of protection concerning the terms of employment and not only the minimum level' which they would like to be the case, could not be accepted, and that 'Member States should have the right to decide if they want to provide more protective supervision measures or even terms of employment.'[135]

Sweden also submitted a note to the WPIME explaining that in its view it is 'important that holders of ICT permits are treated equally with EU citizens who are posted' to another Member State while according to Article 15(3) of the Charter of Fundamental Rights, nationals of third countries who are authorised to work in the territories of the Member State are entitled to working conditions equivalent to those of citizens of the Union. Therefore, the same rules should apply to posted workers coming from another Member State as well as to posted workers coming from a third country.[136] Spain was the only Member State that suggested that intra-corporate transferees be granted equal treatment with nationals with respect to all the provisions of draft Article 14. In a note to the SQWP, Spain suggested an amendment to draft Article 14(1) which provided that third-country nationals who have been admitted to the territory of a Member State in the framework of an intra-corporate transfer shall enjoy equal treatment with nationals of the Member States where they are employed as regards working conditions, including pay and dismissal as well as health and safety at the workplace.[137] Spain's rationale for the amendment was that this formulation would 'avoid the social dumping resulting from the fact that the conditions of a posted worker of a third country are more beneficial to the employer than the national worker.'[138]

In a draft report to the WPIME, the SQWP recommended 'to have an explicit reference' to the terms and conditions of employment in Article 3(1) of the Posted Workers Directive in Article 14(1).[139] In their examination of the draft Article, the SQWP 'took as a starting point the category of workers the draft directive is about and the duration of their stay (which can vary from a very short stay up to 1 or 3 years).'[140] Within the SQWP it was 'a common understanding that the group of reference is the national workers in a comparable situation, i.e. mainly covered by the PWD. While recognizing this, some delegations wished to go beyond this (minimum) setting and called for equal treatment with national workers in terms of working conditions, including dismissal, health and safety provisions and pay (and not just the minimum rates of pay) in order to reduce the possibility of social dumping.'[141] The SQWP further provided that it recognises these arguments, but wishes to avoid situa-

135 *Ibid.*

136 Council of the European Union, Note from the Czech and the Swedish delegations to the Working Party on Integration, Migration and Expulsion, 10 January 2011, document number: 5120/11, 12.

137 Council of the European Union, Note from Council General Secretariat to the Working Party on Social Questions, 22 March 2011, document number: 8060/11, 3.

138 *Ibid.*, 4.

139 Council of the European Union, Note from the Presidency to the Social Questions Working Party, 8 April 2011, document number: 8822/11, 6.

140 *Ibid.*

141 *Ibid.*

tions where intra-corporate transferees 'have more rights than EU national workers in a comparable situation,' and concluded that 'nevertheless the issue of which rights to grant is not a drafting question as such, nor a legal, but rather a political choice which is up to the Member States to decide on at a certain point in the negotiations.'[142]

The Parliament suggested an amendment to draft Article 14(1) which stipulated that intra-corporate transferees shall be entitled to equal treatment with nationals of the host Member State as regards the terms and conditions of employment. In the explanatory note on the amendment, the Parliament recalled that 'the Treaties of the European Union as well as the Charter of Fundamental Rights both state that third-country nationals should be treated equally with Union citizens,' and declared that the Directive 'should clearly state that equal treatment with local workers is a principle.' Furthermore, that 'following this principle would be the easiest way out, both for Member States and/or companies who know exactly what rules must be applied.'[143] During the trilogue, the Parliament's position regarding this was described as that it insists on equal treatment with nationals of the host Member State, while the Council considers 'that workers posted from third-countries should be treated in the same manner as workers posted within the EU.'[144] These differences remained one of the outstanding issues until the end of the negotiations while the Council wanted to maintain 'the Commission proposal which provides for equal treatment of intra-corporate transferees and workers posted by an undertaking established in a Member State to an entity of that undertaking in another Member State,' and have Directive 96/71 define the terms and conditions of employment that are applicable to posted workers.' This position of the Council is probably best explained with reference to the fact that it 'considers intra-corporate transferees a special kind of posted workers, namely workers who have a contract with a third-country company instead of an EU based company.'[145] The Parliament's position was based on the concern that 'the application of equal treatment with Directive 96/71 could lead to social dumping. Firstly, because the list of terms of employment of posted workers does not cover all terms and conditions to which nationals are entitled,' secondly, 'the Parliament takes into account the ruling of the Court of Justice ('Laval', Case 341/05 of 18 December 2007) which interpreted the list of terms and conditions of posted workers in a manner that provided for minimum rules of protection.'[146]

With a view to converge the positions of the Council and the Parliament with regard to the terms and conditions of employment, the Presidency suggested 'a Council position that combines two elements.' First, the Article on conditions for admission

142 *Ibid.*

143 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Rapporteur: Salvatore Iacolino), PE464.961v02-00, 12 March 2014, 64.

144 Council of the European Union, Note from Presidency to JHA Counsellors, 22 February 2013, document number: 6667/13, 82.

145 Council of the European Union, Note from Presidency to Permanent Representatives Committee, 8 November 2013, document number: 13436/13, 8 November 2013, 3.

146 *Ibid.*

provides that the remuneration of intra-corporate transferees must be equal to that of nationals and that the terms and conditions of employment of intra-corporate transferees must be equal to those of posted workers. Second, draft Article 14 provides a 'right for intra-corporate transferees to at least equal treatment with posted workers as regards terms and conditions of employment including remuneration.'[147] The Presidency considered that adopting this approach by providing for 'equal treatment between intra-corporate transferees and nationals of the host Member State as regards remuneration as an admission ground would reduce the risk of social dumping without directly granting intra-corporate transferees an individual right to equal treatment with nationals.'[148] This compromise suggestion of the Presidency was accepted, and the adopted provision on terms and conditions of employment, is in accordance with the position of the Commission and the Council. It stipulates the following in Article 18(1): Whatever the law applicable to the employment relationship, and without prejudice to point (b) of Article 5(4), intra-corporate transferees admitted under this Directive shall enjoy at least equal treatment with persons covered by Directive 96/71/EC with regard to the terms and conditions of employment in accordance with Article 3 of Directive 96/71/EC in the Member State where the work is carried out.[149] The Directive does thus not grant intra-corporate transferees equal treatment as concerns terms and conditions of employment with nationals in the Member State where they are working, but with persons covered by the Posted Workers Directive. When the conditions set forth in Article 5 and Article 18(1) are considered together it is clear that intra-corporate transferees are only granted equal treatment with nationals as regards remuneration.

8.6.2 Equal Treatment

Draft Article 14(2) provided that intra-corporate transferees shall be entitled to equal treatment with nationals of the host Member State as regards: (a) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security; (b) recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures; (c) without prejudice to existing bilateral agreements, provisions in national law regarding the branches of social security defined in Article 3 of Regulation (EC) No 883/2004. In the event of mobility between Member States and without prejudice to existing bilateral agreements, Council Regulation (EC) No 859/2003 shall apply accordingly; (d) without prejudice to Regulation (EC) No 859/2003 and to existing bilateral agreements, payment of statutory pensions based on the worker's previous employment when moving to a third country; (e) access to goods and ser-

147 Council of the European Union, Note from Presidency to Permanent Representatives Committee, 3 February 2014, document number: 5771/14, 3.

148 *Ibid.*

149 See Article 18(1) of the Directive in the Annex to Chapter 8.

vices and the supply of goods and services made available to the public, except public housing and counselling services afforded by employment services.

8.6.2.1 Branches of Social Security

In the exchange of views on the draft Article in the WPIME, Poland raised a concern about the 'application of social security/use of unemployment benefits,' in response to which the Commission clarified that all branches of unemployment benefits pursuant to Regulation (EC) 883/2004 are applicable in this Article and that it is not 'possible to differentiate access to unemployment benefits, as long as the same contributions are paid.'[150] The Czech Republic suggested deleting the provision on social security, claiming that it 'interferes with national law on social security' and may 'constitute an obstacle to facilitating the entry and residence' of prospective intra-corporate transferees. Furthermore, the Czech Republic maintained that equal treatment entails an obligation to pay contributions and is likely to create a double obligation for intra-corporate transferees to pay contributions in the Member State and the third country as well.[151] Germany voiced a 'general scrutiny reservation on the principle of equal treatment as regards social security' and expressed particular concerns about the family member allowances, which should be granted only to third-country nationals who settle permanently, otherwise they could 'constitute a pull factor.' Hungary and Austria made similar reservations on granting of allowances/family benefits.[152] According to the assessment of Lithuania, social security should not come under the principle of equal treatment, unless the third-country national is covered by social security in the Member States concerned and Estonia and Latvia held the position that a third-country nationals should not be granted access to certain benefits under this Directive. Sweden however, considered that intra-corporate transferees should be treated as national workers given their contribution to the Member States economies.[153] In its contribution to this discussion, the SQWP provided the assessment that 'as regards equal treatment it was common ground that, except contribution-based benefits, there is no obligation, following from Union Law or from the case-law of the Strasbourg Court, for Member States to grant equal treatment for third-country nationals with respect to all social benefits in all branches.'[154] Additionally, that the 'SQWP understands that the point of departure is that the principle of equal treatment should only apply' if the intra-corporate transferee 'comes within the ambit of national law of the host Member State. Therefore, the national conditions of affiliation should continue to be applicable.'[155] The SQWP did not put forth a decisive position as to granting equal treatment to intra-corporate transferees as regards social security rights but was 'divided on how this equal treatment should be handled in the

150 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 3 December 2010, document number: 16281/10, 31.
151 *Ibid.*
152 *Ibid.*, 32.
153 *Ibid.*
154 Council of the European Union, Note from the Presidency to the Social Questions Working Party, 8 April 2011, document number: 8822/11, 7.
155 *Ibid.*

framework of the draft proposal.' Some delegations of the working party, 'expressly supported equal treatment as envisaged' in the original Commission proposal 'while several delegations supported the insertion of derogations as regards residence based benefits, as well as family benefits.'[156]

After the negotiations had moved from the WPIME to the Council, Germany sent a note to the Justice and Home Affairs Counsellors, commenting on the absence of a possibility to 'exclude family benefits from the right to equal treatment.' The note stated among other things that the 'Presidency seems to hold the view that it would be unlawful to make it possible to exclude family benefits – a view Germany does not share. The denial of family benefits could only be unlawful if there were a general obligation to treat third-country nationals and Union citizens equally. However, no such obligation is stipulated in European primary law.'[157] During the trilogue, the Parliament made clear that it could not 'support the exclusion of family benefits from the scope of draft Article 14.'[158] This was one of the outstanding issues between the Council and Parliament towards the end of the negotiations, whereas the Parliament wanted 'intra-corporate transferees to have a right to family benefits as nationals of the host Member State,' several delegations in the Council advocated 'full exclusion from such a right.' These delegations took 'the position that intra-corporate transferees are not entitled to family benefits taking into account that such benefits are designed to support a positive demographic development and intra-corporate transferees stay only temporarily.'[159] To reach an agreement on the Directive, the Presidency suggested a compromise that permitted 'Member States to restrict equal treatment between intra-corporate transferees and nationals as regards family benefits only if intra-corporate transferees have been authorised to stay and work in the territory of a Member State for a period not exceeding 9 months.'[160] This compromise was accepted by the Parliament.[161] Other than this, no further restrictions were made on the right to equal treatment with regard to social security provided by draft Article 14. Intra-corporate transferees shall enjoy equal treatment with nationals of the Member State where the work is carried out to provisions in national law regarding the branches of social security defined in Article 3 of Regulation (EC) No 883/2004, unless the law of the country of origin applies by virtue of bilateral agreements or the national law of the Member State is carried out, ensuring that the intra-corporate transferee is covered by the social security legislation of one of those countries.[162] In cases where the law of the country of origin applies, intra-corporate transferees might not enjoy equal treatment with nationals in the Member State where they work if the conditions provided by the applicable law are less favourable.

156 *Ibid.*

157 Council of the European Union, Note from General Secretariat of the Council to JHA Counsellors, 17 April 2012, document number: 8850/12, 2.

158 Council of the European Union, Note from Presidency to JHA Counsellors, 22 February 2013, document number: 6667/13, 83.

159 Council of the European Union, Note from Presidency to Permanent Representatives Committee, 3 February 2014, document number: 5771/14, 4.

160 *Ibid.*

161 See Article 18(3) of the Directive in the Annex to Chapter 8.

162 See Article 18(2)(C) of the Directive in the Annex to Chapter 8.

Austria was not content with the result of the negotiations on branches of social security after having 'repeatedly raised severe objections to the way equal treatment in the field of social security is dealt with under' the Directive. Austria considered that 'in the field of family benefits the text does not sufficiently reflect the necessity for third country nationals of having required the necessary integration into the society of the host member state before entitlement to benefits have to be opened.' Due to this, Austria requested 'a detailed examination of all existing and any further texts concerning equal treatment in the field of social security' before agreeing on such provisions and abstained from voting on the Directive.[163]

8.6.2.2 Goods and Services

In the discussion on access to goods and services in the WPIME, Malta wanted 'housing as a whole (not just public)' to be excluded and Finland suggested that 'all services related to employment' be excluded. Germany also suggested the exclusion of 'services in the social sphere,' stating that 'counselling services ought not to be mentioned under the employment framework' and that 'long-term training/educational services should also be excluded.' Italy raised a concern regarding access to training,[164] and Germany suggested adding a new paragraph stating that Member States may restrict equal treatment with respect to study and maintenance grants or loans or other grants and loans.[165] The only amendment that was made to the provision on goods and services was to widen the restriction to housing by excluding equal treatment to procedures for obtaining housing as provided for by national law[166] rather than just public housing. Other concerns raised above did not lead to changes in the draft Article which is probably best explained by the fact that it does not refer explicitly to study and maintenance grants, loans or other grants or training and educational services.

8.6.2.3 Provisions on Equal Treatment added during the Negotiations

As with the other Directives discussed in this study, a new provision was added to the draft Article on equal treatment that provides that the Article on equal treatment shall be without prejudice to the right of Member States to withdraw or refuse to renew an intra-corporate permit in accordance with Article 8 of the Directive.[167]

163 Council of the European Union, 'I/A' Item Note from General Secretariat of the Council to Permanent Representatives Committee/Council, 5 May 2014, document number: 9346/14 ADD 1, 3.

164 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 3 December 2010, document number: 16281/10, 32.

165 Council of the European Union, Outcome of Proceedings of Permanent Representatives Committee, 6 June 2012, document number: 10618/12, 40.

166 See Article 18(2)(e) of the Directive in the Annex to Chapter 8.

167 See Article 18(4) of the Directive in the Annex to Chapter 8.

8.7 RIGHT TO FAMILY REUNIFICATION AND ACCESS OF FAMILY MEMBERS TO THE LABOUR MARKET

In the explanatory memorandum to the proposal it was stated that draft Article 15 on family members, contains the 'derogations from Directive 2003/86 considered necessary in order to set up an attractive scheme for intra-corporate transferees and follows a different rationale from the Family Reunification Directive, which is a tool to foster integration of third-country nationals who could reasonably become permanent residents.'[168] Furthermore, that in line 'with similar schemes already existing in Member States and in other countries, it provides for immediate family reunification in the first State of residence. To achieve this aim, it also stipulates that possible national integration measures may be imposed only once the family members are on EU territory.'[169]

Draft Article 15 provided the following:

> Council Directive 2003/86/EC shall apply, subject to the derogations laid down in this Article.
>
> By way of derogation from Articles 3(1) and 8 of Directive 2003/86/EC, family reunification in the first Member State shall not be made dependent on the requirement that the holder of the permit issued on the basis of this Directive must have reasonable prospects of obtaining the right of permanent residence and have a minimum period of residence.
>
> By way of derogation from the last subparagraph of Article 4(1) and from Article 7(2) of Directive 2003/86/EC, the integration measures referred to therein may be applied by the first Member State only after the persons concerned have been granted family reunification.
>
> By way of derogation from the first subparagraph of Article 5(4) of Directive 2003/86/EC, residence permits for family members shall be granted by the first Member State, if the conditions for family reunification are fulfilled, at the least within two months from the date on which the application is lodged.
>
> By way of derogation from Article 13(2) and (3) of Directive 2003/86/EC, the duration of validity of the residence permit of family members in the first Member State shall be the same as that of the intra-corporate transferee permit, insofar as the period of validity of their travel document allows.

In the discussion on the draft Article in the WPIME, Germany and Austria made a scrutiny reservation and questioned its 'added value' based on a 'query about the number of ICT who come to EU for only a short period (e.g. 3-4 months) for whom family reunification is not particularly relevant.'[170] As concerns the derogation on in-

168 Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, COM(2010) 378, 13 July 2010, 11.

169 *Ibid.*

170 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 22 December 2010, document number: 17781/10, 32.

tegration measures, Austria suggested to delete the paragraph, stating that it 'will be counter to its upcoming legislation.'[171] Several Member States made comments on the time limit to examine the application for the permit for family reunification, in that regard Lithuania wanted it to be noted that in some cases the examination of the application could take longer than 30 days and stated that there should be a possibility to extend it. Sweden wanted to replace the two month time limit with 'as soon as possible' while the Netherlands and Austria suggested the time limit be 90 days and Austria wanted a longer deadline to be considered in light of the six month period provided for by Directive 2004/38/EC on the freedom of movement of Union citizens and their family members.[172] These suggestions for an extended time limit for examining applications for family reunification were taken into consideration and the time limit provided for in the adopted Directive is 90 days.[173]

The other main issue of concern regarding the draft Article was access of family members to the labour market but the draft proposal did not address that. In the WPIME, Sweden wished to 'make a provision for the access of family members to the labour market on the basis of the relevant provision in the Blue Card Directive,' which provides for immediate access of family members to the labour market, and the Netherlands suggested adding a new paragraph to the same effect. These suggestions were made with 'a view to making the admission scheme more attractive, to approximate the rights of family members under this proposal with those under the Blue Card Directive and to facilitate the integration of these family members to the host society.'[174] Portugal supported these suggestions but wanted to exclude family members of graduate trainees 'considering the relatively short duration of their stay.' Austria expressed concerns regarding access to the labour market of family members 'since this is a long-term entitlement,'[175] and Hungary stated that it wanted a time limit to be applied in 'respect of access to the labour market of family members.'[176] The Parliament set forth an amendment to the provision that provided that by way of derogation from Article 14(2) of the Family Reunification Directive and 'without prejudice to the principle of preference for Union citizens as expressed in the relevant Acts of Accession, the family members of the intra-corporate transferee who have been granted family reunification shall be entitled to have access to employment and self-employment activity, in the territory of the Member State which issued the family member residence permit.'[177] This formulation of the provision was adopted,[178] the

171 *Ibid.*

172 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 12 July 2011, document number: 12637/11, 32.

173 See Article 19(4) of the Directive in the Annex to Chapter 8.

174 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 12 July 2011, document number: 12637/11, 32.

175 *Ibid.*

176 Council of the European Union, Outcome of Proceedings of Permanent Representatives Committee, 6 June 2012, document number: 10618/12, 41.

177 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Rapporteur: Salvatore Iacolino), PE464.961v02-00, 12 March 2014, 40.

178 See Article 19(6) of the Directive in the Annex to Chapter 8.

provision does not include a time limit or stipulate that family members should have immediate access to the labour market as provided for in the Blue Card Directive. It is therefore possible that each Member State may interpret the provision differently and it cannot be excluded that some Member States will apply a time limit for access to the labour market while the provision does not expressly provide for immediate access.

Two additional changes were made to the draft Article. Firstly, the adopted Directive stipulates that Directive 2003/86/EC shall apply with the derogations provided for in both the first and second Member State which allow the intra-corporate transferee to stay and work on their territory long-term.[179] Secondly, a provision determining that the duration of validity of the residence permits of family members in a Member State shall, as a general rule, end on the date of expiry of the intra-corporate transferee permit or permit for long-term mobility issued by that Member State, was added during the negotiations.[180]

8.8 CONCLUSIONS

The lengthy and complicated negotiations on the provisions that address the access of intra-corporate transferees to the territory and labour markets of EU Member States and the rights granted to them by the Directive were, both as regards the process and the outcome, framed by a fundamental contradiction. This contradiction has at its core, the perception or understanding of the status of intra-corporate transferees as, on the one hand third-country nationals temporarily present in a Member State as employees of a foreign undertaking, and on the other hand as workers participating in the labour market in an EU Member State. Intra-corporate transferees are employees of a foreign undertaking, while their employment contract is with an undertaking established outside EU Member States,[181] they do however 'carry out their work' in an EU Member State and are therefore participating in the labour market of the Member State where they work. The fact that their employment contract is with a foreign undertaking was described by the European Federation of Food, Agriculture and Tourism and Trade Unions as leading to the EU labour market becoming 'a jungle in which laws from any third country may be applied,' which can cause intra-corporate transferees to 'be under-protected and exposed to different forms of exploitation.'[182]

The contradictory views on how to define intra-corporate transferees, was most visible in the approach adopted by the Member States in the Working Party on Migration, Integration and Expulsion, the Social Questions Working Party and the Council. Examples of this include the discussion on the right to equal treatment con-

179See Article 19(1) of the Directive in the Annex to Chapter 8.

180 See Article 19(5) of the Directive in the Annex to Chapter 8.

181 See Article 3(b) of the Directive in the Annex to Chapter 8.

182 European Federation of Food, Agriculture and Tourism and Trade Unions. 2014. Proposed directive on intra-corporate transfers. Available at: http://www.effat.org/en/node/10940 (accessed on 6 November 2015)

cerning terms and conditions of employment, in relation to which the intra-corporate transferee is considered a posted worker and not a part of the EU labour market as such and not granted equal treatment with nationals as regards terms and conditions of employment. The criteria on admissions however provides that they shall enjoy remuneration not less favourable than nationals of the Member States, a compromise provided by the Presidency 'so as not to grant individual intra-corporate transferees equal treatment with nationals' in all terms and conditions of employment, as the Parliament and Spain insisted on in order to avoid social dumping. The Parliament, in its position as a co-legislator with the Council agreed on this compromise and Spain was the only Member State that called for equal treatment with nationals as regards terms and conditions of employment. Finland and Sweden were particularly adamant to ensure that intra-corporate transferees are treated as temporary posted workers in relation to equal treatment in terms and conditions of employment and the majority of Member States were silent on the issue.

In relation to the discussion on equal treatment to social security the Social Questions Working Party and Germany expressed such views as that there is no obligation in EU primary law that requires granting third-country nationals equal treatment with nationals in the Member State where they reside. The Czech Republic wanted to delete the provision on equal treatment as concerns social security claiming that it 'interferes with national law on social security'. Germany and Austria who in fact entered a reservation on draft Article 14 addressing equal treatment as a whole while they wanted individual Member States to 'retain the power to decide on what rights should be allocated', also advocated for full exclusion of family benefits for intra-corporate transferees. This resulted in a compromise suggestion from the Presidency which links the granting of family benefits to length of residence in a Member State, a compromise that the Parliament agreed to as a co-legislator with the Council although it had earlier advocated for full inclusion of family benefits for intra-corporate transferees, independent of their length of residence. The Directive does not address the right to equal treatment to education and vocational training, the Commission considered that 'irrelevant' for intra-corporate transferees, along with housing and counselling services from employment services, due to the temporary nature of the intra-corporate transfer. An assessment that does not take into account that an intra-corporate transferee can reside and work in a Member State for a maximum period of three years and after the end of those three years obtain another permit to reside and work in the same Member State. There is no minimum period that has to pass before a new permit can be granted, only the maximum is set at six months. The access to territory and the labour market granted by the Directive does not support the claim that intra-corporate transferees are 'temporary' workers.

In the discussions on the provisions providing for access to territory such as on grounds for rejection, withdrawal or non-renewal of a permit and volumes of admission, there was a strong focus on controlling access to the national labour markets of Member States, which is demonstrated in the numerous mandatory and discretionary criteria added to these provisions, and the repeated suggestion for the Directive to permit Member States to conduct labour market tests before agreeing to admit an intra-corporate transferee. The discussion on the provisions on intra-EU mobility is indicative of a lack of trust between Member States as regards admission decisions for third-country nationals and also reveals that Member States do not commonly regard

their national labour market as an integral part of an EU wide labour market, but as a separate national labour market that the authorities of a particular Member State have the sovereign right to control and is seen as in competition with the other national labour markets of EU Member States. One of the objectives of the proposal for the Directive was to attract much needed highly-skilled and specialised third-country nationals to the EU to fill positions in foreign enterprises, including multi-national companies that could not be filled by the domestic labour force, by providing for a simplified and transparent procedure for such a transfer of skills. During the negotiations on the provisions of the Directive that provide for access to the EU for intra-corporate transferees, the conditions were made more restrictive and less transparent partially due to multiple optional conditions that Member States can apply at their discretion. This result makes the framework less coherent, leads to legal uncertainty and does not provide for harmonization among EU Member States.

9. EU Law on Labour Migration – The Compatibility of a Sectoral Approach to Migration Management and the Right to Equal Treatment of Third-country Nationals

9.1 INTRODUCTION

The adoption of the Directives included in this study is an outcome of the Commission's Policy Plan on legal migration introduced by the Commission in 2005 after EU Member States had rejected adopting a horizontal approach to labour migration, and the Communication on Policy priorities in the fight against illegal immigration of third-country nationals.[1] This chapter will discuss the five Directives set forth based on these policy documents in the framework of the sectoral approach to migration management on the one hand, and the human rights and labour law frameworks relevant to EU law on labour migration on the other.[2] Following the approach used in the discussion on the negotiations of the Directives, four aspects of the Directives will be addressed in particular. Those are access to territory and access to the labour market, the right to equal treatment and the right to family reunification, including access of family members to the labour market. The outcome of the sectoral approach and the effect it had for the four aspects listed above will be explored in particular as it relates to the right to equal treatment, to reveal the consequences of the sectoral approach for the right to equal treatment for third-country nationals with nationals. Additionally, the impact of the different statuses constructed for groups of migrants based on type will be examined to divulge the relationship between access to territory and the labour market on the one hand, and the right to equal treatment and the right to family reunification on the other hand. The purpose of this discussion is to establish whether the right to equal treatment with nationals, granted to third-country nationals by EU law on labour migration, is compatible with the international and European human rights law and international labour law frameworks that EU Member States are bound by.

The question whether migration management policies, resting on the sovereign right of States to control migration into their territory and the international and European frameworks that provide for the human rights and labour rights of labour migrants are inherently incompatible, is addressed. As well as the discourses underpinning and justifying a sectoral approach to labour migration, in particular as they relate to the policy of granting migrants status according to 'type' and determining the right to equal treatment granted to migrants based on this classification of migrants into different groups. Lastly, the outcome of EU law on labour migration and its consequences for a common EU labour market are explored, having regard to the policy processes in formulating the EU's approach to labour migration and the negotiations for the five Directives addressed in this study.

1 See Chapter 3 for a detailed discussion.
2 See Chapter 2 for a detailed discussion.

9.2 THE OUTCOME OF THE SECTORAL APPROACH IN MIGRATION MANAGEMENT AS REGARDS ACCESS TO TERRITORY AND THE LABOUR MARKET, THE RIGHT TO EQUAL TREATMENT AND THE RIGHT TO FAMILY REUNIFICATION

9.2.1 Access to Territory and the Labour Market

None of the four Directives on regular migration provide for access to territory. Article 79(5) of the TFEU which is a part of the legislative basis for EU law on labour migration provides that Article 79 shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed. The four Directives addressing regular labour migration have in their preamble a recital stating that the Directive should be without prejudice to the right of the Member State to determine the volumes of admission of third-country nationals which are covered by the scope of the Directive.[3] All of the Directives also have a provision to the effect that the Directive 'does not affect the right of a Member State to determine the volumes of admission of third-country nationals' and that on that basis an application may be considered either inadmissible or be rejected.[4] Additionally in the equal treatment provisions all four Directives have a clause stating that the right to equal treatment shall be without prejudice to the right of the Member State to withdraw or to refuse to renew the permit issued under the Directive.[5] This section will look at how access to territory and to the labour market are constructed for the groups of migrants that fall under the scope of each Directive, that is, the conditions they have to fulfil in order to be granted a permit to enter, reside and work in an EU Member State.

9.2.1.1 The Blue Card Directive

The standard validity of the EU Blue Card shall be set by Member States at between one to four years, or if the work contract is shorter than one year, the time period of the work contract and additional three months.[6] The Directive sets out criteria for refusal, withdrawal and non-renewal of the permit that contains both obligatory and discretionary provisions.[7] As regards refusal to grant a permit, Member States may apply a labour market test and 'verify' whether the position can be filled by a national, EU citizen, a lawfully resident third-country national or a Union long-term resident.[8]

3 Recital 8 of preamble to the Blue Card Directive, Recital 6 of preamble to the Single Permit Directive, Recital 10 of preamble to the Seasonal Workers Directive and Recital 23 of Preamble to the Intra-corporate transfer Directive.

4 Article 6 Blue Card Directive, Article 8 Single Permit Directive, Article 7 Seasonal Workers Directive and Article 6 Intra-corporate transfer Directive.

5 Article 14(3) Blue Card Directive, Article 12(3) Single Permit Directive, Article 23(3) Seasonal Workers Directive and Article 18(3) Intra-corporate transfer Directive.

