

STUDY

Requested by the LIBE committee



The EU legal migration package

Towards a rights-based approach to attracting skills and talent to the EU



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, assesses the European Commission's 2022 legal migration package on effectiveness, efficiency, legal and practical coherence, and fundamental rights compliance. The study finds that a more coherent and ambitious rights-based legal migration agenda is warranted. In the EU struggle for skilled and talented third-country national workers, social obligations, climate change, and sustainable growth cannot be disregarded.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
AMIF	Asylum, Migration and Integration Fund
BCD	Blue Card Directive
CEAS	Common European Asylum System
CEE	Central Eastern European
CJEU	Court of Justice of the European Union
CoE	Council of Europe
EMN	European Migration Network
EoI	Expression of Interest
EUAA	European Union Agency for Asylum
FRA	Fundamental Rights Agency
FTA	Foreign Trade Agreement
ICTD	Intercompany Transfer Directive
ILO	International Labour Organisation
LTC	Long-term care
LTR	Long-term residence
LTRD	Long-term residence Directive
MPF	Migration Policy Framework
MS	Member States
OECD	Organisation for Economic Co-operation and Development
RCD	Reception Conditions Directive
SBC	Schengen Borders Code
SPD	Single Permit Directive

SRD	Students & Researchers Directive
SWD	Seasonal Workers Directive
TCN	Third-country National
TFEU	Treaty on the Functioning of the EU
TP	Temporary Protection
TPD	Temporary Protection Directive
WHO	World Health Organisation
YMS	Youth Mobility Scheme

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EXECUTIVE SUMMARY

Background

The European Commission's *Legal migration package: Attracting skills and talent to the EU* of April 2022 is a next step in the road map on legal migration into the EU and the object of this study. The package consists of three pillars: first, a legislative pillar presenting recasts of two Directives: the Single Permit Directive and the Long-Term Residence Directive. The aim is to simplify migration procedures and to improve migrant workers' rights. Secondly, there is an operational pillar for supporting better matching of skills and needs for the EU and partner countries, which develops Talent Partnerships with countries of origin and an EU Talent Pool, to better match EU employers and third-country national (TCN) workers. Thirdly, the package presents a forward-looking pillar with so-called key priority areas of exploring potential avenues for legal migration in the medium to long term. These avenues concern labour migration for care, of youth and for innovation.

Aims of the Study

The aim of this study is to map and assess the European Commission's proposals as to their effectiveness, efficiency, legal and practical coherence, and fundamental rights compliance. Furthermore, the aim is to identify missing legal and policy options and present alternative choices closely related to the proposals.

Key Findings

The Commission's Legal Migration Package is an important step in improving the legal migration acquis. Yet, our in-depth analysis of the Package as to the proposals' effectiveness, efficiency, legal and practical coherence, and fundamental rights compliance leaves room for improvement.

A clear narrative on sustainable rights-based migration policy is missing

The European Commission makes a strong case for labour migration for demographic, political, and economic reasons. A socially sustainable policy would need to draw from intersecting policy fields relating to a wider societal well-being in the EU Member States as well as countries of origin, today as well as taking into account the needs of future generations. **Sustainability for TCN migrants needs to be defined in terms of rights and prospects.** We see improvement in respect of the rights and prospects, but more can be offered. Were the improvements to be deleted during the inter-institutional negotiations, we would strongly question the social sustainability agenda of the European legislature.

Coherence at all levels can be improved

Coherence **within the legal migration acquis** can be improved. Especially the recently adopted revised Blue Card Directive has much more to offer in respect of efficient procedures, proportionality and individual assessments, migrant rights' including rights of family members and rights to remain in the EU. Coherence within the package is missing as, for instance, the Talent Partnerships are not integrated in a coherent way in the Single Permit Directive.

A coherent and rights-based **intersection of legal migration pathways and international protection is missing.** Beneficiaries of international protection and beneficiaries of temporary protection remain excluded from the scope of the Single Permit Directive, which makes the system incoherent, inefficient, and not as rights-based as it claims to be. We also see opportunities for more coherence in offering forcibly displaced TCNs access to the Talent Pool and developing Partnerships targeting such populations. The efforts of the European Commission to pilot the Talent Pool with Ukrainian displaced persons in a few EU Member States is to be praised. Yet, we have pointed out that **measures are needed to secure the legal employment of Ukrainians** in case the temporary

protection status ends by a Council Decision or expiration of the three-year protection. The successful inclusion of many forcibly displaced Ukrainians on the European labour market would come to an end were the Reception Conditions Directive to apply unchanged, it could put their right to access the labour market on hold.

A coherent **intersection with other fields of EU law, such as the social pillar of rights**, can be improved. In terminology, in awareness of the social rights of (irregularly staying) TCN migrant workers, as well as in the enforcement of these rights, the Employer Sanctions Directive and the Seasonal Workers Directive have more to offer than the proposed Single Permit Directive. Aligning the legal migration acquis with the social rights, such as the Directive on transparent and predictable working conditions and the recently adopted Minimum Wage Directive would improve efficiency and effectiveness of enforcement of the social rights and the protection of migrant workers against abusive working relations.

Benefit from (long-term) care workers already present in the EU territory

We also brought forward the **need to benefit from (long-term) care workers** already present in the EU territory, yet without legal residence. This can be done by, for instance, allowing applications from within the EU territory for (long-term) care work or other shortage occupations. Many so-called 'undocumented' irregularly staying migrants offer care services to families and elderly people in need in the EU. And although some of the social rights directives apply to them, there is little awareness of their rights nor is their security of residence, opportunity to reunite with their family, or to build-up rights towards more permanent residence in the EU guaranteed. They have sought-after care skills and their endeavour to care for Europeans, in jobs Europeans prefer not to perform, should be rewarded with legal residence.

Ways forward to improve enforcement

The European Commission could have initiated infringement procedures to enforce Member State compliance and it could recast the two Directives to this end. It has chosen the latter, for now. We recommend expanding the reporting obligations of the Member States in the two recast proposals towards better monitoring and, if needed, better enforcement using the tool of infringement procedures in the future.

1 INTRODUCTION

1.1. Context of this study

The context of this study is the European Union legal migration acquis, based on article 79(1) and 79(2) of the Treaty of the Functioning of the EU (TFEU). This legal migration acquis is a patchwork of legislative tools and policy instruments that has developed over the past twenty years.¹ The Commission presented a 'New Agenda' in 2015 in which it was regarding legal migration as one of the four key pillars of the EU approach to asylum and migration, but which was not followed by any effect then apart from the revision of the Blue Card Directive (BCD).² Prior to the BCD, the directives on students and researchers' migration were combined into the Students and Researchers Directives (SRD).³ In April 2016, the European Parliament called for a comprehensive labour migration policy and better integration of third-country national (TCN) migrants, "in order to meet the European Union's goals for smart, sustainable and inclusive growth, as well as to fill gaps identified in the European Union's labour market".⁴ In 2019 the 'Fitness check'⁵, underlined in general "that more could be done to increase the impact of the EU legal migration framework on the EU's demographic and migration challenges". A broad scholarly analysis on the attractiveness of EU labour immigration policies then led to conclude that "a central objective to guide the stages that will follow the Commission's Legal Migration Fitness Check should be streamlining and harmonising the substantive conditions for admission, as well as a uniform framework of rights and standards for all third-country workers in the EU."⁶ Indeed, following the Fitness check in 2019, the European Commission brought forward its 'fresh start' on migration and asylum in 2020 in the Pact on Migration and Asylum.⁷ The EU has for long been called upon and recognised the need to improve legal pathways to regular migration but achieving this goal has been elusive. All along, the European Parliament has been calling on the Commission to make it a priority to present an ambitious admission scheme for low and medium-skilled third-country workers in consultation with social partners and civil society, while reflecting the labour market demand of the Member States. Renewing its call for enhanced pathways for legal migration and suggesting practical tools such as the Talent Pool, the European Parliament has adopted two resolutions.⁸

The *Legal migration package: Attracting skills and talent to the EU*⁹ is the next step in the road map set by the Commission on legal migration¹⁰ and the object of this study. The package consists of three pillars: first, a legislative pillar presenting recasts of two Directives, the Single Permit Directive and the Long-Term Residents Directive. The aim is simplifying migration procedures and improving migrant workers' rights. Secondly, there is an operational pillar for supporting better matching of skills and needs for the EU and partner countries, which develops Talent Partnerships with countries of origin

¹ On this development see De Lange and Groenendijk 2021; Minderhoud 2021; Farcy 2022.

² European Commission 2015; Directive (EU) 2021/1883.

³ Directive (EU) 2016/801.

⁴ European Parliament 2016.

⁵ European Commission 2019a, available at https://ec.europa.eu/home-affairs/policies/migration-and-asylum/legal-migration-and-integration/legal-migration-fitness-check_en.

⁶ Carrera, Geddes & Guild, 2017, p. 204

⁷ European Commission 2020a.

⁸ European Parliament 2021c; European Parliament 2021h.

⁹ European Commission (COM(2022) 657 final) of 27 April, 2022.

¹⁰ We follow the Commission's use of terminology and speak of 'legal' migration. We are aware of the ILO and UN bodies' preference for the term 'regular' migration instead, which is the terminology used in for example the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990, not ratified by any of the current EU Member States.

and an EU Talent Pool, to better match EU employers and third-country national (TCN) workers. Thirdly, the package presents a forward-looking pillar with so-called key priority areas of exploring potential avenues for legal migration in the medium to long term. These avenues concern labour migration for care, of youth and for innovation.

Our point of departure of this in-depth analysis of the Package is that we recognize the challenges of demographic change and needs of businesses in the EU for skilled workers no longer available locally to take up the work. This reality leads large industries, small- and medium enterprises, as well as educational, health and other public service providers 'struggle for skills'. Labour migration is one of the solutions to this conundrum. As does the Commission and the European Parliament, our research takes into account the demands of sustainable and inclusive growth. Member States, as do countries of origins, face climate change induced global economic transitions, in which legal migration has a part to play. Our research results reveal shortcomings in legal and policy options in the European Commission's proposals yet relevant to achieving the Commission's objective of sustainability for migrants through a rights-based approach.

1.2. Aims and Approach

The overall aims of this study are:

- to map and assess the European Commission's proposals as to their effectiveness, efficiency, legal and practical coherence, and fundamental rights compliance;
- to identify missing legal and policy options (other choices) closely related to the proposals.

Although asked, we found there was no need to calculate to what extent our other policy options can achieve the same benefits at lesser cost. We found no budgetary implications for both legislative acts.

The Odysseus Network answered the EP LIBE committee call for a study on the European Commission's proposals as brought forward in the *Legal migration package Attracting skills and talent to the EU*. The research team are highly specialized researchers embedded in the Odysseus Network and offer a rights-based analysis of the legal migration package. Besides desk research, a number of members of the Odysseus Network completed a brief questionnaire on the implementation of the SPD and the LTRD in their respective countries, and we conducted online interviews or email exchanges on the package. We also draw from participating in conferences and events on topics related to the operational and forward-looking pillar. We are most grateful to all who offered us their time and most useful insights. For a more detailed outline of our methodology, we refer to Annex 1.

1.3. Structure

Following the structure of the Commission's package, our material is organised in four chapters.

Chapter 3 discusses the Proposal for a **recast of the Single Permit 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. The Single Permit Directive, adopted in 2011, while providing a solid framework for a common status of third country nationals in the EU with permission to work, has been underutilized by many Member States. Among the innovative elements of the directive was the fusion of work and residence permits thus reducing administrative workloads in migration departments, uncertainty for employers (which otherwise have had to ensure that their employees had both work and residence permits through procedures that were often the responsibility of different government departments) and simplicity for third country nationals themselves. Thus, though the advantages of the new system were substantial,

there was concern in some state sectors that control over third country national workers was somehow diminished or at least consolidated in one ministry rather than shared. According to Eurostat, the most important single reason for issuing a first residence permit to a third country national in the EU is work.¹¹ According to the 2019 Fitness check,¹² France, Italy, Germany, Spain and Portugal together issued 75% of the single permits recorded. While this means that many Member States were not making substantial use of the directive, it must also be borne in mind that the first four are the Member States (other than Poland) which issue the most first residence permits to third country nationals including for purposes of work. The Commission's proposal for a recast directive has a number of objectives, first among which is to make the directive more attractive to Member States while widening the personal scope.

Chapter 4 deals with the Proposal for a **recast of the Long-Term Residence Directive** concerning the status of third-country nationals who are long-term residents. The Long-Term Residence Directive, adopted in 2003, was the second measure adopted by the EU in the field of regular migration after the allocation of competence under the Amsterdam Treaty in 1999. While the competence under which it was adopted did not require the measure within five years (the case for other areas) the choice of the legislator was to work quickly towards the Tampere Conclusion commitment of fair treatment of third country nationals. However, a significant problem was that Member States' policies in this area varied considerably.¹³ While most had some status for long-term resident third country nationals, the qualifying periods of residence varied, the conditions varied and the degree of security of residence was uneven. Thus, the 2003 Directive was negotiated in an area where harmonization would be difficult. In recognition of this, the Directive permits Member States to continue to apply their national long residence schemes in parallel with the Directive.¹⁴ This has resulted in different rates of use of the directive depending on the Member State. The proposal seeks to create a level playing field now that the directive has been in place for almost 20 years. The objective is to widen the personal scope, clarify the rights of long-term residents and iron out practical administrative problems of implementation.¹⁵

We analyse the text of the proposal focusing especially but not exclusively on the shortcomings and deficits which have been revealed by previous evaluations, in particular the 2019 Fitness Test. The Commission's proposal for a recast directive has a number of objectives, first among which is to remove the main barriers to intra-EU mobility, and furthermore to make the directive more attractive by expanding the conditions to acquire the EU LTR status, enhancing circular migration opportunities but also, answering to the European Parliament's criticisms,¹⁶ curbing access to the LTR for those present in the EU under investor residence schemes.

In Chapter 5, we discuss the measures set out in the **operational pillar** of the Package on measures Talent Partnerships & the Talent Pool. This is the so-called external limb of the EU's migration policy and so far, it resulted in limited additional mobility opportunities for third country nationals.

Central to Chapter 6 is the **forward-looking pillar** on long-term care, youth mobility and innovative entrepreneurs. The Commission proposes a step-by-step approach where the European Parliament asked for a scheme for low- and medium skilled labour migration. With respect to the care sector, which expects over 7 million job openings for essential care work by 2030, the Commission will launch a mapping of the admission conditions at the national level and has identified the need to assess how it

¹¹ EUROSTAT MIGR_RESOCC.

¹² European Commission 2019a, p. 20.

¹³ Shortcomings are mentioned e.g. in the Fitness check or in the Implementation Report on the LTR Directive.

¹⁴ More also in De Lange and Groenendijk 2021.

¹⁵ See also Explanatory memorandum to the proposal for the recast of LTR.

¹⁶ European Parliament 2021c.

can help improve admission to the EU of this category of essential workers. Earlier, Navarra and Fernandes proposed youth mobility through working-holiday schemes. This type of mobility is likely to offer legal migration pathways for young third-country nationals, to reduce EU labour shortages, and to contribute to the EU's Skills Agenda.¹⁷ It is a common practice in at least some Member States, yet national schemes do not give access to the EU as a whole, which could make such schemes more attractive. The Commission intends to investigate opening up the EU through such a Youth Mobility Scheme in the third quarter of 2022. An entry policy for entrepreneurial migrants was part of the original Directive on legal migration for the purpose of employment and self-employment, proposed in 2001 and later withdrawn.¹⁸ The topic of migrant entrepreneurship has been researched extensively by e.g. the European Migration Network and in academic studies.¹⁹

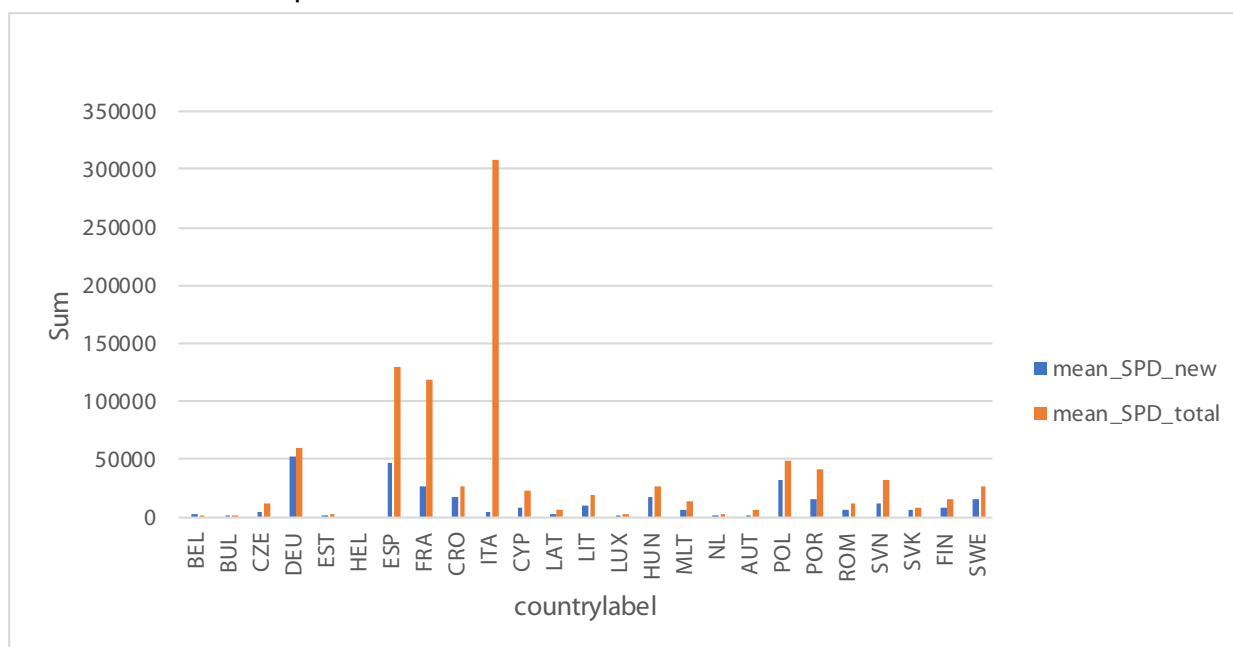
To conclude, this study provides an in-depth and rights-based analysis of the issues outlined in the Commission's proposals in the legal migration package and presents policy recommendations on moving forward.

1.4. Some statistical data on legal migration into the EU

The EU Member States have to provide data in accordance with Regulation 862/2007/EC and with a specific article in the Single Permit Directive (Article 15 SPD).