6 Article 7(2) Blue Card Directive.

7 Article 9 Blue Card Directive.

8 Article 8(2) Blue Card Directive.

Access to the labour market is restricted for the first two years to employment that meets the criteria for admission set out in the Directive and changes in employer are subject to prior authorisation. After the two years the Member States are free, but not obliged, to grant the EU Blue Card holder equal treatment with nationals in access to highly qualified employment.[9] The EU Blue Card holder is permitted a one time period of unemployment of three months without withdrawal of the permit.[10] The Directive foresees the obtaining of a long-term residence status and provides for conditions for intra-EU mobility after the first eighteen months of legal residence.[11] Member States may decide to permit applications for a permit from a person legally present in its territory,[12] but the scope of the Directive explicitly excludes applicants or beneficiaries of national or international protection.[13]

9.2.1.2 The Single Permit Directive

The Single Permit Directive is a general framework Directive. It can be derived from the scope of the three other Directives on regular migration that address specific groups of labour migrants, that the Single Permit Directive extends to third-country nationals other than those that fall under the specialised Directives and those that are explicitly excluded from its scope. The Single Permit Directive does not regulate access to territory or access to the labour market, national law in each Member State does. The Directive only provides that once an applicant has fulfilled the conditions of national law he/she should be granted the single permit. The Directive does not prescribe any minimum or maximum length of time for the duration of the single permit. The permit is issued in accordance with national law, and the length of time determined by national law of each Member State. The Directive does not, unlike the other three, provide for any criteria regarding renewal or withdrawal of the permit, these are also regulated by national law. As regards access to the labour market, once the permit has been granted the holder has the right to exercise the specific employment activity authorised under the single permit in accordance with national law.[14] As there are no time limits on this restriction in the Directive, it is regulated by national law and the restrictions on labour market access are likely to vary in accordance to that. The scope of the Directive includes third-country nationals who have been admitted for other purposes and are allowed to work,[15] but explicitly excludes applicants and beneficiaries of national and international protection.[16] The provision on scope provides that Member States may decide that Chapter II of the Directive, which addresses the single application procedure and the single permit, does not apply to those third-country nationals who have been admitted for the purpose of study

9 Article 12(1) and (2) Blue Card Directive.
10 Article 13(1) Blue Card Directive.
11Articles 16, 17 and 18 Blue Card Directive.
12 Article 10(3) Blue Card Directive.
13 Article 3(2)(a),(b) and (c) Blue Card Directive.
14 Article 11(c) Single Permit Directive.
15 Article 3(1)(b) Single Permit Directive.
16 Article 3(2)(f),(g) and (h) Single Permit Directive.

and those authorised to work in the Member State for six months or less.[17] This entails that Member States can give third-country nationals permits to work within their territory for a period not exceeding six months without using the Single Permit Directive as a framework.

9.2.1.3 The Seasonal Workers Directive

The scope of the Seasonal Workers Directive solely extends to third-country nationals who reside outside the territory of the Member States.[18] That is, only those who are residing outside EU Member States can apply to be admitted as a seasonal worker. Seasonal workers are obliged to keep their residence in a third-country while 'staying' in an EU Member State for work.[19] It provides that the maximum length of stay of a person granted seasonal workers authorisation shall be determined by Member States and that the duration of the authorisation shall be between five to nine months in any twelve-month period. At the end of the duration of the authorisation, the seasonal worker is obliged to leave the territory of the Member State unless he/she has been granted a residence permit for other purposes.[20] Authorisations can also be granted for stays not exceeding 90 days, and those can be in the form of a short-stay visa or a visa and a work permit.[21] As regards access to the labour market, the authorisations are granted on the basis of an employment contract or a job offer and therefore bound to a specific employer.[22] If the conditions are fulfilled Member States are obliged to grant a seasonal worker one extension of his/ her stay with the same employer, additionally, they have the discretion to grant additional extensions of stay with the same employer and to grant an authorisation to extend stay for work for another employer, but all on the condition that the maximum time period is not surpassed.[23] Member States are obliged to facilitate re-entry of third-country nationals who have been granted authorisation for seasonal work before, but only once within five years from when the first authorisation was granted. Included in the measures is the issuance of several seasonal workers authorisations in one administrative act.[24] The Directive provides for some obligatory but mostly discretionary provisions regarding rejection, extension and renewal of the authorisation which include provisions referring to verification of whether the vacancy can be filled by a national, Union Citizens or third-country nationals legally resident in the Member State.[25]

17 Article 3(3) Single Permit Directive.
18 Article 2(1) Seasonal Workers Directive.
19 Article 3(b) Seasonal Workers Directive.
20 Article 14(1) Seasonal Workers Directive.
21 Article 12(a) and (b) Seasonal Workers Directive.
22 Article 6(1)(a) Seasonal Workers Directive.
23 Article 15(1),(2), (3) and (4) of Seasonal Workers Directive.
24 Article 16(1) and 2(b) Seasonal Workers Directive.
25Articles 8(3) and 15(6) Seasonal Workers Directive.

9.2.1.4 The Intra-Corporate Transfer Directive

The Intra-Corporate Transfer Directive only permits applications from third-country nationals who are resident outside EU territory.[26] The duration of the intra-corporate transfer permit shall be at least one year or the duration of the contract, whichever is shorter and can be extended to a maximum of three years for managers and specialists and one year for trainee employees.[27] After this maximum period of three or one years, the respective holder shall leave the territory of the Member State unless he/she is granted a residence permit on another basis.[28] The Directive provides for the possibility to grant, upon application, the same person another permit of the same maximum duration, the only requirement is that the Member State may require a period of maximum six months between the end of one transfer and the beginning of the next.[29] What is noteworthy is that there is no minimum period provided; in fact the applicant for a new permit could only be required to stay away for the time period it takes to consider the application, and there is no maximum given for numbers of renewals of a permit for the same person. On the basis of the permit, the holder has the right to exercise the specific employment activity authorised under the permit.[30] The Directive provides for the possibility of both short-term and long-term intra-EU mobility to work in one or several other Member States working for the same undertaking or group of undertakings that the intra-corporate transfer permit was issued for.[31]

9.2.1.5 Irregular Migrants

The Employers Sanctions Directive does not address access to territory or the labour market for irregularly resident migrants in employment. As was discussed in Chapter 5, the suggestions made by the Parliament to give some consideration to the fact that irregular status might be due to lack of administrative efficiency and allow for a time period to amend that, or to permit regularization of irregularly present migrants were rejected. Thus 'illegally staying third-country nationals', when detected are subject to return in accordance with the Returns Directive. This migration management approach towards irregularly present migrants in employment is one of exclusion of those that are classified as 'unwanted, unsolicited and undesirable,' while having sought alternative access paths onto the labour market in a Member State.[32] This approach has been described as a 'totalizing account where undocumented migrants are given a very specific name' that of 'illegally staying third-country nationals'. As they are characterized as not belonging due to lack of authorisation for being present, their ascribed status 'is accompanied with instructions to others how to treat them,' that is

26 Article 11(2) Intra-Corporate Transfer Directive.
27 Article 13(2) Intra-Corporate Transfer Directive.
28 Article 12(1) Intra-Corporate Transfer Directive.
29 Article 12(2) Intra-Corporate Transfer Directive.
30 Article 17(c) Intra-Corporate Transfer Directive.
31 Articles 20, 21, 22 o Intra-Corporate Transfer Directive
32 Menz, G. 2009. *The Political Economy of Managed Migration: Nonstate Actors, Europeanization and the Politics of Designing Migration Policies*. Oxford: Oxford University Press, 2.

'Employers: do not employ them, States: issue them a return decision.'[33] In this context it has to be noted that the Employers Sanctions Directive is seen to 'complement' the Seasonal Workers Directive which is described by the Commission as 'the most recent example of the EU opening channels for low-skilled labour migration, typically in sectors such as agriculture and tourism.'[34]

9.2.1.6 Comparison – Consistency

The Seasonal Workers Directive and the Intra-Corporate Transfer Directive explicitly state that only third-country nationals residing outside the EU can apply to be admitted under the Directives, whereas the Blue Card Directive explicitly permits applications from those who are resident in the EU and the Single Permit Directive leaves Member States the choice to permit that. Access to territory of EU Blue Card holders and intra-corporate transferees is significantly more generous than for the single permit holders and seasonal workers. There is complete inconsistency in how long each group of migrants can expect to be able to stay and work in the EU and seasonal workers are explicitly excluded from long term stay, as provided above, they are obligated to leave the territory of a Member State at the end of their contract. EU Blue Card holders and intra-corporate transferees have the opportunity of intra-EU mobility and the Blue Card Directive provides for the possibility of EU Blue Card holders to obtain long-term residence status. The manner in which access to territory is defined for each groups of migrants creates significant differences in status between those groups. All Directives are consistent as regards access to the labour market in that they all provide for binding a permit to an employer. The Single Permit and Seasonal Workers Directives do not contain clauses on criteria for rejection, withdrawal or renewal of a permit. The Single Permit Directive differs from the others in that the substantive criteria for admission to territory and the labour market are decided by national law, not EU law.

9.2.2 Equal Treatment

9.2.2.1 Working Conditions, Terms of Employment and Freedom of Association

The Blue Card, the Single Permit and the Seasonal Workers Directives all provide for equal treatment with nationals regarding working conditions and terms of employment.[35] The Intra-Corporate Transfer Directive however provides only for equal

33 Gunnelfo, M. with Selberg, N. 2010. Discourse or Merely Noise? Regarding the Disagreement on Undocumented Migrants, *European Journal of Migration and Law* 12, 180.

34 Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, COM (2014) 286, 22 May 2014, 2.

35 Article 14(1)(a) Blue Card Directive, Article 12(1)(a) Single Permit Directive, Article 23(1)(a) Seasonal Workers Directive.

treatment with nationals to remuneration,[36] as concerns terms and conditions of employment, intra-corporate transferees are granted equal treatment, based on Article 3 of the Posted Workers Directive, with persons covered by that Directive in the Member State where the work is carried out.[37] All four Directives provide for equal treatment with nationals concerning freedom of association and membership of organisations representing workers or employers, including also the benefits conferred by such organisations.[38]

9.2.2.2 Social Security

As regards equal treatment to social security, EU Blue Card holders are entitled to provisions in national law regarding the branches of social security as defined in Regulation (EEC) No 1408/71 (now (EC) No 883/2004),[39] and no discretionary restrictions are provided. Single permit holders are entitled to branches of social security, as defined in Regulation (EC) No 883/2004,[40] but these rights may be limited except for workers who are in employment or who have been in employment for a minimum period of six months and who are registered unemployed. Member States may also decide that equal treatment to social security excludes family benefits in cases of third-country nationals who work for a period not exceeding six months, have been admitted for studying or are working on the basis of a visa.[41] Seasonal workers are entitled to branches of social security as defined in Article 3 of Regulation (EC) No 883/2004,[42] and Member States have the discretion to decide to restrict equal treatment by excluding family benefits and unemployment benefits.[43] Intra corporate transferees are entitled to equal treatment as regards provisions in national law regarding the branches of social security defined in Article 3 of Regulation (EC) No 883/2004, unless the law of the country of origin applies by virtue of bilateral agreements or the national law of the Member State where the work is carried out, but it has to be ensured that the intra-corporate transferee is covered by the social security legislation in one of those countries. This also applies in the event of intra-EU mobility of an intra-corporate transferee.[44] Whether intra-corporate transferees enjoy equal treatment with nationals will therefore depend upon which law applies in each case. Additionally, Member States have the discretion to decide that family benefits shall not apply when the permit holder is authorised to work for a period not exceeding nine months.[45] In all cases social assistance is excluded from the scope of the Directives.

36 Article 5(4)(b) Intra-corporate transfer Directive.
37 Article 18(1) Intra-corporate transfer Directive.
38 Article 14(1)(b) Blue Card Directive, Article 12(1)(b) Single Permit Directive, Article 23(1)(b) Seasonal Workers Directive and Article 18(2)(a) Intra-corporate transfer Directive.
39 Article 14(1)(e) Blue Card Directive.
40 Article 12(1)(e) Single Permit Directive.
41 Article 12(2)(b) Single Permit Directive.
42 Article 23(1)(d) Seasonal Workers Directive.
43 Article 23(2)(a) Seasonal Workers Directive.
44 Article 18(2)(c) Intra-corporate transfer Directive.
45 Article 18(3) Intra-corporate transfer Directive.

9.2.2.3 Statutory Pensions

EU Blue Card holders are to receive payment of income-related acquired statutory pensions in respect of old age, at the rate applied by virtue of the law of the debtor Member State(s) when they move to a third country.[46] The Single Permit Directive provides that when moving to a third-country, the permit holder or their survivors who reside in a third country and who derive rights from those workers, shall receive, in relation to old age, invalidity and death, statutory pensions based on previous employment and acquired in accordance with the legislation referred to in Article 3 of Regulation (EC) No 883/2004. This shall be granted under the same conditions and at the same rates as the nationals of the Member States concerned when they move to a third country.[47] The Seasonal Workers Directive contains an analogous provision to the Single Permit Directive, except it only refers to statutory pensions and does not enumerate old age, invalidity and death.[48] The Intra-Corporate Transfer Directive provides for the same as the Directives above that is that the intra-corporate transferee, or the survivors of such intra-corporate transferees residing in a third country deriving rights from the intra-corporate transferee, are entitled to payment of old-age, invalidity and death statutory pension based on the intra-corporate transferees' previous employment and acquired by intra-corporate transferees moving to a third country, in accordance with the legislation set out in Article 3 of Regulation (EC) No 883/2004, under the same conditions and at the same rates as the nationals of the Member State concerned when they move to a third country.[49]

9.2.2.4 Education and Vocational Training

Unlike the Intra-Corporate Transfer Directive, the Blue Card, Single Permit and Seasonal Workers Directives include provisions on equal treatment pertaining to education and vocational training,[50] but give discretion to the Member States to restrict access to it. Access of seasonal workers can be limited to education and vocational training directly linked to their specific employment activity, and any grants and loans related to it can be excluded.[51] For EU Blue Card holders equal treatment may be restricted as regards any type of loans and grants in relation to secondary and higher education and vocational training,[52] access to university and post-secondary education may be subject to specific prerequisites in accordance with national law and equal treatment may be restricted to cases where the registered or usual place of residence of the EU Blue Card holder, or that of the family member for whom benefits are claimed, lies within its territory.[53] In the case of single permit holders, access can

46 Article 14(1)(f) Blue Card Directive.
47 Article 12(4) Single Permit Directive.
48 Article 23(1) Seasonal Workers Directive.
49 Article 18(2)(d) Intra-corporate transfer Directive.
50 Article 14(1)(c) Blue Card Directive, Article 12(1)(c) Single Permit Directive, Article 23(1)(g) Seasonal Workers Directive.
51 Article 23(2)(b) Seasonal Workers Directive.
52 Article 14(2) Blue Card Directive.
53 Article 14(2)(a) and (b) Blue Card Directive.

be restricted to those who are in employment, or who have been employed and who are registered as unemployed, by excluding third-country workers who have been admitted for the purpose of study, excluding any grants or loans related to it and by laying down specific prerequisites including language proficiency and the payment of tuition fees, in accordance with national law, with respect to access to university and post-secondary education and to vocational training which is not directly linked to the specific employment activity.[54]

9.2.2.5 Goods and Services

All four Directives provide for equal treatment with nationals as regards access to goods and services and all of them give Member States the discretion to restrict equal treatment but the permitted derogations are different. The Blue Card Directive provides for the possibility to restrict access to procedures to obtain housing,[55] while for single permit holders equal treatment can be limited to those who are in employment and access to housing can be restricted fully.[56] In the Seasonal Workers Directive access to goods and services explicitly excludes access to housing[57] and for intra-corporate transferees, access to procedures for obtaining housing is excluded from the provision.[58] The Seasonal Workers Directive provides for access to advice services but restricted to advice on seasonal work afforded by employment offices,[59] whereas EU Blue Card holders are entitled to counselling services afforded by employment offices.[60]

9.2.2.6 Tax Benefits

Only single permit holders and seasonal workers are entitled to tax benefits provided that they are resident for tax purposes in the Member State where they are working.[61] Both Directives permit equal treatment to be restricted to cases where the registered or usual place of residence of family members for whom tax benefits are claimed are in the Member State concerned.[62] This entails that tax benefits cannot be claimed for family member resident in a third-country, only those family members that are resident in the same Member State where the single permit holder is residing and the seasonal worker is staying and working. Whereas the scope of the Seasonal Workers Directive only applies to third-country nationals who reside outside of the territory of the Member State where they stay and work[63] and seasonal workers are not granted a residence permit in that Member State based on the Directive, it is not clear whether

54 Article 12(2)(a) Single Permit Directive.
55 Article 14(2) Blue Card Directive.
56 Article 12(2)(d) Single Permit Directive.
57 Article 23(2)(e) Seasonal Workers Directive.
58 18(2)(e) Intra-corporate transfer Directive.
59 Article 23(1)(f) Seasonal Workers Directive.
60 Article 14(1)(g) Blue Card Directive.
61 Article 12(1)(f) Single Permit Directive and Article 23(1)(i) Seasonal Workers Directive.
62 Article 12(2)(c) Single Permit Directive and Article 23(2)(c) Seasonal Workers Directive.
63 Articles 2(1) and 3(b) Seasonal Workers Directive.

they will be considered as resident for tax purposes in the Member State where they stay.

9.2.2.7 Recognition of Diplomas and Qualifications

All of the Directives provide for equal treatment with nationals as concerns recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures.[64] This provision requires that third-country nationals who have obtained education or professional qualifications in a third county have the right to have these recognised by the national authorities in the Member State where they are working based on equal treatment with nationals of that Member State which have obtained education or professional experience in a third country.

9.2.2.8 Intra-EU Mobility

When an EU Blue Card holder exercises intra-EU mobility under the Directive, his/her right to equal treatment, except as regards freedom of association and membership of organisations and recognition of diplomas can be restricted until a positive decision on issuing an EU Blue Card in the second Member State has been taken, except if he/she is allowed to work during that period.[65] The Intra-Corporate Transfer Directive which is the only other Directive that grants rights to intra-EU mobility does not address the right to equal treatment of intra-corporate transferees in relation to mobility between Member States.

9.2.2.9 Comparison – Consistency

The adopted Directives all derogate from the principle of non-discrimination in their equal treatment clauses and give Member States the discretion to restrict the right to equal treatment in several ways as was discussed in the above. Furthermore, the extent of the permissible derogations varies between the Directives and in general there is little consistency regarding the principle of equal treatment in EU law on labour migration. The way in which equal treatment to social security is constructed in the Directives is largely similar and they have in common that they all exclude equal treatment to family benefits to some extent. The manner in which the right to equal treatment as concerns unemployment benefits is determined varies between the Directives, they are excluded completely for seasonal workers and although the right to equal treatment as regards unemployment is not restricted in the Blue Card Directive, EU Blue Card holders can only be unemployed for three months before their permit is revoked. For single permit holders however, unemployment benefits cannot be restricted for third-country nationals who have been in employment. During the negotiations for the Single Permit Directive, this issue was discussed with respect to the fact that social insurance contributions paid at work lead to an entitlement to receive

64 Article 14(1)(d) Blue Card Directive, Article 12(1)(d) Single Permit Directive, Article 23(1)(h) Seasonal Workers Directive and Article 18(2)(b) Intra-corporate transfer Directive.

65 Article 14(4) Blue Card Directive.

unemployment benefits, which are rights that have been found by the European Court of Human Rights (ECtHR) to be protected by Article 1 of Protocol 1 of the ECHR.[66] Interestingly, this fact was not brought up during the negotiations for the Seasonal Workers Directive which permits Member States to exclude unemployment benefits from the branches of social security, without taking into account that seasonal workers are likely to be obligated to pay contributions in this regard. All four Directives grant equal treatment on freedom of association and membership in organisations representing workers and employers, as well as recognition of diplomas and professional qualifications which is to be granted in accordance with the relevant national procedures. All but the Intra-Corporate Transfer Directive grant equal treatment with nationals concerning terms and conditions of employment, while it stipulates that intra-corporate transferees shall enjoy at least equal treatment with persons covered by Directive 96/71/EC, the Posted Workers Directive, in accordance with Article 3 of the Directive in the Member State where the work is carried out. The Posted Workers Directive has been interpreted by the Court of Justice of the European Union as only requiring employers to observe 'a nucleus of mandatory rules for minimum protection in the Member State'[67] where the work of the intra-corporate transferee is carried out.

9.2.3 Right to Family Reunification

In EU law the right to family reunification is governed by Directive 2003/86/EC, the purpose of which is stated to be 'to determine the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member State.'[68] It is stipulated in the Directive that it shall only apply where the sponsor seeking to have his/her family join him/her has a residence permit valid for one year or more and has 'reasonable prospects of obtaining the right of permanent residence.'[69]

9.2.3.1 The Blue Card and Intra-Corporate Transfer Directives

The right to family reunification is only addressed in two of the Directives under discussion here. Those are the Blue Card and the Intra-Corporate Transfer Directives which grant family reunification with derogations from Directive 2003/86/EC in several important aspects. Firstly, it shall not depend on the EU Blue Card or intra-corporate transfer permit holder having prospect of obtaining permanent residence or having a minimum period of residence.[70] Secondly, integration requirements may

66 Council of the European Union, Note for the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum, 15 July 2010, document number: 12156/10, 4.

67 Case C-341/05 *Laval* [2007], paragraph 108.

68 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Article 1.

69 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Article 3(1).

70 Article 15(2) Blue Card Directive and Article 19(2) Intra-Corporate Transfer Directive.

not be applied until after family reunification has been granted.[71] Thirdly, the time limit given for granting the permits is shorter, limited to 90 days in the Intra-Corporate Transfer Directive and six months in the Blue Card Directive.[72] Additionally, in the case of the family members of EU Blue Card holders, no time limit shall be applied for their access to the labour market,[73] and the Intra-Corporate Transfer Directive provides for access of family members to the labour market but does not include a time limit.[74] The rationale for the derogations is in both cases that it is 'considered necessary to set out an attractive scheme' for this group of workers and that this approach 'follows a different logic from the family reunification directive, which is a tool to foster integration of third-country nationals who could reasonably become permanent residents.'[75]

9.2.3.2 The Single Permit Directive

The Single Permit Directive is silent on family reunification, there is no reference to it in the Directive. In the explanatory statement with the proposal for the Directive however, it was stated that it does not 'touch upon conditions for the exercise of the right to family reunification.'[76] It may be assumed that the right to family reunification of single permit holders will be governed by the Family Reunification Directive as implemented by the Member State where they reside. Whereas the Single Permit Directive is a general framework Directive, which is bound to apply to a varied and possibly large group of third-country nationals, it would have been appropriate to at least make a reference to the fact that family reunification of single permit holders is governed by the Family Reunification Directive, while a claim to family reunification cannot be made based on the Single Permit Directive.

9.2.3.3 The Seasonal Workers Directive

It is stated in the preamble of the Seasonal Workers Directive that the Directive does not provide for family reunification.[77] The rationale for this was based on the approach to seasonal workers as not being residents and only permitted to stay for short periods of time with no prospects of long-term or permanent stay as they are obligated to leave the territory of a Member State when their authorisation for stay expires. Seasonal workers can however stay for a period of nine months out of twelve

71 Article 15(3) Blue Card Directive and Article 19(3) Intra-Corporate Transfer Directive.
72 Article 15(4) Blue Card Directive and Article 19(4) Intra-Corporate Transfer Directive.
73 Article 15(6) Blue Card Directive.
74 Article 19(6) Intra-Corporate Transfer Directive.
75 Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23 October 2007,11.
76 Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638, 23 October 2007, 8.
77 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, Recital 46.

and there is nothing in the Directive that prevents the permit being renewed several times. There is no obligation for Member States to do so, but there is also no limit on how many times the same seasonal worker can be granted a permit to re-enter a Member State for work. This could result in situations where a seasonal worker, lives and works in a Member State for several years in a row for nine months out of twelve, but has no right to have his/her family join during the periods employed there. The fear of the Seasonal Workers Directive becoming an instrument for 'eternal employment of 'seasonal' workers' has been expressed with regard to the fact that the level of rights granted under the Single Permit Directive is more generous than in the Seasonal Workers Directive and that these differences may become 'a temptation for employers (and for member state authorities) to give an expansive interpretation of what is defined as seasonal work.'[78] The fact that it also explicitly excludes family reunification, taken together with that seasonal workers cannot fulfil the requirements of the Family Reunification Directive while the maximum length of the seasonal permit is nine months, could add to the temptation.

9.2.3.4 Comparison – Consistency

The provisions on family reunification in the Blue Card and the Intra-Corporate Transfer Directives are virtually the same. Family reunification is evidently considered and used in the context of EU law on labour migration as a tool to give favourable treatment to selected groups of labour migrants, as noted by the Commission during the negotiations for the Intra-Corporate Transfer Directive, it was a political choice based on the intention to attract highly qualified third-country nationals.[79] The way family reunification is constructed in the two Directives that address it, and the absence of it in the Single Permit and Seasonal Workers Directives is related to how possible length of stay is constructed for each group and the status ascribed in accordance to that. There is however no consistency between the Directives as regards family reunification because EU Blue Card holders and intra-corporate transferees can be granted family reunification regardless of their length of stay, that is even if they stay for only six months, but seasonal workers cannot although they can spend nine months out of twelve working in a Member State. This could be considered to constitute discrimination, but the most likely factor to be used to counter such an assessment is the fact that seasonal workers are not granted a residence permit in the Member State where they work and are not regarded as a part of future demography of the EU, unlike EU Blue Card holders.

78 Groenendijk, K. 2014. Which Way Forward with Migration and Employment in the EU?, in *Rethinking the Attractiveness of EU Labour Immigration Policies: Comparative perspectives on the EU, the US, Canada and beyond*, edited by S. Carrera, E. Guild and K. Eisele. Brussels: Centre for European Policy Studies, 95.

79 Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 32.

9.3 EU LAW ON LABOUR MIGRATION AND PROTECTION OF THE HUMAN RIGHTS OF MIGRANT WORKERS

9.3.1 Standards provided by the Relevant Human Rights and Labour Law Frameworks

The human rights and labour law frameworks relevant to EU law on labour migration that were presented and discussed in Chapter 2, provide the human rights parameters concerning equal treatment of nationals and non-nationals as well as international labour law standards and instruments specifically addressing the rights of migrant workers. These frameworks can be used to assess the degree to which EU law on labour migration adheres to the relevant standards.

The personal scope of international and European human rights instruments, such as the International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights and the European Convention on Human Rights, includes all those present in the territory of a State. They apply to 'everyone' regardless of nationality and administrative status, unless non-nationals are explicitly excluded from provisions such as those addressing political participation and freedom of movement. Although nationality was not listed as a suspect ground of discrimination in any of these instruments, the UN Treaty Bodies overseeing the implementation of the two UN Covenants and the ECtHR have added nationality as a prohibited ground of discrimination through their interpretation and case law on these instruments. The personal scope of the TFEU and the EU Charter of Fundamental Rights includes third-country nationals, unless they are explicitly excluded, as is the case with a few provisions of both. As EU law on labour migration is based on Article 79 TFEU, third-country nationals working in an EU Member State are entitled to equal treatment with nationals according to both the Treaty and the Charter while EU law on labour migration falls within the scope of the TFEU.[80]

The four EU Directives addressing regular migrants discussed in this study, do not guarantee equal treatment between nationals and the third-country nationals that fall under their scope and thereby violate the principle of equal treatment as set forth in international and European human rights instruments, including the International Convention on the Protection of the Rights of all Migrant Workers and Members of their families (ICRMW), which calls for full equality between regularly resident migrant workers and nationals. Although the ICRMW has not been ratified by any EU Member State, it is one of the ten United Nations' core human rights instruments and due to that status, has to be regarded as setting the international standards for human rights protection of migrant workers. These human rights instruments generally require that any discrimination based on nationality is reasonably justified, pursues a legitimate aim and is proportionate to the aim pursed. In light of these strict requirements for justifying discrimination, it is not likely that the discrimination prescribed by EU law on labour migration, firstly between nationals and third-country nationals, and secondly, in the varying degree to which the right to equal treatment is granted to different 'types' of labour migrants, would constitute justifiable discrimination pursu-

80 See discussion in sections 2.3.2.1 and 2.3.2.2.

ing a legitimate aim. The primary aim of the construction of the right to equal treatment in EU law on labour migration is to grant favourable treatment to certain types of migrants over others for utilitarian economic purposes.

The absence of any recognition of the human rights of irregularly present migrants in employment in the Employers Sanctions Directive is contrary to international and European human rights law, including the ICRMW which recognises the fundamental human rights of all migrants irrespective of their administrative status. It also contravenes the general approach to irregularly present migrants in employment of ILO Convention No. 143, except for the right to receive back pay for employment.