Eurostat statistics on the Single Permit include the renewal, change, and first issued permits. In addition, the data reveals the reason of entry for employment, family and student purposes. As this study is concerned with the employment purposes, we first focus on Single Permits for that specific purpose.

Figure 1: Average (mean) annual number of Single Permits (under SPD), new and total, issued between 2013-2021, per destination Member State



Source: EUROSTAT: MIGR_RESSING

¹⁷ Navarra and Fernandes 2021, p. 74-75.

¹⁸ European Commission 2001.

¹⁹ European Migration Network 2019; De Lange 2018.

Figure 1 presents both first issue and renewal decisions on Single Permits. Over the past eight years, Germany, Spain, France, Croatia and Poland issued most new SPs (blue). Italy did not issue many new permits, contrary to Poland. In Italy the vast majority is renewed (10,000-20,000 new permits issued annually; and in total an average of over 300,000 exist); Poland and Germany mostly issue new permits and very few extensions.

Eurostat provides data on the duration of a Single Permit specifying: 3-5 months, 6-11 months and 12 or more months. The choice for these durations is not clearly explained. If the SPs of >12 months are not split in duration, this might explain part of the variation between Member States in renewal percentages.

Table 1: Average duration of SPs issued for EMPLY reasons (per year 2014-2021)

Country	Duration			totals
	%3-5mo	%6-11mo	%>12mo	
Germany	7.07%	32.13%	60.80%	51,567
France	1.05%	6.58%	92.37%	119,563
Italy	2.52%	33.45%	64.04%	308,865
Poland	2.01%	11.30%	86.69%	49,282
Portugal	0.02%	0.30%	99.68%	42,162

Source EUROSTAT: MIGR_RESSING; filtered by EMPLY only.

A short duration means the permit needs frequent renewal. This renewal is used by some Member States to assess anew if the conditions are met, thus creating legal uncertainty for the TCN and the employer. Most SPs are however granted for more than 12 months. This suggests the permit is not evidently used for typical temporary or seasonal labour, for which the SWD should be used.

According to article 3 SPD, the Directive applies to all TCNs who have been admitted for the purpose of work as well as those who have been admitted for another purpose who are allowed to work. If anything, the statistics show a great variety of registering people as holding an SP when in the EU for employment or as family members or students. In France, for instance, the number of total family SPs averaged 391,257 per year between 2013 and 2021. For instance, while in Germany, the COVID-19 pandemic seems to have reduced greatly the issue of SPs (from 402,000 in 2019 compared with 28,000 in the subsequent year), the statistics for France, Portugal, Austria and Latvia show the underlying ground for issue of most of their SPs as 'other', leaving the observer without any actual knowledge about the use of SPs in these countries. In the Netherlands, on the other hand, both students and family migrants are registered at 0. However, the Netherlands issues an average of 30,000 family migration permits annually (MIGR-RESFAM). This supports our finding that the Netherlands does not use the SPD as is intended. This conclusion also holds true for employment purposes, since from MIGR_RESOCC we learn that in 2019 as well as in 2021 the Netherlands issued more than 20,000 first permits for remunerated activities yet registered only 3,281 single permits.

A comparison between Italy and Germany over time also leaves the observer guessing as to how the permit is registered in these countries. For instance in Italy, in 2014, approximately 424,000 TCNs held an SP in total. Out of this number, a majority of 283,000 SPs were issued for employment reasons (17,000 having been first issued for employment in that year). In 2019, the number totaled 527,000, of which 286,000 held an SP for employment hence the other categories had a larger share. In 2019 only 1,745 SPs were first issued for employment in that year. If we compare these data with Germany, this Member State had 97,000 TCNs with an SP in 2014 in total, of which 34,000 for employment reasons only, and 11,000 were first issued for employment in 2014. In 2019, Germany had a total of 402,000 TCNs holding an SP, of which 161,000 were for employment, all of which were reported by Germany as

first issued in that year. For a full overview of issued SPs for employment purposes, see annex III. It would seem that what the statistics reveal is that there is substantial diversity in the underlying basis of the issue of the SP for instance between employment, family reunification or studies, which justifies further harmonization. Yet, as we will elaborate on in the next chapter, the diversity may not be resolved through the Commission's recast proposal only.

Note that the countries listed by the European Commission as potential partner countries in Talent Partnerships (Morocco, Tunisia, Egypt, Nigeria, Pakistan and Bangladesh) are not amongst the major countries of origin of Single Permits issued in the Member States, suggesting that, for instance, legal migration pathways for citizens of these countries into the EU are underdeveloped and/or the skills available in those countries do not (yet) match the EU skills gaps.

In Annex III, we also present tables on the Long-Term Residence permit. So far, the application of the Directive has not been monitored in an extensive way, e.g. data regarding the number of third-country nationals exercising intra-EU mobility and circular migration were not available. And from these tables and figures it becomes evident that the LTRD is underused. Figure 3 in Annex III presents average annual figures (means) per destination country, on the entire 2012-2021 period. On the left, the total number of EU and national permanent residence permits issued is presented. On the right, the average annual number of LTRPs issued within the EU legal framework is presented. Offset against the left, you can see strong variation between Member States in the extent of the use of the EU framework. Italy, Austria and Estonia appear to use the EU framework most extensively (as a proportion of the total number of permanent residence permits issued); Germany, France and Spain do so very infrequently despite recording high numbers of permanent permits issued overall.

In sum, it is difficult to see how the EU is actually making a common labour migration policy on the basis of the statistics which are available.

2 THE SINGLE PERMIT DIRECTIVE RECAST

2.1 Introduction

This chapter examines the Commission’s proposal for a recast directive and presents an analysis of the directive, considering the European Parliament’s recommendations.²⁰ In its communication of 27 April 2022, the European Commission makes a political and economic case for a sustainable and common approach to labour migration.²¹ Indeed, most EU Member States face ageing populations who require care, and post-Covid-19 labour shortages are on the rise jeopardising the green transition. One of the legislative proposals tabled by the European Commission to address these challenges is the recast of the Single Permit Directive.²² Although the European Commission had contemplated conditions for admission for low- and medium-skilled workers in the new pact²³, this idea was abandoned at an early stage of the Impact Assessment Process. Admission conditions of low and medium-skilled workers are sufficiently addressed by national legislation, according to the feedback the Commission received from the Member States.

On 1 January 2021, 23.7 million TCNs resided in the EU (i.e., 5.3% of the population). In 2020 only 2.7 million held a single permit (though many of those 23.7 million may hold long term residents permits or the national equivalents). It is safe to say that the Directive has not substantially contributed to attracting migrants to work in the EU. This is especially so if you consider that France, Italy, Germany, Spain and Portugal together issued 75% of the single permits recorded in 2020. The low number of Single Permits granted in the other countries reflects a national practice to deflect from the application of EU migration law and to prioritise national migration schemes.²⁴ Instead of bringing Member States’ incompatible implementation practices before the Court of Justice of the EU, the Commission’s choice of action is a recast.

According to the 2019 Fitness Check, “The first implementation report on the SPD (2019)²⁵ highlights a number of problems in the implementation of its main obligations: – some inconsistencies relating to the single application procedure for a single residence and work permit, mainly as regards the participation of different authorities in the application process, which sometimes adds several administrative steps to the process of obtaining entry visas and labour market-related authorisations; – problems with the transposition of the equal treatment provisions, including the exclusion of some categories of TCNs; lack of coverage of some social security branches; and unequal treatment in relation to the export of statutory pensions; and – issues with the practical application of procedural safeguards”.

The EP welcomed the Commission’s planned review of the Single Permit Directive and suggested to reach a broader category of workers, expand the scope and the application of the Directive, and align the most favourable provisions in the existing Directives.²⁶

²⁰ European Parliament 2021h.

²¹ European Commission 2022d, p. 2.

²² European Commission 2022e.

²³ European Commission 2020a.

²⁴ De Lange and Groenendijk 2021.

²⁵ Referencing COM(2019) 160.

²⁶ European Parliament 2021c, para. 12.

2.2 The Commission's proposal

The aim of the Single Permit Directive 2011/98/EU (SPD) is twofold. It facilitates the procedure for TCNs to work and reside in an EU Member State through a 'single permit' which combines work and residence permits. The second objective is to ensure equal treatment between lawfully working TCNs (irrespective of whether they have a right to residence for the purpose of work) and Member State nationals. The right to equal treatment has been developed further by the CJEU, as we will discuss. As said, the SPD does not set entry conditions, nor does it define grounds for refusal or renewal of single permits, these remain regulated at the national level or in the other EU migration directives. The SPD has been criticised for its limited scope, excluding amongst others, seasonal workers, au pairs, self-employed workers and posted workers. Moreover, in its 2019 Fitness check, the European Commission concluded that some of the Member States had managed to seriously complicate the intended simple procedural requirements.

The aim of the 2022 proposal for a recast of the Single Permit Directive is to simplify and clarify its scope.²⁷ The scope is expanded only by deleting the Article 3(2)(h), currently excluding beneficiaries of international protection. Deleting their exclusion makes Chapters II on procedures and Chapter III on equal treatment apply to working beneficiaries of international protection. In this respect the proposal follows the revised Blue Card Directive 2021/1883/EU. The envisaged scope is however still narrow. Seasonal Workers under Directive 2014/36, Intra-corporate transferees under 2014/66 and posted workers under Directive 1996/71 remain outside the scope of the Single Permit Directive, as their rights are regulated in the respective Directives. Likewise, the self-employed and seafarers remain outside the scope. Different migration statuses each with a different set of rights contribute to highly segmented labour markets. Harmonising the rights of migrant workers through expanding the scope of the Directive could contribute to more equal treatment.

In addition, the recast aims to improve migrant workers' protection from exploitation. To increase legal certainty and protection, a definition of the employer is added. Proposed Article 2, para 1 (c) defines 'employer' as "any natural person or any legal entity, including temporary work agencies, for or under the direction and/or supervision of whom the employment is undertaken". Recital no. 6 explains that where a Member State's national law allows admission of third-country nationals through temporary work agencies established on its territory and which have an employment relationship with the worker, such agencies should not be excluded from the scope of this Directive. This new definition is similar to article 2(e) of the Employer Sanctions Directive 2009/52, levelling single permit holders' rights and protection with the protection of irregularly employed and irregularly staying migrant workers. Family migrants with access to the labour market and working for a temporary work agency already fall within the scope of and protection offered by the Temporary Agency Work Directive and are already covered by the SPD, but it can't hurt to clarify this.

The recast prescribes in Article 4 that the Member States must allow an application to be submitted in the country by legally staying TCNs. This would improve the effectiveness of the Directive and procedural fairness because it means that an international student will no longer be required to leave a Member State after graduation and apply for a single permit from abroad, possibly waiting for months before being able to return, and only then, after a considerable gap in legal residence and legal uncertainty, start the job. According to the proposed Article 8(3) of the proposal an application may be considered inadmissible on the grounds of volume of admission of TCNs coming from third countries for employment and, on that basis, need not to be processed. However, clear from article 79(5) TFEU as well, volumes of admission may only apply to migrants coming to work from outside the

²⁷ This section is largely based on De Lange 2022.

EU. For those who are already present in the Member State or elsewhere in the EU, such as international students who change status to worker, the volumes of admission limitation does not apply. **For the purpose of clarity, recital 5 could, as does recital 23 of the ICT Directive 2014/66 state “This Directive should not affect the right of the Member States to determine the volumes of admission in accordance with Article 79(5) TFEU.”**

For people who arrive anew in the EU Member States, the recast prescribes that visa and single permit application procedures be merged to avoid rejections or delays in the visa procedure while the requirements for a single permit are fulfilled. The existing time limit for deciding on an application of four months (Article 5) is not shortened, but the recast clarifies that within these four months the competent authorities have to make their assessment on the labour market situation, the visa and the permit application. They cannot, as some Member States apparently do, shift aspects of the decision such as assessing the labour market situation, ‘outside’ the single permit procedure so as to take their time and de facto attract as few skills and talents from outside the EU as possible. We will return to this with a proposal to shorten the period and include the notification of the decision, in accordance with article 11 of the Blue Card Directive (See Box 1).

As part of the procedural improvements, Article 9 on access to information is somewhat expanded. It now obliges Member States to provide, upon request, adequate information to the TCN and the future employer on the documents required to make a complete application. The proposed recast obliges the Member States to make the information easily accessible, which usually refers to a website, and add information on the entry and residence conditions, including the rights, obligations and procedural safeguards of TCNs and their family members. Although it does not specify that this also applies to information on migration rights. **It would be good to at least mention that this should include information on the employers’ obligations to inform the migrant worker of their worker rights under Directive 2019/1152 on Transparent and predictable working conditions, to which we return later.**

Finally, article 10 on fees now clarifies that such fees are to be proportionate and *shall* (no longer ‘may’) be based on the services provided for processing and issuing permits. This is supposedly a codification of the CJEU case law on disproportionate fees, yet the proposed wording differs from the wording in Article 12 of the recently adopted Blue Card Directive 2021/1883/EU, Article 36 of the Students and Researchers Directive 2016/801/EU, Article 19 of the Seasonal Workers Directive 2014/36/EU, and Article 16 Intra-Corporate Transfer Directive 2014/66/EU. The wording in the last two instruments which just says the level should not be disproportionate or excessive was also a codification of CJEU Case law, according to the Commission, and would be the preferred codification here too as the actual costs of the services provided might not at all be proportionate, even if Member States actually can and do calculate such costs.

Moreover, the recast aims to close two gaps. First, the gap between single permit holders and nationals. To this end, Article 11, on the rights of the single permit holder, is supplemented with a paragraph 2 on the right to change employers during the validity of a single permit. Article 11(3) sets the parameters: the Member States will have discretion to require communication to the authorities on a change of employer according to a procedure in national law. They may require that a labour market check is applied to avoid the unlikely event of e.g. a bus driver switching to a job as IT specialist (unless there is a high need for IT specialists). Whichever way the Member States decide to implement their discretion, they would have to decide within 30 days.

In case of unemployment, a valid single permit shall not be withdrawn for at least the first three months (Article 11(4)) and if a new employer has been found and the labour market check is under way,

surpassing those three months, the single permit holder should be allowed to remain on the territory, awaiting the outcome of the check. Indeed, the proposed Article 11 attempts to close the gap between single permit holders and nationals by allowing for an easier change of employers, something for which nationals need no permission at all. Expanding the right to stay and finding a new employer likely facilitates people to stay on in the EU, albeit to a lesser extent than what highly qualified workers holding an EU Blue Card are offered. By comparison, Member States may allow longer periods of unemployment to accumulate before withdrawing or not renewing a Blue Card (Article 8(5) Blue Card Directive 2021/1883) than a single permit. The recast is not used to fully close the gap between migrants of different skills and wage-levels.

Secondly, the gap between single permit holders and irregular migrant workers is not closed, the single permit holders remain the less protected of the two. Irregular migrant workers receive, to some extent, protection under the Employer Sanctions Directive, although reports show that this protection is seriously faltering.²⁸ To close the gap, Member States shall act on possible infringements of the right to equal treatment with nationals enshrined in Article 12 Single Permit Directive. Preventive measures shall include monitoring and inspections in accordance with national law or administrative practice. Effective, proportionate and dissuasive employer penalties in national law pursuant to Article 12 must be laid down in legislation. Only minor changes to Article 12 on the right to equal treatment are foreseen, mostly just clarifications, and the right to restrict these remains in place.

Article 13(3) Single Permit Directive proposes protection of lawful migrant workers beyond the protection offered to irregular migrant workers. To this end, labour inspections and other competent authorities must have access to the workplace to perform their inspections, which also follows from Article 12 ILO Labour Inspection Convention, 1947 (No. 81), ratified by all EU Member States. Somewhat an odd duck in a migration law instrument is that Article 13(3) also, where provided under national law in respect of nationals, supports worker representatives' access to the workplace. In addition, effective complaint mechanisms and legal redress against employers have to be in place (Article 14). Article 14(3) of the proposed recast reads that third parties, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring compliance with the Directive shall be enabled to file complaints against employers. Third parties should be able to act (on behalf of the migrant) before national courts; legal aid for the migrants is however not accounted for. Not all Member States grant trade unions or NGOs representing migrant workers' standing. The objective of Article 14 is to increase the likelihood of complaints. If put in practice, these protective measures could contribute to the enforcement of the rights of migrant workers, their fair treatment, and overall dignity while at work in the EU Member States.

The proposed recast of the SPD is likely to contribute to the overall effectiveness of the directive through improved procedural fairness, shortening procedures and enabling in-country applications, although there is room for further improvement. Also, it pays attention to improve the rights of working migrants to complain and to seek protection, also from third parties. This should contribute to curbing the risk of abuse, an objective that can be labelled as welcoming, placing the value of human dignity at the core of the instrument. However, the Single Permit Directive remains focussed on streamlining national entry procedures and does not, as was suggested in the 2019 Pact, deal with entry conditions for low- and medium skilled labour migrants. In that sense, it meagrely contributes to welcoming people with sought-after skills and talent.

²⁸ See Fox-Ruhs and Ruhs 2022, FRA 2021; European Commission 2021c.

2.3. Effectiveness, efficiencies, and alternatives

2.3.1. Effectiveness

The proposed recast of the Single Permit Directive only minorly contributes to welcoming TCN workers with needed skills. It does however contribute to this objective by increasing the overall effectiveness of the directive through improved procedural fairness, shortening procedures and enabling in-country applications.²⁹ Also, it pays attention to improving the rights of working migrants to complain, to seek protection including with the assistance of third parties. This should contribute to curbing the risk of abuse, an objective that can be labelled as welcoming, placing the value of human dignity at the core of the instrument. However, further improvement is possible and, from a rights-based perspective, warranted.

The proposal gives a **definition** of who is “employer”, clear definitions are likely to contribute to the effectiveness. The proposal does not, and from our research we conclude this can hurt its effectiveness, give a definition of a “worker”. Although we are aware that defining the notion of who is a worker in EU law is contested, we care to highlight why it could be relevant here. According to recital 22 and article 2(b) SPD recast proposal, a third-country worker is a TCN who works in the context of an employment relationship in that Member State *in accordance with national law or practice*. This reference to national law or practice is confusing and should be deleted, its effect is that the personal scope of the SPD varies considerably between Member States. **It would be preferable to have a common definition of who is a TCN ‘worker’, or at least make reference to the case-law of the Court of Justice.**

The issue came up in Polish case law.³⁰ A third-country national applied for a single permit to reside and work in Poland as an employee of a company providing financial services. Because the current SPD refers to national law for defining who is a worker, the single permit was denied because, according to the Polish migration authorities, she, as a shareholder, was not a worker but conducting business activities. The authorities held that the mere holding of shares in a limited liability company (a client, for which she was providing trustee services) constitutes a form of conducting business activity and cannot be performed by a ‘worker’.³¹

The same question was raised in Dutch practice. Here, an intra-corporate transferred manager was holding shares in the company transferring her. The ICT Directive defines ‘manager’ as a person holding a senior position, who primarily directs the management of the host entity, receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent.³² This definition does not preclude the manager holding shares. According to the Commission’s Fitness Check, “The ‘self-employed’ category covers anyone working outside an employer-based relationship”.³³ The question whether a shareholder cannot be a worker was raised in November 2019, in the informal exchanges of the Commission’s Contact Group on Legal Migration, highlighting that there is no established definition of “self-employed” but that the intention of the ICT

²⁹ Definitely improving the effectiveness in Bulgaria for instance, Bulgarian Questionnaire.

³⁰ Polish Questionnaire.

³¹ For the ruling of the Polish Supreme Administrative Court of 31 May 2021 see <https://orzeczenia.nsa.gov.pl/doc/D095EA8104>.

³² Article 3, sub e ICT Directive and Article 2, para. 1 ICT Directive. The ICT directive refers to the General Agreement on Trade in Services (GATS) for an interpretation of the definitions of manager and professional, recital 13 to ICT Directive. The terms *manager* and *executive* are not defined more specifically in the GATS. For further reading see Minderhoud and De Lange 2018.

³³ European Commission 2019a, p. 33.

Directive, and this would assumably not be different for single permits, is not to exclude people with a work contract who hold shares.³⁴

From a legal coherence perspective, the definition of employment in the Blue Card Directive is especially relevant, because holders of a BC fall within the personal scope of the SPD. The BCD defines 'highly qualified employment' to mean the employment (according to national law or practice irrespective of the type of contract) of a person who undertakes genuine and effective work for which he or she is paid under the direction of someone else. The BCD definition echoes the EU definition of EU citizen workers, which cannot however be subject to national definitions or be interpreted restrictively.³⁵

Whether someone is self-employed according to EU free movement of persons law, depends on whether the person involved performs services for or under the direction and/or supervision (subordination) or, by contrast performs them under his or her own responsibility, and for remuneration that is paid in full and directly to the person involved.³⁶ In the *Holterman v. Spies von Bülllesheim* case, which involved an employment relationship with a director, the Court considered that it must be determined on an individual case basis, considering all data and circumstances that characterize the relationship between the parties, whether the work is performed under the direction or supervision of the 'employer'.³⁷

Rather than continue with the insistence on the application of national law to the definitions, the EU legislator might take the opportunity now to harmonize the definition of worker and self-employed to be consistent with that of EU national workers and EU social policy. According to Article 3(2) sub j of the SPD recast proposal, the Directive shall not apply to third-country nationals who have applied for admission or who have been admitted to the territory of a Member State as self-employed workers. Indeed, all labour migration Directives explicitly exclude from their scope TCNs who work on a self-employed basis.³⁸ Yet none define exactly when a person works on a self-employed basis or if holding shares is decisive in this respect. According to the Commission's Fitness Check "The 'self-employed' category covers anyone working outside an employer-based relationship."^{39,40} Alternatively, and taking into consideration "self-employment" in platform labour as well as the forward-looking pillar on innovative entrepreneurs, self-employed TCNs are to be included in the SPD.

Hungarian caselaw mainly deals with employers who do not pass the examination of the national labour market situation.⁴¹ A Hungarian case of nonrenewal of a Single Permit after ten years of living in Hungary, based on national security grounds, could have benefitted from an individual assessment and proportionality test as could cases of nonrenewal during the COVID-19 pandemic.⁴²

³⁴ MIGRAPOL Contact Group, Mig-Dir-157, Summary of discussions related to Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer ("ICT-Directive") following the meeting of 19 November 2018, p. 5. <https://ec.europa.eu/transparency/expert-groups-register/screen/meetings/consult?lang=en&meetingId=17314&fromExpertGroups=true>

³⁵ Case C-75/63, *Unger*, [1964], EU:C:1964:19; Case C-53/63, *Lawri-Blum*, [1986], EU:C:1986:284.

³⁶ Case C-268/99, *Jany et al. v. State Secretary of Justice*, [2001], EU:C:2001:616.

³⁷ Case C-47/14, *Holterman et al. v. Spies von Bülllesheim*, [2015], EU:C:2015:574.

³⁸ Article 2, sub 2.d ICT Directive.

³⁹ European Commission 2019a, p. 33.

⁴⁰ The ICT directive refers to the General Agreement on Trade in Services (GATS) for an interpretation of the definitions of manager and professional. Preamble 13 to ICT Directive. The terms *manager* and *executive* are not defined more specifically in the GATS.

⁴¹ Hungarian Questionnaire.

⁴² *Ibid.*

Finally, we found the effectiveness and efficiency of the Directive is jeopardized in the Netherlands due to the Dutch restrictive interpretation of a “single permit”, excluding all TCNs at work under the national highly skilled scheme.⁴³ This explains the low number of Single Permits granted in the Netherlands compared to its total number of migrant workers. SPs in the Netherlands are only granted to seasonal workers, trainees, and labour migrants who enter after a restrictive labour market assessment. All other migrants admitted for the purpose of work or for other reasons are not holding an SP under EU law. This limited implementation was missed in the implementation report, fitness check or the impact assessment. The Dutch case offers another example of the ineffectiveness of the Directive’s procedures.⁴⁴

2.3.2. Efficiency

The Commission aims to improve the efficiency of the Single Permit system. Eurostat statistics of use of the permit by Member States indicate a substantial gap between the number of first residence permits for employment issued by the Member States and the number of single permits issued (see section 1.4 above). To what extent does the proposal contribute to reducing the administrative requirements and inefficiencies in permit procedures which prevent migration by legal pathways from responding to real labour market needs, as was recommended by the European Parliament?⁴⁵

The Commission proposes that streamlining the procedures will be the best approach to make them more efficient. In particular, the Commission highlights the **length of procedures** as a deterrent, in particular to employers, of the single permit procedure as implemented by the Member States. Certainly, length of procedures is an obstacle to both employers and third country nationals seeking to move to or remain in the EU which has intensified as a result of the Covid19 pandemic. It seems that many administrations are still struggling to get back on top of their work loads, resulting in long waiting times even for straight forward applications. This issue of procedural incoherence and delay was also highlighted in the fitness check and by the European Parliament’s resolution of 21 May 2021. According to our respondents, the decision time for the SP is too long in practice, and even if it would be 90 days, as preferred from a legal and practical coherence perspective. Time and money are spent prior to those 90 days in preparation of the application, recognition of qualifications, translations. In practice this means there is a considerable risk for employers to lose their candidates for positions that offer better and especially faster prospects of moving (e.g. to countries outside the EU where their skills are also in demand). If faster entry schemes are in place – even if only for shorter stays – employers are likely to prefer those, which means less legal certainty over the duration of their stay for TCNs. Thus, if the aim is to apply the same procedure across the EU for TCN labour migrants, it makes no sense to exclude from Chapter II those who come for a period not exceeding 6 months (Article 3(3) SPD recast).

The time limit set in the original Directive was a limit of 4 months for consideration of an application. As the fitness test indicates, this was not met in many cases, with all sorts of excuses being offered by Member States as to why the time limit was not applied. **The recast does not propose to change the time limit but tightens up its application and removes wiggle-room for Member States in its application.** In particular the period will now include the issue of a visa (where required) as well as the permit so that the time limit for one is not extended by any time limit for the other. Additionally, the recast requires there to be only one consideration of the documentation for both any visa requirements and the single permit. This will reduce the problem of different documents being required for each of

⁴³ Dutch Questionnaire. Lawyers have argued against this in court, asking for an EU proportionality test in case of a gap in the continuous validity of a residence permit as highly skilled migrant worker, but without success, District Court The Hague 7 October 2021, NL:RBDHA:2021:16576.

⁴⁴ De Lange and Groenendijk 2021.

⁴⁵ European Parliament 2021c.

the procedures and the same document being assessed (potentially with different outcomes) in two procedures. This is to be recommended as it is an area which is particularly frustrating for employers, employees and anyone within the scope of the Directive. It also adds to the factual coherence with the other AFSJ directives.

Box 1: Suggestions for Article 5 on “competent authority” (and timely decisions)

In respect of the application procedure, we recommend changing article 5 (the heading of which should be *Competent Authority and Procedural safeguards*) paragraph 2 in one of the following ways:

a) “the competent authority shall **adopt and notify** a decision....” This is the same wording as used in article 11 of the BCD on procedural safeguards. And this must be done “within 90 days maximum”. All other labour migration Directives have as a procedural safeguard a period of no more than 90 days (Article 11 BCD; Article 15 ICTD; Article 24 SRD; Article 18 SWD).

In practice, our respondents tell us, it can take weeks if not months after a decision has been adopted before TCNs or their employers receive notification. It can take even longer before they receive the permit.

b) Efficiency as well as protection would improve if within 90 days **both employer and migrant receive notification**, and the migrant receives the physical card *and – both – receive a digital version*.

Timely delivery of the physical card is relevant to access basic services such as opening a bank account or signing a rental agreement. It is however also important for migrants to always have access to a digital version of their permit in case an employer holds their residence permit for them, an indicator of trafficking. In the Belgium Borealis case it took the authorities 20 days to provide the lawyers with information on their clients’ residence status, as the migrants had no documents on them and no idea what permits they might have had.⁴⁶

c) Furthermore, article 5 paragraph 2 allows for an indefinite number of extensions of the time given to adopt a decision under ‘exceptional circumstances’. From an effectiveness and efficiency perspective it would be advisable to **limit the number of extensions** to, for instance once only.

d) As mentioned in Chapter 5, we suggest adding a paragraph to **support the Talent Partnerships** and possibly also the future Talent Pool:

“Where the applicant is recruited through an EU or a national Talent Partnership Program [or the EU Talent Pool], the decision on the application shall be adopted and notified as soon as possible but not later than 30 days after the date on which the complete application was submitted.”

In order for the Talent Partnership to be effective, the application procedure should be expedited; both TCNs and employers invest time in preparing for the arrival of the TCNs in the EU under the Partnership program. This time and effort should be awarded and not go to waste. Not offering a fast track after the thorough preparation to come to work in the EU under a (pilot) Talent Partnership has been identified as an inefficiency and ineffectiveness of the pilot Talent Partnerships and should be addressed in the recast. For the wording above, inspiration is taken from the Blue Card Directive article 11 paragraph 1.

⁴⁶ Interview with Belgium lawyer Vanlaer, representing some of the workers.

The recast does not seek to deal with the issue of recognition of diplomas which may be a requirement for a visa or single permit application. However, we welcome the Commission's Work programme for 2023, which includes a proposal for a directive on the **recognition of qualifications acquired in third countries**.⁴⁷ Such legislation is likely to increase the efficiency of labour migration under the SPD and the other directives.

Secondly, also related to efficiency is the recast proposal to allow single permit holders to **change employer without needing to obtain a new permit (article 11 paragraph 2 and 3)**. Member States may require a notification and may subject the change of employer to a check of the labour market situation. This is a re-introduction of a labour market test by other means. It is an excellent proposal that employees should not be tied to one employer and should be free to change employment (also a recommendation of the ILO⁴⁸) as this will reduce the power of employers over the employee and enable the employee to move to another job without putting at risk his or her residence permit for instance where the employer is exploitative (or better conditions are available elsewhere). However, the power of the Member State to check labour market conditions is the reintroduction of the much-reviled labour market test by other means.

Some respondents suggest that a certain level of control on changing of employers is necessary in order to prevent abuse, which is actually why the clause is included. Their fear is that if TCNs can change employer immediately after arrival without anybody checking on the new employer, the risk of them being lured away under false pretences and abused at work could be large. Others see the SPD as a burden on TCNs, making integration in the domestic job market difficult.⁴⁹

Box 2: Suggestions for Article 11 on the right to change employer

The new employer as the one to benefit from the migrants labour, should be obliged to notify the authorities two days before the employment commences, or at the latest within two weeks; In case of a delay, a minor administrative fine could be imposed which should not have any consequences for the migrant; they should not be held accountable for minor administrative delays by the employer. This is the eloquent proportionality test introduced in the Blue Card Directive Recast. Furthermore, migrants should be allowed to work in the meantime. If approval is required, there should be a safeguard against lengthy procedures, for instance if there is no response from the authorities within four weeks, the change of employers is deemed to be accepted. This is necessary to avoid a situation where single permit holders will have to wait so long that they will effectively never be able to change employer.

The communication should be accompanied by a prescribed form listing at least former and new employer, name of employee, job title, remuneration package, length of contract.

One could also choose to articulate that the moving jobs has to be within the same sector during the first six months or, and only if the SP holder would change sectors (other ISCO classification maybe), during the first year, the labour market situation may again be taken into account.

⁴⁷ Commission's Work programme for 2023, published on 8 Nov 2022, p. 11, https://ec.europa.eu/info/sites/default/files/cwp_2023.pdf

⁴⁸ Article 8(2) C143 (supplementary provisions) ILO Convention, 1975 no. 143 also provide some guarantees in this regard, e.g. equal treatment with nationals in respect of security of employment and training.

⁴⁹ Questionnaire Luxemburg.

Furthermore, our respondents suggest that Article 11(4), which allows a period of 3 months⁵⁰ to search for another job, is considered too short. In practice, a serious job search, interviews, etc. will take more than 90 days. Therefore, they suggest the period should be doubled to 6 months. Drawing from CJEU case law *Antonissen*⁵¹, at least six months or allow for an extension as long as there is a reasonable chance to new employment (e.g. while job application procedures are going on). During this period, the TCN should be allowed to work in order to sustain themselves (as they may not be eligible for unemployment benefits).

Alternatively, the nine-month search period could be justified with reference to article 25(1) Students and Researchers Directive 2016/801 to stay on the territory of the Member State that issued the authorization [...] for a period of at least nine months to seek employment or set up a business. This would also address the unjustified difference between talented SP holders and international students, possibly both just as wanted on the EU labour markets.

Thirdly, there are still no requirements regarding the length of issue of a single permit. While on the one hand this may increase the scope of the Directive, as it includes all TCNs who are working, even if for short periods, on the other hand it does not address Member State practices which involve issuing residence permits for short periods with the effect of denying security of residence to the individual. Requiring Member States to issue single permits for a **one-year minimum period** would enhance the protection for workers but exclude all those on temporary contracts, without necessarily being in a situation of abuse. Including as many people as possible should be, from a rights-based perspective, the aim; hence, it would be better not to prescribe a minimum duration.

Fourthly, the **inclusion of beneficiaries of international protection** is likely to increase the effectiveness and efficiency of the Directive. This is a substantial category of persons who have the right to work in the EU. While they have a variety of rights under the Qualification Directive⁵² in the interests of coherence their inclusion in the single permit is advantageous. In the interests of integration, equal access and protection of status in the labour market is to be encouraged. It is also a pity that **beneficiaries under the temporary protection** directive⁵³ are not included. The opening of a scheme for those displaced by the war in Ukraine in March 2022 has resulted in the largest influx of third country nationals into the EU in a rather long time. At the current estimation of UNHCR, over 7 million persons have registered for temporary protection in Europe. Ensuring equal access to the labour market and rights would be very useful for this category as well. There are no serious objections against inclusion of beneficiaries of temporary protection. The TP-status ends automatically once the 3-year maximum is reached or at an earlier Council decision. Beneficiaries of temporary protection who are employed should be able to continue to work under the SPD, rather than fall back on the limited rights of the Reception Conditions Directive.

Fifthly, proposed new Articles 13 and 14 on **increasing labour inspections** and facilitating **complaints and legal redress** are likely to have substantial efficiency consequences. The effectiveness of the Directive depends on its consistent and efficient implementation including follow-up where enforcement problems arise.⁵⁴ Thus, the provision in this directive of implementation measure on

⁵⁰ We also suggest aligning terminology with other legislation to the number of days.

⁵¹ ECJ 26 February 1991, Case C-292/89, ECLI:EU:C:1991:80.

⁵² Directive 2011/95/EU.

⁵³ Directive 2001/55/EC.

⁵⁴ From Bulgaria we learn that there is some caselaw on monetary sanctions imposed on employers who have employed TCN without the required documents, or that those required documents have not been updated on time, Questionnaire

safety of workers in a regular situation consistent with those in an irregular situation is justified. In this respect, considering the enforcement measures in the **Seasonal Workers Directive** and the **Employer Sanctions Directive**, our respondents from the side of employers, unions and civil society, all call for more coherence in this respect.

2.4. Legal & Factual Coherence

As the body of EU law on third country nationals expands, it is key that there is clear and well-defined legal coherence among the measures of the legal migration acquis.

2.4.1. Grounds for refusal, withdrawal or non-renewal: public policy & public security

The terms public policy and public security have been used regularly in EU law as part of a trilogy of grounds⁵⁵ for the limitation of various rights. All three have given rise of interpretation by the CJEU, but none more so than public policy, followed by public security. In the Area of Freedom, Security and Justice, the terms public policy and public security have been liberally used in secondary EU law about third country nationals. This includes in the Long-term residents directive, the Schengen Borders Code, the family reunification directive and the students directive (as well as elsewhere). The terms also appear in the Single Permit Directive but only in Article 12(1)(b) regarding freedom of association and even there with a limitation on the terms on the basis of national law. The recast does not propose to change this situation.

Where an application for a single permit is refused or rejected, Article 8 applies which is silent on the grounds for refusal. There is only a requirement that there must be written notification which must include reasons. But those reasons are not limited in the directive. **This is a serious shortcoming of the directive not least as it undermines the harmonisation objective of the measure across the Member States.** In effect, Article 8 permits each Member State to refuse a single permit on the grounds of national law including secondary legislation or the discretion of the determining authority. In a hypothetical example, while a single permit application according to the national legislation of one Member State might be refused on the ground, for instance, that the applicant has insufficient income according to a national criterion to this effect (even though the individual has a right to equal treatment as regards access to social security benefits under Article 12(1)(e)) in another Member State this might not be the case. This situation is exacerbated in the Directive by Article 12(3) which apparently permits Member States to refuse to renew or withdraw single permits because the holder has made use of the equal treatment right. This is possible only because there is no limitation on the grounds for refusal to issue or renew or on withdrawal of a permit. So, in theory, a Member State is free to put in national law as a ground for refusal to renew or withdraw a single permit the fact that the holder has tried to use his or her equal treatment rights. This is clearly an unacceptable situation which needs to be **remedied by a list of grounds for refusal** as is common in other Area of Freedom, Security and Justice (AFSJ) migration and borders measures (for instance Article 7(1)(c) Blue Card Directive; Article 6 Family Reunification Directive; Article 8 ICTD; Article 15 SWD; Article 32(1)(vi) Visa Code etc.) While in the other EU borders and migration related measures there is an enumeration of the grounds for refusal, usually finite, this is not the case for the single permit.