In addition to contravening the principle of equal treatment in general, specific provisions of the four Directives on regular labour migrants violate the standards set by the Covenant on Economic, Social and Cultural Rights as regards the right to equal treatment with nationals in access to education, adequate housing and social security, and with the absence of any recognition of the right to social assistance.[81] The same is accurate as regards the ICRMW and ILO Conventions No. 97 and No.118 as regards social security. In an assessment of the Blue Card and the Single Permit Directives, Groenendijk concluded that the 'access to social security benefits under the equal treatment clauses' in both of them, are below the level of ILO Convention No. 97 and ILO Convention No. 118.[82] The same is accurate for the Seasonal Workers and Intra-Corporate Transfer Directives. In its case law on equal treatment to social security benefits, the ECtHR has concluded in the *Gaygusuz* and the *Koua Poirrez* judgments[83] that discrimination based on nationality in relation to social security benefits is prohibited based on Article 14 of the ECHR in conjunction with Article 1 of Protocol No. 1 to the Convention. Having conducted an assessment of the social security case law of the ECtHR, Minderhoud maintains that if EU legislation fails to provide sufficient protection, Article 14 of the ECHR 'can provide an instrument for combating the refusal of social security rights, including social assistance benefits, when this refusal is based on discrimination by nationality.'[84] The ECtHR case law presented in chapter 2, provided that in *Dhahbi v. Italy* the Court found a violation of Article 14 in conjunction with Article 8, while the applicant had been refused a family allowance solely based on his nationality. In *Niedzwiecki v. Germany* and *Okpisz v. Germany* the Court found that refusing migrants family benefits on the basis of them not holding a 'stable residence permit' is a violation of Article 14 in conjunction with Article 8.

The four Directives on regular migrants include a few standards that are analogous to, but incompatible with, the standards provided by the human rights and la-

81 See section 2.2.1.2.

82 Groenendijk, K. 2013. Social Assistance and Social Security for Lawfully Present Third-Country Nationals: On the Road to Citizenship?, in *Social Benefits and Migration: A Contested Relationship and Policy Challenges in the EU,* edited by E. Guild, S. Carrera and K. Eisele. Brussels: Centre for European Policy Studies, 29.

83 See section 2.3.1.2.3 above.

84 Minderhoud, P. 2010. Social Security Rights of Third Country Nationals: Developments in EU Legislation and in the Case law of the European Court of Human Rights, *Journal of Social Security Law* 4, 239.

bour law frameworks outlined in Chapter 2. These include the provision of the Blue Card Directive restricting access to the labour market of EU Blue Card holders for two years which is incompatible with the European Convention on the legal status of migrant workers[85] which provides for a maximum period of one year of such restrictions. The Single Permit Directive also raises concerns in this respect while it provides for binding a work permit to an employer without explicitly providing for a time limit. The three month period of unemployment an EU Blue Card holder is granted to look for new employment before his/her permit is withdrawn, is not compatible with the five month period provided by the European Convention on the legal status of migrant workers.[86] Intra-corporate transferees are not entitled to equal treatment with nationals as regards terms and conditions of employment which contravenes ILO Convention No. 111 which prohibits discrimination based on nationality in employment which in the definition of the Convention includes 'terms and conditions of employment.'[87] It could also be found to contravene Article 15(3) of the EUCFR which stipulates that nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of the citizens of the Union. The outcome of that assessment will depend on what is the reference group in relation to this provision, citizens who are posted workers in the Member State where the intra-corporate transferee is working, or nationals of the Member State where he/she is working. The exclusion from equal treatment for intra-corporate transferees in this regard is assessed as 'likely to lead to bypassing of the EU labour legislation and national labour protection,' and that the 'equal treatment of ICTs could be endangered as potentially laws from any sending third country may be applicable to their situation.' Consequently, third-country nationals 'could be afforded less protection and be subjected to the different forms of exploitation.'[88]

9.3.2 Regular Migrants

The Directives addressed in this study are adopted on the legal basis of Article 79 of the TFEU which provides that the common EU policy on labour migration should aim at granting 'fair treatment' to legally resident third-country nationals. The policy plan on legal migration which provides the policy background to the approach the EU chose as regards development of legislation on labour migration, stated that the policy goal with respect to rights was 'to offer a fair, rights-based approach to all labour immigrants on the one hand and attracting conditions for specific categories of immigrants needed in the EU, on the other.'[89] No definition of 'fair treatment' or

85 Article 8 of the European Convention on the legal status of migrant workers.
86 Article 9 of the European Convention on the legal status of migrant workers.
87 ILO Convention 111, Discrimination Employment and Occupation Convention, Article 1(3).
88 Brieskova, L. 2014. *The new Directive on intra-corporate transferees: Will it enhance protection of third-country nationals and ensure EU Competitiveness?* Available at: http://eulawanalysis.blogspot.com.es/2014/11/the-new-directive-on-intra-corporate.html (accessed on 5 April 2015).
89 Communication from the Commission, Policy Plan on Legal Migration, COM(2005) 669, 21 December 2005, 5.

'rights based approach' is provided by EU policy documents on labour migration, but the United Nations Office of the High Commissioner for Human Rights (UNOHCHR) defines a human rights-based approach as 'a conceptual framework that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.' It is considered to require that policies and programmes adopted under a human rights-based approach 'are anchored in a system of rights and corresponding obligations established by international law.'[90] Even though the policy goal of the EU was to grant labour migrants 'fair treatment', EU Member States are, as discussed above, bound by international and European human rights and international labour law that stipulate that non-nationals are entitled to equal treatment with nationals. Had a human rights based approach been applied when developing EU law on labour migration, compliance with these international and European standards could have been ensured.

One defining feature of EU law on labour migration is that it falls short of providing equal treatment between nationals and third-country nationals and that it creates differential protection as regards equal treatment for third-country nationals based on their status or type, both as concerns possible length of stay and perceived economic value for the EU labour market. It is therefore obviously not human rights-based. As was discussed in the section above, the principle of equal treatment enshrined in international and European human hights and international labour law is not so flexible as to lend itself to be used as a tool for migration management and discriminate between groups of migrants as regards equal treatment with nationals in the State where they reside and work. These instruments do not foresee distinguishing between groups of regularly resident migrants in employment and granting them the right to equal treatment with nationals to a varying degree depending on their type or length of stay. Although EU law on labour migration defines the right to equal treatment for each group of migrant workers based on the status they are granted by the four EU Directives through access to territory and the labour market, the comparator as regards equal treatment is in all cases nationals of the EU Member State where the migrant lives and works.

With the sectoral approach to labour migration adopted by the EU 'the application of the principle of non-discrimination and equality of treatment has been challenged.'[91] The differentiation between groups of migrants pertaining to equal treatment is however not isolated to labour migrants, it is a feature that permeates all EU Directives on migration. Thus the 'higher degree of rights' protection' granted to highly qualified migrants, as opposed to 'less-skilled migrant workers,' should also be viewed in the context of the most privileged group of third-country nationals, namely those who are family members of EU citizens.[92] There is in fact no consistency in the

90 United Nations Office of the High Commissioner for Human Rights. 2010. *Information Note on Applying Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures*, 1. Available at: http://www.ohchr.org/Documents/Issues/ClimateChange/Info NoteHRBA.pdf (accessed on 6 July 2015).

91 Cholewinski, R. 2014. Labour Migration, Temporariness and Rights, in *Rethinking the Attractiveness of EU Labour Immigration Policies: Comparative perspectives on the EU, the US, Canada and beyond*, edited by S. Carrera, E. Guild and K. Eisele. Brussels: Centre for European Policy Studies, 25.

92 *Ibid.*, 26.

application of the principle of equal treatment with nationals within EU law on migration, and in no instance is a group of third-country nationals granted equal treatment with nationals of a Member State. Halleskov, in her analysis of the Long-Term Residents Directive in comparison to the framework on freedom of movement of EU citizens, aimed to answer the question whether the legal status accorded to long-term resident third-country nationals by the Directive, fulfils the Tampere vision of 'near equality' as the equality rights are defined by Article 11 of the Directive. In this context she noted that no 'independent definition of 'near equality' exists in European law,' that it was therefore 'not possible to determine exactly what this concept amounts to as regards long-term resident migrant workers.'[93] Among the assessments from her examination was that in respect to the majority of the areas listed in Article 11 of the Long-Term Residents Directive, it can be concluded that the legal status assigned to long-term residents 'differs from that enjoyed by EC workers working in another Member State to such an extent that reflections on the exact meaning of near-equality are rendered superfluous.'[94] Thus it is not only the equal treatment provisions of the EU Directives on labour migration that fall short of complying with the principle of equal treatment between nationals and third-country nationals, but also the Long-Term Residents Directive that in general offers more generous rights to third-country nationals than the Directives on labour migration. All these Directives are a part of the EU's legal framework to administer migration and residence of third-country nationals in EU Member States. This migration management framework bears resemblance to what has been described by Morris as 'civic stratification' which is 'a system of inequalities based on the relationship between different categories of individuals and the state,' where rights are granted or denied based on these different relationships. Formal inclusions and exclusions, which operate with respect to eligibility for rights and the informal gains and deficits that shape delivery, are deemed to be central to such a system which permits using 'rights as governance, whereby the elaboration of rights for categories of noncitizens also provides the opportunity and the means for exercising surveillance and control.'[95]

In EU policy documents on labour migration, the goal of granting 'fair treatment' and 'near equal rights' to regularly resident third-country nationals has always been connected to integration of migrants into the society where they reside which is considered to enhance social stability and social cohesion. Carrera and Wiesbrock have maintained that increasingly, 'less importance is being ascribed to the nationality connection in the recognition and allocation of citizenship rights and freedoms' to third-country nationals in the EU, and that this 'is gradually, and profoundly, transforming 'who' is to be understood as a 'citizen' in the EU.'[96] Furthermore, they provided that by approximating the treatment of third-country nationals 'to that of nationals of the

93 Halleskov, L. 2005. The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?, *European Journal of Migration and Law* 7, 182.

94 *Ibid*., 200.

95 Morris, L. 2003. Managing Contradictions: Civic Stratification and Migrants' Rights, *The International Migration Review* 37(1), 79.

96 Carrera S. and Wiesbrock, A. 2010. Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU, *European Journal of Migration and Law* 12, 359.

EU, the Union is fundamentally altering traditional political and legal configurations of European citizenship,' and thereby 'asserting its 'added value' in the citizenship and migration domains, while at the same moment intending to foster some sense of a European identity' among third-country nationals.[97] Considering the newly developed hierarchical system of EU law on labour migration, both in isolation, and in comparison to other instruments on migration, status, type and assumed economic contribution of a migrant is still highly relevant as regards 'who' is to be understood as a 'citizen' and it is a system which might 'seriously jeopardizes the political goal of establishing a more equal society,'[98] within the European Union. Not only is the human rights principle of equal treatment not respected in standards set by the EU Directives on labour migration. In the implementation at the national level, the right to equal treatment of third-country nationals is granted in comparison to the nationals of the particular Member State where they reside and work, with the numerous derogations permitted to be used at the discretion of each Member State, which Iglesias maintains 'deprives the status of EU migrants of a significant European component.'[99]

9.3.3 Irregular Migrants

As discussed in section 9.3.1, migrants who are irregularly present in the territory of a State are entitled to protection of their human rights under United Nations and Council of Europe human rights instruments and ILO instruments. The Employers Sanctions Directive does not explicitly recognise the human rights of irregular migrants, it only provides for the right to back pay for work performed, and the EU *acquis* is silent on the rights of irregular migrants. This approach is in fact reminiscent of Cholewinski's observation concerning the ratification of instruments set forth to protect the rights of irregular migrants that 'merely build upon and clarify' human rights commitments 'to which states are already bound under general international human rights treaty law.' In his assessment, the 'reluctance of governments to accept explicitly the specific commitments protecting irregular migrants can only raise serious doubts regarding their readiness to protect the fundamental human rights of this vulnerable group.'[100] Discussing the 'unstable relationship' between human rights claims of irregular migrants and the State, Noll concludes that while 'it is uncontroversial for many that such migrants are generally entitled to human rights by virtue of

97 *Ibid.*, 342.

98 Morano-Foadi, S. and De Vries, K. 2012. The equality clauses in the EU Directives on non-discrimination and migration/asylum, in *Integration for Third-Country Nationals in the European Union; The Equality challenge*, edited by S. Morano-Foadi and M. Malena. Cheltenham: Edgar Elgar Publishing, 5.

99 Iglesias Sánchez, S. 2014. Nationality: The Missing Link between Citizenship of the European Union and European Migration Policy, in *The Reconceptualization of European Union Citizenship*, edited by E. Guild, C. Gortázar Rotaeche and D. Kostakopoulou. Leiden: Brill Nijhoff, 73.

100 Cholewinski, R. 2006. Control of Irregular Migration and EU Law and Policy: A Human Rights Deficit, in *EU Immigration and Asylum Law Text and Commentary*, edited by S. Peers and N. Rogers. Leiden and Boston: Martinus Nijhoff Publishers, 904.

their humanity, it remains patently unclear how this entitlement relates to the state's power to exclude by virtue of its personal and territorial sovereignty.' He finds that this 'instability' not only creates difficulties for migrants, but 'confronts us with an aporia in thinking the universality of human rights law.' In relation to that, he poses the question of how it can be 'that enjoyment of a set of human rights amongst which there are a number of 'immediately applicable' economic and social rights is systematically barred for a group of human beings with a clear and pressing need?' and wonders whether the whole system of human rights law has not failed 'its stated universalist purpose if it failed that group?'[101] The lack of explicit recognition of the human rights of irregular migrants appears to be a conscious decision on behalf of the EU. Seeing how there is no EU instrument that directly addresses the human rights of irregular migrants and having regard to the Employers Sanctions Directive, the UNOHCHR recommended, that the EU 'standardize protection afforded to irregular migrant workers', by adopting a Directive on the rights irregular migrant workers and their families are entitled to, an act that the UNOHCHR sees as possible only 'if European States politically and collectively recognize as a principle that irregular migrants are entitled to fundamental human rights.'[102]

The EU approach to irregular migrants with the Employers Sanctions Directive fits the definition of what Dewhurst refers to as a 'protection with consequences approach'.[103] It 'essentially provides that irregular immigrants are entitled to the protection of labour laws' in the State where they have worked, but they are 'not protected from the consequences of enforcing those rights.' The consequences of enforcing rights, which include detection of their irregular status by immigration authorities as a result of coming forward to enforce their employment rights and potential detention and deportation, do however undermine 'the protective effect of the approach.'[104] This punitive approach to irregular migration and its effect on the possibilities of irregular migrants to assert their rights has been considered by many as leading to 'profound hindrances for undocumented migrants gaining access to basic rights,'[105] while 'any move to vindicate labour-related rights with an employer may be responded to with the threat of informing the authorities of the irregular presence of the migrant in question.'[106] Even where access to rights 'is not prohibited by the law and

101 Noll, G. 2010. Why Human Rights Fail to Protect Undocumented Migrants, *European Journal of Migration and Law* 12, 243-244.

102 United Nations Human Rights Office of the High Commissioner. 2011. *Migrant Workers' Rights in Europe*. Brussels: United Nations Human Rights Office of High Commissioner, Europe Regional Office, 21.

103 Dewhurst, E. 2014. The Right of Irregular Immigrants to Back Pay: The Spectrum of Protection in International, Regional, and National Legal Systems, in *Migrants at Work: Immigration and Vulnerability*, edited by C. Costello and M. Freeland. Oxford: Oxford University Press, 227.

104 *Ibid*., 219.

105 Carrera, S. and Merlino, M. 2009. *Undocumented Immigrants and Rights in the EU - Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?* Brussels: Centre for European Policy Studies (CEPS), 20.

106 Noll, G. 2010. Why Human Rights Fail to Protect Undocumented Migrants, *European Journal of Migration and Law* 12, 257.

should be available, the very illegality of the migrants' stay creates further legal and practical obstacles to the enjoyment of these rights.'[107]

In the first report from the Commission on the implementation of the Employers Sanctions Directive in the Member States it is provided that the Member States have correctly transposed the provision 'providing for 'irregular migrants' right to be remunerated for the work performed' as well as the provision which 'obliges the employer to pay all taxes and social security contributions that should have been paid, had the third-country national been legally employed.' As concerns the length of work performed, all Member States except Estonia, Spain and Romania have introduced the assumption of a period of three months and the Netherlands provides for a period of six months.[108] The Communication reveals however a considerable lack of emphasis on the provisions of the Directive that address access to justice in order to make a claim for back pay. Only four Member States, Bulgaria, Cyprus, Greece and Slovenia, have 'explicitly transposed the right of illegally employed migrants to make a claim against their employer for any outstanding remuneration,' and four Member States, Cyprus, Greece, Poland and Sweden provide for the possibility to make a claim for a migrant that has been returned. Five Member States, Belgium, France, Hungary, Malta and Poland, have established the non-obligatory procedure to claim recovery of back pay 'without the need for the third-country national to introduce a claim.'[109] From these statistics, which seem to include only information on explicit transposition of the provisions of the Directive and do not take into account Member States such as the Netherlands, that have comparable procedures in place, the Commission concludes that 'the lack of specific mechanisms in many Member States to remedy the difficulties that irregular migrants may face in having access to justice and enforcing their rights may be counterproductive to the fight against illegal employment.' Additionally, the Commission argues that 'encouraging complaints against employers can play an important role in Member States' strategies to detect illegal employment.'[110] What is noteworthy about this assessment, as it relates to mechanism to protect migrants, is that it focuses primarily on the effect of the low level of implementation on the 'fight against illegal migration', not on the consequences for the rights of migrants.

The impact of the regime introduced by the Employers Sanctions Directive on migrants working while irregularly present was considered from several different aspects in the discussion of the proposal for the Directive. In relation to the need to tackle 'illegal employment', the Commission raised issues such as that irregular employment 'prevents workers from benefiting from social welfare' and that 'where jobs are shifting from the regular labour market to the black economy, this may lead to resentment when these jobs are taken by illegally staying third-country nationals.' Fur-

107 Cholewinski, R. 2005. *Irregular migrants: access to minimum social rights*. Strasbourg: Council of Europe Publishing, 73.

108 Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, COM (2014) 286, 22 May 2014, 7.

109 *Ibid.*

110 *Ibid.*, 8.

thermore, that the advantage of 'reducing employment of this kind' is that it 'might contribute to reducing intolerable forms of exploitation' and 'diminishing xenophobic attitudes.'[111] The European Trade Union Confederation (ETUC) and several migrants' rights organisations assess the impact of the punitive approach very differently from the Commission. In this regard, the ETUC expressed concerns that 'the Directive may contribute to a negative 'profiling' of migrant workers in general, with more discrimination and xenophobia as a result,' that the obligation for employers to 'check documents will lead to 'foreign looking people' being singled out for checking,'[112] and that the Directive's 'main effect might actually be 'the victimization of migrant workers whatever their legal status.'[113] ENAR, PICUM and Solidar also raised concerns that the Directive 'will have a number of unintended effects that run counter to both the values of the European Union and specific policies in the migration, integration and employment fields.'[114] Firstly, that with migration control as the primary goal, it 'will have the effect of increasing and entrenching undeclared work and will make it harder, not easier, to effectively address the problems associated with irregular migration, including the denial of rights of irregular migrants.' Secondly, that it endangers 'integration measures through the stigmatization of employment of third-country nationals and migrants, whereby third-country nationals are subject to procedures that question their right to reside in the country on a regular basis.' This is considered to possibly, at the most extreme end, result in employers deciding it is 'too much trouble' to employ third-country nationals, leading to nationality discrimination.[115] Thirdly, they argue that 'placing a duty on employers to exercise immigration control functions will not only deter employers from hiring unauthorised workers, but is likely to create both intentional and unintentional racial discrimination whereby not only every third- country national but also every 'foreign' looking worker is placed under suspicion and subjected to potentially repeated checks and scrutiny solely on the grounds of their actual or apparent race or ethnic origin.'[116] Thus, the status ascribed to irregularly resident migrants in employment by classifying them as 'illegal' may directly result in discrimination based on nationality.

It remains to be seen what the consequences of the enforcement of the Directive will be, but the concerns expressed above seem highly relevant given the punitive approach taken by the Directive. It is of significance in relation to the EU's policy documents on employment of irregularly present migrants that there are no statistics presented on the scope of the issue, they only provide statistics on irregularly present migrants. There is nothing in these policy documents that supports the assumption

111 Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals, COM(2006) 402, 19 July 2006, 9.

112 European Trade Union Confederation. 2007. ETUC position regarding European Commission's proposals on legal and 'illegal' migration, 14. Available at: http://www.etuc.org/documents (accessed on 5 November 2011).

113 *Ibid.*, 13.

114 ENAR, PICUM and Solidar. 2008. Employers' Sanctions Directive: Will migrant workers pay the price of their exploitation?, 5. Available at: http://picum.org/picum.org/uploads/file_/2008-04-15_employer_sanctions_directive.pdf (accessed on 5 November 2011).

115 *Ibid.*

116 *Ibid.*, 6.

that all those who are irregularly present are in employment, which points to the conclusion that the EU does not possess knowledge of the actual scope of issue. There is a direct relation between the punitive approach to irregularly present migrants in employment and the difficulties in getting comprehensive information about the scope of that population, while the punitive approach is seen as 'incapable of curing the phenomena' due to the fact that it pushes migrants further 'towards anonymity and invisibility.'[117] In this context it is also important to draw attention to what has been described as a 'schizophrenic' position of States 'in which they seek to end irregular migration while resorting to it for low-skilled jobs.' In respect to this, the 'debate on the rights of irregular migrant workers in Europe is distorted by the tolerance, and in some cases support that States may give, intentionally or not, to irregular work of migrants in their territory.' The 'principled position of States against irregular migration' that is evident in the EU's approach with the Employers Sanctions Directive 'often contrasts with their non-action about irregular employment of migrant workers.'[118]

9.3.4 The Right to Family Reunification

The right to family reunification is not enshrined in any of the international or European human rights treaties but Article 8 of the ECHR recognises the right to respect for family life which is relevant to the case of family reunification. As was outlined in section 9.2.3, family reunification is explicitly granted in EU law on labour migration based on preferential status and treatment to only those migrant workers who fall under the scope of the Blue Card and Intra-Corporate Transfer Directives. This migration management policy decision made based on the identified priority to provide for 'attracting conditions for specific categories of immigrants needed in the EU,'[119] and the consequences of its implementation, resonate in Morris's statement that 'while the right to family life is established as a universal right, in so far as it is asserted in the ECHR, it is subject to qualifications commonly dictated by a desire to control and limit immigration.' In relation to the efforts to control and limit immigration, family reunification is 'governed by different rules for different categories of migrants, and there are common deficits in realizing the right and meeting the associated conditions.'[120] It remains to be seen whether the approach taken by EU law on labour migration as regards family reunification will be considered discriminatory based on differences in statuses according to type, between the migrant groups that

117 Atger, A.F. 2011. Competing Interests in the Europeanization of Labour Migration Rules, in *Constructing and Imagining Labour Migration, Perspectives of Control from Five Continents*, edited by E. Guild and S. Mantu. Surrey: Ashgate, 170-171.

118 United Nations Human Rights Office of the High Commissioner. 2011. *Migrant Workers' Rights in Europe.* Brussels: United Nations Human Rights Office of High Commissioner, Europe Regional Office, 21.

119 Communication from the Commission, Policy Plan on Legal Migration, COM(2005) 669, 21 December 2005, 5.

120 Morris, L. 2003. Managing Contradictions: Civic Stratification and Migrants' Rights, *The International Migration Review* 37(1), 86.

are granted it and those denied it. Boeles has however concluded, that the 'mere fact that a distinction is made in the framework of migration law, does not exclude the possibility that such a distinction is discriminatory,' while in 'particular cases, the detrimental effects of a certain policy on a certain group may be disproportional, and thus, discriminatory.'[121]

The case of *Hode and Abdi v. The United Kingdom*, bears some similarities to the differences in rights, or lack thereof, granted to EU Blue Card holders and intra-corporate transferees on the one hand and seasonal workers and single permit holders on the other hand. The first two groups are granted family reunification regardless of their length of residence in an EU Member State, for seasonal workers however, family reunification is explicitly excluded due to their limited right to stay and the Single Permit Directive is silent on the issue. The case concerned differences in treatment between groups of persons with temporary leave to remain in the United Kingdom. UK law granted different rights to family reunification to students and workers with a temporary residence permit and refugees with a temporary residence permit which the complainant maintained was not objectively and reasonably justified while they were in analogous positions. In justifying these differences, the UK maintained that it 'faced international competition to attract students and workers,' and therefore sought to encourage applications from them to reside in the UK, and explained that 'one incentive offered to prospective applicants was the assurance that they could be joined by their spouses.'[122] In assessing the case, the ECtHR accepted that 'the offering of incentives to certain groups of immigrants may amount to a legitimate aim for the purpose of Article 14 of the Convention,' but noted that in the case at hand no justification is put forth for such preferential treatment.[123] The Court did not consider that the difference in treatment between students and the applicant, a refugee, based on the policy of the UK to actively attract students and workers, but not refugees, was objectively and reasonably justified and concluded that there was a violation of Article 14 read together with Article 8.[124] As regards the groups of labour migrants under discussion in this study, the question that remains to be answered is whether the reasons given by the EU for preferential treatment for EU Blue Card holders and intra-corporate transferees as compared with seasonal workers and single permit holders is 'objectively and reasonably' justified in the assessment of the Court. Any such assessment would also have to take into account that the EU considers family reunification as helping 'to create sociocultural stability facilitating the integration of third-country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.'[125]

121 Boeles, P., Den Heijer, M., Lodder, G. and Wouters, K. 2014. *European Migration Law*. Cambridge-Antwerp-Portland: Intersentia, 239.

122 ECtHR, *Hode and Abdi v. The United Kingdom* (No. 22341/09), 6 November 2012, paragraph 36.

123 ECtHR, *Hode and Abdi v. The United Kingdom* (No. 22341/09), 6 November 2012, paragraph 53.

124 ECtHR, *Hode and Abdi v. The United Kingdom* (No. 22341/09), 6 November 2012, paragraphs 54 and 56.

125 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Recital 4 of preamble.

9.4 MIGRATION MANAGEMENT POLICIES AND HUMAN RIGHTS OF LABOUR MIGRANTS – ARE THEY INHERENTLY INCOMPATIBLE?

Neither the TFEU nor any of the Directives discussed in this study, grant labour migrants access to territory. EU law on labour migration upholds the sovereign right of the Member States to control access to their territory for labour migrants. In light of the differences in human rights protection and admission criteria for labour migrants to the territory and the labour market provided for by the Directives, it is important to explore the relations between migration management and protection of the human rights of labour migrants. In that respect, it is pertinent to ask whether the right of States to manage the number and types of labour migrants that are permitted to enter, reside and work in a Member State of the EU necessitates discrimination between migrants and nationals on the one hand, and different groups of migrants on the other. The response to that is negative, while international and European human rights law, as regards voluntary labour migrants, does not impede on the principle of the sovereignty of States to grant access to territory. In discussing the interplay between the rights of States to control access to their territory and non-discrimination, Joppke sees a paradox and asks 'how can policies that regulate the always particular boundaries of a distinct society bear the anonymous marks of universalism or non-discrimination; aren't particularism and discrimination notionally inscribed in these policies, as is acknowledged in the international law construct of (almost) unfettered state sovereignty in matters of immigration and nationality law?'[126] These considerations bear the mark of the 'tendency to overstate the constraints on liberal democracies posed by the 'international human rights regime" which is 'exacerbated by a failure to identify which rights that regime protects.'[127] As Soysal[128] and Guiraudon and Lahav[129] have observed, the human rights regime does not encroach on the sovereign right of States to control access to their territory as concerns voluntary migration, it does however provide that once migrants are within the territory of the State, their human rights are protected. The two fields of law are therefore separate.

On the contrary, Ruhs sees these two fields as related and states 'that migrant rights cannot be studied and debated in isolation of admission policy, both in terms of positive and normative analysis,' and maintains that to 'understand why, when and how countries restrict the rights of migrant workers, and to debate what rights migrant workers *should* have, we need to consider how particular rights restrictions are related to policies that regulate the admission, i.e. the numbers and selection, of mi-

126 Joppke, C. 2005. Exclusion in the Liberal State: The Case of Immigration and Citizenship Policy, *European Journal of Social Theory* 8(1), 44.

127 Opeskin, B. 2012. Managing International Migration in Australia: Human Rights and the 'Last Major Redoubt of Unfettered National Sovereignty', *International Migration Review* 46(3), 560.

128 Soysal, Y. 1994. *Limits of Citizenship: Migrants and Postnational Membership in Europe*. Chicago: University of Chicago Press, 7-8.