There is some merit to the argument that because the directive only negatively enumerates the kinds of situations which are outside its scope, leaving all other applications within its scope, defining the grounds for refusal of a single permit must be fairly flexible as the situations covered by the permit are

Bulgaria. Such caselaw on the enforcement of the Employer Sanctions Directive has to our knowledge not been systemically mapped.

⁵⁵ Public policy, public security and public health.

so diverse. However, this argument is only applicable to first applications where the conditions to be fulfilled are subject to national law. **Where an application is for renewal or appeal against a decision of withdrawal, the situation is different. The Member State has already considered the merits of an original application and approved its issue.** Provided that the Single Permit holder still fulfils the conditions on the basis of which the original permit was issued, the grounds for withdrawal should be more limited. This would be the place to restrict such refusals to the grounds of public policy or public security. These grounds have the benefit of establishing an EU common standard which would enhance the value of the permit both for employers and employees.

The meaning in EU law of public security and public policy has some flexibility built in. While as regards EU citizens' free movement rights, there is a very strict definition of the ground contained both in the citizens' directive⁵⁶ and the CJEU caselaw, as regards the AFSJ measures the CJEU has introduced a more flexible approach. Starting in 2017, the CJEU for the first time, found that the meaning of public security is not singular.⁵⁷ In a case regarding the students' directive,⁵⁸ it held that the meaning of public security left a substantial margin of appreciation to the Member States considering political issues. This has started a fracturing of the meaning of the term 'public security'. Subsequently, the CJEU has created something of a hierarchy regarding the strictness of the interpretation.

In *EP*⁵⁹ the Court examined the correct interpretation of public policy in the Schengen Borders Code (SBC). It found that the meaning of the term for the purposes of the citizen's directive is not applicable to the same term in the SBC. Greater flexibility is permitted to Member States as regards who and what is a threat to public policy where first admission of a third country national at an EU external border is at stake. In *GS & VS*⁶⁰ the Court examined the meaning of the same term in the context of the family reunification directive.⁶¹ The Court held that a stricter meaning of the term in the context of family reunification where the third country national had already been granted a permit to remain with family in the host state. Nevertheless, the meaning of the term was more flexible as regards this directive than for EU citizens. The justification for this difference in meaning of the same term was based on difference in the drafting process, a careful examination of the recitals and the need for a strict proportionality test. For our purposes, the extra flexibility which the Court has granted to Member States as regards the meaning of public policy and security in the AFSJ migration and borders measures would be applicable to the single permit directive as well. The flexibility, as viewed on a sliding scale depending on the links of the individual with a Member State – the stronger the links, such as family members, the stricter the test as an exception to the rule; the weaker the links, e.g. SBC where the individual is at the external border seeking entry, the more flexibility there is for Member States' appreciation of the public security dimension. For the purposes of issuing, renewal or withdrawal of a single permit, potentially on first issue of a permit, Member States would have more flexibility as regards the meaning of public policy and security for the purposes of refusing a permit.

Our core argument in this section is that **for refusal, renewal or withdrawal of an SP there should be only one ground. This ground is public policy, public security, or public health.** Here we suggest, to be coherent, that the SP when up for renewal and when no changes in the conditions have occurred, it is *only* on these public policy, public security and public health grounds that renewal might be refused. Such a change would still leave Member States ample room to refuse to renew or withdraw

⁵⁶ Article 27 et seq, Directive 2004/38/EC.

⁵⁷ Case C-544/15, *Fahimian*, [2017], EU:C:2017:255.

⁵⁸ Case C-544/15, *Fahimian*, [2017], EU:C:2017:255.

⁵⁹ Case C-380/18, *E.P.*, [2019], EU:C:2019:1071.

⁶⁰ Case C-381/18, *G.S. and V.S.*, [2019], EU:C:2019:1072.

⁶¹ Case C-381/18, *G.S. and V.S.*, [2019], EU:C:2019:1072.

a permit on justified grounds related to the initial grant of the permit yet would limit such a refusal where the initial conditions continue to be fulfilled. Upon renewal, there should be no evaluation of the labour market situation, which corresponds with the proposed adjustment to Article 11 SPD recast.⁶² Indeed, on renewal or withdrawal, that flexibility would be more limited as the links between the individual and the Member State (possibly protected as private life under Article 8 of the European Convention of Human Rights) are greater. Hence the person's protection of residence and work demand a higher level of justification from the Member State as regards an interference with it. Article 8 SPD recast should thus be amended and added with: **"A Member State may withdraw or refuse to renew an SPD for reasons of public policy, public security or public health."**

Furthermore, to enhance coherence in the legal migration acquis, we suggest to, in include in the SPD a recital similar to the one in the Blue Card Directive 2021/1883/EU (recital 33), **to not hold the single permit holder responsible for the conduct of the employer, minor irregularities/ or misconduct⁶³ of the employer should in no case constitute the sole ground for rejecting an application for a Single Permit or withdrawing or refusing to renew a Single Permit.**

At a minimum, the SPD should, as do the other directives, require that any decision by the Member States **"to withdraw or to refuse to renew a Single permit shall take account of the specific circumstances of the case and respect the principle of proportionality."** (Article 15(11) SWD; Article 8(6) ICTD; Article 8(7) revised BCD etc.).

Another argument for legal harmonization of the grounds for withdrawal among the directives is that it will improve factual coherence on the ground for enforcement authorities.

2.4.2. Ethical recruitment

We miss a consideration on ethical recruitment in this Directive. The proposal defines common standards and procedures to be applied in Member States in accordance with fundamental rights as general principles of Union law (Besides recital 3). Yet it does not **commemorate migrant workers' dignity** (as is done for instance in the Return Directive), *or* give a statement on the importance of supporting **ethical recruitment** (as is done in the Blue Card Directive).

To this end reference can be made to the ILO Fair Recruitment Initiative (FRI) which was launched in 2014 following concerns raised about the growing role of unscrupulous employment agencies (rightly so included in the new definition of employer), as well as informal labour intermediaries and other operators acting outside the scope of the Directive yet who have a tremendous impact. The Blue Card Directive (recital 41) reads:

Ethical recruitment policies and principles that apply to public and private sector employers should be developed in key sectors, for example in the health sector. This is consistent with the Union's commitment to the 2010 World Health Organization's Global Code on the International Recruitment of Health Personnel, as well as with the conclusions of the Council and the Member States of 14 May 2007 on the European

⁶² Otherwise it would be more difficult to renew a single permit while remaining with the same employer than to change employers while holding a still valid single permit.

⁶³ The concept of a "minor misconduct" is not defined in EU law and was introduced in the migration acquis in the revised BCD, recital 33. "Minor irregularities" are defined in Directive 2014/24 on public procurement, recital 101 "In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However, repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion." The CJEU rules that the authorities must pay particular attention to the principle of proportionality in case of such an exclusion (see for instance CJEU 30 January 2020, C-395/18 *TIM SpA*).

Programme for Action to tackle the critical shortage of health workers in developing countries (2007-13), and to the education sector. It is appropriate to strengthen those principles and policies by the development and application of mechanisms, guidelines and other tools to facilitate, as appropriate, circular and temporary migration, as well as other measures that would minimise the negative impact, and maximise the positive impact, of highly qualified immigration on developing countries in order to turn brain drain into brain gain.

Member States shall inform the Commission of agreements with third countries concluded in accordance with Article 7(2), point (e) BCD. **A recital similar to recital 41 BCD and a provision similar to Article 7(2), point (e) BCD should be inserted in the recast SPD.**

2.4.3. The costs of alternative (coherent) choices

Our alternative choices would be neither less, nor more costly than the Commission's proposals.⁶⁴

2.5. Fundamental Rights consistency

The Single Permit directive as it currently stands has been examined five times by the Court of Justice of the EU. In these cases, the consistency of the directive (or its application) with the EU Charter of Fundamental Rights has been important. **It is key to ensure that any revisions of the directive are fully consistent with EU fundamental rights.**

Two things stand out as regards these CJEU judgments on the SPD, discussed in Annex 2. First is their source – one single Member State which seems to have trouble with one provision of the Directive (Article 12(1)(e)). What also stands out is that the cases were brought before Italian courts by NGOs on behalf of TCNs; NGOs in other Member States do not necessarily have standing in these types of cases, a matter which is sufficiently addressed in the recast (Article 14 on legal redress). **We do recommend adding to recital 33 an explicit reference to article 47 of the Charter of Fundamental Rights on the Right to an effective remedy and to a fair trial.**

Secondly, no other Member State seems to have any interest in the subject, in any event they have not intervened in any of the cases either to support Italy or to present some other view. In light of this, it is not surprising that in the Commission's proposed recast, no substantive changes are proposed to Articles 12(1)(e) nor 12(2)(b).

As regards the recast proposal, Article 12(2)(c) would allow Member States to limit tax advantages in respect of family members who are not resident in the Member State. This would not just punish family members who are on long stays in a third country but also in other Member States, which seems unfair and certainly not based on equal treatment. It is a clear movement to limit the CJEU's judgment in *WS* discussed in Annex 2 where a single permit holder was entitled to family benefits including in respect of family members temporarily resident outside the EU (because own nationals of the state were entitled to such benefits) to social security. The intention seems to be to ensure that it does not extend to non-discrimination in tax advantages for non-resident third country national family members of single permit holders.

Further recasting Article 12(2)(d)(i) would allow Member States to limit equal treatment in access to goods and services to those in employment rather than those who had been in employment and were now registered as unemployed as is currently the case. A new Article 12(2)(d)(ii) permits Member States

⁶⁴ Van Ballegooij and Thirion 2019.

to place a restriction on access to public housing for single permit holders. **This is a step away from the *Kamberaj* caselaw of the CJEU which was specifically regarding housing.**

Perhaps a little surprisingly, the SPD has turned out to be more than an administrative simplification matter, but a directive where the rights of persons within its scope have been contested. All the CJEU cases on the Directive have come from courts in Italy and relate to access to social benefits of various kinds, engaging Article 12 and the entitlement to equal treatment with own nationals as regards social security. No other Member State has intervened in any of these cases. A constant feature of the judgments is the CJEU's suggestion that if the Italian authorities want to exclude third country nationals with the right to work from the equal treatment entitlement in that provision, they ought to consider the exception built into the directive at Article 12(2)(b) and whether the exclusions which they would like to make can be brought within that provision. For the moment, this advice does not appear to have been heeded.

In Annex 2 we examine the caselaw in chronological order, setting out the issues, the facts and the reasoning of the CJEU in its judgments. Each of the four decisions so far, reveal different aspects of the issue of equal treatment. The relationship of social benefits in the Directive with the EU Regulation on coordination of social security, Regulation 883/2004, is a constant theme through all the judgments. It takes a primary position in the third case where that relationship is found to be central to the application of Article 24 of the Charter to the directive. On one occasion, the Italian authorities sought to argue that third country nationals who hold permits issued for reasons other than work are outside the scope of Article 12. The CJEU found this to be an incorrect interpretation of the Directive.

2.6. Conclusions & Recommendations

To conclude, the Commission's SPD recast offers steps forward towards a more efficient and effective entry procedure and the protection of TCN workers in the EU. Nevertheless, we have argued for further improvements of the proposal in respect of the efficient and effective procedures, legal and practical coherence with the other AFSJ directives as well as fundamental rights compliance. We have identified options closely related to the proposal that can bring it much closer to its objectives.

General provisions

- Keep the original recitals

The proposal deletes recital 1 which codifies the history of the Directive as well as the objective to offer those legally staying fair treatment and a more vigorous integration policy towards rights and obligations comparable to those of citizens. Keep fair treatment and integration on the agenda.

- Define who is a TCN worker

The proposal defines who is an employer, but not who is a worker. Caselaw in the Member States shows this can be problematic. **A common definition in accordance with CJEU caselaw would be preferred.**

- Expand the scope to include beneficiaries of international protection and temporary protection

Single Application Procedure and Single Permit

- Harmonize and improve the procedural safeguards by obliging the competent authority to **adopt and notify** a decision...." within 90 days maximum"

This is to make the Directive coherent with Article 11 BCD; Article 15 ICTD; Article 24 SRD; Article 18 SWD.

- Safeguard that **both employer and migrant receive notification**, and the migrant receives the physical card *and – both – receive a digital version*.

Timely delivery of the physical card is relevant to access basic services such as opening a bank account or signing a rental agreement. It is also important for migrants to always have access to a digital version of their permit.

- Limit **the number of extensions** for 'exceptional circumstances' to once only.
- Include a fast-track procedure to **support the Talent Partnerships** and possible also the future Talent Pool for them to be effective legal pathways.

"Where the applicant is recruited through an EU or a national Talent Partnership Program [or the EU Talent Pool], the decision on the application shall be adopted and notified as soon as possible but not later than 30 days after the date on which the complete application was submitted."

- Add grounds of refusal, withdrawal and non-renewal on public policy and public security

Member States are currently free to **define the grounds for refusal, withdrawal and non-renewal** of a Single Permit. With an application for renewal of appeal against a decision of withdrawal, the Member State already considered the merits of an original application and approved the issue. Non-renewal or withdrawal should from a migrant rights perspective, as well as legal certainty for the employer not be possible on grounds other than public policy, public security or public health.

- Alternatively, if grounds for withdrawal or non-renewal remain at the discretion of the Member States, do not allow Member States to hold a TCN responsible for the minor misconduct of the employer
- At a minimum, include that Member States shall take into account the specific circumstances of the case and respect the principle of proportionality

The revised Blue Card Directive serves as an inspiration for these proposals. We fail to see why Single Permit holders would receive less protection than a Blue Card holder, once their entry has been approved.

- Add ethical recruitment as a ground for refusal.

Again, inspiration is taken from the Blue Card Directive and we make reference to the ILO Fair Recruitment Initiative.

- Adjust article 11 on the right to change employer to include an obligatory notification procedure and possibly define sectoral limit to move during the first year(s).

Although giving TCNs a right to change employers is cheered, the unconditional wording of the proposal leaves room for abusive practices. We recommend addressing these without giving up on the basic freedom to leave one's employer without automatically losing a right to stay.

- Make explicit reference to article 47 of the Charter of Fundamental Rights on access to an effective remedy and to a fair trial.

Right to Equal treatment

- **Protect TCNs with a single permit against abusive labour relations** at least at the same level as TCNs at work under the scope of the Seasonal Workers Directive and informally employed under the scope of the Employer Sanctions Directive.

Final Provisions

The reporting on the Single Permit Directive reveals a patchwork of implementation styles. For the purpose of policy making and enforcement, the quality and uniformity of **the statistics delivered must improve.**

3. THE LONG-TERM RESIDENCE DIRECTIVE RECAST

3.1. Introduction

The Long-term Residence Directive (LTRD)⁶⁵ was the second legal act adopted in the area of immigration and asylum after the entry into force of the Amsterdam Treaty. The Directive's aim to grant a special status to persons after a certain period of legal residence was widely supported in the legislative process. The requirements for the acquisition of long-term status however as well as the rights attached to the status found different reactions in the Council negotiations and led to several compromises in the final text. As mentioned in the Preamble of the Directive the status of third-country nationals as long-term residents was seen as "a key element in promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty".⁶⁶ This phrase perfectly summarises why the negotiations finally led to the adoption of the Directive.

The European Parliament acknowledged already in the legislative phase that the aim to reach equal treatment for TCNs and to equate their situation in certain areas to that of EU nationals is a long-term goal.⁶⁷ First the Directive should be adopted and later-on "the reduction of the qualifying period to, say, three instead of five years"⁶⁸ should be envisaged. A recent Resolution adopted by the European Parliament based on the LIBE report again called for a reduction of the number of years of residence that should be necessary for granting the status (from five to three years).⁶⁹

The Directive was adopted in 2003 and revised once. This revision⁷⁰ extended the scope of the Directive and included beneficiaries of international protection (persons who are granted asylum or subsidiary protection on the legal basis of the Qualification Directive).⁷¹

At the time of adoption of the Directive Member States policies regarding residence permits for third-country nationals residing already a certain time in the Member State concerned varied considerably. While most States had a sort of status for long-term resident TCNs, the qualifying periods of residence as well as the conditions for acquisition showed considerable differences and the degree of security of residence was not the same for all types of residence permits. The 2003 Directive was negotiated without a full prospect of harmonisation of the national systems. In recognition of this, the Directive permits Member States to continue to apply their national long residence schemes in parallel with the Directive.⁷²

3.2. The Commission's proposal

The proposal⁷³ was published in April 2022 as a follow-up to the Commission's Communication on a New Pact on Migration and Asylum,⁷⁴ adopted on 23 September 2020. The proposal is part of the legal migration package discussed in this study. Key aims of the proposal are "facilitating the acquisition of long-term resident status for those third-country nationals ... who have settled down in the EU, as well

⁶⁵ Council Directive 2003/109/EC.

⁶⁶ Preamble, *supra*.

⁶⁷ European Parliament 2001.

⁶⁸ *Supra*.

⁶⁹ European Parliament 2021h. See, for the LIBE report, European Parliament 2021g.

⁷⁰ Directive 2011/51/EU.

⁷¹ At the time of adoption of the amendment Council Directive 2004/83/EC was in force.

⁷² See De Lange and Groenendijk 2021.

⁷³ European Commission 2022c.

⁷⁴ European Commission 2020a.

as further improving their rights.”⁷⁵ The proposal intends to widen the personal scope, clarify the rights of long-term residents, and reduce practical administrative problems of implementation among others in respect of the right to intra-EU mobility.⁷⁶

3.2.1. Amendments in comparison to the present Directive

Article 3 refers to the scope of the Directive. The Directive applies to “third-country nationals residing legally and continuously in the territory of a Member State”. Third-country nationals who reside in order to pursue studies or vocational training and those who are authorised to reside in a Member State on the basis of temporary protection are explicitly excluded. Applicants for temporary protection and applicants for international protection are excluded as well. These third-country nationals do not have a right to get a permit issued, the periods of residence however are counted when these persons fulfil the other criteria for obtaining long-term residence status.⁷⁷ TCNs who have been granted a national protection status are also not covered by the Directive. The consequences of the exclusion of these categories of TCNs – including those covered by the temporary protection regime for Ukrainians – are discussed below. The notion of “continuous” residence will also be discussed.⁷⁸

Article 4 provides for easier acquisition of long-term residence status as the calculation of the period of residence allows the cumulation of periods of residence in different Member States, provided that the requirement of two years of legal and continuous residence within the territory of the Member State of application is fulfilled. A two-year period of residence in the Member State of application suffices to allow the issuance of the EU long-term resident permit provided that all other requirements are fulfilled.