129 Guiraudon, V. and Lahav, G. 2000. A Reappraisal of State Sovereignty Debate: The Case of Migration Control, *Comparative Political Studies*, 33(2), 163.

grant workers.'[130] Having regard to international and European human rights law and international labour law however, it is evident that the scope for the debate on rights that migrants *should* have, is in fact limited by the rights they *do* have according to human rights and labour law instruments that prohibit discrimination based on nationality and grant human rights to migrants. In his theorising about the interplay between access to territory and human rights of labour migrants, Ruhs argues 'that there is a strong case for advocating for the liberalisation of international labour migration, especially of lower-skilled workers, through temporary migration programmes that protect a universal set of 'core rights' and account for the interests of nation states by restricting a few specific rights that create net costs for receiving countries, and are therefore obstacles to more open admission policies.'[131]

A similar argument was made by Ruhs and Martin, in relation to supply and demand of different types of migrant workers. In their assessment, the 'international labour market for skilled and highly-skilled migrant workers is characterised by 'excess' demand for labour,' which results in that 'a significant number of high-income countries are competing for a relatively small pool of highly qualified workers willing to migrate.'[132] The same argument was indeed set forth by the Commission while identifying migration management approaches for labour migration into EU Member States.[133] As a consequence of this, qualified migrants are seen as 'able to choose among competing destinations,' and their choices are regarded as 'likely to depend on both expected earnings and expected rights in destination areas.' Due to that, 'countries and employers seeking to attract skilled workers are likely to grant them not only high wages but also substantial rights, generating a positive relationship between the number and rights of highly-skilled migrants.'[134] On the other hand, Ruhs and Martin assess that 'the demand for low-skilled migrant workers is likely to be downward sloping with regard to migrants' rights.' While, as they assert, there 'is an almost unlimited supply of migrants willing to accept low-skilled jobs in high-income countries at wages and under employment conditions significantly lower than those mandated by local laws and international norms.'[135] These assessments or assumptions which can certainly serve as a good basis for the rhetorical discourse to justify the need to treat different groups of migrant unequally, are then linked to the cost of migrants from the point of view of an employer, for whom 'more employment rights for workers generally mean increased labour costs, generating a numbers-trade off.' They draw an analogy with protection provided by UN and ILO Conventions to labour migrants, stating that if migrants 'had' full rights, 'including the rights to equal wages

130 Ruhs, M. 2014. Rethinking Migrants Rights, in *Rethinking the Attractiveness of EU Labour Immigration Policies: Comparative perspectives on the EU, the US, Canada and beyond*, edited by S. Carrera, E. Guild and K. Eisele. Brussels: Centre for European Policy Studies, 12.

131 *Ibid*., 13.

132 Ruhs, M. and Martin, P. 2006. *Numbers vs. Rights: Trade-offs and Guest workers programmes*. Working Paper No. 40. Oxford: University of Oxford, Centre on Migration Policy and Society, 7.

133 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment, COM(2003) 336, 3 June 2003, 9.

134 Ruhs, M. and Martin, P. 2006. *Numbers vs. Rights: Trade-offs and Guest workers programmes*. Working Paper No. 40. Oxford: University of Oxford, Centre on Migration Policy and Society, 7.

135 *Ibid.*

and all-work related benefits, their cost will be higher and fewer will be employed.' Furthermore, they maintain, that 'fewer and more limited migrant rights mean lower costs for employers' which results in more migrants employed. In relation to this, they conclude, that 'increasing the rights of migrants affects their employment in the same way that a higher minimum wage can reduce the number of jobs (for all workers, not just migrants).'[136] These views are closely related to 'utilitarian politics' which are based on a largely utilitarian conception of migrant workers, by hierarchizing migrants and their rights 'on the basis of their (economic) interests for Europe.'[137] Huysmans has described this as a 'functional and instrumental reading of the politicization of immigration and asylum,' a method that 'disconnects the policy process from political contexts in which the stake of the game is not the effective or efficient management of the phenomenon, but the mode of allocating values, rights and duties that define the good life in a political community.'[138]

The logic presented by Ruhs and Martin firstly rests on that it is an 'open question' what rights labour migrants *do* have, as if there are no standards that States are obliged to adhere to. Secondly, it seems to be based on the assumption that States that have no obligation through international law, or in the case of EU Member States, EU law, to admit third-country nationals for the purposes of employment into their territory, would be inclined to admit more numbers of migrants than there is an identified or perceived need for in their national labour markets. The argument also presumes that due to 'huge reserves of unskilled persons, ready to accept salaries and working conditions below standards' and wanting to migrate for work, that there is pressure on States to admit them. EU Member States, who as can be seen from the multiple clauses in EU Directives on labour migration establishing no access to territory, have the sovereign right to control the number of labour migrants admitted into their territory are unlikely to admit more numbers of migrants than they assess a need for while the system is based on demand primarily. The only plausible explanation for why States would do that, is in the case they would like to have access to workers that are less 'costly' for employers and social security systems and do not enjoy the same protection of rights as national workers. That would constitute social dumping. One interesting feature of the argument presented by Ruhs and Martin is the idea that it could be justifiable to base labour migration policy on the assumption that lower skilled migrants are willing to accept work 'at wages and under employment conditions significantly lower than those mandated by local laws and international norms'. Basing labour migration policy on these assumptions, would encourage and institutionalize exploitation of migrant workers. It is a fact that rights cost, all human rights do, both for nationals and non-nationals and it is worth noting that their argument is set forth as a justification for discrimination based on nationality and does not extend to low-skilled workers who are nationals of potential host States of migrant workers.

136 *Ibid.*

137 Oger, H. 2009. **'**The French political refusal on Europe's behalf', in *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights*, edited by R. Cholewinski, P. De Guchteneire and A. Pécoud. New York: UNESCO Publishing and Cambridge University Press, 320.

138 Huysmans, J. 2006. *The Politics of Insecurity: Fear, migration and asylum in the EU*. London and New York: Routledge, 106-107.

In regard to this discussion, the following statement by the UN Special Rapporteur on the human rights of migrants is of particular relevance:

> The Special Rapporteur would like to strongly emphasize, however, that migration is first and foremost about human beings who are rights holders exercising their personal freedom to move and whose dignity can be defined by how much they are allowed to exercise options in defining their own future and that of their family, without being constrained by status and circumstances. It is therefore crucial to facilitate mobility while effectively promoting and protecting the human rights of migrants within a well-governed migration process.[139]

9.5 DISCOURSES UNDERPINNING AND JUSTIFYING A SECTORAL APPROACH TO MANAGEMENT OF LABOUR MIGRATION

The EU Directives on labour migration addressed in this study are an outcome of a sectoral approach to migration management the dominant feature of which is the differentiation between labour migrants based on ascribed status related to their skills and qualifications, or lack thereof, how valuable their labour market participation is considered for the EU economy and whether they are regarded as a potential part of the future demography of the EU. This development is in direct opposition to what Joppke assesses as the current characteristics of migration management in liberal States. He claims, that a 'dissociation of State and nation in the liberal State's membership policies' has emerged. That these States have 'become wide open for new entrants, who can no longer be included or excluded on the basis of ascribed group characteristics, but only as individuals.' He considers these changes mainly due to the fact that liberal non-discrimination and human rights norms have put to a halt the 'particularistic nation building possibilities of the state.'[140]

Based on surveying the 'evolution of Western states' immigration policies since their first systematic elaboration at the beginning of the twentieth century,' Joppke concludes that they reflect 'increased universalism, and the reduced scope of ascriptive group distinctions.' In his assessment, the era of policies explicitly showing preference for 'immigrants of certain ethnic and national origins' and excluding 'immigrants of certain undesired 'races'' belong to the past. In Joppke's words, it is an 'astonishing development that such ascriptive group distinctions have notionally disappeared from immigration policies which generally have come to revolve around the individual criteria of skills and family ties. The only legitimate group distinction left is that between 'citizens', who have a right to enter and cannot be expelled, and 'aliens', who have no such right, and who are subject to a state's 'immigration' or 'foreigners' policies.'[141] Joppke deems this new method of exclusion as 'fundamentally different

139 United Nations General Assembly, Human rights of migrants: Note by the Secretary-General transmitting the report of the Special Rapporteur on the human rights of migrants, François Crépeau, submitted in accordance with Assembly resolution 68/179, UN Doc A/69/302, 7. New York: United Nations, 2014.

140 Joppke, C. 2005. Exclusion in the Liberal State: The Case of Immigration and Citizenship Policy, *European Journal of Social Theory* 8(1), 53-54.

141 *Ibid*., 49.

from nationalist or ethnic exclusion,' while it does not, unlike ethnic or nationalistic exclusion, operate on 'the basis of particular group characteristics,' but an individual exclusion based on a belonging to the legal category of aliens.[142] As can be seen from the Directives addressed in this study, qualifications and skills, or lack thereof, are used as factors of inclusion and exclusion and these legal instruments institutionalise group discrimination based on economic status and perceived worth and qualifications and skills level as it is assessed in relation to the economic needs of EU Member States and the goal to increase the competitiveness of the EU economy. Although the gravity of discrimination based on race and discrimination based on skills level or legal status is not comparable while the latter can change through the course of a person's life but the former cannot, a migration management system resting on differentiating between persons based on their ascribed legal status is no less discriminatory than a system based on race or nationality. In relation to the principle of equal treatment any criteria or status that is used to treat people differently is discriminatory unless it can be objective justified and pursues a legitimate aim.

Taking the opposite view to Joppke, Castles provides that the 'mobility of labour and its differentiation into specific categories has become the basis of a new transnational class structure, where people holding the 'right' passports and qualifications enjoy mobility rights which come close to global citizenship. People from the South who lack formal skills can often only move irregularly, running enormous risks.'[143] In a similar vein, Amaya-Castro argues that 'immigration policy has never truly abandoned its discriminatory origins' that 'it has merely reframed them.' Whereas before, 'Civilisation' was the self-evident justification for discrimination, even when it was a clear euphemism for race and ethnicity, it is now 'economic worth."[144] Unlike racist or nationalistic migration policies, contemporary policies, such as the EU's sectoral policy on labour migration, have achieved in the assessment of de Haas et al, increased 'sophistication', and their real aim is seen to be to 'increase the ability of states to control *who* is allowed to immigrate regularly and who is not.' Thus the 'new layer of selection, based on criteria such as skill, wealth or family characteristics of migrants, has been superimposed on national or ethnic origin criteria which dominated earlier policy making.' While generic nationality or 'racial' bans have been abolished, nationality is still a selection tool today and has been complimented by mechanisms which regulate access of non-desired nationalities through skill, wealth and other criteria.'[145] This new approach to the construction of migration management policies is seen to 'provide evidence for the idea that migrants have been increasingly 'commodified' as part of the framing of migration within a utilitarian discourse focusing on the purported economic 'value' of migrants.'[146]

142 *Ibid.*

143 Castles, S. 2011. Migration, Crisis, and the Global Labour Market, *Globalization* 8(3), 318.

144 Amaya-Castro, J.M. (2015) *International Migration Law: Licence to Discriminate?* 5 June, 2015, EJIL: Talk!, blog of the European Journal of International Law. Available at: http://www.ejiltalk.org/international-migration-law-license-to-discriminate/ (accessed 5 June 2015).

145 De Haas, H., Natter, K. and Vezzoli, S. 2014. *Growing restrictiveness or changing selection? The nature and evolution of migration policies*. Working Papers: Paper 96. Oxford: International Migration Institute, 23.

146 *Ibid.*

This strategy of selection has an additional dimension that plays out within EU territory as regards access to employment for third-country nationals in accordance with their acquired level of education, qualifications and skills. As was discussed above, all the Directives on regular migration grant third-country nationals equal treatment with nationals to have their diplomas, certificates and other professional qualifications recognised in accordance with national procedures. Recognition of qualifications and diplomas is of importance both in terms of labour market access for individual migrant workers, that is, having access to employment that corresponds with their education and professional experience, and for the labour market to benefit from the qualifications, skills and experiences of third-country nationals. In this regard, the Commission has provided that in 2011, a third of migrants within the EU were overqualified for the jobs they occupy, which it considered 'a waste of human capital that Europe cannot afford.' To remedy this, the Commission declared that 'the EU must make greater efforts to recognize the formal qualifications of migrants, whether already legally present or newly arrived.'[147] In a report by the International Organisation for Migration on recognition of qualifications and competences of migrants published in 2013, it is provided that in 'EU Member States, foreign qualifications, especially if earned in third countries, are largely discounted in the labour market,' and that the same applies to work experience gained abroad.'[148] The absence of recognition of qualifications, coupled with the lack of possibilities for upward mobility for most groups of migrants provided for in EU law on labour migration, for example by binding the permit of a third-country national to a specific employer, increase the importance of the different statuses ascribed to labour migrants by the EU Directives on labour migration, in particular the Seasonal Workers Directive and the Single Permit Directive.

EU policies and legislative acts aimed at attracting highly qualified migrants, for inclusion even in the future demographic of the EU, and excluding lower skilled migrants by constructing their stay only as temporary and the punitive approach towards irregularly present third-country nationals is supported by rhetoric such as was outlined in the section above. In that rhetoric, lower skilled migrants are considered to be a group of people unlimited in scope, willing to work under precarious conditions and highly qualified migrants as scarce goods that have to be granted favourable treatment. EU policies on labour migration are supported by discourses ascribing attributes to different groups of migrants and justifying the control of those who are labelled as unwanted. Thus highly qualified migrants, who 'because they are desired, are described with objective and subjective characteristics that distinguish them from the current undocumented immigrants, from the ancient guest workers, or from settled regular migrants.' Additionally, they are described and considered as manageable and

147 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Communication on Migration, COM(2011) 248, 4 May 2011, 12.

148 International Organisation for Migration. 2013. *Recognition of Qualifications and Competences of Migrants*. A report by the Independent Network of Labour Migration and Integration Experts, edited by A. Schuster, M.V. Desiderio and G. Urso. Brussels: International Organisation for Migration, 18.

able to be easily integrated.[149] Interestingly, as observed by Gsir, the term 'migrant' is avoided when addressing highly qualified migrants, rather they are referred to as 'highly skilled workers' or 'highly skilled persons' or simply 'highly qualified' or 'expatriates' which 'indicates a willingness to distinguish them from irregular immigration or migrants, for which another vocabulary is used as 'economic migrants' or 'stock of irregular migrants."[150] An exception to this is a reference to highly qualified workers as 'human resources' that need to be allocated efficiently within the European Union in the impact assessment that accompanied the proposal for the Blue Card Directive.[151] In this context, Guild observes that low skilled workers 'are not classified as the good migrants according to the scheme' of EU Directives on labour migration 'even though they are the ones which the economy may need the most', while 'the dominance of the managed migration discourse means that the good labour migrant is always defined as the highly skilled/paid. Because he or she is classified as desirable, there is an assumption that there is competition among states to encourage the individual to move to their country.'[152]

The punitive approach towards irregularly present migrant workers have been framed as 'illegal people' by dominant EU policy discourses. The discursive elements of threat from, and criminalisation of irregular migrants found in EU policy and legislation, 'do not suggest the integration of the societal group of irregular migrants but their 'marginalization, exclusion and expulsion.'[153] Bigo explains how in this context, 'wording is never innocent', and that the 'relation between security and migration is fully and immediately political.' Furthermore, that the contested concepts 'migration and security' are 'used to mobilize political response, not to explain anything,' and immigration 'is now problematized in Western countries in a way that is very different from the distinction between citizen and foreigner.' In this regard, it is not a legal status that is under discussion but a social image, concerning, the 'social distribution of bad.'[154] In relation to this, politicians display a 'will to mastery' of irregular migrants and 'see themselves as insulted by the incapacity to enforce the integrity of the national body they represent,' while the "migrant' is seen as both a public enemy breaking the law and a private enemy mocking the will of the politician.'[155] The UN Special Rapporteur on the human rights of migrants has expressed regret over the use of the terminology of 'illegal migrants' in the EU and 'laments the linking of irregular

149 Gsir, S. 2013. EU Labour Immigration Policy: Discourses and Mobility, *Refugee Survey Quarterly*, 32(4), 105.

150 *Ibid*., 105-6.

151 Commission Staff Working Document, Accompanying document to the Proposal for a Council Directive on the conditions for entry and residence of third-country nationals for the purposes of highly qualified employment, Summary of the Impact Assessment, SEC(2007) 1382, 23 October 2007, 4.

152 Guild, E. 2011. Equivocal Claims? Ambivalent Controls? Labour Migration Regimes in the European Union, in *Constructing and Imagining Labour Migration, Perspectives of Control from Five Continents*, edited by E. Guild and S. Mantu. Surrey: Ashgate, 217.

153 Vollmer, B.A. 2011. Policy Discourses on Irregular Migration in the EU – 'Number Games' and 'Political Games', *European Journal of Migration and Law* 13, 337.

154 Bigo, D. 2002. Security and Immigration: Toward a Critique of the Governmentality of Unease, *Alternatives* 27, Special issue, 71.

155 *Ibid*., 70.

migration with crime and security concerns.' In his assessment, using 'incorrect terminology that negatively depicts individuals as 'illegal' contributes to the negative discourses on migration, and further reinforces negative stereotypes or irregular migrants as criminals. Moreover, such language legitimates the discourse of criminalization of migration, which in turn, contributes to the further alienation, discrimination and marginalization of irregular migrants, and may even encourage verbal and physical violence against them.'[156]

Through research conducted in several EU Member States, Vollmer has identified interplay 'between number games, threat perceptions and policy responses' as regards irregular migrants, which has been found to result 'in yet another phenomenon in the discourse on irregular migration' which is 'the demonstration of efficient governance.'[157] From this research there emerges a common denominator across discourses, that is 'a desire on behalf of governments to prove that they are succeeding in regulating migration flows, according to the best interest of the citizens.' In these discourses, 'governments across the EU place great emphasis on their operational efficiency,' which 'is continuously demonstrated to the public, and the public in turn demands it.' The demonstration of efficient government 'has developed and increasingly amounts to 'political games'' and 'the staging of 'political games' requires 'number games'.' The 'number games' were found to be intrinsically interwoven with the discursive element of threat and thus determined the dominance of the threat element in policy discourse, i.e. higher numbers leading to more restrictive policy measures, lower numbers leading to less of them. As a result, higher numbers on the scope of irregular migration necessitated at the same time a 'proof of the efficiency', since higher numbers point to a policy failure or dysfunctional governance.[158] Furthermore, the research shows that 'political trust is created when governance performs well in excluding and expelling this specific migrant group.'[159] This 'number game' is reminiscent of the EU's approach to policy development on irregular migration. As was discussed in Chapter 5, the numbers employed by the EU to justify the need for the adoption of a punitive approach with the Employer Sanctions Directive, were assessed by the Clandestino project to be based on unreliable estimates. The findings of the Clandestino research estimated the maximum number of irregular migrants present within the EU to be significantly lower than minimum number the Commission set forth in its policy documents.[160]

The discourses outlined above all serve to support the sectoral approach adopted by the EU and the policy has come to rest on the differentiation between 'desirable' and 'good' migrants who are given preferential status, easier access and more generous rights, lower skilled migrants admitted to contribute to the economy by their

156 United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, UN Doc A/HRC/23/46. New York: United Nations, 2013, 11.

157 Vollmer, B.A. 2011. Policy Discourses on Irregular Migration in the EU – 'Number Games' and 'Political Games', *European Journal of Migration and Law* 13, 331.

158 *Ibid.*, 336.

159 *Ibid.*, 337.

160 See Section 5.2 above.

labour market participation but have no prospects of becoming residents and 'bad', 'illegal people'.

9.6 COMMON EU LAW ON LABOUR MIGRATION – ONE EU LABOUR MARKET?

The four EU Directives on regular labour migration under discussion here, which constitute the core of current EU law on labour migration, all derogate from the principle of equal treatment and non-discrimination in their equal treatment clauses and none of them provides for equal treatment for third-country nationals that fall under the scope of the Directive and nationals of the host Member State. By adopting a sectoral approach to developing legislation on labour migration different standards, as regards human rights and access to territory and the labour market and family reunification, have been created for different groups of migrants based on the status ascribed to them. There is little consistency between the Directives as regards these aspects. In addition, there are numerous discretionary provisions in all the Directives which result in standards being set in accordance with national law in each Member State, and all four Directives on regular migration provide that Member States may apply 'more favourable provisions'[161] than those set forth in the Directives. The Employers Sanctions Directive is silent on the human rights and labour rights of irregularly present third-country nationals in employment, except for a provision on the right to receive back pay from employers.

This outcome of the sectoral approach was exacerbated by the position of Member States in the negotiations for the Directives. First of all, the Commission's proposals for the Directives all provided for derogations from the principle of equal treatment with nationals and set the blue print for the sectoral approach with differences in access to territory and the labour market. As was discussed in chapters 4, 6, 7 and 8, the general approach of the Member States in the negotiations was to restrict further than provided by the Commission proposals access to territory and labour market. In most cases where the majority of Member States, or individual dominant Member States expressed the will to make further restrictions, that will was reflected in the final outcome and notably a large number of Member States were passive during the negotiations. The approach of the Member States as regards human rights and labour rights has two main characteristics. Firstly, there was a general tendency to restrict the right to equal treatment further than provided for by the equal treatment provisions in the Commission proposals. Secondly, human rights and ILO standards were rarely brought up as relevant norms in the legislative process. In relation to the principle of equal treatment, the Member States were in general consistent in the approach of suggesting further limitations to equal treatment of third-country nationals than provided by the Commission proposals. This is in particular as concerns social security rights, access to goods and services such as housing and access to education, study grants, vocational training and tax benefits. The Parliament was the party most

161 Article 4 Blue Card Directive, Article 13 Single Permit Directive, Article 4 Seasonal Workers Directive and Article 4 Intra-Corporate Transfer Directive.

vocal in relation to relevant standards on human rights and labour rights and equal treatment. Interestingly, the Parliament's approach changed from calling for equal treatment with nationals, to no effect though, in the negotiations on the Blue Card Directive where it was consulted for its opinion, to trying to mitigate the restrictions on equal treatment for the other three Directives on regular migration. It managed to improve in particular the Single Permit and the Seasonal Workers Directives as regards equal treatment. In the negotiations for these two Directives as well as the Intra-Corporate Transfer Directive, the Parliament had the status of a co-legislator with the Council as a consequence of the entry into force of the Lisbon Treaty. Given its status as a co-legislator with the Council, the Parliament's impact on the negotiations was quite limited while in most instances where there were fundamental differences in the position of the Council and the Parliament, the end result of the negotiations reflected the position of the Council. Overall it is accurate to state that the Member States exercised most influence over the outcome of the negotiations and that their approach was restrictive with respect to equal treatment as well as access to territory and the labour market.

In a Communication from the Commission on the implementation of the Blue Card Directive, the Commission remarks that it 'was negotiated and adopted before the entry into force of the Treaty of Lisbon,' and that under 'the former system unanimity was required in the Council, instead of the current qualified majority, and the European Parliament was not co-legislator.' The Commission maintains that the former legislative procedure, 'led to long and difficult negotiations on the Commission's proposal,' which resulted in the Directive only setting 'minimum standards and left much leeway through many 'may-clauses' and references to national law.'[162] This assessment is not accurate when the process of adopting the Blue Card Directive is compared to those for the Single Permit, the Seasonal Workers and the Intra-Corporate Transfer Directives. The three latter Directives were adopted after Lisbon with the Parliament acting as a co-legislator with the Council, the negotiations for each of them lasted for between three to four years and they all set minimum standards and leave ample leeway for the Member States through numerous discretionary clauses and references to national law. These outcomes can thus not be attributed to the legislative procedure, but much rather the dominant role of the Member States in the negotiations. As an example in relation to this, the result of the negotiations on the Single Permit Directive, in particular as regards access to the labour market and social assistance, has been described as a failure considering the Commission's intention to address the 'rights gap,' while 'the level of protection enjoyed by long-term residents is much higher than that of third-country workers who would hold a single permit.'[163]

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162 Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, COM(2014) 287, 22 May 2014, 10.

163 Kostakopoulou, D., Acosta Arcarazo, D. and Munk, T. 2014. EU Migration Law: The Opportunities and Challenges Ahead, in *EU Security and Justice Law: After Lisbon and Stockholm,* edited by D. Acosta Arcarazo and C.C. Murphy. Oxford and Portland, Oregon: Hart Publishing, 139.

The outcome of the negotiations is largely due to the position of the Member States, but all outcomes as regards the principle of equal treatment in EU law on labour migration have also to be considered in the context of the variations and inconsistencies in the terminology used by the Commission when referring to equal treatment and rights. Equal treatment is not addressed as a fundamental human rights principle in EU policy documents, but as a flexible, somewhat undefined parameter. Terminology such as 'near equal', 'fair treatment' and 'adequate rights,'[164] is not likely to support a consistent and uniform approach by Member States when addressing the human rights of migrants, especially not when the 'driving force' of the laws and policies on labour migration seems 'to be both the desire to satisfy perceived needs of economic actors and the protection of internal labour markets, at the expense of an approach based on the rights and security of the individual on the move.'[165] All the EU legal instruments on labour migration were developed by the Directorate General on Justice and Home Affairs (now DG Migration and Home Affairs). In respect to that, 'the mixing of 'migration' with home affairs' has rightly been found to 'lead to contamination of issues related to labour mobility with policing and criminality.' To remedy this, Carrera and Guild have suggested that in order to build 'a genuine common labour immigration policy that critically reassesses the EU's attractiveness as a destination for work,' a 'partnership between the Migration Commissioner and the one for Employment, Social Affairs, Skills and Labour Mobility will be critical.'[166] With respect to the rights of migrant workers in particular, Ryan considers it to be for the advantage of migrant workers to address 'the question of equal treatment not as a part of immigration law measures, but as a social policy question,' and suggests that this could be done 'by relying upon Article 137 EC Treaty (now Article 153 TFEU), which allows legislation inter alia on 'social security and social protection of workers' and on 'the conditions of employment for third-country nationals legally residing' in the European Union.[167]

While examining the process of developing common EU policy and law on labour migration, Gsir observed, that at the beginning of the process, the 'European discourse was different from the dominant discourse of Member States in terms of programmatic ideas and policy solutions at the national level.' Rather than 'considering labour migration as a problem to be solved through restrictive policies or border closure, the new EU political idea presented it as a positive phenomenon, a solution to solve economic and demographic problems.'[168] In relation to this, it is interesting

164 Communication from the Commission to the European Parliament and the Council, 5th Annual Report on Immigration and Asylum (2013), COM(2014) 228, 22 May 2014, 13.

165 Atger, A.F. 2011. Competing Interests in the Europeanization of Labour Migration Rules, in *Constructing and Imagining Labour Migration, Perspectives of Control from Five Continents*, edited by E. Guild and S. Mantu. Surrey: Ashgate, 169.

166 Carrera, S. and Guild, E. 2014. *A New Start for the EU's Area of Freedom, Security and Justice? Setting of Priorities for the New European Commission*. CEPS Commentary. Brussels: Centre for European Policy Studies, 3.

167 Ryan, B. 2007. The European Union and Labour Migration: Regulating Admission or Treatment?, in *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, edited by A. Baldaccini, E. Guild, H. Toner. Oxford and Portland Oregon: Hart Publishing, 514.

168 Gsir, S. 2013. EU Labour Immigration Policy: Discourses and Mobility, *Refugee Survey Quarterly*, 32(4), 94.

to review Carrera's assessment of the shared tendencies of EU Member States in relation to labour immigration before and around 2007 when the first proposals for the Directives on labour migration based on the sectoral approach were introduced by the Commission. He provides that among some shared tendencies:

> 'we can see the influence and expansion of a utilitarian, selective and economically-oriented approach. This tendency is mainly characterized by a profit-oriented doctrine of selection, which favours the economic interests of the state and provides 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".'[169]

Having regard to this, Carrera warned that 'it would be a mistake to base the renewed European labour immigration strategy on the current political and economic policies and laws of key Member States.' That although 'this would facilitate political agreement in the Council, it could on the other hand put at risk a coherent, global and long-term common EU immigration policy.'[170] From comparing the assessment of the 'shared tendencies' among the Member States and the four Directives on regular labour migration discussed in this study, it is evident that the dominant national approaches have been replicated at the EU level. This is partially due to the Commission's adoption of a sectoral strategy, 'in order to support its own process of getting around institutional and political difficulties encountered in the development of a Community immigration policy.'[171] As was explained by the Commission when it introduced the sectoral approach in the 2005 Policy plan on Legal Migration, the Member States 'did not show sufficient support' for the horizontal approach.[172] The horizontal approach would have covered 'without distinction all the categories of immigrant workers' but it was 'considered too far from the existing patterns in the national legal systems.'[173]

The outcome of the negotiations on EU law on labour migration is not surprising given that the dominant approach of the Member States was followed, and considering the fact that the EU is not one labour market but consists of 28 national labour markets. The underlying differences of which, in 'terms of labour market needs and practices' is considered to discourage 'a pooling of sovereignty both on the question of migrants' first entry to the Union and on efforts encouraging the mobility even of highly qualified workers between member states.'[174] De Lange sees the con-

169 Carrera, S. 2007. *Building a Common Policy on Labour Immigration: Towards a Comprehensive and Global Approach in the EU?* CEPS Working Document No. 256. Brussels: Centre for European Policy Studies, 2.

170 *Ibid.*

171 Gsir, S. 2013. EU Labour Immigration Policy: Discourses and Mobility, *Refugee Survey Quarterly* 32(4), 108.

172 Communication from the Commission: Policy Plan on Legal Migration, COM(2005) 669, 21 December 2005, 5.

173 Carrera, S. 2007. *Building a Common Policy on Labour Immigration: Towards a Comprehensive and Global Approach in the EU?* CEPS Working Document No. 256. Brussels: Centre for European Policy Studies, 2.