Article 5 contains the conditions for acquisition of EU long-term resident status. The proposal introduces clarifications concerning the existing requirements (adequate resources, sickness insurance, to avoid becoming a burden for the Member State, and integration conditions, if required by the Member State of application). According to the explanations in the Preamble of the Proposal the clarifications are based on EU Court of Justice judgments. These judgments gave some guidance for the interpretation of the notion ‘adequate resources’. There are however still wide margins of interpretation left to national practice.

Member States have to evaluate the stable and regular resources by reference to their nature and regularity and may take into account the level of minimum wages and pensions prior to the application for long-term resident status. They may indicate a certain sum as a reference amount, but they may not impose a minimum income level, below which all applications for EU long-term resident status would be refused, irrespective of an actual examination of the situation of each applicant. Member States shall not require EU long-term resident permit applicants to comply with stricter resources and integration conditions than those imposed on applicants for such national residence permits.

Article 9 contains the possibility to extend the period for EU long-term residents to be absent from the territory of the EU without losing their EU long-term resident status from the current 12 months to 24 months. In case of longer absences, Member States should establish a facilitated procedure for the re-acquisition of the status.

The proposed text includes references to third-country nationals who invest in a Member State. As the Commission sees a “risk of abusive acquisition of the EU LTR status on the basis of investor residence

⁷⁵ Commission Staff Working Document, Impact Assessment Report, p. 5.

⁷⁶ See also European Commission 2022c, Explanatory memorandum, p. 2.

⁷⁷ See Section 3.2.2.

⁷⁸ See Section 3.2.2.

schemes pursuant to which the issuing of residence permits is not subject to the requirement of continuous physical presence in the Member State or is merely subject to the requirement of the investor's presence in the Member State for a limited time"⁷⁹ special provisions create a kind of control system for these persons. The rules as such do not really fit into the text but stand alone and express the difficulties of how to cope with such exceptions.⁸⁰

Article 10 lays down the procedural guarantees relating to the refusal, withdrawal or loss of the status. These are the same as already contained in the LTRD in force.

Article 11 regulates fees to be paid by applicants. In line with the most recent EU Directives on legal migration, Member States may levy fees for the processing of applications. The amount of such fees however should not have the object or the effect of creating an obstacle to the obtaining of the long-term resident status.

Article 12 lays down the equal treatment rights for EU long-term residents, which are partly similar/identical to those already provided for in the Directive in force. In addition, the proposal introduces three main changes. According to the proposal's Explanatory Memorandum, the aim is to reinforce rights and improve the integration process. EU long-term residents should have the same right as nationals regarding the acquisition of private housing. This right is seen as particularly relevant for the integration of EU long-term residents. Article 12 aligns the definition of social security and the right to the export of pensions and family benefits to the provisions of the most recent legal migration Directives. The text refers to Regulation (EC) No 883/2004 regarding the definition of social security (paragraph 1 (d)); EU long-term residents or their survivors moving to a third country should receive statutory pensions under the same conditions and at the same rates as the nationals of the Member States concerned, where such nationals move to a third country, in line with other legal migration Directives (paragraph 6). Finally, the proposal extends the EU long-term residents' equal access to social protection and social assistance, by removing the possibility for Member States to limit such access to 'core benefits'.

Article 15 contains important adaptations concerning the acquisition of EU long-term residence status for family members. These amendments have often been demanded as situations occurred where family members of long-term residents could not obtain the status of long-term residents. Para. 1 regulates that children of an EU long-term resident who are born or adopted in the territory of the Member State that issued him/her the EU long-term residence permit shall acquire EU long-term resident status automatically, without being subject to the conditions set out in Articles 4 and 5. The EU long-term resident shall lodge an application with the competent authorities of the Member State in which he/she resides to obtain the EU long-term resident permit for his/her child. Paras 2, 3 and 4 contain derogation from the Family Reunification Directive.⁸¹ Para. 5 aims to adapt the situation of EU long-term residents to holders of national permits if these rules are more favorable.

Chapter III of the proposal is particularly important as it contains the conditions for residence in another Member State. To simplify the freedom of movement of long-term residents is a key goal mentioned in all reports and often demanded in legal literature. A right to reside in another Member State is granted to exercise an economic activity in an employed or self-employed capacity, for the pursuit of studies or vocational training or for other purposes.

⁷⁹ European Commission 2022c, p. 5.

⁸⁰ See for the LTR status for investors European Commission 2022c, p. 17.

⁸¹ Council Directive 2003/86/EC.

Member States may no longer require labour market tests for long-term residents who move to another Member State. Furthermore, Member States may not prioritise EU citizens. Both amendments to the present rules are key improvements regarding the rights of long-term residents.

To simplify and speed up the procedure and the factual change of Member State of residence, EU long-term residents are entitled to apply while still residing in the first Member State, and to begin employment or study at the latest 30 days after having submitted their application. Chapter III also refers to recognition of professional qualifications.⁸²

3.2.2. Shortcomings in the transposition and implementation, analysis whether the Proposal is suitable to solve these shortcomings

The Directive's transposition and implementation were evaluated several times. In 2011 and 2019 the Commission published reports on the LTR Directive.⁸³ Whereas the 2011 report mainly referred to the transposition of the provisions, the 2019 report took the implementation into account and was accompanied by a long and detailed report expressing the genesis of the Fitness Check on legal migration.⁸⁴ The Commission highlighted that the implementation and application of the rules on intra-EU mobility were still problematic in several Member States and that national types of status were more widely used than the EU long-term residence status. This situation led to incoherence between the long-term residence status and the parallel national permanent residence schemes. Several inconsistencies were also detected in the evaluation carried out by EMN in 2020.⁸⁵ This study also found that the implementation has not been uniform.

The Fitness Check on legal migration⁸⁶ published in 2019 identified these and several other shortcomings especially regarding the achievement of the objectives. Another issue is the strict interpretation of the requirement to show sufficient and stable resources, which was reported in the answers to a questionnaire sent to Odysseus members.⁸⁷ More details regarding these shortcomings are mentioned below in connection with the proposed changes and the analysis of these changes as suitable to cope with the shortcomings. Yet, despite these shortcomings, the Fitness Check showed that the legal migration directives, including the Long-term Residence Directive, have had a variety of positive effects which revealed the added value of European migration legislation.⁸⁸

The current proposal was drafted with the results of evaluations and reports in mind. Not all recommendations contained in the reports however were finally included in the text. The five-year residence requirement is still included in the text with no exceptions. Though the reduction of the period to three years had already been envisaged by the European Parliament's resolutions,⁸⁹ the Commission finally did not include the shorter period into the text. As mobility within the EU should be made easier for a variety of reasons, among these first and foremost to facilitate quick reaction to labour market demands, a reduction to three years would be supportive for reaching this goal. As this goal was already expressly specified by the EP, time has come to realise the reduction of the required residence period. On the other hand, even for the acquisition of the right to permanent residence for

⁸² European Commission 2022c.

⁸³ European Commission 2011b; European Commission 2019c.

⁸⁴ European Commission 2019a.

⁸⁵ European Migration Network 2020.

⁸⁶ European Commission 2019a, p. 14.

⁸⁷ Odysseus members were involved in the research. The answers are cited as questionnaires for the respective country.

⁸⁸ Meijers Committee 2022, p. 1. See also European Commission 2022h, p. 2.

⁸⁹ European Parliament, 2021h.

EU citizens and their family member including third-country national family members is still five years.⁹⁰ Though these categories of persons may be treated differently, a harmonisation should be envisaged as a long-term goal.

The majority of Member States requires a period of residence of a minimum of five years for acquisition of citizenship. Though citizenship and long-term residence have always been fundamentally different concepts, we recommend and find it legitimate to conclude that for the granting of a long term-residence permit, which entails certain rights but much less than those of citizens, a period of three years should be sufficient.

Moreover, there are no exceptions for persons whose residence is based on a type of status provided for in the Qualification Directive or national type of protection. Article 71 of the proposed Asylum and Migration Management Regulation⁹¹ contains a provision on legal onward movement for beneficiaries of international protection with long-term residence status. This proposal provides for a derogation from the provisions of the Long-term residents Directive. The present proposal for a recast of the LTRD however does not contain any such provisions.⁹² For persons granted asylum or subsidiary protection, the reduction of the five-year period to three years could have the effect that the distribution of persons seeking protection could be better facilitated after recognition. Of course, these special rules should be negotiated having the rules in the CEAS and the progress in the negotiations in mind.

Also, OECD (2016) recommended that third-country nationals holding an EU international protection status should have access to the special long-term resident status of EU Blue Card holders⁹³ A recommendation that has been implemented in the Blue Card Directive Recast.

Box 3: Beneficiaries to benefit of the internal market sooner

We recommend that the occasion should be used to insert the text of Article 71 of the proposed Asylum and Migration Management Regulation into the Qualification Directive as a derogation from the LTRD. It will enable beneficiaries to move legally and enjoy the benefits of the internal market sooner. Their right to mobility is to the benefit of the EU Member States and employers in need of workforce.

Article 4 intends to promote the intra-EU mobility of third-country nationals. Article 4 is one of the provisions which should facilitate the mobility as it regulates the periods necessary for the acquisition of the status. The other provisions of intra EU-mobility are those in Chapter III regulating mobility after the acquisition of long-term resident status. Article 4 contains laudable amendments as cumulations of residence times are possible. This amendment allows that third-country nationals do not have to wait for five years to move to another Member State. Labour market demands, family reasons and other reasons make it necessary that these persons choose to move to another Member State.

Furthermore, periods are counted where the residence is based on a long-stay visa or another residence permit issued under Union or national law. Previously excluded periods like residence as a student or residence for vocational training are counted as well. The proposal regulates that any period

⁹⁰ Arts. 16-18 Directive 2004/38/EC.

⁹¹ European Commission 2020b.

⁹² See for the original idea and arguments Meijers Committee. 2015. Comments on the Proposals for a Qualification Regulation (COM (2016) 466 final), Procedures Regulation (COM (2016) 467 final), and a Revised Reception Conditions Directive (COM (2016) 465 final). www.commissie-meijers.nl/sites/all/files/cm1614_comments.pdf

⁹³ OECD 2016, p. 273.

of residence spent as holder of a long-stay visa or residence permit issued under Union or national law is fully counted as legal residence. Residence periods for study purposes, for a subsequent search period, as beneficiaries of national protection or – especially important – temporary protection as periods of legal residence. Residence based on permits for seconded employees is counted as well.⁹⁴

Residence as beneficiaries of national or temporary protection, or residence initially based solely on temporary grounds is included as well. These amendments will make it easier to acquire long-term residence status. Ukrainians and other persons covered by the present Temporary Protection regime⁹⁵ may not acquire the status as long as they reside under this regime. If they later-on reside on another residence title, the period of residence under the Temporary Protection regime will be counted and can be added to periods of lawful residence immediately before the application or after the end of the temporary protection regime.

As additional periods are counted, a new paragraph is included in Article 4 requiring Member States to ensure the monitoring of legal and continuous residence for all categories of third-country nationals. As the cumulation is possible for all residence permits including residence permits granted on the basis of any kind of investment in a Member State, the Commission sees a higher risk of abuse also because the granting of these residence permits is not always subject to the requirement of continuous physical presence in the Member State. The special situation of persons residing under the investment regime caused the need for adaptation of several provisions, which stand as a kind of “foreign object” in the text. The additional monitoring requirements might lead to a restrictive interpretation of Article 4 and should thus either be deleted or it should be added that they are only applied to persons whose residence is based on a residence permit for investors.

The possibility to count residence periods in other Member States is a step forward in improving the possibilities for persons granted international protection to acquire long term status. However, other impediments, like labour market tests or restrictions to access to the labour market may restrict the flexibility in the first five years. The cumulation of residence in the Member States has the intention to stimulate mobility within the EU and “preventing people to stay put in a place waiting for the 5 years”.

One of the key issues in the implementation in Member States is the definition of adequate and stable resources. Odysseus members reported that Member States define the adequacy in a narrow way. **Polish** jurisprudence shows that income requirements are the most problematic issue, especially the concept of stability of income.⁹⁶ This requirement is interpreted in a narrow way in Polish jurisprudence and leads to problematic consequences. As an example, the case of artists revealed that the stability was not seen as given. In **Germany**, the sufficient resources requirement gives rise to a number of questions.⁹⁷ These questions relate to the distinct character of social and labour legislation in Germany. As the situation might be similar in other Member States harmonisation could only be done by national case law interpreting the notions in conformity with the Directive as far as the terms are contained in the Directive. Also in **Luxemburg**, the financial resources condition seems to be the most problematic.⁹⁸ In **Italy**, the requirement of a permanent income is particularly problematic when permits are renewed after five years.⁹⁹ Italian courts have been playing a crucial role in determining the notions. The Court of Cassation affirmed that not granting the allowance for the family unit, provided for by Article 65 of Law no. 448 of 1998 to LTRs for the period prior to 1 July 2013, constitutes collective

⁹⁴ Farcy 2022.

⁹⁵ Council Implementing Decision (EU) 2022/382.

⁹⁶ Questionnaire on Poland.

⁹⁷ Questionnaire on Germany.

⁹⁸ Questionnaire on Luxembourg.

⁹⁹ Questionnaire on Italy.

discrimination on grounds of nationality, due to a violation of the principle of equality in social assistance and social protection, in relation to essential services, provided for by the long-term residents Directive and implemented by Article 13, paragraph 1, of Italian Law no. 97 of 2013.

As mentioned, the clarifications in the proposed Article 5 are mainly based on EU Court of Justice (CJEU) case law. Case law interpreted the terms adequate resources, sickness insurance, to avoid becoming a burden for the Member State, and integration conditions, if required by the Member State of application. The judgments of the CJEU contain several clarifications. There are however still discrepancies between the interpretation in these judgments and national practice. Several situations in national practice have not yet been answered by the Court. In the *Chakroun* judgment¹⁰⁰ the CJEU ruled that Member States may indicate a certain sum as a reference amount, but they may not impose a minimum income level below which all applications for family reunification will be refused. The judgment interpreted the notion in the Family Reunification Directive. In the judgment *X v Belgium*, the Court ruled on the LTRD.¹⁰¹ According to this judgment, Member States may take factors such as contributions to the pension system and fulfilment of tax obligations into account when they make an assessment of the possession of stable and regular resources. The concept of 'resources' does not concern solely the 'own resources' of the applying person. It may also cover the resources made available to that applicant by a third party provided that, in the light of the individual circumstances of the applicant concerned, they are considered to be stable, regular and sufficient.

Member States are still allowed to require that applicants for long-term residence status comply with integration conditions. These integration requirements might be civic integration tests or language examinations. However, the CJEU requires that the means of implementing this requirement should not be liable to jeopardise the objective of promoting the integration of third-country nationals, having regard, in particular, to the level of knowledge required to pass a civic integration examination, to the accessibility of the courses and material necessary to prepare for that examination, to the amount of fees applicable to third-country nationals as registration fees to sit that examination, or to the consideration of specific individual circumstances, such as age, illiteracy or level of education.¹⁰² Despite these clarifications by the CJEU, Odysseus members reported that administrative barriers are still in place, e.g. the Polish report reveals long waiting periods for language exams which are needed to pass the language test.¹⁰³

Though the integration of long-term residents has been one of the primary goals from the beginning, the Commission's impact assessment report 2022 highlighted that "there are no data to indicate to what extent the integration objective has been achieved, as there are no comprehensive and reliable study on the integration of long-term residents."¹⁰⁴ This statement clearly reveals that there is a lack of reliable data and reports.

Article 9 extends the periods allowing absence from the territory of a Member State without the loss of the status as a long-term resident from 12 to 24 months. The possibility of longer absences from EU territory intends to promote circular migration¹⁰⁵ for EU long-term residents. This is again a laudable progress. The proposal mainly points to investors who should have the option to invest in their

¹⁰⁰ Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, [2010], EU:C:2010:117.

¹⁰¹ Case C-302/18, *X v. Belgische Staat*, [2019], EU:C:2019:830, para. 44.

¹⁰² Case C-579/13, *P. and S.*, [2015], EU:C:2015:369, para. 48 ff.

¹⁰³ Questionnaire on Poland.

¹⁰⁴ European Commission 2022h, p. 17.

¹⁰⁵ In 2007 the Commission defined circular migration as 'a form of migration that is managed in a way allowing some degree of legal mobility back and forth between two countries', see European Commission, *On circular migration and mobility partnerships between the European Union and third countries* see European Commission 2007, pp. 8-9.

countries of origin and share the knowledge and skills acquired in the Union. Furthermore, long-term residence permit holders should be allowed to return temporarily to their countries for personal and family circumstances. According to a judgment by the CJEU delivered in January 2022 it is sufficient for the status holders to be present in the EU only a few days a year while residing in a third country.¹⁰⁶ Member States may not require uninterrupted or permanent presence after the acquisition of long-term resident status, even a very limited presence is sufficient.

In case of longer absences, Member States should establish a facilitated procedure for the reacquisition of the EU long-term resident status. To improve legal certainty and promote circular migration, the proposal for a recast regulates the main conditions of such procedure, which according to Directive 2003/109/EC are regulated by national law. According to the proposal, Member States may decide not to require the fulfilment of the conditions related to the duration of residence, adequate and stable resources and sickness insurance. In any case, Member States should not require third-country nationals who apply for the re-acquisition of the EU long-term resident status to comply with integration conditions. Finally, the proposal amends the wording of this Article to ensure consistency with the Return Directive 2008/115/EC. Regarding the withdrawal of the LTR status in cases where he/she constitutes a threat to public policy, Polish NGOs report that the documents for such allegations are confidential and the persons concerned are not entitled to an effective remedy.¹⁰⁷

Article 11 regulates fees to be paid by applicants. Reports by Odysseus members clearly reveal that high fees for the issuance of EU long-term residence permits are still a major impediment for TCNs who fulfil the criteria but struggle with high fees. In an infringement proceeding, the CJEU referred to the recital 10 of the LTRD in a case about the high fees required of applicants to obtain an LTR permit.¹⁰⁸ Recital 10 requires that the procedural rules have to be “transparent and fair, in order to offer appropriate legal certainty to those concerned. They should not constitute a means of hindering the exercise of the right of residence.” The Court also decided that no substantive use of the Charter was made.

The proposal extends the EU long-term residents’ equal access to social protection and social assistance, by removing the possibility for Member States to limit such access to ‘core benefits’. This amendment is a very positive aspect of the proposal as it ensures equal treatment of persons who stay for a long period and contribute to the social system of the receiving State as taxpayers and contributors to social security system and the pension system.¹⁰⁹

The amendments in Article 15 take results of evaluations and points of criticism into account. The rules seem to be suitable to cover most cases where family reunification was either impossible or led to situations of delay in reunification. The proposed facilitation of family reunification with persons holding the long-term resident status is likely to support the integration of the long-term residents and their family members.¹¹⁰ These provisions are corresponding to the new provisions in the revised BCD.¹¹¹ This is laudable as it contributes to the legal and factual coherence of the migration acquis.

¹⁰⁶ Case C-432/20, *Z.K.*, [2022], EU:C:2022:39.

¹⁰⁷ See the questionnaire on Poland.

¹⁰⁸ Case C-508/10, *Commission v The Netherlands*, [2012], EU:C:2012:243, paras. 70-73.

¹⁰⁹ See, for an assessment of the situation under the present Directive, Thym 2016, p. 480.

¹¹⁰ Meijers Committee 2022, p. 2. The definition of ‘family member’ in Article 2(e) should be adjusted to this innovative part of the proposal. Now the definition only covers family members with a residence right under Directive 2003/86. This definition should be extended by adding at the end the words: “or in accordance with this Directive” in order to also cover the children granted an automatic residence right in Article 15(1) of the proposal.

¹¹¹ Directive (EU) 2021/1883.

Chapter III of the proposal amends the provisions on residence in other Member States. The amendments are designed to facilitate intra EU-mobility, a goal that is regularly mentioned as essential. Though the 2003 Directive was the first directive to allow third-country nationals who acquired the EU long-term resident status in one Member State the conditional right to live and work or study in another Member State. Also, family members are entitled to freedom of movement.¹¹²

Labour market tests may no longer be required. Member States may not prioritise EU citizens. In fact, these amendments are important and laudable as they are designed to increase mobility.¹¹³

The removal of labour market tests and other barriers to employment in another Member State in Articles 16 and 24(2) of the proposed Directive is a key progress and it is strongly recommended keeping these provisions in the final text of the Directive. Together with the introduction of the possibility to start employment or study after 30 days in a second Member State in Article 17(5), these changes are essential for intra-EU mobility. Considering the structural demand for labour in several Member States, these new opportunities for third-country workers already available in the EU for more than five years are to be welcomed. In addition, it offers a legal migration route where long-term residents are now working informally and/or irregularly in the second Member State. Keeping the labour market test would likely feed abusive working conditions instead of preventing them.

Box 4: Proof of self-employment according to article 17 LTRD recast

According to Article 17 (2) of the proposal, Member States may require the person concerned to provide evidence that they have stable and regular resources, also made available by a third party, which are sufficient. For each of the categories referred to in Article 16 (2), which is a) the exercise of an economic activity in an employed or self-employed capacity, b) pursuit of studies or vocational training and c) other purposes, Article 17(4) stipulates that the application shall be accompanied by documentary evidence, to be determined by national law, that the persons concerned meet the relevant criteria.

In Dutch practice the type of supporting documents that are needed for exercising an economic activity as self-employed and for other purposes is *not determined by national law*, nor is information on the required documents as provided in circulars, on application forms, or a website consistent. Furthermore, the documents in evidence of their self-employed capacity that are requested are assessed in such a formalistic way that the assessment undermines the usefulness of the Directive. The self-employed capacity is easily called into doubt by civil servants, especially when people work in the "gig economy". Moreover, unrealistic demands are made on the "stability" of income, assignments of the self-employed, or, in case of stay *for other purposes*, the origin of the funds. Legal practitioners flag this tendency as jeopardizing the effectiveness of the Directive.¹¹⁴

This is an illustration of the difficulty experienced by civil servants when they have to distinguish genuine self-employment from bogus self-employment.

We recommend making a reference in recital 34 to the Court of Justice caselaw for the interpretation of genuine self-employment.

¹¹² De Lange and Groenendijk 2021, p. 20. See for a more in-depth discussion Della Torre & De Lange 2018.

¹¹³ Meijers Committee 2022, p. 1. In the view of the Meijers Committee the most important positive elements of the proposal are the removal of labour market tests and other barriers to employment in another Member State.

¹¹⁴ Meeting with eight Dutch immigration lawyers held on 14 October 2022 (see Annex I on Methodology). Recent Dutch case-law has taken a turn towards better implementation, District Court 19 August 2022, NL:RBDHA:2022:9917 and NL:RBOBR:2022:3452 referencing the CJEU *Chakroun* decision.

We note that the push into (bogus) self-employment will be less after deleting the labour market test for employees. Deleting the labour market test is thus likely to improve the labour rights protection of mobile TCNs

To avoid administrative barriers and increase the information, the Directive should explicitly regulate that the EU status on the residence permit issued in a second Member State is clearly indicated. The current Directive lacks such a provision. Thus, public authorities, private organisations and other persons are often unaware that third-country nationals hold the EU long-term resident status and are entitled to the rights attached to that status (such as the equal treatment (Article 24 of the proposal) and protection against withdrawal (Article 25)).¹¹⁵ In respect of the residence in a second Member State by students, the Meijers Committee points to an inconsistency with the Students and Researchers Directive 2016/801.¹¹⁶ According to the last sentence of Article 24(2), a long-term resident third-country national who moves to another Member State as a student under Article 16(2)(b) would have less access to employment than a student from outside the EU under Article 24 of the Students and Researchers Directive 2016/801. This is a result of the fact that his or her access to employment in the second Member State will depend entirely on the relevant national rules. A third country national with at least five years of lawful residence in the EU would thus have less rights than a student residing for a shorter period. As suggested by the Meijers Committee, a reference to Article 24 of said Directive and the entitlement to be employed or exercise self-employed economic activities of no less than 15 hours a week, or the equivalent in days or months per year, would be a solution to reach coherence.

3.3. Effectiveness, efficiencies, and alternatives

3.3.1. Effectiveness & efficiencies

Presently, the long-term resident status is often criticized as not being sufficiently effective to reach the goal of creating a uniform type of status in all Member States. According to literature, effectiveness can be improved by extending the scope, limiting the years to be counted towards application and facilitating onward intra-EU mobility.¹¹⁷ The underuse is mainly caused by the fact that Member States still use the national types of status instead. As statistics show over 10 million third-country nationals hold a long-term resident permit, but only about 3 million of these permits are EU long-term permits¹¹⁸ and about 7 million hold a national long-term permit.¹¹⁹ One of the causes of the limited acquisition on the EU-status is due to the preference of three large Member States (France, Germany and Spain) for issuing national permits and making limited use of EU long-term residence permits.¹²⁰ As the majority of the long-term resident TCNs lives in these three Member States, it would increase the efficiency if the national types of status would be brought in line with the recast of the Directive. Moreover, most TCNs often are not aware of the directive and of the advantages of the status compared with the national status, such as the better protection against loss of the status and, thus, more security of residence, broader equal treatment and the chance of intra-EU mobility.

¹¹⁵ Meijers Committee 2022, p. 6: A clause similar to the one in Article 8(3) of proposal should be added to Article 21(3), reading: "The residence permit shall be issued in accordance with the rules and standard model as set out in Council Regulation (EC) No 1030/2002. Under the heading 'remarks', the Member States shall add 'the holder is entitled to rights of an EU long-term resident under Chapter III of Directive XXX.'"

¹¹⁶ Meijers Committee 2022, p. 5.

¹¹⁷ De Lange and Groenendijk, 2021, p. 12f.

¹¹⁸ European Parliament, BRIEFING: Initial Appraisal of a European Commission Impact Assessment, p. 1.

¹¹⁹ Eurostat, see See Annex III, table 2.

¹²⁰ See also Meijers Committee 2022, p. 2f.

3.3.2. Alternative choices

The Commission had mainly four options to react. The proposal follows option 3 as the Commission decided to propose a recast of the Directive.

In general, third-country nationals should be allowed to hold both types of status – EU long-term resident status and a national type of status – in order to avoid that they are not benefitting from the rights attached to the EU long-term resident status.

Another option – suggested by an OECD report – regarding the increase of efficiency could be the automatic issuance of an EU long-term residence permit if the conditions are met¹²¹ or to include provisions into the text which regulate the switch from national permits to long-term resident permits.

In any way it is essential that the third-country national residents are automatically informed about the possibility to apply for EU long-term resident status once they fulfil the five-year lawful residence requirement.

Lawfully present third-country nationals in the Union should get priority to access the EU labour market.¹²² This priority should reduce the use of intra-EU posting and avoid that 'cheap' third-country national workers are hired and work and live in substandard conditions in low- and medium-skilled jobs.¹²³

3.4. Legal and Factual Coherence

The recast of the LTR Directive is a step forward in legal coherence. The periods of legal residence in various Member States are accumulated as provided for in Article 4 LTRD. Situations where documents presented, or information provided in support of the application are inadequate or incomplete are regulated similar to the rules provided for in other EU Directives on legal migration.

There are several failures regarding legal coherence as well.

Firstly, as national permits and EU long-term residence permits might still be issued in parallel, there is no coherence. Many Member States use national permits parallel to the issuance of EU long term residence permits. In order to increase factual coherence, the possibility to issue parallel national permits should be avoided or at least reduced. If practice continues, Member States should clearly inform third-country nationals about the rights attached to long-term resident status and about the possibility that both types of status can be applied for. The proposal does not regulate if Member States are allowed to issue national permits parallel to the EU long-term residence permits. Member States who already implement the practice of parallel permits may continue this practice. The obligation to inform is essential for third-country nationals.

Secondly, Dutch practice has brought forward a major incoherence and practical failure of effectively applying the derogations in the BCD Directive 2009/50. These provisions should be included in the text of the recast as well (see Box 4).

Box 5: Circular Migration of a Blue Card Holder yet exclusion from the LTR

In accordance with article 16 BCD 2009/50, the holder of a BC has the opportunity to return to his home country for a maximum of 12 months without, supposedly, losing his future entitlement to

¹²¹ OECD 2016.

¹²² De Lange and Groenendijk, 2021, p. 25.

¹²³ Ibid.

long-term residence status. As this BC holder is not in employment during the absence, the Blue Card has to be withdrawn according to Article 5 BCD.

In the Dutch case a new Blue Card was granted upon his return with a gap of 11 months of interrupted legal residence. According to Article 16 of the BCD (article 18 recast), 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.

The BCD notwithstanding, the TCN was refused an EU Long-Term Residence permit because he had been away for more than six months. Although he had specifically referred to the BCD in his application, the rejection did not make reference to his rights under the Blue Card Directive and the derogations therein of the LTRD. The rejection was unsuccessfully challenged in court. At the time of writing appeal is pending.¹²⁴

Recommendation: A paragraph is to be added to article 4 LTRD on the duration of stay making reference to the possibility of derogations to facilitate circular migration in other Directives: "Periods of absence from the territory of the EU in accordance with the Blue Card Directive and subsequent interruption of continuous employment, shall not interrupt the duration of legal and continuous residence". Such circularity should not prevent the TCN from meeting the required duration of residence under the LTRD.

Alternatively, at a minimum, add a sentence of this nature to recital (10) LTRD to clarify to the Member States that such 'gaps' as a result of the use of the Blue Card right to circularity should not prevent the TCN from meeting the required 'duration of residence' under the LTRD.

This recommendation is currently relevant to the BCD only but could in the future also be relevant to long-term care workers or start-up founders in case their circular migration for longer periods is facilitated.

Thirdly, to our knowledge not addressed elsewhere, there is a certain incoherence between on the one hand the exclusion of investors from the LTR permit and EU laws and policies, including the Commission's "Forward-Looking Pillar", trying to attract (investors in) innovative talent (see para.6.4).

As mentioned above the legal onward movement for beneficiaries of international protection with long-term residence status after three years is foreseen in the Proposal for a Regulation on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM/2020/610 final. The present proposal for a recast however does not contain any such provisions. Legal coherence would be required.¹²⁵

3.5. Fundamental Rights Consistency, Charter of Fundamental Rights

The Preamble of the proposal in line with the present Directive and other legal acts in the area of freedom, security and justice confirms the full compliance with the Charter of Fundamental Rights. Thus, there is commitment to full respect for Charter rights as well as an obligation that Member States

¹²⁴ De Lange, 2021; the District Court Decision 9 March 2022, AWB 20/7665 and AWB 21/3521 (not published).

¹²⁵ See Section 3.2.2.

when implementing the Directive must do so in a manner fully consistent with the Charter. The CJEU has already interpreted several notions contained in the Directive. There are however still clarifications needed as several important points which need clarification have not yet been submitted by national courts.

The CJEU often refers to recital 2 in the Preamble of the current Directive. This recital should therefore not be deleted as proposed.

The recast of the Directive concerns especially the following rights guaranteed in the Charter of Fundamental Rights of the EU: right to family and private life (Article 7), professional life (Article 33), non-discrimination (Article 21), and the right of access to social security and social assistance (Article 34).

The CJEU has determined about 20 cases regarding the LTRD of which five include some consideration of the directive in light of the Charter. Leaving aside the Charter provision on its scope, Article 51 (1) and (2), four substantive Charter rights have been considered by the CJEU in these cases: (1) Article 7, private and family life;¹²⁶ (2) Article 21, non-discrimination;¹²⁷ (3) Article 24, the rights of the child;¹²⁸ (4) Article 34 access to housing.¹²⁹

As mentioned above several amendments in the recast are intended to include clarifications by the jurisprudence of the CJEU. In the first reference, where the CJEU considered the Charter in the context of the LTRD Directive,¹³⁰ it confirmed its constant jurisprudence that the Charter constitutes a superior category of rights. In this judgment the CJEU made clear that housing benefits cannot be excluded from the category of 'core benefits' under Article 11 (4) LTRD, in so far as the housing benefit at issue is designed to fulfil the objective of Article 34 (3) CFR which is to ensure a decent existence for all those who lack sufficient resources. The CJEU further decided that the benefit has to be granted to EU long-term residents and to persons residing on the basis of a national type of status equally.¹³¹

Another judgment on the LTRD once again dealt with housing assistance.¹³² The problem was whether a specific housing assistance benefit could be made dependent on the applicant's knowledge of the

¹²⁶ "Everyone has the right to respect for his or her private and family life, home and communications."

¹²⁷ "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 Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited."

¹²⁸ "1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

¹²⁹ "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 Union 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 Union 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 Union law and national laws and practices."

¹³⁰ Case C-571/10, *Kamberaj*, [2012], EU:C:2012:233.

¹³¹ Case C-571/10, *Kamberaj*, [2012], EU:C:2012:233, para. 93.

¹³² Case C-94/10, *Land Oberösterreich v. K.V.*, [2021], EU:C:2021:477.

language of the state. The CJEU was unsure whether the assistance constituted a core benefit within the meaning of Article 11(4) LTRD or not so decided the case in the alternative. In the event that it was not a core benefit, as the Member State had used its derogation in Article 11(4), the CJEU held that the matter was outside the scope of EU law (thus a matter of national law exclusively). On the other hand, if the benefit was a core benefit and thus within the scope of EU law, while the Charter is applicable, the CJEU found that the language requirement did not place persons of a particular ethnic origin at a disadvantage and so could not be discrimination based on ethnic origin within the meaning of Article 21 Charter.

3.6. Conclusions & Recommendations

Based on the above we derive to the following conclusions:

Long-term residence Directive

- Limit waiting time, reduce residence requirement

The proposal still requires five years of residence; this period should be reduced in order to facilitate the quicker integration of third-country nationals and their freedom of movement within the EU Member States. As mobility within the EU should be made easier for a variety of reasons, among these first and foremost to facilitate quick reaction to labour market demands, a reduction to three years would be supportive for reaching this goal.

- Allow for exceptions for protected persons

There are no exceptions regarding the five-year period necessary for the acquisition of the LTR status for persons whose residence is based on a type of status provided for in the Qualification Directive or national type of protection. Article 71 of the proposed Asylum and Migration Management Regulation¹³³ contains a provision on legal onward movement for beneficiaries of international protection with long-term residence status. The proposal provides for a derogation of the provisions of the LTRD. The present proposal for a recast however does not contain any such provision. This option could be included into the text.

- Include the beneficiaries of temporary protection

The proposal does not refer to the persons covered by the Temporary Protection regime for Ukrainians. The situation of Ukrainians legally residing in the EU will require a solution in case the regime ends and/or also if they intend to stay longer. Many Ukrainians are already integrated into the labour market. The proposal was drafted before the regime was enacted and published shortly after the Russian attack on Ukraine. As the situation could not have been foreseen, the text could be amended.

We recommend that either in the Council decision ending the application of the TPD for Ukrainians or otherwise before the automatic ending of the three years of TP an arrangement is needed to allow the Ukrainians to remain in legal employment. They should not all of a sudden be employed illegally if the TPD regime ends. They should not fall within the regime of Article 15 of the Reception Conditions Directive, because this would entail a possible waiting time.

We recommend addressing their future right to work in the EU in the Reception Conditions Directive by adding an article 15(4) stating that "Access to the labour market shall not be withdrawn where applicants had prior access to the labour market under the TPD".

¹³³ European Commission 2020b.

We recommend explicitly mentioning that the period of stay under the TPD counts towards an LTR permit. To this Article 4(5) should include, besides long-stay visa holders and residence permit holders, periods of stay as beneficiaries of temporary protection.

- Keep the recitals in place

The proposal states that the jurisprudence of the CJEU is codified in the text. The Court however often refers to recital 2 in the Preamble of the current Directive. This recital should therefore not be deleted as proposed.

- Clarify derogations towards circular migration

As the previous example of state practice revealed, national authorities and courts failed to facilitate circular migration of a Blue Card holder with his exclusion from his right to an LTR as a consequence. This incoherence can be addressed by adding a clarification to article 4 of the recast.

- Reconsider the exclusion of investors

The rules for investors are not well-integrated into the text and may lead to additional administrative barriers for all long-term residents who are not necessarily the ones targeted by this exclusion. Such negative consequences should be avoided.

- Provide access to social protection

The proposal extends the EU long-term residents' equal access to social protection and social assistance, by removing the possibility for Member States to limit such access to 'core benefits', which is a laudable progress. This amendment is a very positive aspect of the proposal as it ensures equal treatment of persons who stay for a long period and contribute to the social system of the receiving State as taxpayers and contributors to the pension system.¹³⁴

- Encourage Intra-EU mobility

The proposal should encourage intra EU-mobility. In order to reach that goal, it would be necessary to regulate that the second and possibly third Member States do not carry out labour market tests nor grant priority to EU citizens and also do not otherwise restrict access to the labour market or impose administrative barriers.