174 Parkes, R. and Angenendt, S. 2010. Discussion Paper: *After the Blue Card EU Policy on Highly Qualified Migration: Three Ways out of the Impasse*. Berlin: Heinrich Böll Stiftung, 3.

struction of the mobility clause in the Blue Card Directive as a sign of a low level of trust 'between the Member States when it comes to the other states' capacity in seeking out the desirable highly skilled migrants.' While 'all Member States may impose their own criteria for admission, including quota, different salary levels and labour market tests.'[175] This assessment is accurate for the intra-EU mobility clause in the Intra-Corporate Transfer Directive as well. The reluctance of Member States in pooling sovereignty is additionally 'compounded by the changeability of labour market demands.' While most Member States 'seek to ensure that their entry systems are flexible to changing labour market needs,' to 'pool sovereignty on entry and to offer migrants a subsequent right to move around the Union after a time-lag can run counter to these priorities.'[176] These problematic aspects of EU policy on labour migration are a concern for the Commission who in its 2015 European Agenda on Migration stated that 'European cooperation in the area of migration needs to go further,' that with a new model on legal migration 'the EU needs to look at how to marry' the limitation existent due to the fact that the 'EU Treaties reserve the final decision on the admission of economic migrants for Member States' with 'the collective needs of the EU economy.'[177] The largest problem that will have to be tackled in order to achieve that goal is, as emerged during the negotiations for the Directives discussed in this study, that EU Member States do not seem to share the Commission's objectives on developing common legislation on labour migration as they regard that issue area first and foremost from their own national needs and interests.

9.7 CONCLUSIONS

The Directives on labour migration discussed in this study were developed on the basis of a sectoral approach to labour migration which has resulted in institutionalizing differentiation between groups of labour migrants as regards access to territory, access to the labour market and the right to family reunification. Additionally, it institutionalizes discrimination against regularly resident migrants in employment compared with nationals of the EU Member State where they reside, as well as granting the right to equal treatment with nationals to a varying degree in its material scope to different groups of migrants according to their status based on 'type'. Both of these approaches contravene the human right principle of equal treatment and prohibition of discrimination based on nationality, while the result of granting certain types of labour migrants preferential treatment through granting rights, manifests itself in discrimination based on nationality as compared to nationals of EU Member States. Ad-

175 De Lange, T. 2013. The EU Blue Card Directive: A Low Level of Trust in EU Labour Migration Regulation, in *The Blue Card Directive: Central Themes, Problem Issues and Implementation in Selected Member States*, edited by C. Grütters and T. Strik. Oisterwijk: Wolf Legal Publishers, 23.

176 Parkes, R. and Angenendt, S. 2010. Discussion Paper: *After the Blue Card EU Policy on Highly Qualified Migration: Three Ways out of the Impasse*. Berlin: Heinrich Böll Stiftung, 3.

177 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: A European Agenda on Migration, COM(2015) 240, 13 May 2015, 17-18.

ditionally, the only EU instrument that directly addresses irregularly present migrants in employment does not include any references to the human rights of migrants.

The differentiation and discrimination constructed by the Directives are based on the group a migrant is classified as belonging to, and in comparative terms, the level of discrimination between the groups increases the less skilled and less economically desirable a group of labour migrants is considered to be for the development and competitiveness of the EU economy. The determining factor for granting the right to equal treatment is thus the status of the labour migrant and through this approach, status has been used as a proxy to discriminate against migrants based on nationality. The outcome of this approach is a system lacking in consistency and legal certainty which is to a large degree due to the many discretionary clauses and references to national law of the Member States in the Directives, in particular in the provisions on access to territory and labour market and the right to equal treatment. The way the right to equal treatment is constructed in the Directives is incompatible with international and European human rights standards and international labour law, which were not generally taken into consideration during the negotiations for the Directives although EU Member States are bound by these standards. By that, the EU has developed legislative instruments on labour migration that set standards below those set at the international and European level.

A major contributing factor to this result is the role that the Member States played by insisting on adopting a sectoral approach to labour migration and in the negotiations for the Directives. Their position was dominant among the negotiating partners and their approach was characterized by the will to restrict access to territory and labour market and equal treatment with nationals further than provided for by the Commission proposals. The adoption of the sectoral approach, which was the only way for the Member States to reach an agreement on common measures on labour migration resulted in destroying equality, which was most likely the purpose of adopting the approach in the first place as the Member States were not interested in adopting standards that applied to all groups and types of migrants as was intended by the horizontal approach. EU Member States want to use the right to equal treatment to attract migrants of certain economic status and thereby grant them favourable treatment. In fact, the horizontal approach did not provide for equal treatment between third-country nationals and nationals of EU Member States but it was consistent in the sense that it provided for granting the same right of equal treatment to all types of labour migrants.

EU law on labour migration constitutes one component of the EU legislative framework on immigration. The system that has been created is hierarchical, ranging from the Long-Term Residents Directive as the most generous and applying to those who have been resident within the EU for at least five years, to the Employers Sanctions Directive which does not address the human rights of irregular migrants and calls for the return of migrants that have been employed while irregularly resident without any consideration of administrative or other factors that might have caused them to become irregularly present. The Blue Card Directive comes closest to the Long-Term Residents Directive in granting the right to equal treatment with nationals, then the Single Permit Directive. The Intra-Corporate Transfer Directive, in particular while it does not grant intra-corporate transferees equal treatment with nationals as regards terms and conditions of employment, and the Seasonal Workers Direc-

tive, both have such serious short comings that they are easily ranked as providing less rights than the other Directives mentioned above. The fact is that this system has very limited coherence and having regard to the rights set forth by each of the Directives it is only possible to comprehend which rights were included and which ones excluded with reference to the political will of the Member States. The human rights principle of non-discrimination and equal treatment was evidently not used as a parameter.

Samenvatting (Summary in Dutch)

Wat is er gebeurd met gelijkheid?
De constructie van het recht op gelijke behandeling van derdelanders bij de regulering van arbeidsmigratie in de Europese Unie

Velen beschouwen het beginsel van recht op gelijke behandeling als het belangrijkste kenmerk van de mensenrechten. Dit is gebaseerd op de aanname dat 'onderscheidende behandeling, vanwege bijzondere kenmerken van een persoon of groep waartoe iemand behoort, niet in overeenstemming is met het principe van gelijkheid voor de wet'. Het EU-recht inzake arbeidsmigratie druist in tegen dit fundamentele beginsel met de normen die zijn vastgesteld voor het recht op gelijke behandeling van onderdanen van EU-lidstaten en derdelanders die wonen en werken op het grondgebied van de EU.

EU-wetgeving betreffende arbeidsmigratie voorziet niet in een gelijke behandeling van nationale onderdanen en de verschillende groepen derdelanders die onder de relevante Richtlijnen vallen. De vier Richtlijnen over legale migratie die in deze studie centraal staan, variëren wat betreft het recht op gelijke behandeling voor uiteenlopende 'soorten' migranten, afhankelijk van hoe belangrijk hun arbeidsbijdrage wordt geacht voor de economie van de EU. Bovendien zwijgt het enige EU-instrument dat illegaal verblijvende migranten op de arbeidsmarkt behandelt over de fundamentele mensenrechten van illegale migranten.

Deze studie onderzoekt EU-wetgeving inzake arbeidsmigratie vanuit het perspectief van theorieën en verhandelingen over migratiebeheersing en het mensenrechtelijke principe van gelijke behandeling. Uitgangspunt vormen de voorstellen van de Europese Commissie voor vijf richtlijnen over arbeidsmigratie die aangenomen zijn op grond van een sectorale aanpak van arbeidsmigratie – de Europese Blauwe Kaart Richtlijn, de Werkgeverssancties Richtlijn, de Eén-procedurerichtlijn, de Seizoenarbeidersrichtlijn en de Richtlijn overplaatsing binnen een onderneming – en de studie geeft een beschrijving en analyse van de onderhandelingen over vier specifieke aspecten van de richtlijnen. De onderhandelingen tussen de Commissie, de Raad en het Parlement laten zien hoe deze vier aspecten van de richtlijnen, te weten toegang tot het grondgebied, toegang tot de arbeidsmarkt, het recht op gelijke behandeling en het recht op gezinshereniging, zijn geconstrueerd voor de verschillende groepen arbeidsmigranten die onder het toepassingsgebied van elke richtlijn vallen.

De vijf richtlijnen zijn vastgesteld op basis van artikel 79 VWEU, dat het soevereine recht van de EU-lidstaten bevestigt om de toelating van derdelanders tot hun grondgebied om daar te wonen en te werken te beheersen. De migratiebeheersingsbenadering die de EU heeft gekozen met betrekking tot arbeidsmigratie toont hoe toegang tot het grondgebied, toegang tot de arbeidsmarkt, het recht op gelijke behandeling en het recht op gezinshereniging worden gebruikt als instrumenten van migratiebeheersing met als doel om niet alleen de toegang tot het grondgebied en de arbeidsmarkt te beheersen, maar ook om de gewenste economische en arbeidsmarktresultaten te bereiken.

Het resultaat van deze migratiebeheersingsbenadering wordt beoordeeld in de context van het overkoepelende kader van de mensenrechten en het arbeidsrecht, in het bijzonder het mensenrechtelijke principe van gelijke behandeling van onderdanen en niet-onderdanen. Deze beoordeling toont de onverenigbaarheid van de EU-arbeidsmigratie regelgeving met het principe van gelijke behandeling aan. De mate waarin het EU-recht inzake arbeidsmigratie aan arbeidsmigranten uit derde landen gelijke behandeling als nationale onderdanen verleent, hangt af van het economische doel van de EU met betrekking tot elke groep arbeidsmigranten.

Theorieën en verhandelingen over migratiebeheersing

Het begrip migratiebeheersing, dat wel het nieuwe trefwoord van de 21ste eeuw wordt genoemd, is voornamelijk staatgerelateerd. Van de doeleinden om 'de voordelen te maximaliseren en de kosten van mobiliteit te minimaliseren' en migratiebeheersing 'ten voordele van alle betrokkenen' te maken, richten maar weinig componenten zich op migranten als individuele personen of houders van mensenrechten.

De theorieën en verhandelingen over migratiebeheersing in deze studie hebben drie bestanddelen gemeen. Dit zijn ten eerste een gerichtheid op het soevereine recht van staten om migratie op hun grondgebied te beheersen; ten tweede een gerichtheid op de legitieme redenen voor de aanpak die staten hebben gekozen om hun controle over migratiebeheersing voor specifieke doeleinden uit te oefenen; ten derde het feit dat ze de demografische kenmerken van migranten, of wat wel aangeduid wordt als het 'wezen' van migratie, tot het middelpunt van beleid maken. Veel van deze verhandelingen hebben getoond dat dit beleid, vooral met betrekking tot het veiligstellen en beheersen van migratie met als doel de bescherming van de nationale gemeenschap of de welvaartsstaat, meestal gebaseerd is op retoriek die wordt gebruikt om beperkende reacties op ondervonden beleidsproblemen te rechtvaardigen. Ze houden geen rekening met de bestaande culturele diversiteit binnen een nationale gemeenschap, afgezien van migratie, of met het feit dat migranten voor het overgrote deel bijdragen aan de welvaartsstaat door deelname aan de arbeidsmarkt.

Theorieën en verhandelingen over migratiebeheersing, die zich vooral concentreren op het belang van de staat om migratie te beheersen, en beleid dat wordt toegepast overeenkomstig deze theorieën en verhandelingen hebben op verschillende manieren directe gevolgen voor de rechten van migranten. Het veiligstellen van migratie beïnvloedt individuele migranten en hun rechten direct. Door verhandelingen over veiligheid worden kenmerken toegeschreven aan migranten gebaseerd op generalisaties over groepen personen en hypotheses over de gevolgen van hun individuele beslissing om te migreren voor het belang van een bepaalde natie-staat. In verband met beleid ten aanzien van migratiebeheersing ter bescherming van de arbeidsmarkt, wordt het recht op gelijke behandeling van migranten met staatsburgers vaak gerelateerd aan de noodzakelijke bescherming van de binnenlandse arbeidsmarkt, terwijl de toekenning van gelijke behandeling aan migranten wordt gezien als bescherming van nationale werknemers tegen oneerlijke concurrentie. Het recht van migranten op gelijke behandeling met staatsburgers en de positie van migranten als houders van mensenrechten worden alleen inhoudelijk behandeld in theorieën over de beperkingen die het internationale mensenrechtenregime heeft opgelegd aan het soevereine recht van

staten om migratie te beheersen. Naar de status ten opzichte van de staat die het mensenrechtenregime heeft toegekend aan migranten, wordt bijvoorbeeld onder de utilitaire benadering van migratiebeheersing verwezen als 'post-nationaal lidmaatschap'.

De discussie over de verenigbaarheid van de eerbiediging van het soevereine recht van staten om migratie te beheersen met het beschermen van mensenrechten van vrijwillige migranten laat zien dat het internationale mensenrechtenregime de staatssoevereiniteit om migratie te beheersen niet op de proef heeft gesteld. In wezen legt het alleen de plicht van de staat vast om de mensenrechten van vrijwillige migranten te respecteren zodra zij zich op het grondgebied van een staat bevinden, maar verplicht haar niet om hen toe te laten. Door de status van migranten te definiëren als 'post-nationaal lidmaatschap', een status die niet-staatsburgers worden geacht te genieten ten opzichte van een staat waarvan zij geen burgers zijn op grond van een universeel mensenrechtenregime, worden de rechten van niet-staatsburgers gezien als legitimatie op basis van persoonlijke status, niet nationaliteit. In de discussies over het belang van burgerschap bestaan echter uiteenlopende meningen over de vraag of de rechten die door het internationale mensenrechtenregime zijn toegekend het begrip burgerschap als parameter voor deze rechten hebben vervangen. In de utilitaire benadering van migratie krijgen de demografische kenmerken van migranten een extra dimensie. De kern van de aanpak is een 'onpartijdige' manier om beleid voor arbeidsmigratie vorm te geven waarin rechten van migranten worden vastgesteld op grond van hun 'kosten' tegenover de 'voordelen' die de natie-staat heeft van hun bijdrage aan de arbeidsmarkt. Deze utilitaire benadering is intrinsiek onverenigbaar met de kaders van de mensenrechten en het arbeidsrecht, terwijl deze benadering mensenrechten beschouwt als flexibele normen waarover onderhandeld kan worden om tegemoet te komen aan sommige specifieke behoeften van het economische en het arbeidsmarktbeleid.

Verbod van discriminatie op grond van nationaliteit in het kader van de internationale en Europese rechten van de mens en het internationaal arbeidsrecht

Nationaliteit wordt in de meeste internationale en Europese mensenrechtelijke en internationale arbeidsrechtelijke instrumenten niet vermeld als verdachte grond voor discriminatie. De interpretatie van deze instrumenten door zowel organen en commissies van de Verenigde Naties en de Internationale Arbeidsorganisatie als de jurisprudentie van het Europese Hof voor de Rechten van de Mens en het Hof van Justitie van de Europese Unie bepaalt echter dat discriminatie op grond van nationaliteit en administratieve status van migranten verboden is, zeer beperkte uitzonderingen daargelaten. De persoonlijke werkingssfeer van internationaal en Europees recht inzake mensenrechten en internationaal arbeidsrecht, evenals van instrumenten die de rechten van migrerende werknemers betreffen, voorziet in de mensenrechtelijke parameters met betrekking tot gelijke behandeling van staatsburgers en niet-onderdanen die relevant zijn voor het EU-recht inzake arbeidsmigratie.

De persoonlijke werkingssfeer van instrumenten van internationaal en Europees recht inzake mensenrechten en internationaal arbeidsrecht, zoals het Internationaal Verdrag inzake burgerrechten en politieke rechten, het Internationaal Verdrag inzake

economische, sociale en culturele rechten en het Europees Verdrag voor de Rechten van de Mens omvat alle aanwezigen op het grondgebied van een staat. Ze gelden voor 'iedereen', ongeacht nationaliteit en administratieve status, tenzij niet-onderdanen expliciet worden uitgesloten van bepalingen inzake politieke deelname en vrij verkeer. De persoonlijke werkingssfeer van het VWEU en het Europees Handvest van de grondrechten omvat derdelanders, tenzij zij expliciet worden uitgesloten, zoals het geval is in enkele bepalingen van beide. Hoewel het nog steeds omstreden is, hebben veel deskundigen van het EU-recht geconcludeerd dat, omdat EU-recht inzake arbeidsmigratie is gebaseerd op artikel 79 VWEU, derdelanders die in een EU-lidstaat werken recht hebben op gelijke behandeling met staatsburgers volgens zowel het Verdrag als het Handvest, terwijl het EU-recht inzake arbeidsmigratie binnen de werkingssfeer van het VWEU valt.

Alle fundamentele IAO-verdragen zijn van toepassing op werknemers, ongeacht hun nationaliteit. Het Internationaal Verdrag inzake de bescherming van de rechten van alle migrerende werknemers en hun gezinnen (IVRMW) bevat nationaliteit als verboden grond voor discriminatie en dat verbod strekt zich in de meeste opzichten uit tot zowel legale als illegale migrerende werknemers. Het IVRMW heeft een materiële werkingssfeer waarbij sommige rechten tot legale migranten beperkt zijn, zoals sociale bijstand. Het voorziet in een reeks van rechten, inclusief die met betrekking tot arbeidsvoorwaarden, sociale zekerheid en fundamentele burger- en politieke rechten die worden gegarandeerd voor illegale migranten. Hoewel het IVRMW door geen enkele EU-lidstaat is geratificeerd, is het een van de tien mensenrechtelijke kerninstrumenten van de Verenigde Naties. Door deze status moet het worden beschouwd als grondlegger van de internationale normen voor mensenrechtelijke bescherming van migrerende werknemers. De persoonlijke werkingssfeer van het IAO Verdrag 97 is beperkt tot legale migranten en bevat nationaliteit als een verboden grond voor discriminatie en pleit expliciet voor gelijke behandeling van nationale en buitenlandse werknemers wat betreft een groot aantal arbeids- en socialezekerheidsrechten. IAO Verdrag 143 heeft een dubbele focus. Ten eerste de bescherming van de grondrechten van illegale migranten en het pleit voor gelijke behandeling met betrekking tot arbeidgerelateerde rechten voor deze groep migranten. Ten tweede roept het op tot het vaststellen van een nationaal beleid om de gelijkheid van kansen en behandeling van migrerende werknemers te bevorderen en te garanderen op het gebied van werkgelegenheid, sociale zekerheid, culturele rechten en collectieve vrijheden. Hoewel een beperkt aantal EU-lidstaten deze twee IAO-verdragen heeft geratificeerd, worden ze beschouwd als de algemene norm voor instrumenten van de IAO wat betreft migrerende werknemers. Daardoor zijn ze van belang voor het EU-recht inzake arbeidsmigratie, omdat alle EU-lidstaten lid zijn van de IAO, de toonaangevende internationale organisatie op het gebied van arbeidsrechten.

EU-beleid en recht inzake arbeidsmigratie

De EU-richtlijnen inzake arbeidsmigratie die in deze studie centraal staan, zijn het resultaat van een sectorale benadering van arbeidsmigratie die de lidstaten hebben gekozen nadat de Raad er niet in was geslaagd tot overeenstemming te komen om een gedetailleerd voorstel van de Commissie voor een horizontale richtlijn over de toela-

ting van arbeidsmigranten uit 2001 te aanvaarden. Het resultaat van de daaropvolgende besprekingen was ten eerste een beleidsplan inzake legale migratie dat in 2005 werd geïntroduceerd en voorzag in een blauwdruk voor een sectorale benadering van arbeidsmigratie. Ten tweede een communiqué dat in 2006 werd geïntroduceerd over beleidsprioriteiten in de strijd tegen illegale immigratie van derdelanders, dat de aanpak van illegaal verblijvende derdelanders op de arbeidsmarkt uiteenzette, wat maatregelen zijn die worden beschouwd als een integraal onderdeel van het uitgebreide migratiebeleid van de EU.

Door de sectorale benadering identificeerde de EU verscheidene beleidsdoeleinden in relatie tot de verschillende groepen migranten die in deze studie worden behandeld. De Europese Blauwe Kaart Richtlijn werd op de eerste plaats geïntroduceerd om een scenario van gesignaleerde 'behoeften' op de EU-arbeidsmarkt ten aanzien van economische immigratie in het algemeen aan de orde te stellen; op de tweede plaats in verband met de bevinding dat de EU als geheel niet aantrekkelijk leek te zijn voor hooggekwalificeerde professionals in een context van zeer sterke internationale concurrentie. EU-ondernemingen werden geconfronteerd met toenemende aantallen vacatures, vooral voor hoogopgeleide werknemers in sectoren waarvoor het aantrekken van arbeidsmigranten zo belangrijk werd geacht om demografische tendensen binnen de EU te 'compenseren'. Het doel van de Werkgeverssancties Richtlijn is werkgevers van illegaal verblijvende derdelanders die arbeid verrichten te sanctioneren ter bestrijding van illegale migratie naar de EU. De beschikbaarheid van arbeid wordt beschouwd als een aantrekkende factor en de belangrijkste reden voor illegale binnenkomst. De Eén-procedurerichtlijn werd geïntroduceerd als een algemene richtlijn inzake de rechten van werknemers uit derde landen, dat wil zeggen een vorm van horizontale wetgeving om de rechten van werknemers uit derde landen op EU-niveau te dekken. De belangrijkste reden hiervoor was, zo werd gezegd, dat bij het ontbreken van horizontale Uniewetgeving inzake de rechten van werknemers uit derde landen hun rechten aanzienlijk kunnen verschillen, afhankelijk van hun nationaliteit en van de lidstaat waar zij verblijven. Men vond dat de situatie rechtsonzekerheid voor werknemers uit derde landen schiep en hen op ongelijke voet plaatste met arbeiders wiens rechten wel expliciet zijn omschreven. De Seizoenarbeidersrichtlijn beoogt bij te dragen aan een effectieve beheersing van migratiestromen voor de specifieke categorie van seizoengebonden tijdelijke arbeid door eerlijke en transparante regels op te stellen voor toegang en verblijf waarbij prikkels en garanties worden geboden om te voorkomen dat een tijdelijk verblijf een permanent verblijf wordt. Het doel is om ten eerste een structurele behoefte aan seizoengebonden arbeid binnen EU-economieën aan te pakken waarvoor arbeidskrachten van binnen de EU naar verwachting steeds minder beschikbaar komen. Ten tweede om uitbuiting en slechte arbeidsvoorwaarden die de gezondheid en veiligheid van seizoenarbeiders kunnen bedreigen aan te pakken. De Richtlijn overplaatsing binnen een onderneming wordt gezien als een instrument om de concurrentie van de EU-economie te bevorderen en als aanvulling op het geheel van andere maatregelen die de EU neemt om de doeleinden van de EU 2020-strategie te halen. In verband hiermee werd gesteld dat binnen bedrijven overgeplaatste werknemers gekwalificeerde werknemers zijn die het EU-bedrijf hard nodig heeft en dat de overplaatsing meestal hogere stafmedewerkers betreft die nodig zijn ter aanvulling van de middelen als er een gebrek aan vaardigheden is. De verschillende doelstellingen achter elke richtlijn zijn bepalende factoren wat be-

treft toegang tot het grondgebied en de arbeidsmarkt, het recht op gelijke behandeling en het recht op gezinshereniging die worden toegekend aan de groep migranten die onder het toepassingsgebied van elke richtlijn valt.

Toegang tot het grondgebied en toegang tot de arbeidsmarkt

De standaard geldigheid van de Europese Blauwe Kaart is door lidstaten vastgesteld op tussen één en vier jaar of , als het arbeidscontract korter dan een jaar is, de contracttijd plus drie maanden. De Werkgeverssancties Richtlijn behandelt geen toegang tot grondgebied of de arbeidsmarkt voor illegaal verblijvende migranten op de arbeidsmarkt. Tijdens de onderhandelingen over de richtlijn werden de suggesties van het Parlement om rekening te houden met het feit dat illegale status te wijten zou kunnen zijn aan een gebrek aan administratieve efficiency en een periode toe te staan om dit aan te passen of om regularisatie van illegaal aanwezige migranten toe te laten afgewezen. Daardoor moeten 'illegaal verblijvende derdelanders' als ze ontdekt worden terugkeren in overeenstemming met de Terugkeerrichtlijn. De Eén-procedurerichtijn regelt geen toegang tot grondgebied of de arbeidsmarkt, dat doet het nationale recht van elke lidstaat. De richtlijn voorziet er alleen in dat als een aanvrager voldoet aan de voorwaarden van het nationale recht, hij/zij de vergunning moet krijgen. De richtlijn geeft geen minimum of maximum tijd voor de duur van de vergunning. De vergunning wordt verleend overeenkomstig nationaal recht en de tijdsduur wordt bepaald door het nationale recht van elke lidstaat. De Seizoenarbeidersrichtlijn bepaalt dat de maximale verblijfsduur van een seizoenarbeider wordt bepaald door de lidstaten en dat de duur van de vergunning tussen de vijf en negen maanden binnen een periode van twaalf maanden ligt. Aan het eind van deze periode moet de seizoenarbeider het grondgebied van de lidstaat verlaten tenzij hij/zij een verblijfsvergunning voor andere doeleinden heeft gekregen. Toelating kan ook worden verleend voor verblijf van ten hoogste 90 dagen en dit kan in de vorm van een kort-verblijf visum of een visum en een werkvergunning. Seizoenarbeiders moeten hun hoofdverblijf in een derde land behouden terwijl ze voor werk 'verblijven' in een EU-lidstaat. De duur van de vergunning voor overplaatsing binnen een onderneming is ten minste één jaar of de duur van het contract als dat korter is en kan verlengd worden tot maximaal drie jaar voor managers en specialisten en één jaar voor stagiaires. Na deze periode van maximaal drie of één jaar moet de betrokken vergunninghouder het grondgebied van de lidstaat verlaten tenzij hij/zij op een andere grond een verblijfsvergunning heeft gekregen. De richtlijn voorziet in de mogelijkheid om dezelfde persoon op diens verzoek nóg een vergunning voor dezelfde tijdsduur te verlenen, het enige vereiste is dat de lidstaat een periode van maximaal zes maanden tussen het einde van de ene overplaatsing en het begin van de volgende kan vragen.

De Seizoenarbeidersrichtlijn en de Richtlijn overplaatsing binnen een onderneming bepalen expliciet dat alleen derdelanders die buiten de EU verblijven een verzoek kunnen indienen om onder de richtlijn te worden toegelaten, terwijl de Europese Blauwe Kaart Richtlijn en de Eén-procedurerichtlijn de lidstaten de keuze geven om dit toe te staan. Toegang tot het grondgebied van Blauwe Kaarthouders en overgeplaatsten is beduidend gunstiger dan voor houders van de één-procedurevergunning en seizoenarbeiders. Er is volstrekte inconsistentie over hoe lang elke groep

migranten mag verwachten om in de EU te verblijven en werken en seizoenarbeiders worden expliciet uitgesloten van een verblijf voor lange termijn, zij moeten het grondgebied van een lidstaat aan het eind van hun contract verlaten. Arbeidsmigranten die onder het toepassingsgebied van de Europese Blauwe Kaart Richtlijn en de Richtlijn overplaatsing binnen een onderneming vallen, hebben de mogelijkheid tot mobiliteit binnen de EU en de Europese Blauwe Kaart Richtlijn biedt Blauwe Kaarthouders de mogelijkheid om de status van langdurig ingezetene te verkrijgen. De manier waarop toegang tot het grondgebied voor elke groep migranten is gedefinieerd leidt tot aanzienlijke verschillen in status tussen deze groepen.

Alle richtlijnen zijn in zoverre consistent wat betreft toegang tot de arbeidsmarkt dat zij er alle in voorzien dat een vergunning wordt verleend om te werken voor een specifieke werkgever. Anders dan de Europese Blauwe Kaart Richtlijn en de Richtlijn overplaatsing binnen een onderneming bevatten de Eén-procedurerichtlijn en de Seizoenarbeidersrichtlijn geen substantieve criteria voor afwijzing, intrekking of vernieuwing van een vergunning. Deze zijn afhankelijk van het nationale recht in elke lidstaat. De Eén-procedurerichtlijn verschilt in die zin van de andere dat de substantieve criteria voor toegang tot het grondgebied en de arbeidsmarkt door nationaal recht worden bepaald, niet door EU-recht.

Het recht op gelijke behandeling

Het materiële toepassingsbereik van de gelijke behandelingsbepalingen van de vier richtlijnen over legale migratie omvatten arbeidsomstandigheden en -voorwaarden, sociale zekerheid, betaling van inkomensgerelateerde wettelijke pensioenen, onderwijs en beroepsopleidingen, goederen en diensten, belastingvoordelen en erkenning van diploma's, certificaten en andere beroepskwalificaties. Het materiële toepassingsbereik is echter niet in alle richtlijnen hetzelfde. Zo hebben alleen houders van een éénprocedurevergunning en seizoenarbeiders recht op belastingvoordelen op voorwaarde dat hun fiscale woonplaats gelegen is in de lidstaat waar ze werken. Alle richtlijnen wijken in hun gelijke behandelingsclausules af van het principe van non-discriminatie en geven lidstaten de discretionaire bevoegdheid om het recht op gelijke behandeling op verschillende manieren te beperken. Bovendien varieert de mate van toegestane afwijkingen tussen de richtlijnen en over het algemeen is er weinig consistentie wat betreft het principe van gelijke behandeling in EU-recht inzake arbeidsmigratie. De manier waarop gelijke behandeling voor sociale zekerheid is geconstrueerd in de richtlijnen is grotendeels hetzelfde en ze hebben gemeen dat ze allemaal gelijke behandeling voor gezinsbijslagen tot op zekere hoogte uitsluiten. De manier waarop het recht op gelijke behandeling wat betreft werkloosheidsuitkeringen is vastgesteld verschilt eveneens tussen de richtlijnen. Seizoenarbeiders worden helemaal uitgesloten en hoewel het recht op gelijke behandeling wat betreft werkloosheid niet wordt beperkt in de Europese Blauwe Kaart Richtlijn, kunnen kaarthouders slechts drie maanden werkloos zijn voordat hun vergunning wordt ingetrokken. Ingeval van éénprocedurevergunninghouders kunnen werkloosheidsuitkeringen echter niet worden beperkt voor derdelanders die in loondienst waren. Alle vier richtlijnen verlenen gelijke behandeling met betrekking tot vrijheid van vereniging, en lidmaatschap van organisaties die werknemers en werkgevers vertegenwoordigen, evenals erkenning van

diploma's en beroepskwalificaties die toegekend moet worden overeenkomstig de relevante nationale procedures. Alle richtlijnen behalve de Richtlijn overplaatsing binnen ondernemingen waarborgen gelijke behandeling met nationale onderdanen wat betreft arbeidsomstandigheden en -voorwaarden. Deze laatste bepaalt dat overgeplaatste werknemers binnen ondernemingen ten minste gelijke behandeling genieten met personen die vallen onder Richtlijn 96/71/EC, de Richtlijn gedetacheerde werknemers, in overeenstemming met artikel 3 van de richtlijn in de lidstaat waar het werk wordt uitgevoerd.

Het recht op gezinshereniging

In het EU-recht wordt het recht op gezinshereniging geregeld in Richtlijn 2003/86/EC inzake het recht op gezinshereniging, en het doel daarvan is de voorwaarden vast te stellen voor de uitoefening van het recht op gezinshereniging door derdelanders die legaal op het grondgebied van de lidstaat verblijven. In de richtlijn wordt bepaald dat deze alleen van toepassing is als de aanvrager die wil dat zijn/haar familie zich bij hem/haar voegt, een geldige verblijfsvergunning voor een jaar of langer heeft, of die redelijke vooruitzichten heeft om een permanente verblijfsstatus te krijgen. Het recht op gezinshereniging komt in slechts twee van de in deze studie bestudeerde richtlijnen voor, de Europese Blauwe Kaart Richtlijn en de Richtlijn overplaatsing binnen ondernemingen, die gezinshereniging toestaan met, op sommige belangrijke punten, afwijkingen van Richtlijn 2003/86/EC. In de eerste plaats is het niet van belang of de vergunninghouder uitzicht heeft op een permanente verblijfsstatus of een minimum verblijfsperiode heeft. In de tweede plaats mogen integratievereisten pas worden gesteld nadat gezinshereniging is toegestaan. In de derde plaats is de tijdslimiet voor het verlenen van de vergunningen korter en beperkt tot 90 dagen in de Richtlijn overplaatsing binnen ondernemingen en tot 6 maanden in de Europese Blauwe Kaart Richtlijn. Bovenden wordt ingeval van familieleden van Blauwe Kaarthouders geen tijdslimiet gesteld aan hun toegang tot de arbeidsmarkt en ook de Richtlijn overplaatsing binnen ondernemingen voorziet in toegang van familieleden tot de arbeidsmarkt zonder tijdslimiet. De Eén-procedurerichtlijn zwijgt over gezinshereniging, er wordt niet naar verwezen. In de toelichting van het voorstel voor de richtlijn werd echter gesteld dat deze geen betrekking heeft op voorwaarden voor de uitoefening van het recht op gezinshereniging. In de preambule van de Seizoenarbeidsrichtlijn wordt bepaald dat de richtlijn niet voorziet in gezinshereniging.

Slotopmerkingen

De richtlijnen inzake arbeidsmigratie die in deze studie zijn besproken, zijn ontwikkeld op basis van een sectorale benadering van arbeidsmigratie die heeft geresulteerd in een institutionalisering van de differentiatie tussen migranten wat betreft toegang tot het grondgebied, toegang tot de arbeidsmarkt , het recht op gezinshereniging, en discriminatie van migranten vergeleken met nationale onderdanen, hetgeen in strijd is met het mensenrecht op gelijke behandeling en het verbod van non-discriminatie op grond van nationaliteit en administratieve status. Bovendien omvat het enige EU-

instrument dat illegaal verblijvende migranten op de arbeidsmarkt betreft geen enkele verwijzing naar de mensenrechten van migranten. De door de richtlijnen geconstrueerde differentiatie en discriminatie zijn gebaseerd op de categorie waartoe de migrant behoort. Vergelijkenderwijs kan gesteld worden dat hoe hoger de mate van discriminatie tussen de categorie migranten en de nationale onderdanen van de lidstaat waar zij verblijven en werken is, hoe lager opgeleid en economisch minder gewenst deze categorie migranten voor de ontwikkeling en het concurrentievermogen van de EU-economie is. Door deze benadering is status gebruikt als een manier om migranten te discrimineren op grond van nationaliteit. Het resultaat van deze benadering is een systeem dat consistentie en rechtszekerheid mist, hetgeen voor een groot deel te wijten is aan de vele discretionaire bepalingen en verwijzingen naar nationaal recht van de lidstaten in de richtlijnen, vooral de bepalingen betreffende toegang tot het grondgebied en de arbeidsmarkt en het recht op gelijke behandeling. De manier waarop het recht op gelijke behandeling is geconstrueerd in de richtlijnen is onverenigbaar met internationale en Europese mensenrechtennormen en het internationaal arbeidsrecht. Hiermee werd over het algemeen geen rekening gehouden tijdens de onderhandelingen over de richtlijnen, hoewel EU-lidstaten gebonden zijn door deze normen. Hierdoor heeft de EU wettelijke instrumenten inzake arbeidsmigratie ontwikkeld die lagere normen vaststellen dan die op internationaal en Europees niveau.

Een belangrijke factor die heeft bijgedragen aan dit resultaat is de rol die lidstaten hebben gespeeld door aan te dringen op de aanvaarding van een sectorale benadering van arbeidsmigratie en in de onderhandelingen over de richtlijnen. Zij hadden een dominante positie tijdens de onderhandelingen en hun aanpak werd gekenmerkt door de wil om de toegang tot het grondgebied en de arbeidsmarkt en gelijke behandeling met nationale onderdanen meer te beperken dan de Commissievoorstellen voorzagen. De aanvaarding van de sectorale benadering, wat de enige manier voor de lidstaten was om overeenstemming te bereiken over gemeenschappelijke maatregelen inzake arbeidsmigratie, resulteerde in de afbraak van gelijkheid, hetgeen hoogstwaarschijnlijk op de eerste plaats het doel van de aanvaarding van deze benadering was, omdat de lidstaten niet geïnteresseerd waren in de goedkeuring van normen die golden voor alle categorieën migranten, zoals die door een horizontale benadering zou zijn bedoeld.

Annexes

Annex to chapter 2 – Relevant Articles of UN, ILO, CoE and EU human rights and labour law instruments

Charter of the United Nations

Article 13(1)(b)

The General Assembly shall initiate studies and make recommendations for the purpose of: b) promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction such as to race, sex, language, or religion.

Article 55(c)

With a view to the creation of conditions of stability and well-being which is necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Universal Declaration of Human Rights

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

International Convention on the Elimination of All Forms of Racial Discrimination

Article 1

1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

International Covenant on Economic, Social and Cultural Rights

Article 2(2)

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
(a) Primary education shall be compulsory and available free to all;
(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

International Covenant on Civil and Political Rights

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interest of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the policy in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning the Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour,

sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Convention on the Protection of the Rights of all Migrant Workers and their Families

Article 1(1)

The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Article 7

State Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

ILO Convention 87 Freedom of Association and Protection of the Right to Organise

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

ILO Convention 97 Migration for Employment Convention

Article 6

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals is respect of the following matters:

(a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities-
(i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;
(ii) membership of trade unions and enjoyment of the benefits of collective bargaining;
(iii) accommodation;
(b) social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other

contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:
(i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
(ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension;
(c) employment taxes, dues or contributions payable in respect of the person employed; and
(d) legal proceedings relating to the matters referred to in this Convention.

Article 11(1)

For the purpose of the Convention, the term ***migrant for employment*** means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.

ILO Convention 111 on discrimination (employment and occupation)

Article 1

1. For the purpose of this Convention the term ***discrimination*** includes--
(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

3. For the purpose of the Convention the terms ***employment*** and ***occupation*** include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Article 2

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

ILO Convention 118 Equality of Treatment (Social Security)

Article 2

Each Member may accept the obligations of this Convention in respect of any one or more of the following branches of social security for which it has in effect operation legislation covering its own nationals within its own territory: (a) medical care, (b) sickness benefits, (c) maternity benefit, (d) invalidity benefit, (e) old age benefit, (f) survivor's benefit, (g) employment injury benefit, (h) unemployment benefit and (i) family benefit.

Article 3

1. Each Member for which this Convention is in force shall grant within its territory to the nationals of any other Member for which the Convention is in force equality of treatment under its legislation with its own nationals, both as regards coverage and as regards the right to benefits, in respect of every branch of social security for which it has accepted the obligations of the Convention.
2. In the case of survivors' benefits, such equality of treatment shall also be granted to the survivors of the nationals of a Member for which the Convention is in force, irrespective of the nationality of such survivors.
3. Nothing in the preceding paragraphs of this Article shall require a Member to apply the provisions of these paragraphs, in respect of the benefits of a specified branch of social security, to the nationals of another Member which has legislation relating to that branch but does not grant equality of treatment in respect thereof to the nationals of the first Member.

ILO Convention 143 Migrant Workers (Supplementary Provisions)

Article 1

Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers.

Article 8

1. On condition that he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit.
2. Accordingly, he shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining.

Article 9

1. Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy

equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

Article 10

Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

Article 12

Each Member shall, by methods appropriate to national conditions and practice –
(a) seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of the policy provided for in Article 10 of this Convention;
(b) enact such legislation and promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;
(c) take measures, encourage educational programmes and develop other activities aimed at acquainting migrant workers as fully as possible with the policy, with their rights and obligations and with activities designed to give effective assistance to migrant workers in the exercise of their rights and for their protection;
(d) repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
(e) in consultation with representative organisations of employers and workers, formulate and apply a social policy appropriate to national conditions and practice which enables migrant workers and their families to share in advantages enjoyed by its nationals while taking account, without adversely affecting the principle of equality of opportunity and treatment, of such special needs as they may have until they are adapted to the society of the country of employment;
(f) take all steps to assist and encourage the efforts of migrant workers and their families to preserve their national and ethnic identity and their cultural ties with their country of origin, including the possibility for children to be given some knowledge of their mother tongue;
(g) guarantee equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment.

Article 14

A Member may
(a) Make the free choice of employment, while assuring migrant workers the right to geographical mobility, subject to the conditions that the migrant worker has resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years, or, if its laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract.

European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 1 – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and the public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 1

Article 1- Protection of property

Everyone natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2 - Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Article 1 – General Prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The European Social Charter

Article 13 – The right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:
1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political and social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1,2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

Article 31 - The right to housing

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:
1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.

Appendix Article 1

Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20-31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.
This interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties.

European Convention on the Legal Status of Migrant Workers

Article 1 Definition

For the purpose of this Convention, the term 'migrant worker' shall mean a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up employment.

Article 8 Work permit

2. However a work permit issued for the first time may not a rule bind the worker to the same employer or the same locality for a period longer than one year.

Article 9 Residence permit

1. Where required by national legislation, each Contracting Party shall issue residence permits to migrant workers who have been authorised to take up paid employment on their territory under conditions laid down in this Convention.

4. If a migration worker is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident or because he is involuntarily unemployed, this being duly confirmed by the competent authorities, he shall be allowed for the purpose of the application of Article 25 of this Convention to remain on the territory of the receiving State for a period which should not be less than five months. Nevertheless, no Contracting Party shall be bound, in the case provided for in the above sub-paragraph, to allow a migrant worker to remain for a period exceeding the period of payment of the unemployment allowance.

Article 14 Pretraining – Schooling – Linguistic training – Vocation training and retraining

1. Migrant workers and members of their families officially admitted to the territory of a Contracting Party shall be entitled, on the same basis and under the same conditions as national workers, to general education and vocational training and retraining and shall be granted access to higher education according to the general regulations governing admission to respective institutions in the receiving State.

Article 16 Conditions of work

1. In the matter of conditions of work, migrant workers authorised to take up employment shall enjoy treatment not less favourable than that which applied to national workers by virtue of legislative or administrative provisions, collective labour agreement or custom.
2. It shall not be possible to derogate by individual contract from the principle of equal treatment referred to in the foregoing paragraph.

Article 18 Social Security

1. Each Contracting Party undertakes to grant within its territory, to migrant workers and members of their families, equality of treatment with its own nationals, in the matter of social security, subject to conditions required by national legislation and by bilateral or multilateral agreements already concluded or to be concluded between the Contracting Parties concerned.

Article 27 Use of employment services

Each Contracting Party recognises the right of migrant workers and of the members of their families officially admitted to its territory to make use of employment services under the same conditions as national workers subject to the legal provisions and regulations and administrative practice, including conditions of access, in force in that State.

Treaty on the Functioning of the European Union

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3(3)

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
It shall promote economic, social and territorial cohesion, and solidarity among Member States.
It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, are shall constitute general principles of the Union's law.

Article 18

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 79

1.The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
2. For the purpose of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion;
(b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
(d) combating trafficking in persons, in particular women and children.
5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Article 153

1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:
(a) improvement in particular of the working environment to protect workers' health and safety;
(b) working conditions;
(c) social security and social protection of workers;
(d) protection of workers where their employment contract is terminated;
(e) the information and consultation of workers;
(f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
(g) conditions of employment for third-country nationals legally residing in Union territory;
(h) the integration of persons excluded from the labour market, without prejudice to Article 166;
(i) equality between men and women with regard to labour market opportunities and treatment at work;
(j) the combating of social exclusion;
(k) the modernisation of social protection systems without prejudice to point (c).

The European Charter of Fundamental Rights

Article 15 Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 20 Equality before the law

Everyone is equal before the law.

Article 21 Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty of the European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 34 Social Security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by the Community law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by the Community law and national laws and practices.

Article 45 Freedom of movement and residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member State.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State

Article 52 Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

ANNEX TO CHAPTER 4 – RELEVANT ARTICLES OF THE BLUE CARD DIRECTIVE

Article 2 Definitions

(b) 'highly qualified employment' means the employment of a person who:
- in the Member State concerned, is protected as an employee under national employment law and/or in accordance with national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, someone else,
- is paid, and,
- has the required adequate and specific competence, as proved by higher professional qualifications,

Article 3 Scope

1. This Directive shall apply to third-country nationals who apply to be admitted to the territory of a Member State for the purpose of highly qualified employment under the terms of this Directive.
2. This Directive shall not apply to third-country nationals:
(a) who are authorised to reside in a Member State on the basis of temporary protection or have applied for authorisation to reside on that basis and are awaiting a decision on their status;
(b) who are beneficiaries of international protection under Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted or have applied for international protection under that Directive and whose application has not yet given rise to a final decision;
(c) who are beneficiaries of protection in accordance with national law, international obligations or practice of the Member State or have applied for protection in accordance with national law, international obligations or practice of the Member State and whose application has not given rise to a final decision;
(d) who apply to reside in a Member State as researchers, within the meaning of Directive 2005/71/EC, in order to carry out a research project;
(e) who are family members of Union citizens who have exercised, or are exercising, their right to free movement within the Community in conformity with Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States;
(f) who enjoy EC long-term resident status in a Member State in accordance with Directive 2003/109/EC and exercise their right to reside in another Member State in order to carry out an economic activity in an employed or self-employed capacity;
(g) who enter a Member State under commitments contained in an international agreement facilitating the entry and temporary stay of certain categories of trade and investment-related persons;
(h) who have been admitted to the territory of a Member State as seasonal workers;
(i) whose expulsion has been suspended for reasons of fact or law;
(j) who are covered by Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services as long as they are posted on the territory of the Member State concerned.

In addition, this Directive shall not apply to third-country nationals and their family members whatever their nationality, who, under agreements between the Community and its Member States and those third countries enjoy rights of free movement equivalent to those of Union citizens.
3. This Directive shall be without prejudice to any agreement between the Community and/or its Member States and one or more third countries, that lists the professions which should not fall under this Directive in order to assure ethical recruitment, in sectors suffering from a lack of personnel, by protecting human resources in the developing countries which are signatories to these agreements.
4. This Directive shall be without prejudice to the right of the Member States to issue residence permits other than an EU Blue Card for any purpose of employment. Such residence permits shall not confer the right of residence in the other Member States as provided for in this Directive.

Article 5 Criteria for admission

1. Without prejudice to Article 10(1), a third-country national who applies for an EU Blue Card under the terms of this Directive shall:
(a) present a valid work contract or, as provided for in national law, a binding job offer for highly qualified employment, of at least one year in the Member State concerned;
(b) present a document attesting fulfilment of the conditions set out under national law for the exercise by Union citizens of the regulated profession specified in the work contract or in the binding job offer as provided for in national law;
(c) for unregulated professions, present the documents attesting the relevant higher professional qualifications in the occupation or sector specified in the work contract or in the binding job offer as provided for in national law;
(d) present a valid travel document, as determined by national law, an application for a visa or a visa, if required, and evidence of a valid residence permit or of a national long-term visa, if appropriate. Member States may require the period of validity of the travel document to cover at least the initial duration of the residence permit;
(e) present evidence of having or, if provided for by national law, having applied for sickness insurance for all the risks normally covered for nationals of the Member State concerned for periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or resulting from, the work contract;
(f) not be considered to pose a threat to public policy, public security or public health.
2. Member States may require the applicant to provide his address in the territory of the Member State concerned.
3. In addition to the conditions laid down in paragraph 1, the gross annual salary resulting from the monthly or annual salary specified in the work contract or binding job offer shall not be inferior to a relevant salary threshold defined and published for that purpose by the Member States, which shall be at least 1,5 times the average gross annual salary in the Member State concerned.
4. When implementing paragraph 3, Member States may require that all conditions in the applicable laws, collective agreements or practices in the relevant occupational branches for highly qualified employment are met.
5. By way of derogation to paragraph 3, and for employment in professions which are in particular need of third-country national workers and which belong to the major groups 1 and 2 of ISCO, the salary threshold may be at least 1,2 times the average gross annual salary in the Member State concerned. In this case, the Member State concerned shall communicate each year to the Commission the list of the professions for which a derogation has been decided.

6. This Article shall be without prejudice to the applicable collective agreements or practices in the relevant occupational branches for highly qualified employment.

Article 6 Volumes of admission

This Directive shall not affect the right of a Member State to determine the volume of admission of third-country nationals entering the territory for the purposes of highly qualified employment.

Article 7 EU Blue Card

1. A third-country national who has applied and fulfils the requirements set out in Article 5 and for whom the competent authorities have taken a positive decision in accordance with Article 8 shall be issued with an EU Blue Card.
2.Member States shall set a standard period of validity of the EU Blue Card, which shall be comprised between one and four years. If the work contract covers a period less than this period, the EU Blue Card shall be issued or renewed for the duration of the work contract plus three months.
4. During the period of its validity, the EU Blue Card shall entitle its holder to:
(a) enter, re-enter and stay in the territory of the Member State issuing the EU Blue Card;
(b) the rights recognised in this Directive.

Article 8 Grounds for refusal

1. Member States shall reject an application for an EU Blue Card whenever the applicant does not meet the conditions set out in Article 5 or whenever the documents presented have been fraudulently acquired, of falsified or tampered with.
2. Before taking the decision on an application for an EU Blue Card, and when considering renewals or authorisations pursuant to Article 12(1) and (2) during the first two years of legal employment as an EU Blue Card holder, Member States may examine the situation of their labour market and apply their national procedures regarding the requirements for filling a vacancy.
Member States may verify whether the concerned vacancy could not be filled by national or Community workforce, by third-country nationals lawfully resident in that Member State and already forming part of its labour market by virtue of Community or national law, or by EC long-term residents wishing to move to that Member State for highly qualified employment in accordance with Chapter III of Directive 2003/109/EC.
3. An application for an EU Blue Card may also be considered as inadmissible on the grounds of Article 6.
4. Member States may reject an application for an EU Blue Card in order to ensure ethical recruitment in sectors suffering from a lack of qualified workers in the countries of origin.
5. Member States may reject an application for an EU Blue Card if the employer has been sanctioned in conformity with national law for undeclared work and/or illegal employment.

Article 9 Withdrawal or non-renewal of the EU Blue Card

1. Member States shall withdraw or refuse to renew an EU Blue Card issued on the basis of this Directive in the following cases:
(a) when it has been fraudulently acquired, or has been falsified or tampered with;

(b) wherever it appears that the holder did not meet or no longer meets the conditions for entry and residence laid down in this Directive or is residing for purposes other than that for which the holder was authorised to reside;
(c) when the holder has not respected the limitations set out in Article 12(1) and (2) and 13.
2. The lack of communication pursuant to Article 12(2) second subparagraph and 13(4) shall not be considered to be sufficient reason for withdrawing or not renewing the EU Blue Card if the holder can prove that the communication did not reach the competent authorities for a reason independent of the holder's will.
3. Member States may withdraw or refuse to renew an EU Blue Card issued on the basis of this Directive in the following cases:
(a) for reasons of public policy, public security or public health;
(b) whenever the EU Blue Card holder does not have sufficient resources to maintain himself and, where applicable, the members of his family, without having recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members of the person concerned. Such evaluation shall not take place during the period of unemployment referred to in Article 13;
(c) if the person concerned has not communicated his address;
(d) when the EU Blue Card holder applies for social assistance provided that the appropriate written information has been provided to him in advance by the Member State concerned.

Article 10 Applications for admission

1. Member States shall determine whether applications for an EU Blue Card are to be made by the third-country national and/or by his employer.
2. This application shall be considered and examined either when the third-country national concerned is residing outside the territory of the Member State to which he wishes to be admitted or when he is already residing in that Member State as holder of a valid residence permit or national long-stay visa.
3. By way of derogation from paragraph 2, a Member State may accept, in accordance with its national law, an application submitted when the third-country national concerned is not in possession of a valid residence permit but is legally present in its territory.
4. By way of derogation from paragraph 2, a Member State may provide that an application can only be submitted from outside its territory, provided that such limitations, either for all the third-country nationals or for specific categories of third-country nationals, are already set out in the existing national law at the time of the adoption of this Directive.

Article 12 Labour market access

1. For the first two years of legal employment in the Member State concerned as an EU Blue Card holder, access to the labour market for the person concerned shall be restricted to the exercise of paid employment activities which meet the conditions for admission set out in Article 5. After these first two years, Member States may grant the persons concerned equal treatment with nationals as regards access to highly qualified employment.
2. For the first two years of legal employment in the Member State concerned as an EU Blue Card holder, changes in employer shall be subject to the authorisation in writing of the competent authorities of the Member State of residence, in accordance with national procedures and within the

time limits set out in Article 11(1). Modifications that affect the conditions for admission shall be subject to prior communication or, if provided for by national law, prior authorisation.
After these first two years, where the Member State concerned does not make use of the possibility provided for in paragraph 1 regarding equal treatment, the person concerned shall, in accordance with national procedures, communicate changes that affect the conditions of Article 5 to the competent authorities of the Member State of residence.
3. Member States may retain restrictions on access to employment, provided such employment activities entail occasional involvement in the exercise of public authority and the responsibility for safeguarding the general interest of the State and where, in accordance with existing national or Community law, these activities are reserved to nationals.
4. Member States may retain restrictions on access to employment activities, in cases where, in accordance with exiting national or Community law, these activities are reserved to nationals, Union Citizens or EEA citizens.
5. This Article shall be applied without prejudice to the principle of Community preference as expressed in the relevant provisions of the Acts of Accession of 2003 and 2005, in particular with respect to the rights of nationals of the Member States concerned to access to the labour market.

Article 13 Temporary unemployment

1. Unemployment in itself shall not constitute a reason for withdrawing an EU Blue Card, unless the period of unemployment exceeds three consecutive months, or it occurs more than once during the period of validity of an EU Blue Card.
2. During the period referred to in paragraph 1, the EU Blue Card holder shall be allowed to seek and take up employment under the conditions set out in Article 12.
3. Member States shall allow the EU Blue Card holder to remain on their territory until the necessary authorisation pursuant to Article 12(2) has been granted or denied. The communication under Article 12(2) shall automatically end their period of unemployment.
4. The EU Blue Card holder, shall communicate the beginning of the period of unemployment to the competent authorities of the Member State of residence, in accordance with the relevant national procedures.

Article 14 Equal treatment

1. EU Blue Card holders shall enjoy equal treatment with nationals of the Member State issuing the Blue Card, as regards:
(a) working conditions, including pay and dismissal, as well as health and safety requirements at the workplace;
(b) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;
(c) education and vocational training;
(d) recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures;
(e) provisions in national law regarding the branches of social security as defined in Regulation (EEC) No. 1408/71. The special provisions in the Annex to Regulation (EC) No 859/2003 shall apply accordingly;

(f) without prejudice to existing bilateral agreements, payment of income-related acquired statutory pensions in respect of old age, at the rate applied by virtue of the law of the debtor Member State(s) when moving to a third country;
(g) access to goods and services and the supply of goods and services made available to the public, including procedures for obtaining housing, as well as information and counselling services afforded by employment offices;
(h) free access to the entire territory of the Member State concerned, within the limits provided for by national law.
2. With respect to paragraph 1(c) and (g) the Member State concerned may restrict equal treatment as regards study and maintenance grants and loans or other grants and loans regarding secondary and higher education and vocational training, and procedures for obtaining housing.

With respect to paragraph 1(c):
(a) access to university and post-secondary education may be subject to specific prerequisites in accordance with national law;
(b) the Member State concerned may restrict equal treatment to cases where the registered or usual place of residence of the EU Blue Card holder, or that of the family member for whom benefits are claimed, lies within its territory.
Paragraph 1(g) shall be without prejudice to the freedom of contract in accordance with Community and national law.
3. The right to equal treatment as laid down in paragraph 1 shall be without prejudice to the right of the Member State to withdraw or to refuse to renew the EU Blue Card in accordance with Article 9.
4. When the EU Blue Card holder moves to a second Member State in accordance with Article 18 and a positive decision on the issuing of an EU Blue Card has not yet been taken, Member States may limit equal treatment in the areas listed in paragraph 1, with the exception of 1(b) and (d). If, during this period, Member States allow the applicant to work, equal treatment with nationals of the second Member State in all areas of paragraph 1 shall be granted.

Article 15 Family Members

1. Directive 2003/86/EC shall apply with the derogations laid down in this Article.
2. By way of derogation from Articles 3(1) and 8 of Directive 2003/86/EC, family reunification shall not be made dependent on the requirement of the EU Blue Card holder having reasonable prospects of obtaining the right to permanent residence and having a minimum period of residence.
3. By way of derogation from the last subparagraph of Article 4(1) and Article 7(2) of Directive 2003/86/EC, the integration conditions and measures referred to therein may only be applied after the persons concerned have been granted family reunification.
4. By way of derogation from the first subparagraph of Article 5(4) of Directive 2003/86/EC, residence permits for family members shall be granted, where the conditions for family reunification are fulfilled, at the latest within six months from the date on which the application was lodged.
5. By way of derogation from Article 13(2) and (3) of Directive 2003/86/EC, the duration of validity of the residence permits of family members shall be the same as that of the residence permits issued to the EU Blue Card holder insofar as the period of validity of their travel documents allows it.
6. By way of derogation from the second sentence of Article 14(2) of Directive 2003/86/EC, Member States shall not apply any time limit in respect of access to the labour market.

This paragraph is applicable from 19 December 2011.
7. By way of derogation to Article 15(1) of Directive 2003/86/EC, for the purposes of calculation of five years of residence required for the acquisition of an autonomous residence permit, residence in different Member States may be cumulated.
8. If Member States have recourse to the option provided for in paragraph 7, the provisions set out in Article 16 of this Directive in respect of accumulation of periods of residence in different Member States by the EU Blue Card holder shall apply *mutatis mutandis*.