- Avoid administrative barriers

To avoid administrative barriers and increase the information the Directive should explicitly regulate that the EU LTR status is explicitly indicated on the residence permit issued in a second Member State. A provision should be added to Article 8 obliging the second Member State to issue a residence permit for the purposes as listed in article 16 (2) entering the remark "mobile EU long-term resident". This is necessary because currently the residence permit does not reflect the EU status of mobile migrants, hampering their access to their rights accorded to them in the Directive.

- Facilitate family reunification

In general, family reunification possibilities for long-term residents should be regulated in a consolidated way, as in Article 15 and in Article 18 of the proposal.

¹³⁴ See for an assessment of the situation under the present Directive Thym 2016, p. 480.

4. THE OPERATIONAL PILLAR

4.1. Introduction

The operational pillar is meant to simultaneously enhance access to the EU's labour markets, while promoting the EU's strategic interests (in the region) and assisting development in third partner countries. There are synergies as well as tension between these ambitious goals, which are reflected throughout the operational design and which manifest in policy discourse. On the one hand, it is largely uncontroversial that Europe must urgently deal with demographic change, which is putting an increasing strain on its social systems. One important way to address this challenge is migration.¹³⁵ Migration governance is to be pursued in a balanced manner which also advances development in the countries of origin, e.g. through co-development programs and avoiding brain drain. Nonetheless, as we analyse below, EU Member States have to date established relatively few legal migration programs, which have yielded numerically limited results. At the same time, the EU and Member States are increasingly instrumentalising cooperation to pursue migration management objectives through conditionalities. For example, the EU and Member States have made support for mobility conditional on control-oriented commitments in the EU visa system (e.g. 2019 Visa Code reform), in funding instruments drawing from both EU and national funds (e.g. the EU Trust Fund for Africa), and in cooperation frameworks (e.g. common agendas on migration and mobility).

Despite the determination of the EU institutions to press ahead with these new initiatives, scholars have cautioned that due to the way competences are organised, the EU's intervention will be limited to funding and coordination so that the impact of these schemes will rely on Member States' readiness to foresee more opportunities for migrants to enter their labour market.¹³⁶ As outlined in the introduction to this study, our point of departure is that, although labour market demands differ, Member States face a 'struggle for skills' which hinders the demand of sustainable and inclusive growth. Member States, as well as countries of origin, face climate change-induced global economic transitions. Moreover, the war in Ukraine and the consequent energy crisis has seen (food) production processes change due to the inability of businesses to meet their energy costs. This has already resulted in lay-offs for mobile EU citizens at work in, for instance, Dutch agriculture and horticulture. These shifts possibly free up parts of the workforce for other labour market sectors in need.

Some scholars argue that skills shortages, especially in the OECD and EU context, are a product of informal or non-sustainable economies.¹³⁷ These shortages are thus not necessarily a solid justification for stimulating labour migration; addressing the non-sustainable business models is just as necessary. Nevertheless, we do believe that migrant labour is likely to be part of a solution for labour shortages in specific sectors, such as the care sectors (needed due to demographic developments) and in green transition sectors (needed due to a lack of skills to respond to climate change).¹³⁸ We feel such important reflections on the policy options, and in the absence thereof of the operational pillar, is missing from the European Commission's proposals yet are relevant to achieving the set objectives in current times of change.

In the next sections, we sketch the legal and policy developments preceding EU's Talent Partnerships (Section 4.2). We then critically assess the Commission's approach and policy vision, as well as the current state of play of implementation (Section 4.3). We investigate the legal coherence of the

¹³⁵ See, e.g. Iván Martín et al. 2015, pp. 26-31 and Joint Research Centre 2020.

¹³⁶ García Andrade 2022.

¹³⁷ Pastore 2014; Haas, De Castles and Miller 2020, p. 277-278.

¹³⁸ De Lange 2021.

proposed operations with other instruments, where we also present potential alternatives and their implications (Section 4.4). We next focus particularly on the likely effectiveness of the proposed approach, scrutinising the increased efficiencies which the proposals are likely to bring compared to previous schemes such as the Mobility Partnerships (Section 4.5). Thereafter, we tackle the intricate issue of fundamental rights consistency. In order to render this analysis more tangible, we sketch out a number of scenarios (Section 4.6). A concluding section draws together our analysis and main recommendations (Section 4.7).

4.2. The Road to Talent Partnerships

The external limb of the EU's migration policy has resulted in limited additional mobility opportunities for third country nationals to date.¹³⁹ This is linked with the fact that labour migrant quotas are a competence exclusively reserved to Member States.¹⁴⁰ Therefore, both participation in a given scheme and the volume of admission depend on Member States' individual buy-in. Competences dictate an intricate legal balance to be struck between the Member States and the EU, between the different EU institutions, and between migration and other areas of EU action, such as development cooperation¹⁴¹ and addressing climate change.¹⁴²

Launched in 2005 under the banner of a Global Approach to Migration (GAM),¹⁴³ followed in 2011 by the GAMM¹⁴⁴, EU Policy initiatives such as 'Mobility Partnerships' were adopted to provide a framework for Member States to offer legal migration possibilities.¹⁴⁵ Few Member States have taken up these possibilities and, even when they have done so, they concern very few individuals. For example, the Mobility Partnership concluded with Morocco in 2013¹⁴⁶ has apparently not produced significant results regarding legal migration. Between 2010 and 2016, the number of Moroccan seasonal workers in the EU dropped from 10,416 to 3,781 and the number of Moroccans admitted for other remunerated activities from 43,334 to 6,283.¹⁴⁷

Since 2016, the Migration Policy Framework clearly embeds migration and international protection in the EU's broader external relations.¹⁴⁸ As Moreno-Lax elaborates, this entails a multi-dimensional engagement, going beyond the 'migration toolkit alone', through the coordination of EU action and Member States' bilateral efforts; the mainstreaming of the Framework's goals in all EU policies; and increased financial assistance and targeted support to priority countries, comprising top refugee-producing and transit States.¹⁴⁹ Most importantly, the Migration Policy Framework (MPF) introduces conditionality as a means to achieve migration management objectives and it directly links development assistance to cooperation on readmission.¹⁵⁰ Conditionality has been further institutionalised through tying in mobility and control-oriented commitments in the EU's visa

¹³⁹ On the topic of partnerships more extensively see Sauer, Michael and Volarevi 2020.

¹⁴⁰ See TFEU, Art 79.5.

¹⁴¹ See analysis in Garcia Andrade 2018.

¹⁴² See De Lange 2021.

¹⁴³ European Council 2006.

¹⁴⁴ European Commission 2011c.

¹⁴⁵ See, e.g. Reslow 2015; Reslow 2018.

¹⁴⁶ General Secretariat of the Council 2013.

¹⁴⁷ See Guild 2020, <https://eumigrationlawblog.eu/negotiating-with-third-countries-under-the-new-pact-carrots-and-sticks/>.

¹⁴⁸ European Commission 2016a. (hereinafter: Migration Policy Framework or MPF).

¹⁴⁹ See, *ibid*, 2-3, as well as analysis in Moreno Lax (forthcoming) 2022.

¹⁵⁰ Migration Policy Framework, 9.

system,¹⁵¹ or in funding instruments.¹⁵² The MPF also contains a legal migration component and a number of Pilot projects have been operationalised under this banner. Below, we refer to the experience of pilot schemes adopted under the MPF as they could act as a blueprint for EU's Talent Partnerships. It is against this backdrop that the European Commission launched as part of its New Pact on Migration and Mobility the concept of 'Talent Partnerships'.¹⁵³

The Talent Pool on the other hand originates from an initiative from members of the EP.¹⁵⁴ The Tool is to be a matching platform where TCNs could express their interest to work in the EU and a 'one-stop-shop' for TCNs, employers and national administrations to make a match. It would be helpful to small- and medium enterprises and public employment services. This tool would build on the experience of the Expression of Interest (Eoi) system, used by New Zealand, Australia and Canada to manage skilled migration. The OECD was sceptical of implementing an Eoi system in the EU although specific elements could be adopted to help improve international employment matching.¹⁵⁵ This matching would however need to be adapted to the EU regulatory framework and context which unlike the above-mentioned countries foresees that individual Member States retain exclusive competence on permit issuance. Furthermore the EU framework does not offer immediate permanent residence for those admitted. This has the EU experience difficulties to attract talent. The EP successfully pushed for the tool and it was taken on board by the European Commission in its April 2022 communication, where the Commission set out the target to complete (a pilot) operationalization by the end of 2022.

4.3. The Commission's approach

Talent partnerships are meant to advance cooperation with partner countries on mobility and legal migration. These policy instruments are to create training opportunities in countries of origin, including training of non-migrants. The Commission launched such schemes very ambitiously in June 2021 as a centerpiece of the EU's external relations, along with an EU policy and funding framework to engage strategically with partner countries and better match labour and skills needs. In its Communication, the Commission outlined its broader vision for the Talent Partnerships but did not provide full detail on their scope and form. It stated that the partnerships would consist of 'a comprehensive EU policy framework as well as funding support for cooperation with third countries'.¹⁵⁶ It also mentioned their instrumental character as one of their attributes, referring to them as being part of the EU's toolbox for engaging partner countries strategically on migration'.¹⁵⁷ It highlighted their overarching character, foreseeing coordination between different national ministries at Member State level, the private sector, and social partners, and also at EU level, with different funding sources coming together within a single framework.¹⁵⁸ Further elements were made apparent during the official launch of the Talent Partnerships in June 2021 such as their dual character: addressing skills shortages in the European

¹⁵¹ Regulation (EU) 2019/1155 of the European Parliament and of the Council amending Regulation (EC) 810/2009 establishing a Community Code on Visas (Visa Code) [2019] OJ L188/25, Art. 25a and analysis in Guild and Grundler 2022.

¹⁵² See, e.g. operationalisation of the EU Trust Fund for Africa.

¹⁵³ European Commission 2020a, p., 23.

¹⁵⁴ European Parliament 2021c; European Parliament 2021h, point 3.

¹⁵⁵ OECD 2019b; OECD 2022.

¹⁵⁶ European Commission 2020a, p. 23.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

Union by better matching labour and skills needs, while strengthening mutually beneficial partnerships on migration with third countries.¹⁵⁹

It was, however, the 2022 Commission Communication on Attracting Skills and Talent to the EU that more fully expressed the Commission's vision, confirming the layered approach to the Partnerships. On the one hand, Talent Partnerships are to 'boost international labour mobility and development of talent in a mutually beneficial and circular way'.¹⁶⁰ On the other hand, they are part of a comprehensive policy to 'engage key partner countries strategically in all areas of migration management, including effective return and readmission, as well as the prevention of irregular departures'.¹⁶¹ There is underlying tension between these goals, especially if (negative) conditionalities will be employed.

Mobility opportunities to the EU for either work, study, or training are a key aspect of Talent Partnerships. However, alongside mobility to the EU, the Partnerships also incorporate a capacity building and investment in human capital that does not necessarily involve mobility. This means that the cooperation partnership could involve activities in the partner third country, e.g. vocational education and training, without a subsequent mobility component. This in line with economic development in the partner country being one of the goals of Talent Partnerships. In its policy discourse, the Commission has connected the existence of legal mobility and training opportunities directly with reduction in irregular migration,¹⁶² even if there is no empirical evidence in support of this point.¹⁶³

According to the 2022 Communication, the Partnerships are not to target exclusively the highly skilled but should be open to migrants of all skill levels and relate to different sectors of the labour market, provided the risk of brain drain in partner countries is avoided.¹⁶⁴ Moreover, the cooperative framework should result in various types of mobility, which is temporary, long-term, or circular.¹⁶⁵ The Commission further wishes to incentivise multiple Member States to participate in a Talent Partnership with a single partner country.¹⁶⁶ According to the Commission, this is one factor that would enhance scalability and sustainability. Finally, the Commission envisages the active involvement of private stakeholders such as employers, training institutions and diaspora organisations in the design, operationalisation, and financing of the Partnerships.¹⁶⁷

The Commission foresees four steps towards the operationalisation of a Talent Partnership.¹⁶⁸ Firstly, a consultation between Member States and partner countries which involves identification of both labour market needs and interests on labour mobility and talent development, but also takes into account the overall state of external relations and migration management needs. Secondly, meetings between the Commission and Member States to more clearly identify labour market needs and ongoing and envisaged initiatives. Thirdly, Commission services, the EEAS, and external delegations

¹⁵⁹ Talent Partnerships in European Commission 2020a; European Commission 2021d: see [Talent Partnerships: Commission launches new initiative to address EU skills shortages and improve migration cooperation with partner countries | EURAXESS \(europa.eu\)](#).

¹⁶⁰ European Commission 2022d, p. 10.

¹⁶¹ Ibid.

¹⁶² Commissioner Johansson in Talent Partnerships: European Commission 2021d. see [Talent Partnerships: Commission launches new initiative to address EU skills shortages and improve migration cooperation with partner countries | EURAXESS \(europa.eu\)](#).

¹⁶³ For critique on the lack of empirical basis for such an assumption see, Beirens et al. 2019; According to Hein de Haas, education increases the aspirations and capabilities to migrate, De Haas 2021.

¹⁶⁴ European Commission 2022d, p. 11.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid, p. 13.

would steer discussions that would culminate in a technical roundtable to discuss and agree on the design of a specific partnership. Finally, financing from different sources would come together: the neighbourhood, development and international cooperation (the so-called NDICI-Global Europe instrument); the Asylum, Migration, and Integration Fund (AMIF); Member States' own funds; and private sector funds. This operationalisation design is true to the Commission's vision outlined above. It relates migration management objectives to labour mobility and talent development opportunities. It embeds the Talent Partnership in broader external relations cooperation. It aims for scalability through the involvement of several Member States, and it seeks to pool funding from the EU, Member States and the private sector.

As stated above, the Commission took up the Parliament's call and in its 2022 Communication announced the establishment of such a platform and matching tool that would include 'candidates from non-EU countries, which will be selected on the basis of specific skills levels, criteria and migration requirements, following a screening of candidates' credentials'.¹⁶⁹

4.3.1. Implementation: state of play

The Talent Partnerships will draw from the experience of existing initiatives. Firstly, they echo the ideas behind the Global Skills Partnerships model, which was recommended in the Global Compact on Migration.¹⁷⁰ A partnership is in essence an up-front agreement between employers and/or governments in destination countries and professional training centres in origin countries, whereby benefits of migrants' professional service at the destination serve to finance training at the origin — training for both migrants and non-migrants.¹⁷¹ A number of such initiatives are currently under implementation, some also by EU Member States.¹⁷² For example, Germany is implementing since 2017 a pilot program on youth training and employment programming in Kosovo.¹⁷³ The capacity-building element of Talent Partnerships in partner third countries, including developing talent not necessarily for the purpose of migrating to the EU but for the benefit of the partner third country is in line with these policy ideas.

Secondly, the Talent Partnerships will draw from the experience of existing pilot projects under the Mobility Partnership Facility (MPF),¹⁷⁴ and under the European Trust Fund for Africa's THAMM approach (Towards a Holistic Approach to Labour Migration Governance and Labour Mobility in North Africa).¹⁷⁵ The THAMM approach combined the establishment of policy, legislative, institutional, and regulatory frameworks in selected North African countries, notably Egypt, Morocco and Tunisia, with mechanisms for skills verification and assessment, and finally foresaw the establishment of mobility schemes. Several MPF pilot projects are underway. The now concluded first generation of MPF pilot projects focused on skills development and consisted of four initiatives. *Digital Explorers (DE)* offered a career advancement programme in Lithuania to young ICT specialists from Nigeria. The *Pilot Project Addressing Labour Shortages through Innovative Labour Migration Models (PALIM)* provided training to

¹⁶⁹ European Commission 2022d, p. 14.

¹⁷⁰ Ferris and Martin 2019, OHCHR and migration. 2018, The Global Compact for Safe, Orderly and Regular Migration (A/RES/73/195). For commentary see the various contributions in the special issue of the International Journal of Refugee Law (2018) 30(4) titled *The 2018 Global Compacts on Refugees and Migration* and International Migration (2019) 57(6) titled *The Global Compact for Safe, Orderly and Regular Migration and the Global Compact on Refugees*.

¹⁷¹ Clemens 2014.

¹⁷² See for a full list of project <<https://gsp.cgdev.org>>.

¹⁷³ See for further information <<https://gsp.cgdev.org/2021/07/07/youth-employment-and-skills-in-kosovo-yes/>>. And more general on Germany Clemens 2019.

¹⁷⁴ See for full overview of such projects see <<https://www.migrationpartnershipfacility.eu/>>.

¹⁷⁵ European Commission 2018. See for information <https://ec.europa.eu/trustfundforafrica/region/north-africa/regional/towards-holistic-approach-labour-migration-governance-and-labour_en>.

young Moroccan graduates, also with a view of preparing them for employment in the ICT sectors of Belgium and Morocco. The *High Opportunity for Mediterranean Executive Recruitment (HOMERe)* offered internship opportunities in France to students from Morocco and Tunisia. *Young Generations as Change Agents (YGCA)* offered Moroccan graduates the possibility to pursue a master's degree in Spain.¹⁷⁶

These ad hoc pilots were small scale and time limited. Commentators have identified several challenges to their implementation. The multi-stakeholder approach means that their set-up is quite complex, requiring the involvement of a multitude of actors at local, regional, and national level.¹⁷⁷ At the same time, while transaction costs and coordination efforts are high, the outcome in terms of mobility beneficiaries has been low.¹⁷⁸ For example, *PALIM* led to a 7-month training programme organised for 120 young Moroccan talents but did not result in actual mobility during its implementation due to COVID-19 restrictions.¹⁷⁹ In what concerns the private sector involvement, a different commentator noted that actual hiring decisions are separate from private sector interest and commitment to participate in a Pilot Project; cost-benefit considerations, actual needs and the quality of the match may outweigh declared commitment to the process as a driver for success.¹⁸⁰ Others have cautioned about the impact of more structural barriers, such as difficulties getting qualifications recognised, or addressing European employers' lack of familiarity with how foreign-acquired training compares with European standards, to the success of such schemes.¹⁸¹ Finally, others commented on the fact that most pilots were only concerned with circular migration, with limited periods of mobility (6 to 12 months) which might not correspond to either the partner countries' development needs, or to participants' individual agency.¹⁸² As we scrutinize the envisaged Talent Partnership in the next sections, we also explore the ways in which such criticisms can be addressed.