Article 16 EC long-term resident status for EU Blue Card holders

1. Directive 2003/109/EC shall apply with the derogations laid down in this Article.
2. By way of derogation from Article 4(1) of Directive 2003/109/EC, the EU Blue Card holder having made use of the possibility provided for in Article 18 of this Directive is allowed to cumulate periods of residence in different Member States in order to fulfil the requirement concerning the duration of residence, if the following conditions are met;
(a) five years of legal and continuous residence within the territory of the Community as an EU Blue Card holder; and
(b) legal and continuous residence for two years immediately prior to the submission of the relevant application as an EU Blue Card holder within the territory of the Member State where the application for the long-term resident's EC residence permit is lodged.
3. For the purpose of calculating the period of legal and continuous residence in the Community and by way of derogation from the first subparagraph of Article 4(3) of Directive 2003/109/EC, periods of absence from the territory of the Community shall not interrupt the period referred to in paragraph 2(a) of this Article if they are shorter than 12 consecutive months and do not exceed in total 18 months within the period referred to in paragraph 2(a) of this Article. This paragraph shall apply also in cases where the Blue Card holder has not made use of the possibility provided for in Article 18.
4. By way of derogation from Article 9(1)(c) of Directive 2003/109/EC, Member States shall extend to 24 consecutive months the period of absence from the territory of the Community which is allowed to an EC long-term resident holder of a long-term residence permit with the remark referred to in Article 17(2) of this Directive and of his family members having been granted the EC long-term resident status.
5. The derogations to Directive 2003/109/EC set out in paragraphs 3 and 4 of this Article may be restricted to cases where the third-country national concerned can present evidence that he has been absent from the territory of the Community to exercise an economic activity in an employed or self-employed capacity, or to perform a voluntary service, or to study in his own country of origin.
6. Article 14(1)(f) and 15 shall continue to apply for holders of a long-term residence permit with the remark referred to in Article 17(2), where applicable, after the EU Blue Card holder has become an EC long-term resident.

Article 17 Long-term residence permit

1. EU Blue Card holders who fulfil the conditions set out in Article 16 of this Directive for the acquisition of the EC long-term resident status shall be issued with a residence permit in accordance with Article 1(2)(a) of Regulation (EC) No 1030/2002.

2. In the residence permit referred to in paragraph 1 of this Article under the heading 'remarks', Member States shall enter 'Former EU Blue Card holder'.

Article 18 Conditions (for residence in a second Member State)

1. After eighteen months of legal residence in the first Member State as an EU Blue Card holder, the person concerned and his family members may move to a Member State other than the first Member State for the purpose of highly qualified employment under the conditions set out in this Article.
2. As soon as possible and no later than one month after entering the territory of the second Member State, the EU Blue Card holder and/or his employer shall present an application for an EU Blue Card to the competent authority of that Member State and present all the documents proving the fulfilment of the conditions set out in Article 5 for the second Member State. The second Member State may decide, in accordance with national law, not to allow the applicant to work until the positive decision on the application has been taken by its competent authority.
3. The application may also be presented to the competent authorities of the second Member State while the EU Blue Card holder is still residing in the territory of the first Member State.
4. In accordance with the procedures set out in Article 11, the second Member State shall process the application and inform in writing the applicant and the first Member State of its decision either:
(a) issue an EU Blue Card and allow the applicant to reside on its territory for highly qualified employment where the conditions set in this Article are fulfilled and under the conditions set out in Articles 7 to 14; or
(b) refuse to issue an EU Blue Card and oblige the applicant and his family members, in accordance with the procedures provided for by national law, including removal procedures, to leave its territory where the conditions set out in this Article are not fulfilled. The first Member State shall immediately readmit without formalities the EU Blue Card holder and his family members. This shall also apply if the EU Blue Card issued by the first Member State has expired or has been withdrawn during the examination of the application. Article 13 shall apply after readmission.
5. If the Blue Card issued by the first Member State expires during the procedure, Member States may issue, if required by national law, national temporary residence permits, or equivalent authorisations, allowing the applicant to continue to stay legally on its territory until a decision on the application has been taken by the competent authorities.
6. The applicant and/or his employer may be held responsible for the costs related to the return and readmission of the EU Blue Card holder and his family members, including costs incurred by public funds, where applicable, pursuant to paragraph 4(b).
7. In application of this Article, Member States may continue to apply volumes of admission as referred to in Article 6.
8. From the second time that an EU Blue Card holder, and where applicable, his family members, makes use of the possibility to move to another Member State under the terms of this Chapter, 'first Member State' shall be understood as the Member States from where the person concerned moved and 'second Member State' as the Member State to which he is applying to reside.

Article 19 Residence in the second Member State for family members

1. When the EU Blue Card holder moves to a second Member State in accordance with Article 18 and when the family was already constituted in the first Member State, the members of his family shall be authorised to accompany or join him.

2. No later than one month after entering the territory of the second Member State, the family members concerned or the EU Blue Card holder, in accordance with national law, shall submit an application for a residence permit as a family member to the competent authorities of that Member State.
In cases where the residence permit of the family members issued by the first Member State expires during the procedure or no longer entitles the holder to reside legally on the territory of the second Member State, Member States shall allow the person to stay in their territory, if necessary by issuing national temporary residence permits, or equivalent authorisations, allowing the applicant to continue to stay legally on their territory with the EU Blue Card holder until a decision on the application has been taken by the competent authorities of the second Member State.
3. The second Member State may require the family member concerned to present with their application for a residence permit:
(a) their residence permit in the first Member State and a valid travel document, or their certified copies, as well as a visa, if required;
(b) evidence that they have resided as members of the family of the EU Blue Card holder in the first Member State;
(c) evidence that they have a sickness insurance covering all risks in the second Member State, or that the EU Blue Card holder has such insurance for them.
4. The second Member State may require the EU Blue Card holder to provide evidence that the holder:
(a) has an accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in the Member State concerned.;
(b) has stable and regular resources which are sufficient to maintain himself and the members of his family, without recourse to the social assistance of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.
5. Derogations contained in Article 15 shall continue to apply *mutatis mutandis*.
6. Where the family was not already constituted in the first Member State, Article 15 shall apply.

ANNEX TO CHAPTER 5 – RELEVANT ARTICLES OF THE EMPLOYERS SANCTIONS DIRECTIVE

Article 1 Subject matter and scope

The Directive prohibits the employment of illegally staying third-country nationals in order to fight illegal immigration. To this end, it lays down minimum common standards on sanctions and measures to be applied in the Member States against employers who infringe that prohibition.

Article 2 Definitions

(b) 'illegally staying third-country national' means a third-country national present on the territory of a Member State, who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State;

Article 3 Prohibition of illegal employment

1. Member States shall prohibit employment of illegally staying third-country nationals.
2. Infringements of this prohibition shall be subject to the sanctions and measures laid down in this Directive.
3. A Member State may decide not to apply the prohibition referred to in paragraph 1 to illegally staying third-country nationals whose removal has been postponed and who are allowed to work in accordance with national law.

Article 4 Obligations on employers

1. Member States shall oblige employers to:
(a) require that a third-country national before taking up the employment holds and presents to the employer a valid residence permit or other authorisation for his or her stay;
(b) keep for at least the duration of the employment a copy or record of the residence permit or other authorisation for stay available for possible inspection by the competent authorities of the Member States;
(c) notify the competent authorities designated by Member States of the start of employment of third-country nationals within the period laid down by each Member State.
3. Member States shall ensure that employers who have fulfilled their obligations set out in paragraph 1 shall not be held liable for an infringement of the prohibition referred to in Article 3 unless the employers knew that the document presented as a valid residence permit or another authorisation for stay was a forgery.

Article 5 Financial Sanctions

1. Member States shall take the necessary measures to ensure that infringements of the prohibition referred to in Article 3 are subject to effective, proportionate and dissuasive sanctions against the employer.
2. Sanctions in respect of infringements of the prohibition referred to in Article 3 shall include:
(a) financial sanctions which shall increase in amount according to the number of illegally employed third-country nationals; and

(b) payments of the costs of return of illegally employed third-country nationals in those cases where return procedures are carried out. Member States may instead decide to reflect at least the average costs of return in the financial sanctions under point (a).
3. Member States may provide for reduced financial sanctions where the employer is a natural person who employs an illegally staying third-country national for his or her private purposes and where no particularly exploitative working conditions are involved.

Article 6 Back payments to be made by employers

1. In respect of each infringement of the prohibition referred to in Article 3, Member States shall ensure that the employer shall be liable to pay:
(a) any outstanding remuneration to the illegally employed third-country national. The agreed level of remuneration shall be presumed to have been at least as high as the wage provided for by the applicable laws on minimum wages, by collective agreements or in accordance with established practice in the relevant occupational branches, unless either the employer or the employee can prove otherwise, while respecting, where appropriate, the mandatory national provisions on wages;
(b) an amount equal to any taxes and social security contributions that the employer would have paid had the third-country national been legally employed, including penalty payments for delays and relevant administrative fines;
(c) where appropriate, any cost arising from sending back payments to the country to which the third-country national has returned or has been returned.
2. In order to ensure the availability of effective procedures to apply paragraph 1(a) and (c), and having due regard to Article 13, Member States shall enact mechanisms to ensure that illegally employed third-country nationals:
(a) may introduce a claim, subject to a limitation period defined in national law, against their employer and eventually enforce a judgement against the employer for any outstanding remuneration, including in cases in which they have, or have been returned; or
(b) when provided for by national legislation, may call on the competent authority of the Member State to start procedures to recover outstanding remuneration without the need for them to introduce a claim in that case.
Illegally employed third-country nationals shall be systematically and objectively informed about their rights under this paragraph and under Article 13 before the enforcement of any return decision.
3. In order to apply paragraph 1(a) and (b), Member States shall provide that an employment relationship of at least three months duration be presumed unless, among others, the employer or the employee can prove otherwise.
4. Member States shall ensure that the necessary mechanisms are in place to ensure that illegally employed third-country nationals are able to receive any back payment of remuneration referred to in paragraph 1(a) which is recovered as part of the claims referred to in paragraph 2, including in cases in which they have, or have been, returned.
5. In respect of cases where residence permits of limited duration have been granted under Article 13(4), Member States shall define under national law the conditions under which the duration of the permits may be extended until the third-country national has received any back payment of his or her remuneration recovered under paragraph 1 of this Article.

Article 9 Criminal offence

1. Member States shall ensure that the infringement of the prohibition referred to in Article 3 constitutes a criminal offence when committed intentionally, in each of the following circumstances as defined by national law:
(a) the infringement continuous or is persistently repeated;
(b) the infringement is in respect of the simultaneous employment of a significant number of illegally staying third-country nationals;
(c) the infringement is accompanied by particularly exploitative working conditions;
(d) the infringement is committed by an employer who, while not having been charged with or convicted of an offence established pursuant to Framework Decision 2002/629/JHA, uses work or services exacted from an illegally staying third-country national with the knowledge that he or she is a victim of trafficking in human beings;
(e) the infringement relates to the illegal employment of a minor.
2. Member States shall ensure that inciting, aiding and abetting the intentional conduct referred to in paragraph 1 is punishable as criminal offence.

Article 10 Criminal penalties

1. Member States shall take the necessary measures to ensure that natural persons who commit the criminal offence referred to in Article 9 are punishable by effective, proportionate and dissuasive criminal penalties.
2. Unless prohibited by general principles of law, the criminal penalties provided for in this Article may be applied under national law without prejudice to other sanctions or measures of a non-criminal nature, and they may be accompanied by the publication of the judicial decision relevant to the case.

Article 13 Facilitation of complaints

1. Member States shall ensure that there are effective mechanisms through which third-country nationals in illegal employment may lodge complaints against their employers, directly or through third parties designated by Member States such as trade unions or other associations or a competent authority of the Member State when provided for by national legislation.
2. Member States shall ensure that third parties which have, in accordance with the criteria laid down in their national law, a legitimate interest in ensuring compliance with this Directive, may engage either on behalf of or in support of an illegally employed third-country national, with his or her approval, in any administrative or civil proceedings provided for with the objective of implementing this Directive.
3. Providing assistance to third-country nationals to lodge complaints shall not be considered as facilitation of unauthorised residence under Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.
4. In respect of criminal offences covered by Article 9(1)(c) or (e), Member States shall define in national law the conditions under which they may grant, on a case-by-case basis, permits of limited duration, linked to the length of the relevant national proceedings, to the third-country nationals involved, under arrangements comparable to those applicable to third-country nationals who fall within the scope of Directive 2004/81/EC.

ANNEX TO CHAPTER 6 – RELEVANT ARTICLES OF THE SINGLE PERMIT DIRECTIVE

Article 1 Subject matter

1. This Directive lays down:
(a) a single application procedure for issuing a single permit for third-country nationals to reside for the purpose of work in the territory of a Member State, in order to simplify the procedure for their admission and to facilitate the control of their status; and
(b) a common set of rights to third-country workers legally residing in a Member State, irrespective of the purposes for which they were initially admitted to the territory of that Member State, based on equal treatment with nationals of that Member State.
2. This Directive is without prejudice to the Member States' powers concerning the admission of third-country nationals to their labour market.

Article 2 Definitions

(b) 'third-country worker' means a third-country national who has been admitted to the territory of a Member State and who is legally residing and is a allowed to work in the context of a paid relationship in that Member State in accordance with national law and practice;
(c) 'single permit' means a residence permit issued by the authorities of a Member State allowing a third-country national to reside legally in its territory for the purpose of work;
(d) 'single application procedure' means any procedure leading, on the basis of a single application made by a third-country national, or by his or her employer, for the authorisation of residence and work in the territory of a Member State, to a decision ruling on that application for the single permit.

Article 3 Scope

1. This Directive shall apply to:
(a) third-country nationals who apply to reside in a Member State for the purpose of work;
(b) third-country nationals who have been admitted to a Member State for purposes other than work in accordance with Union or national law, who are allowed to work and who hold a residence permit in accordance with Regulation (EC) No 1030/2002; and
(c) third-country nationals who have been admitted to a Member State for the purpose of work in accordance with Union or national law.
2. This Directive shall not apply to third-country nationals:
(a) who are family members of citizens of the Union who have exercised, or are exercising, their right to free movement within the Union in accordance with Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States;
(b) who, together with their family members, and irrespective of their nationality, enjoy rights of free movement equivalent to those of citizens of the Union under agreements either between the Union and the Member States or between the Union and third countries;
(c) who are posted for as long as they are posted;
(d) who have applied for admission or have been admitted to the territory of a Member State to work as intra-corporate transferees;

(e) who have applied for admission or have been admitted to the territory of a Member State as seasonal workers or au pairs;
(f) who are authorised to reside in a Member State on the basis of temporary protection, or who have applied for authorisation to reside there on that basis and are awaiting a decision on their status;
(g) who are beneficiaries of international protection under Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted or who have applied for international protection under that Directive and whose application has not been the subject of a final decision;
(h) who are beneficiaries of protection in accordance with national law, international obligations or the practice of a Member State or have applied for protection in accordance with national law, international obligations or the practice of a Member State and whose application has not been the subject of a final decision;
(i) who are long-term residents in accordance with Directive 2003/109/EC;
(j) whose removal has been suspended on the basis of fact or law;
(k) who have applied for admission or who have been admitted to the territory of a Member State as self-employed workers;
(l) who have applied for admission or have been admitted as seafarers for employment or work in any capacity on board of a ship registered in or sailing under the flag of a Member State.
3. Member States may decide that Chapter II does not apply to third-country nationals who have been either authorised to work in the territory of a Member State for a period not exceeding six months or who have been admitted to a Member State for the purpose of study.
4. Chapter II shall not apply to third-country nationals who are allowed to work on the basis of a visa.

Article 4 Single application procedure

1. An application to issue, amend or renew a single permit shall be submitted by way of a single application procedure. Member States shall determine whether applications for a single permit are to be made by the third-country national or by the third-country national's employer. Member States may also decide to allow an application from either of the two. If the application is to be submitted by the third-country national, Member States shall allow the application to be introduced from a third country or, if provided for by national law, in the territory of the Member State in which the third-country national is legally present.
2. Member States shall examine an application made under paragraph 1 and shall adopt a decision to issue, amend or renew the single permit if the applicant fulfils the requirements specified by Union or national law. A decision to issue, amend or renew the single permit shall constitute a single administrative act combining a residence permit and a work permit.
3. The single application procedure shall be without prejudice to the visa procedure which may be required for initial entry.
4. Member States shall issue a single permit, where the conditions provided for are met, to third-country nationals who apply for admission and to third-country nationals already admitted who apply to renew or modify their residence permit after the entry into force of the national implementing provision.

Article 8 Procedural guarantees

1. Reasons shall be given in the written notification of a decision rejecting an application to issue, amend or renew a single permit, or a decision withdrawing a single permit on the basis of criteria provided for in Union or national law.
2. A decision rejecting the application to issue, amend or renew or withdrawing a single permit shall be open to legal challenge in the Member State concerned, in accordance with national law. The written notification referred to in paragraph 1 shall specify the court or administrative authority where the person concerned may lodge an appeal and the time limit therefor.
3. An application may be considered as inadmissible on the grounds of volume of admission of third-country nationals coming for employment and, on that basis, need not to be processed.

Article 11 Rights on the basis of the single permit

Where a single permit has been issued in accordance with national law, it shall authorise, during its period of validity, its holder at least to:
(a) enter and reside in the territory of the Member State issuing the single permit, provided that the holder meets all admission requirements in accordance with national law;
(b) have free access to the entire territory of the Member State issuing the single permit within the limits provided for by national law;
(c) exercise the specific employment activity authorised under the single permit in accordance with national law;
(d) be informed about the holder's own rights linked to the permit conferred by this Directive and/or by national law.

Article 12 Right to equal treatment

1. Third-country workers as referred to in points (b) and (c) of Article 3(1) shall enjoy equal treatment with nationals of the Member State where they reside with regard to:
(a) working conditions, including pay and dismissal as well as health and safety at the workplace;
(b) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;
(c) education and vocational training;
(d) recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures;
(e) branches of social security, as defined in Regulation (EC) No 883/2004;
(f) tax benefits, in so far as the worker is deemed to be resident for tax purposes in the Member State concerned;
(g) access to goods and services and the supply of goods and services made available to the public including procedures for obtaining housing as provided by national law, without prejudice to the freedom of contract in accordance with Union and national law;
(h) advice services afforded by employment offices.
2. Member States may restrict equal treatment:
(a) under point (c) of paragraph 1 by:

(i) limiting its application to those third-country workers who are in employment or who have been employed and who are registered as unemployed;
(ii) excluding those third-country workers who have been admitted to their territory in conformity with Directive 2004/114/EC;
(iii) excluding study and maintenance grants and loans or other grants and loans;
(iv) laying down specific prerequisites including language proficiency and the payment of tuition fees, in accordance with national law, with respect to access to university and post-secondary education and to vocational training which is not directly linked to the specific employment activity;
(b) by limiting the rights conferred on third-country workers under point (e) of paragraph 1, but shall not restrict such rights for third-country workers who are in employment or who have been employed for a minimum period of six months and who are registered unemployed.
In addition, Member States may decide that point (e) of paragraph 1 with regard to family benefits shall not apply to third-country nationals who have been authorised to work in the territory of a Member State for a period not exceeding six months, to third-country nationals who have been admitted for the purpose of study, or to third-country nationals who are allowed to work on the basis of a visa.
(c) under point (f) of paragraph 1 with respect to tax benefits by limiting its application to cases where the registered or usual place of residence of the family members of the third-country worker for whom he/she claims benefits, lies in the territory of the Member State concerned.
(d) under point (g) of paragraph 1 by:
(i) limiting its application to those third-country workers who are in employment;
(ii) restricting access to housing;
3. The right to equal treatment laid down in paragraph 1 shall be without prejudice to the right of the Member State to withdraw or refuse to renew the residence permit issued under this Directive, the residence permit issued for purposes other than work, or any other authorisation to work in a Member State.
4. Third-country workers moving to a third country, or their survivors who reside in a third country and who derive rights from those workers, shall receive, in relation to old age, invalidity and death, statutory pensions based on those workers' previous employment and acquired in accordance with the legislation referred to in Article 3 of Regulation (EC) No 883/2004, under the same conditions and at the same rates as the nationals of the Member States concerned when they move to a third country.

ANNEX TO CHAPTER 7 – RELEVANT ARTICLES OF THE SEASONAL WORKERS DIRECTIVE

Article 2 Scope

1. This Directive shall apply to third-country nationals who reside outside the territory of the Member States and who apply to be admitted, or who have been admitted under the terms of this Directive, to the territory of a Member State for the purpose of employment as seasonal workers.
This Directive shall not apply to third-country nationals who at the time of application reside in the territory of a Member State with the exception of cases referred to in Article 15.
2. When transposing this Directive the Member states shall, where appropriate in consultation with the social partners, list those sectors of employment which include activities that are dependent on the passing of the seasons. The Member States may modify the list, where appropriate in consultation with the social partners. The Member States shall inform the Commission of such modifications.
3. This Directive shall not apply to third-country nationals who:
(a) are carrying out activities on behalf of undertakings established in another Member State in the framework of the provision of services within the meaning of Article 56 TFEU, including third-country nationals posted by undertakings established in a Member State in the framework of provision of services in accordance with Directive 96/71/EC;
(b) are family members of Union citizens who have exercised their right to free movement within the Union, in conformity with Directive 2004/38/EC of the European Parliament and of the Council;
(c) together with their family members, and irrespective of their nationality, enjoy rights of free movement equivalent to those of Union citizens under agreements either between the Union and the Member States or between the Union and third countries.

Article 3 Definitions

(b) 'seasonal worker' means a third-country national who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State;
(c)'activity dependent on the passing of the seasons' means an activity that is tied to a certain time of the year by a recurring event or pattern of events linked to seasonal conditions during which required labour levels are significantly above those necessary for usually ongoing operations;

Article 5 Criteria and requirements for admission for employment as a seasonal worker for stays not exceeding 90 days

1. Applications for admission to a Member State under the terms of this Directive for stay not exceeding 90 days shall be accompanied by:
(a) a valid work contract or, if provided for by national law, administrative regulations, or practice, a binding job offer to work as a seasonal worker in the Member State concerned with an employer established in that Member State which specifies: (i) the place and type of the work; (ii) the duration of employment; (iii) the remuneration; (iv) the working hours per week or month; (v) the amount of

any paid leave; (vi) where applicable other relevant working conditions; and (vii) if possible, the date of commencement of employment;
(b) evidence of having or, if provided for by national law, having applied for sickness insurance for all the risks normally covered for nationals of the Member State concerned for periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or as a result of, the work carried out in that Member State;
(c) evidence that the seasonal worker will have adequate accommodation or that adequate accommodation will be provided in accordance with Article 20.
2. Member States shall require that the conditions referred to in point (a) of paragraph 1 comply with applicable law, collective agreements and/or practice.
3. On the basis of the documentation provided pursuant to paragraph 1, Member States shall require that the seasonal worker will have no recourse to their social assistance systems.
4. In cases where the work contract or binding job offer specifies that the third-country national will exercise a regulated profession, as defined by Directive 2005/36/EC of the European Parliament and of the Council, the Member State may require the applicant to present documentation attesting that the third-country nationals fulfils the conditions laid down under national law for the exercise of that regulated profession.
5. When examining an application for an authorisation referred to in Article 12(1), Member States not applying the Schengen *acquis* in full shall verify that the third-country national:
(a) does not present a risk of illegal immigration;
(b) intends to leave the territory of the Member States at the latest on the date of expiry of the authorisation.

Article 6 Criteria and requirements for admission as a seasonal worker for stays exceeding 90 days

1. Applications for admission to a Member State under the terms of this Directive for a stay exceeding 90 days shall be accompanied by:
(a) a valid work contract or, if provided for by national law, administrative regulations, or practice, a binding job offer to work as a seasonal worker in the Member State concerned with an employer established in that Member State which specifies: (i) the place and type of work; (ii) the duration of the employment; (iii) the remuneration; (iv) the working hours per week or month; (v) the amount of any paid leave; (vi) where applicable, other relevant working conditions; and (vii) if possible, the date of commencement of employment;
(b) evidence of having or, if provided for by national law, having applied for, sickness insurance for all the risks normally covered for nationals of the Member State concerned for periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or as a result of, the work carried out in that Member State;
(c) evidence that the seasonal worker will have adequate accommodation or that adequate accommodation will be provided, in accordance with Article 20.
2. Member States shall require that the conditions referred to in point (a) of paragraph 1 comply with applicable law, collective agreements and/or practice.
3. On the basis of the documentation provided pursuant to paragraph 1, Member States shall require that the seasonal worker will have sufficient resources during his or her stay to maintain him/herself without having recourse to their social assistance systems.
4. Third-country nationals who are considered to pose a threat to public policy, public security or public health shall not be admitted.

5. When examining an application for an authorisation referred to in Article 12(2), Member States shall verify that the third-country national does not present a risk of illegal immigration and that he or she intends to leave the territory of the Member States at the latest on the date of expiry of the authorisation.
6. In cases where the work contract or binding job offer specifies that the third-country national will exercise a regulated profession, as defined in Directive 2005/36/EC, the Member State may require the applicant to present documentation attesting that the third-country national fulfils the conditions laid down under national law for the exercise of that regulated profession.
7. Member States shall require third-country nationals to be in possession of a valid travel document, as determined by national law. Member States shall require the period of validity of the travel document to cover at least the period of validity of the authorisation for the purpose of seasonal work.
In addition, Member States may require:
(a) the period of validity to exceed the intended duration of stay by a maximum three months;
(b) the travel document to have been issued within the last 10 years; and
(c) the travel document to contain at least two blank pages.

Article 7 Volumes of Admission

This Directive shall not affect the right of a Member State to determine the volumes of admission of third-country nationals entering its territory for the purpose of seasonal work. On this basis, an application for an authorisation for the purpose of seasonal work may be either considered inadmissible or be rejected.

Article 8 Grounds for rejection

1. Member States shall reject an application for authorisation for the purpose of seasonal work where:
(a) articles 5 or 6 are not complied with; or
(b) the documents presented for the purpose of Articles 5 or 6 were fraudulently acquired, or falsified, or tampered with.
2. Member States shall, if appropriate, reject an application for authorisation for the purpose of seasonal work where:
(a) the employer has been sanctioned in accordance with national law for undeclared work and/or illegal employment;
(b) the employer's business is being or has been wound up under national insolvency laws or no economic activity is taking place: or
(c) the employer has been sanctioned under Article 17.
3. Member States may verify whether the vacancy in question could be filled by nationals of the Member State concerned or by other Union citizens, or by third-country nationals lawfully residing in that Member State, in which case they may reject the application. This paragraph shall apply without prejudice to the principle of preference for Union citizens as expressed in the relevant provisions of the relevant Acts of Accession.
4. Member States may reject an application for authorisation for the purpose of seasonal work where:

(a) the employer has failed to meet its legal obligations regarding social security, taxation, labour rights, working conditions or terms of employment, as provided for in applicable law and/or collective agreements;
(b) within the 12 months immediately preceding the date of the application, the employer has abolished a full-time position in order to create the vacancy that the employer is trying to fill by use of this Directive; or
(c) the third-country national has not complied with the obligations arising from a previous decision on admission as a seasonal worker.
5. Without prejudice to paragraph 1, any decision to reject an application shall take account of the specific circumstances of the case, including the interests of the seasonal worker, and respect the principle of proportionality.
6. Grounds for refusing the issuing of a short-stay visa are regulated in the relevant provisions of the Visa Code.

Article 9 Withdrawal of the authorisation for the purpose of seasonal work

1. Member States shall withdraw the authorisation for the purpose of seasonal work where:
(a) the documents presented for the purpose of Articles 5 and 6 were fraudulently acquired, or falsified, or tampered with; or
(b) the holder is staying for purposes other than those for which he or she was authorised to stay.
2. Member States shall, if appropriate, withdraw the authorisation for the purpose of seasonal work where:
(a) the employer has been sanctioned in accordance with national law for undeclared work and/or illegal employment;
(b) the employer's business is being or has been wound up under national insolvency law or no economic activity is taking place; or
(c) the employer has been sanctioned under Article 17.
3. Member States may withdraw the authorisation for the purpose of seasonal work where:
(a) Articles 5 or 6 are not or are no longer complied with;
(b) the employer has failed to meet its legal obligations regarding social security, taxation, labour rights, working conditions or terms of employment, as provided for in applicable law and/or collective agreements;
(c) the employer has not fulfilled its obligations under the work contract; or
(d) within the 12 months immediately preceding the date of the application, the employer has abolished a full-time position in order to create the vacancy that the employer is trying to fill by use of this Directive.
4. Member States may withdraw the authorisation for the purpose of seasonal work if the third-country national applies for international protection under Directive 2011/95/EU of the European Parliament and of the Council or for protection in accordance with national law, international obligations or practice of the Member State concerned.
5. Without prejudice to paragraph 1, any decision to withdraw the authorisation shall take account of the specific circumstances of the case, including the interests of the seasonal worker, and respect the principle of proportionality.
6. Grounds for annulment or revocation of a short-stay visa are regulated in the relevant provisions of the Visa Code.

Article 14 Duration of stay

1. Member States shall determine a maximum period of stay for seasonal workers which shall be not less than five months and not more than nine months in any 12-month period. After the expiry of that period, the third-country national shall leave the territory of the Member State unless the Member State concerned has issued a residence permit under national or Union law for purposes other than seasonal work.
2. Member States may determine a maximum period of time within any 12-month period, during which an employer is allowed to hire seasonal workers. That period shall be not less than the maximum period of stay determined pursuant to paragraph 1.

Article 15 Extension of stay or renewal of the authorisation for the purposes of seasonal work

1. Within the maximum period referred to in Article 14(1) and provided that Article 5 or 6 are complied with and the grounds set out in point (b) of Article 8(1), Article 8(2) and, if applicable, Article 8(4) are not met, Member States shall allow seasonal workers one extension of their stay, where seasonal workers extend their contract with the same employer.
2. Member States may decide, in accordance with their national law, to allow seasonal workers to extend their contract with the same employer and their stay more than once, provided that the maximum period referred to in Article 14(1) is not exceeded.
3. Within the maximum period referred to in Article 14(1) and provided that Articles 5 or 6 are complied with and the grounds set out in point (b) of Article 8(1), Article 8(2) and, if applicable, Article 8(4) are not met, Member States shall allow seasonal workers one extension of their stay to be employed with a different employer.
4. Member States may decide, in accordance with their national law, to allow seasonal workers to be employed by a different employer and to extend their stay more than once, provided that the maximum period referred to in Article 14(1) is not exceeded.
5. For the purposes of paragraphs 1 to 4, Member States shall accept the submission of an application when the seasonal worker admitted under this Directive is on the territory of the Member State concerned.
6. Member States may refuse to extend the stay or renew the authorisation for the purpose of seasonal work when the vacancy in question could be filled by nationals of the Member State concerned or by other Union citizens, or by third-country nationals lawfully residing in the Member State. This paragraph shall apply without prejudice to the principle of preference for Union citizens as expressed in the relevant provisions of the relevant Acts of Accession.
7. Member States shall refuse to extend the stay or renew the authorisation for the purpose of seasonal work where the maximum duration of stay is defined in Article 14(1) has been reached.
8. Member States may refuse to extend the stay or renew the authorisation for the purpose of seasonal work if the third-country national applies for international protection under Directive 2011/95/EU or if the third-country national applies for protection in accordance with national law, international obligations or practice of the Member State concerned.
9. Article 9(2) and points (b), (c) and (d) of Article 9(3) shall not apply to a seasonal worker who applies to be employed by a different employer in accordance with paragraph 3 of this Article when those provisions apply to the previous employer.
10. Grounds for extension of a short-stay visa are regulated in the relevant provisions of the Visa Code.

11. Without prejudice to Article 8(1), any decision on an application for an extension or renewal shall take account of the specific circumstances of the case, including the interests of the seasonal worker, and respect the principle of proportionality.

Article 16 Facilitation of re-entry

1. Member States shall facilitate re-entry of third-country nationals who were admitted to that Member State as seasonal workers at least once within the previous five years, and who fully respected the conditions applicable to seasonal workers under this Directive during each of their stays.
2. The facilitation referred to in paragraph 1 may include one or more measures such as:
(a) the grant of an exemption from the requirement to submit one or more of the documents referred to in Articles 5 or 6;
(b) the issuing of several seasonal workers permits in a single administrative act;
(c) an accelerated procedure leading to a decision on the application for a seasonal worker permit or a long stay visa;
(d) priority in examining applications for admission as a seasonal worker, including taking into account previous admissions when deciding on applications with regard to the exhaustion of volumes of admission.

Article 20 Accommodation

1. Member States shall require evidence that the seasonal worker will benefit from accommodation that ensures an adequate standard of living according to national law and/or practice, for the duration of his or her stay. The competent authority shall be informed of any change of accommodation of the seasonal worker.
2. Where accommodation is arranged by or through the employer:
(a) the seasonal worker may be required to pay a rent which shall not be excessive compared with his or her net remuneration and compared with the quality of the accommodation. The rent shall not be automatically deducted from the wage of the seasonal worker;
(b) the employer shall provide the seasonal worker with a rental contract or equivalent document in which the rental conditions of the accommodation are clearly stated;
(c) the employer shall ensure that the accommodation meets the general health and safety standards in force in the Member State concerned.

Article 22 Rights on the basis of the authorisation for the purpose of seasonal work

During the period of validity of the authorisation referred to in Article 12, the holder shall enjoy at least the following rights:
(a) the right to enter and stay in the territory of the Member State that issued the authorisation;
(b) free access to the entire territory of the Member State that issued the authorisation in accordance with national law;
(c) the right to exercise the concrete employment activity authorised under the authorisation in accordance with national law.

Article 23 Right to equal treatment

1. Seasonal workers shall be entitled to equal treatment with nationals of the host Member State at least with regard to:
(a) terms of employment, including the minimum working age, and working conditions, including pay and dismissal, working hours, leave and holidays, as well as health and safety requirements at the workplace;
(b) the right to strike and take industrial action, in accordance with the host Member State's national law and practice, and freedom of association and affiliation and membership of an organisation representing workers or of any organisation whose members are engaged in a specific occupation, including the rights and benefits conferred by such organisations, including the right to negotiate and conclude collective agreements, without prejudice to the national provisions on public policy and public security;
(c) back payments to be made by the employers, concerning any outstanding remuneration to the third-country national;
(d) branches of social security, as defined in Article 3 of Regulation (EC) No 883/2004;
(e) access to goods and services and the supply of goods and services made available to the public, except housing, without prejudice to the freedom of contract in accordance with Union and national law;
(f) advise services on seasonal work afforded by employment offices;
(g) education and vocational training;
(h) recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures;
(i) tax benefits, in so far as the seasonal worker is deemed to be resident for tax purposes in the Member State concerned.
Seasonal workers moving to a third country, or the survivors of such seasonal workers residing in a third-country deriving rights from the seasonal worker, shall receive statutory pensions based on the seasonal worker's previous employment and acquired in accordance with the legislation set out in Article 3 of Regulation (EC) No 883/2004, under the same conditions and at the same rates as the nationals of the Member States concerned when they move to a third country.

2. Member States may restrict equal treatment:
(i) under point (d) of the first subparagraph of paragraph 1 by excluding family benefits and unemployment benefits, without prejudice to Regulation (EU) No 1231/2010;
(ii) under point (g) of the first subparagraph 1 by limiting its application to education and vocational training which is directly linked to the specific employment activity and by excluding study and maintenance grants and loans or other grants and loans;
(iii) under point (i) of the first subparagraph of paragraph 1 with respect to tax benefits by limiting its application to cases where the registered or usual place of residence of the family members of the seasonal worker for whom he/she claims benefits, lies in the territory of the Member State concerned.

3. The right to equal treatment provided for in paragraph 1 shall be without prejudice to the right of the Member State to withdraw or refuse to extend or renew the authorisation for the purpose of seasonal work in accordance with Articles 9 and 15.

Article 25 Facilitation of complaints

1. Member States shall ensure that there are effective mechanisms through which seasonal workers may lodge complaints against their employers directly or through third parties which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring compliance with this Directive, or through a competent authority of the Member State when provided for by national law.
2. Member States shall ensure that third parties which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring compliance with this Directive, may engage either on behalf of or in support of a seasonal worker, with his or her approval, in any administrative or civil proceedings, excluding the procedures and decisions concerning short-stay visas, provided for with the objective of implementing this Directive.
3. Member States shall ensure that seasonal workers have the same access as other workers in a similar position to measures protecting against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with this Directive.

ANNEX TO CHAPTER 8 – RELEVANT ARTICLES OF THE INTRA-CORPORATE TRANSFER DIRECTIVE

Article 1 Subject-matter

This Directive lays down:

(a) the conditions of entry to, and residence for more than 90 days in, the territory of the Member States, and the rights, of third-country nationals and of their family members in the framework of an intra-corporate transfer;
(b) the conditions of entry and residence, and the rights, of third-country nationals, referred to in point (a), in Member States other than the Member State which first grants the third-country national an intra-corporate transfer permit on the basis of this Directive.

Article 2 Scope

1. This Directive shall apply to third-country nationals who reside outside the territory of the Member States at the time of application and apply to be admitted or who have been admitted to the territory of a Member State under the terms of this Directive, in the framework of an intra-corporate transfer as managers, specialists or trainee employees.
2. This Directive shall not apply to third-country nationals who:
(a) apply to reside in a Member State as researchers, within the meaning of Directive 2005/71/EC, in order to carry out a research project;
(b) under agreements between the Union and its Member States and third countries, enjoy rights of free movement equivalent to those of Union citizens or are employed by an undertaking established in those third countries;
(c) are posted in the framework of Directive 96/71/EC;
(d) carry out activities as self-employed workers;
(e) are assigned by employment agencies, temporary work agencies or any other undertakings engaged in making available labour to work under the supervision and direction of another undertaking;
(f) are admitted as full-time students or who are undergoing a short-term supervised practical training as part of their studies.
3. This Directive shall be without prejudice to the right of Member States to issue residence permits, other than the intra-corporate transferee permit covered, for any purpose of employment for third-country nationals who fall outside the scope of this Directive.

Article 3 Definitions

(b) 'intra-corporate transfer' means the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third-country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second member States;

(c) 'intra-corporate transferee' means any third-country national who resides outside the territory of the Member States at the time of application for an intra-corporate transferee permit and who is subject to an intra-corporate transfer;
(h) 'family members' means the third-country nationals referred to in Article 4(1) of Council Directive 2003/86/EC;
(i) 'intra-corporate transferee permit' means an authorisation bearing the acronym 'ICT' entitling its holder to reside and work in the territory of the first Member State and, where applicable, of second Member States, under the terms of this Directive;
(j) 'permit for long-term mobility' means an authorisation bearing the term 'mobile ICT' entitling the holder of an intra-corporate transferee permit to reside and work in the territory of the second Member State under the terms of this Directive;

A**rticle 5 Criteria for Admission**

1. Without prejudice to Article 11(1), a third-country national who applies to be admitted under the terms of this Directive or the host entity shall:
(a) provide evidence that the host entity and the undertaking established in a third-country belong to the same undertaking or group of undertakings;
(b) provide evidence of employment within the same undertaking or group of undertakings, from at least three up to twelve uninterrupted months immediately preceding the date of the intra-corporate transfer in the case of manager and specialists, and from at least three up to six uninterrupted months in the case of trainee employees;
(c) present a work contract and, if necessary, an assignment letter from the employer containing the following: (i) details of the duration of the transfer and the location of the host entity or entities;(ii) evidence that the third-country national is taking a position as a manger, specialist or trainee employee in the host entity or entities in the Member State concerned; (iii) the remuneration as well as other terms and conditions of employment granted during the intra-corporate transfer; (iv) evidence that the third-country national will be able to transfer back to an entity belonging to that undertaking or group of undertakings and established in a third country at the end of the intra-corporate transfer;
(d) provide evidence that the third-country national has the professional qualifications and experience needed in the host entity to which he or she is to be transferred as manager or specialist or, in the case of a trainee employee, the university degree required;
(e) where applicable, present documentation certifying that the third-country national fulfils the conditions laid down under the national law of the Member State concerned for Union citizens to exercise the regulated profession to which the application relates;
(f) present a valid travel document of the third-country national, as determined by national law, and, if required, an application for a visa or a visa, Member Stats may require the period of validity of the travel document to cover at least the period of validity of the intra-corporate transferee permit;
(g) without prejudice to existing bilateral agreements, provide evidence of having, or, if provided for by national law, having applied for, sickness insurance for all the risks normally covered for nationals of the Member State concerned for periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or as a result of, the work carried out in that Member State.
2. Member States may require the applicant to present the documents listed in points (a), (c), (d), (e) and (g) of paragraph 1 in an official language of the Member State concerned.

3. Member States may require the applicant to provide, at the latest at the time of the issue of the intra-corporate transferee permit, the address of the third-country national concerned in the territory of the Member State.
4. Member States shall require that:
(a) all conditions in the law, regulations, or administrative provisions and/or universally applicable collective agreements applicable to posted workers in a similar situation in the relevant occupational branches are met during the intra-corporate transfer with regard to terms and conditions of employment other than remuneration.
In the absence of a system for declaring collective agreements of universal application, Member States my base themselves on collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers and employee organisations at national level and which are applied throughout their national territory;
(b) the remuneration granted to the third-country national during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established.
5. On the basis of the documentation provided pursuant to paragraph 1, Member States may require that the intra-corporate transferee will have sufficient resources during his or her stay to maintain himself or herself and his or her family members without having recourse to the Member States' social assistance system.
6. In addition to the evidence required under paragraph 1, any third-country national who applies to be admitted as a trainee employee may be required to present a training agreement relating to the preparation for his or her future position within the undertaking or group of undertakings, including a description of the training programme, which demonstrates that the purpose of the stay is to train the trainee employee for career development purposes or in order to obtain training in business techniques or methods, its duration and the conditions under which the trainee employee is supervised during the programme.
7. Any modification during the application procedure that affects the criteria for admission set out in this Article shall be notified by the applicant to the competent authorities of the Member State concerned.
8. Third-country nationals who are considered to pose a threat to public policy, public security or public health shall not be admitted for the purposes of this Directive.

Article 6 Volumes of admission

This Directive shall not affect the right of a Member State to determine the volumes of admission of third-country nationals in accordance with Article 79(5) TFEU. On that basis, an application for an intra-corporate transferee permit may either be considered inadmissible or be rejected.

Article 7 Grounds for rejection

1. Member States shall reject an application for an intra-corporate transferee permit in any of the following cases:
(a) where Article 5 is not complied with;
(b) where the documents presented were fraudulently acquired, or falsified or tampered with;

(c) where the host entity was established for the main purpose of facilitating the entry of intra-corporate transferees;
(d) where the maximum duration of stay as defined in Article 12(1) has been reached.
2. Member States shall, if appropriate, reject an application where the employer or the host entity has been sanctioned in accordance with national law for undeclared work and/or illegal employment.
3. Member States may reject an application for an intra-corporate transferee permit in any of the following cases:
(a) where the employer or the host entity has failed to meet its legal obligations regarding social security, taxation, labour rights or working conditions;
(b) where the employer's or host entity's business is being or has been wound up under national insolvency laws or no economic activity is taking place;
(c) where the intent or effect of the temporary presence of the intra-corporate transferee is to interfere with, or other-wise affect the outcome of, any labour management dispute or negotiation.
4. Member States may reject an application for an intra-corporate transferee permit on the ground set out in Article 12(2).
5. Without prejudice to paragraph 1, any decision to reject an application shall take account of the specific circumstances of the case and respect the principle of proportionality.

Article 8 Withdrawal or non-renewal of the intra-corporate transferee permit

1. Member States shall withdraw an intra-corporate transferee permit in any of the following cases:
(a) where it was fraudulently acquired, or falsified or tampered with;
(b) where the intra-corporate transferee is residing in the Member State concerned for purposes other than those for which he or she was authorised to reside;
(c) where the host entity was established for the main purpose of facilitating the entry of intra-corporate transferees.
2. Member States shall, if appropriate, withdraw and intra-corporate transferee permit where the employer or the host entity has been sanctioned in accordance with national law for undeclared work and/or illegal employment.
3. Member States shall refuse to renew an intra-corporate transferee permit in any of the following cases:
(a) where it was fraudulently acquired, or falsified or tampered with;
(b) where the intra-corporate transferee is residing in the Member State concerned for purposes other than those for which he or she was authorised to reside;
(c) where the host entity was established for the main purpose of facilitating the entry of intra-corporate transferees;
(d) where the maximum duration of stay as defined in Article 12(1) has been reached.
4. Member States shall, if appropriate, refuse to renew an intra-corporate transferee permit where the employer or the host entity has been sanctioned in accordance with national law for undeclared work and/or illegal employment.
5. Member States may withdraw or refuse to renew an intra-corporate transferee permit in any of the following cases:
(a) where Article 5 is not or is no longer complied with;
(b) where the employer or the host entity has failed to meet its legal obligations regarding social security, taxation, labour rights or working conditions;

(c) where the employer's or the host entity's business is being or has been wound up under national insolvency laws or if no economic activity is taking place;
(d) where the intra-corporate transferee has not complied with the mobility rules set out in Article 21 or 22.
6. Without prejudice to paragraphs 1 and 3, any decision to withdraw or to refuse to renew an intra-corporate transferee permit shall take account of the specific circumstances of the case and respect the principle of proportionality.

Article 12 Duration of an intra-corporate transfer

1. The maximum duration of the intra-corporate transfer shall be three years for managers and specialists and one year for trainee employees after which they shall leave the territory of the Member States unless they obtain a residence permit on another basis in accordance with the Union or national law.
2. Without prejudice to their obligations under international agreements, Member States may require a period of up to six months to elapse between the end of the maximum duration of a transfer referred to in paragraph 1 and another application concerning the same third-country national for the purposes of this Directive in the same Member State.

Article 13 Intra-corporate transferee permit

2. The period of validity of the intra-corporate transferee permit shall be at least one year or the duration of the transfer to the territory of the Member State concerned, whichever is shorter, and may be extended to a maximum of three years for managers and specialists and one year for trainee employees.

Article 17 Rights on the basis of the intra-corporate transferee permit

During the period of validity of an intra-corporate transferee permit, the holder shall enjoy at least the following rights:
(a) the right to enter and stay in the territory of the first Member State;
(b) free access to the entire territory of the first Member State in accordance with its national law;
(c) the right to exercise the specific employment activity authorised under the permit in accordance with national law in any host entity belonging to the undertaking or the group of undertakings in the first Member State.
The rights referred to in points (a) and (c) of the first paragraph of this Article shall be enjoyed in second Member States in accordance with Article 20.

Article 18 Right to equal treatment

1. Whatever the law applicable to the employment relationship, and without prejudice to point (b) of Article 5(4), intra-corporate transferees admitted under this Directive shall enjoy at least equal treatment with persons covered by Directive 96/71/EC with regard to the terms and conditions of employment in accordance with Article 3 of Directive 96/71/EC in the Member State where the work is carried out.
2. Intra-corporate transferees shall enjoy equal treatment with nationals of the Member State where the work is carried out as regards:

(a) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the rights and benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;
(b) recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures;
(c) provisions in national law regarding the branches of social security defined in Article 3 of Regulation (EC) No 883/2004, unless the law of the country of origin applies by virtue of bilateral agreements or the national law of the Member State where the work is carried out, ensuring that the intra-corporate transferee is covered by the social security legislation in one of those countries. In the event of intra-EU mobility, and without prejudice to bilateral agreement ensuring that the intra-corporate transferee is covered by the national law of the country of origin, Regulation (EU) No 1231/2010 shall apply accordingly;
(d) without prejudice to Regulation (EU) No 1231/2010 and to bilateral agreements, payment of old-age, invalidity and death statutory pensions based on the intra-corporate transferees' previous employment and acquired by intra-corporate transferees moving to a third country, or the survivors of such intra-corporate transferees residing in a third country deriving rights from the intra-corporate transferee, in accordance with the legislation set out in Article 3 of Regulation (EC) No 883/2004, under the same conditions and at the same rates as the nationals of the Member State concerned when they move to a third country;
(e) access to goods and services and the supply of goods and services made available to the public, except procedures for obtaining housing as provided for by national law, without prejudice to freedom of contract in accordance with Union and national law, and services afforded by public employment offices.
The bilateral agreements or national law referred to in this paragraph shall constitute international agreements or Member States' provisions within the meaning of Article 4.
3. Without prejudice to Regulation (EU) No 1231/2010, Member States may decide that point (c) of paragraph 2 with regard to family benefits shall not apply to intra-corporate transferees who have been authorised to reside and work in the territory of a Member State for a period not exceeding nine months.
4. This Article shall be without prejudice to the right of the Member State to withdraw or to refuse to renew the permit in accordance with Article 8.

Article 19 Family members

1. Directive 2003/86/EC shall apply in the first Member State and in the second Member State which allow the intra-corporate transferee to stay and work on their territory in accordance with Article 22 of this Directive, subject to the derogations laid down in this Article.
2. By way of derogation from Articles 3(1) and Article 8 of Directive 2003/86/EC, family reunification in the Member States shall not be made dependent on the requirement that the holder of the permit issued by those Member States on the basis of this Directive has reasonable prospects of obtaining the right of permanent residence and has a minimum period of residence.
3. By way of derogation from the third subparagraph of Article 4(1) and from Article 7(2) of Directive 2003/86/EC, the integration measures referred to therein may be applied by the Member States only after the persons concerned have been granted family reunification.
4. By way of derogation from the first subparagraph of Article 5(4) of Directive 2003/86/EC, residence permits for family members shall be granted by a Member State, if the conditions for

family reunification are fulfilled, within 90 days from the date on which the complete application was submitted. The competent authority of the Member State shall process the residence permit application for the intra-corporate transferee's family members at the same time as the application for the intra-corporate transferee permit or the permit for long-term mobility, in cases where the residence permit application for the intra-corporate transferee's family members is submitted at the same time. The procedural safeguards laid down in Article 15 shall apply accordingly.
5. By way of derogation from Article 13(2) of Directive 2003/86/EC, the duration of validity of the residence permits of family members in a Member State shall, as a general rule, end on the date of expiry of the intra-corporate transferee permit or permit for long-term mobility issued by that Member State.
6. By way of derogation from Article 14(2) of Directive 2003/86/EC and without prejudice to the principle of preference for Union citizens as expressed in the relevant provisions of the relevant Acts of Accession, the family members of the intra-corporate transferee who have been granted family reunification shall be entitled to have access to employment and self-employed activity in the territory of the Member State which issued the family members residence permit.

Article 20 Mobility

Third-country nationals who hold a valid intra-corporate transferee permit issued by the first Member State may, on the basis of that permit and a valid travel document and under the conditions laid down in Article 21 and 22 and subject to Article 23, enter, stay and work in one or several second Member States.

Article 21 Short-term mobility

1. Third-country nationals who hold a valid intra-corporate transferee permit issued by the first Member State shall be entitled to stay in any second Member State and work in any other entity, established in the latter and belonging to the same undertaking or group of undertakings, for a period of up to 90 days in any 180-day period per Member State subject to the conditions laid down in this Article.
2. The second Member State may require the host entity in the first Member Sate to notify the first Member State and the second Member State of the intention of the intra-corporate transferee to work in an entity established in the second Member State.
In such cases, the second Member State shall allow the notification to take place either:
(a) at the time of the application in the first Member State, where the mobility to the second Member State is already envisaged at that stage; or
(b) after the intra-corporate transferee was admitted to the first Member State, as soon as the intended mobility to the second Member State is known.
3. The second Member State may require the notification to include the transmission of the following documents and information:
(a) evidence that the host entity in the second Member State and the undertaking established in a third country belong to the same undertaking or group of undertakings;
(b) the work contract and, if necessary, the assignment letter, which were transmitted to the first Member State in accordance with point (c) of Article 5(1);
(c) where applicable, documentation certifying that the intra-corporate transferee fulfils the conditions laid down under the national law of the Member State concerned for Union citizens to exercise the regulated profession to which the application relates;

(d) a valid travel document, as provided for in point (f) of Article 5(1); and
(e) where not specified in any of the preceding documents, the planned duration and dates of the mobility.
The second Member State may require those documents and that information to be presented in an official language of that Member State.
4. Where the notification has taken place in accordance with point (a) of paragraph 2, and where the second Member State has not raised any objection with the first Member State in accordance with paragraph 6, the mobility of the intra-corporate transferee to the second Member State may take place at any moment within the period of validity of the intra-corporate transferee permit.
5. Where the notification has taken place in accordance with point (b) of paragraph 2, the mobility may be initiated after the notification to the second Member State immediately or at any moment thereafter within the period of validity of the intra-corporate transferee permit.
6. Based on the notification referred to in paragraph 2, the second Member State may object to the mobility of the intra-corporate transferee to its territory within 20 days from having received the notification, where:
(a) the conditions set out in point (b) of Article 5(4) or in point (a), (c) or (d) of paragraph 3 of this Article are not complied with;
(b) the documents presented were fraudulently acquired, or falsified, or tampered with;
(c) the maximum duration of stay as defined in Article 12(1) or in paragraph 1 of this Article has been reached.
The competent authorities of the second Member State shall inform without delay the competent authorities of the first Member State and the host entity in the first Member State about their objection to mobility.
7. Where the second Member State objects to the mobility in accordance with paragraph 6 of this Article and the mobility has not yet taken place, the intra-corporate transferee shall not be allowed to work in the second Member Sate as part of the intra-corporate transfer. Where the mobility has already taken place, Article 23(4) and (5) shall apply.
8. Where the intra-corporate transferee permit is renewed by the first Member State within the maximum duration provided for in Article 12(1), the renewed intra-corporate transferee permit shall continue to authorise its holder to work in the second Member State, subject to the maximum duration provided for in paragraph 1 of this Article.
9. Intra-corporate transferees who are considered to pose a threat to public policy, public security or public health shall not be allowed to enter or to stay on the territory of the second Member State.

Article 22 Long-term mobility

1. In relation to third-country nationals who hold a valid intra-corporate transferee permit issued by the first Member State and who intend to stay in any second Member State and work in any other entity, established in the latter and belonging to the same undertaking or group of undertakings, for more than 90 days per Member State, the second Member Stay may decide to:
(a) apply Article 21 and allow the intra-corporate transferee to stay and work on its territory on the basis of and during the period of validity of the intra-corporate transferee permit issued by the first Member Sate; or
(b) apply the procedure provided for in paragraphs 2 to 7.
2. Where an application for long-term mobility is submitted:
(a) the second Member State may require the applicant to transmit some or all of the following documents where they are required by the second Member State for an initial application: (i)

evidence that the host entity in the second Member State and the undertaking established in a third country belong to the same undertaking or group of undertakings; (ii) a work contract and, if necessary, an assignment letter, as provided for in point (c) of Article 5(1); (iii) where applicable, documentation certifying that the third-country national fulfils the conditions laid down under the national law of the Member State concerned for Union citizens to exercise the regulated profession to which the application relates; (iv) a valid travel document, as provided for in point (f) of Article 5(1); (v) evidence of having or, if provided for by national law, having applied for, sickness insurance, as provided for in point (g) of Article 5(1).

The second Member State may require the applicant to provide, at the least at the time of issue of the permit for long-term mobility, the address of the intra-corporate transferee concerned in the territory of the second Member State.

The second Member State may require those documents and that information to be presented in an official language of that Member State.

(b) the second Member State shall take a decision on the application for long-term mobility and notify the decision to the applicant in writing as soon as possible but not later than 90 days from the date on which the application and the documents provided for in point (a) were submitted to the competent authorities of the second Member State;

(c) the intra-corporate transferee shall not be required to leave the territories of the Member States in order submit the application and shall not be subject to a visa requirement;

(d) the intra-corporate transferee shall be allowed to work in the second Member State until a decision on the application for long-term mobility has been taken by the competent authorities, provided that: (i) the time period referred to in Article 21(1) and the period of validity of the intra-corporate transferee permit issued by the first Member State has not expired; and (ii) if the second Member State so requires, the complete application has been submitted to the second Member State at least 20 days before the long-term mobility of the intra-corporate transferee starts;

(e) an application for long-term mobility may not be submitted at the same time as a notification for short-term mobility. Where the need for long-term mobility arises after the short-term mobility of the intra-corporate transferee has started, the second Member State may request that the application for long-term mobility be submitted at least 20 days before the short-term mobility ends.

3. Member States may reject an application for long-term mobility where:

(a) the conditions set out in point (a) of paragraph 2 of this Article are not complied with or the criteria set out in Article 5(4), Article 5(5) or Article 5(8) are not complied with;

(b) one of the grounds covered by point (b) or (d) of Article 7(1) or by Article 7(2), (3) or (4) applies; or

(c) the intra-corporate transferee permit expires during the procedure.

4. Where the second Member State takes a positive decision on the application for long-term mobility as referred to in paragraph 2, the intra-corporate transferee shall be issued with a permit for long-term mobility allowing the intra-corporate transferee to stay and work in its territory. This permit shall be issued using the uniform format laid down in Regulation (EC) No 1030/2002. Under the heading 'type of permit', in accordance with point (a)6.4 of the Annex to Regulation (EC) No 1030/2002, the Member State shall enter: 'mobile ICT". Member States may also add an indication in their official language or languages.

Member States may indicate additional information relating to the employment activity during the long-term mobility of the intra-corporate transferee in paper format, and/or store such data in electronic format as referred to in Article 4 of Regulation (EC) No 1030/2002 and point (a)16 of the Annex thereto.

5. Renewal of a permit for long-term mobility is without prejudice to Article 11(3).

6. The second Member Sate shall inform the competent authorities in the first Member State where a permit for long-term mobility is issued.
7. Where a Member State takes a decision on an application for long-term mobility, Article 8, Article 15(2) to (6) and Article 16 shall apply accordingly.

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Curriculum Vitae

Bjarney Friðriksdóttir holds a Master degree in International Affairs from the School of International and Public Affairs, Columbia University, New York and a Master in European and International Law from the University of Amsterdam Law School. Her work experience includes being a Senior Adviser to the Task Force Against Trafficking in Human Beings at the Council of the Baltic Sea States and working with international organisations in the field for several years. In 2008 and 2009 she was a protection officer with the United Nations High Commissioner for Refugees in Syria, before that she worked a as a human rights monitor in Sri Lanka and as the international manager of the United Nations Development Fund for Women Project Office in Kosovo. From 2001-2003 Bjarney was the director of the Intercultural Centre in Reykjavik and from 1997-2001 the director of the Icelandic Human Rights Centre. She has conducted consulatancy work for the International Organisation for Migration, Reykjavik's Human Rights Council, the European Network of Experts on Freedom of Movement of Workers, the Centre for European Policy Studies and the Permits Foundation.