In its April 2022 communication, the Commission identified North African partners, in fact those involved in the Trust Fund's THAMM approach (i.e. Egypt, Morocco and Tunisia) as a priority for the conclusion of Talent Partnerships. It then set up an ambitious implementation timeline for the Talent Partnerships, which would start by the end of 2022.¹⁸³ It also foresaw future dialogue with Pakistan, Bangladesh, Senegal and Nigeria with a view to establishing Talent Partnerships also with those countries, explicitly relating the establishment of said Talent Partnerships with reinforced migration management cooperation.¹⁸⁴

Regarding the EU **Talent Pool**, building up to the full-scale platform, the Commission announced in its April 2022 Communication the creation of a Pilot Talent Pool specifically concerning people fleeing the Russian war of aggression against Ukraine and granted temporary protection in the EU.¹⁸⁵ At this stage, this thus concerns the matching of beneficiaries of temporary protection and employers within the EU. The Commission foresaw the involvement of the private sector (employers, social partners) in its development and set up a thematic group of contact points from Member States interested in

¹⁷⁶ See MPF 2022.

¹⁷⁷ Rasche 2021.

¹⁷⁸ Schneider 2021.

¹⁷⁹ See MPF 2019: MPF project sheet for PALIM at <<https://www.migrationpartnershipfacility.eu/mpf-projects/17-completed-action-pilot-project-addressing-labour-shortages-through-innovative-labour-migration-models-palim/preview>>.

¹⁸⁰ Stefanescu 2020.

¹⁸¹ Hooper 2021.

¹⁸² Solidar 2021.

¹⁸³ European Commission 2022d, p. 14.

¹⁸⁴ European Commission 2022d, p. 14.

¹⁸⁵ European Commission 2022d, p. 15.

participating in the pilot initiative within the framework of the European Migration Network.¹⁸⁶ As of Monday, 10 October 2022, an online matching tool became available in 5 EU Member States. At the time of writing, this is now available in 7 Member States (Finland, Poland, Cyprus, Spain, Croatia, Slovakia and Lithuania).¹⁸⁷ This supplements the existing EURES Job Mobility Platform for intra-EU mobility. To our knowledge, no evaluative structure is in place yet as to the actual functioning of the platform. The European Training Foundation is also collating resources for Ukrainian job seekers at EU and national levels,¹⁸⁸ but a matching tool is not yet available.

The Commission expects to launch the full EU Talent Pool and portal by mid-2023 and to provide further details on its gradual development through a recommendation. The Pool would be informed by detailed elements, such as the types of skills needed in the EU labour market, the relevant admission criteria, and details of the admission process.¹⁸⁹

4.4. Legal coherence and alternatives

The Talent Partnerships will not be developed in a legal vacuum. While the number of admissions remains a national competence, the legal migration *acquis* and the visa *acquis* have harmonised several issues relating to the mobility of those moving under the Talent Partnerships such as conditions and procedures in obtaining visas and residence permits. In this section we investigate the legal coherence of the proposed operations. A first subsection provides an overview of the legal interaction between the Talent Partnerships and the existing EU labour migration directives (subsection 4.4.1). A second subsection focuses specifically on the issue of entry and acquisition of a residence permit, a crucial issue for the operationalisation and efficiency of the envisaged schemes. We therefore outline different alternatives on these aspects, bearing in mind the legal instruments that are currently under negotiation and commenting on how these alternatives could best serve legal coherence (opportunities) but also outlining the legal complexities (drawbacks) (subsection 4.4.2).

The Talent Partnerships link with a number of instruments of the legal migration *acquis* for their operationalisation. For those entering the EU for labour purposes the Single Permit, Blue Card, Seasonal Workers, or Intra-Corporate Transferees directives might be relevant. Like other labour migrants, they would need to possess a work offer or binding job offer; pass the hurdle of labour market tests; possess a valid travel document and (an application for a) visa; proof of sufficient resources (where applicable); health insurance; and documents attesting the recognition of (un)regulated professional qualifications. In the case that those in need of international protection are concerned, the Union's resettlement programs, whether those already operational, or the Union Resettlement Framework under negotiation, are concerned for their identification, whereas afterwards they would also need to fulfil the same conditions of the legal migration *acquis* as things currently stand.

Another relevant instrument is the Students and Researchers Directive. This instrument relates, apart from students and researchers, to trainees and pupils. Talent Partnerships concern all these categories of third country nationals. They include training components, in the country of origin or in the EU which could take the form of studies within a university program, or traineeships and pupillages. In fact, several of the current pilots related to these elements. HOMERe, for example, offered internship

¹⁸⁶ European Commission 2022d, p. 15.

¹⁸⁷ European Commission 2022f, see [European Commission launches EU Talent Pool pilot initiative | European Website on Integration \(europa.eu\)](https://european-commission.eu/press/news/detail/11427).

¹⁸⁸ European Training Foundation 2022. <https://www.etf.europa.eu/en/education-and-work-information-ukrainians-and-eu-countries/information-for-people-fleeing-ukraine>.

¹⁸⁹ European Commission 2022d, p.16.

opportunities in France to students from Morocco and Tunisia, and YGCA offered Moroccan graduates the possibility to pursue a master's degree in Spain.

While the co-legislators can take the Talent Partnerships into account in instruments currently under negotiation, such as the Single Permit Directive or the Union Resettlement Framework, in other areas amendments remain prospective. Another possibility would be a dedicated instrument targeting the operationalisation of the Talent Partnerships.

There are considerable opportunities and drawbacks for the entry and residence of people moving under the Talent Partnerships. We therefore take the opportunity to list some alternative scenarios.

A first avenue would be to create a specific legal instrument to regulate the operationalisation of the Talent Partnerships. While this might initially seem appealing in terms of raising the policy visibility of this initiative, it is mired with complexities. Firstly, the Talent Partnerships are to incorporate different types of employment and mobility including highly skilled, mid skilled, and low skilled labour employment; seasonal employment; and mobility for study or training. Therefore, such a potential instrument would need to amalgamate provisions from different sets of directives, in essence duplicating the existing legal framework. Secondly, due to the wide scope of these schemes, such an instrument would turn out to be highly complex since the co-legislators have decided to differentiate various aspects of the procedure and rights for different categories of third country nationals according to the type of mobility. Finally, instead of advancing legal coherence, adopting a new dedicated instrument for a specific category of third country nationals would further fragment the regulatory landscape.

A second avenue would thus be for the existing instruments to account for the existence of Talent Partnerships in a way which enhances their potential, effectiveness, and efficiencies, while promoting legal coherence. One way to realise this potential is for the proposed recast of the SPD to include a specific reference to people moving under the framework of a Talent Partnership. Labour migrants under a Talent Partnership fall within the remit of SPD as analysed above. The policy goal would be to create a 'fast track' for this category of third country nationals within the SPD. This would mirror the provision in the BCD foreseeing a simplified procedure for 'recognised' employers, including a 30-day deadline from the date of the submission of a complete application for the adoption and notification of the decision on the Blue Card.¹⁹⁰ Therefore, the recast SPD which now foresees a maximum four-month limit from the date of the lodging of the application¹⁹¹ would, through an amendment by the co-legislators, include an additional paragraph in its Article 5 establishing a simplified procedure for third country nationals under a Talent Partnership. Same as in the case of the Blue Card, this would forward the maximum decision deadline to 30 days from the date of the lodging of the application. This would enhance administrative efficiencies, rendering entry under a Talent Partnership advantageous for both third country national labour migrants (and thus their countries of origin) and private sector employers that could rely on a relatively swift decision in the framework of a Talent Partnership.

Another way to realise this potential is to highlight Talent Partnerships in a future amendment of the Students and Researchers Directive. This directive already foresees specific favourable measures for third country nationals 'covered by Union or multilateral programmes that comprise mobility measures', for example in what concerns residence.¹⁹² This could be strengthened for third country nationals under the Talent Partnerships. An example could be to strengthen existing pathways from

¹⁹⁰ See BCD, Arts 11.1 and 13.

¹⁹¹ See recast SPD, Art 5.2.

¹⁹² See, e.g., SRD 18.2.

research or studies to the labour market for those under a Talent Partnership through an extension of the period of stay for the purpose of job searching or entrepreneurship from its current 9-month limit,¹⁹³ or extending the scope of this provision to trainees and pupils.

A final avenue would be to open up Talent Partnerships and the Talent Pool to third country nationals with protection needs where a Talent Partnership is operational in a country that hosts refugees and forced migrants. This would be in line with Commission's statements in the New Pact.¹⁹⁴ The operationalisation of such proposals would involve amendments to the Union Resettlement Framework that is under negotiation.¹⁹⁵ After the identification or referral of the relevant protection seekers and their registration,¹⁹⁶ Member States could include these individuals to mobility for labour or education schemes under the Talent Partnerships. Therefore, their entry would not be based on a protection status but would happen under the migration directives, for example the SRD fast track outlined above. Such a proposal would not be as seamless as it may initially seem. Refugees and forced migrants would need to comply with the requirements included in the migration acquis, such as proof of sufficient resources or documents attesting to the recognition of professional qualifications.¹⁹⁷ Despite the Commission's endorsement, it has left operationalisation to the national level and has not proposed exceptions to conditions for refugees and forced migrants.

Having ascertained issues of legal coherence, we next look at the likely effectiveness of the proposed approach to enhance labour market access while responding to Member States' needs. Given the largely prospective nature of the actions, we will do this by taking into account secondary sources (e.g. relevant policy documents), legal, scholarly, and policy analysis.

4.5. Effectiveness and efficiencies

Previous schemes, whether under the GAMM or the MPF, resulted in extremely limited mobility opportunities.¹⁹⁸ In this section we explore the likely effectiveness of the proposed approach to enhance labour market access while responding to Member States' needs. We understand effectiveness to relate to material aspects (subsection 4.5.1). We also examine the efficiencies which the proposals are likely to bring compared to previous schemes, such as the MPF pilots, in scaling up labour market access. We understand efficiencies to relate to procedural aspects (subsection 4.5.2).

4.5.1. Effectiveness

The starting point for any analysis of effectiveness is the way competences are organised through primary EU law. Crucially, the number of admissions is currently a Member State competence and this basic legal architecture will remain intact. Scholars such as Paula Garcia Andrade have therefore cautioned that despite the new policy framing, the EU's intervention will be limited to funding and coordination, meaning that the impact of these schemes will rely on Member States' readiness to consider more opportunities for migrants to enter their labour markets.¹⁹⁹ Given this basic limitation, the issue is whether and how to incentivise Member States, third states, private stakeholders, and migrants themselves to participate in Talent Partnerships. Our analysis reveals that the needs and aims of these different actors are often contradictory, and hence effectiveness is in the eye of the beholder.

¹⁹³ See SRD, Art. 25.

¹⁹⁴ European Commission 2020a, p. 23.

¹⁹⁵ See European Commission 2016b.

¹⁹⁶ See URF, Arts. 5 and 6.

¹⁹⁷ See detailed analysis on potential hurdles in Vankova, pp. 86, 97-102.

¹⁹⁸ See analysis above, under Section 4.2.

¹⁹⁹ Garcia Andrade 2022, pp. 219, 226-228.

On the material side, we focus our analysis on three areas: scalability; conditionalities; and costs (understood broadly).

Scalability affects the effectiveness of these schemes. A number of factors relate to scalability. The new set up addresses one key factor which is the schemes' *duration*. Unlike the previous ad hoc schemes, Talent Partnerships are long-term cooperation frameworks. The MPF pilots' short-term nature (for example 18 months) significantly limited their effectiveness. Unforeseen factors, such as the COVID-19 pandemic, derailed much of the schemes' potential. A long-term investment in a third country cooperation can also justify the high up-front costs these collaborative frameworks have due to their complexity (that is due to the number of involved stakeholders). A second factor relating to scalability is the *level of participation* these schemes will secure. The nature of the current pilots as bilateral schemes involving only one Member State has limited their effectiveness. The Commission explicitly aims to involve multiple Member States in these collaborative frameworks, in an attempt to address this limitation. It will not only need to convince a significant number of Member States and national stakeholders to participate, but also to operationalise the schemes in terms of robust numbers of mobility opportunities. Incentivising Member States to participate is intrinsically linked with conditionalities, an issue that we explore below.

An additional factor affecting scalability is the *available level of financing*. The Commission has foreseen the pooling of different resources: the NDICI, AMIF, and national level state and private sector funding. Once again, scalability will also depend on the actual level of buy-in from the national level actors. Finally, the *scope* of the schemes, not numerically, but in terms of *categories of third country nationals concerned* will also affect scalability. In this sense, the programmatic framework of the Commission encompassing categories beyond workers, such as trainees, students, and researchers, as well as targeting labour migrants of varying skill sets will be conducive to enhancing scalability. Actual scalability will depend on whether Member States will open up different areas of their labour market and not limit mobility opportunities to the highly skilled, or not limit opportunities to seasonal work, and thus short-term mobility, where it concerns lower skilled workers.

Next, conditionalities affect the effectiveness of the schemes. The Commission has been explicit about this being a broad collaborative framework that will link external relations and migration management to education, training, and mobility opportunities. Current EU policies link (continuing) access to funding or visa facilitation to collaboration on control measures and readmission. This could serve as a blueprint for the broader linkages that the Commission envisages as part of the Talent Partnerships. Given Member State support for conditionalities, their inclusion may enhance Member State willingness to participate in Talent Partnerships. However, this is a point where private stakeholder interests, and especially industry, diverge. Due to their multi-stakeholder nature and breadth of activities, Talent Partnerships involve high up-front investment costs. For industry, this investment only makes sense if it will be coupled with a guarantee of sustainable access to significant numbers of well-trained labour migrants as part of the cooperative framework. The operation of conditionalities, however, makes such access conditional on third country cooperation in areas extraneous to the labour mobility component, such as border management and readmission. Should the third country not perform satisfactorily, conditionality would include counter-incentives, such as the suspension of labour mobility opportunities. This is a risk that industry partners are unlikely to be willing to shoulder, especially given the time and money investment they also need to make to operationalise the different elements of a Talent Partnership. Conditionality also complicates the buy-in from third countries. Mobility and training commitments, as well as the funding component, will

need to be both concrete and extensive from the outset in order for third countries to be incentivised to undertake additional conditionality agreements.

A final factor affecting the effectiveness of Talent Partnerships are the **costs** of operationalisation, broadly understood to mean money and time investment. Such schemes will require collaboration at the national (different ministries, industry, civil society, unions), EU (institutions, Member States) and global levels (EU-third country cooperation). In order for all relevant governmental and private actors to be incentivised to undertake this significant investment they should be durable, provide employers with access to a wide pool of well qualified workers, provide third countries with considerable labour mobility and training opportunities, be appropriately funded, and released from conditionalities which create an unpredictable risk in this setting. Otherwise, it appears that the costs and complexity will be prohibitive to their operationalisation.

4.5.2. Efficiencies

If effectiveness concerns the material aspects, efficiencies concern the procedural aspects of operationalising the Talent Partnerships. The Commission has not been explicit regarding all these aspects in its Communication. Nonetheless, the administrative dimension is also key in realising these schemes. First, given the multitude of actors that will be involved at national level (various ministries, private stakeholders, civil society), it seems necessary to establish a national point of contact that will have an overview of those involved, with a coordination function between the different actors who will also act as interface with the EU level. Next, simplified procedures for those partaking in these schemes should be embedded in the instruments of the legal migration *acquis* to enhance their efficiency and make them attractive for prospective migrants and societal partners, including employers. We made such a proposal above regarding the establishment of a Talent Partnership ‘fast track’ within the SPD for the adoption and notification of the decision in a shortened deadline (see Box 1, Chapter 2).

A further element is the mode linking employers and third country workers. Given the small scale of the existing pilots, that is involving only 100 individuals specialised in a single sector of the labour market, in one Member State, this could be done in a more informal manner among the few actors concerned. However, now that the schemes will be scaled up, bringing together multiple Member States and actors operating in different sectors of the labour market, connecting them with potentially thousands of potential applicants, a larger centralised interface will be necessary. The Commission, upon the recommendation of the Parliament, foresees the creation of a Talent Pool (as analysed above) to undertake this role. The program’s efficiency also hinges on its smooth operation.

Moreover, the schemes’ efficiency is affected by the recognition of qualifications, possibly addressed in a future Directive.²⁰⁰ Other than the formal procedure for the recognition of qualifications, the issue of legibility of qualifications will be important for employers at the recruitment stage. For example, currently the European Union Agency for Asylum (EUAA) and the European Training Foundation have created resources providing indications of the equivalence of Ukrainian degrees and qualifications with counterparts at national level in different Member States. Such exercise would need to be replicated for every third country concerned by a Talent Partnership and for every Member State participating in the collaboration. It will otherwise be extremely cumbersome for private actors, some being small and medium enterprises, to have to conduct research and navigate this landscape on their own resources.

²⁰⁰ European Commission 2022g.

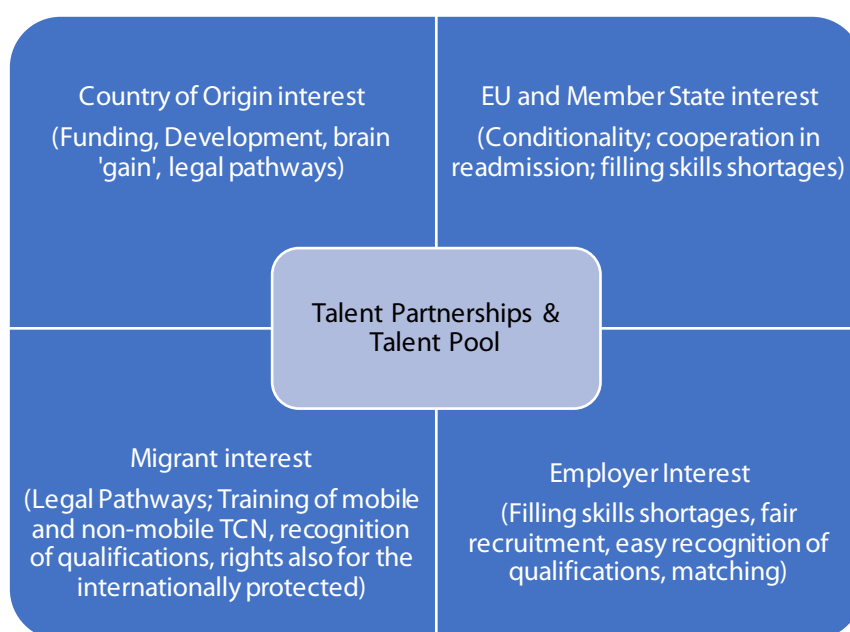
4.6. Fundamental Rights Consistency

Other than the legal migration *acquis*, the Talent Partnership proposals interlink with the EU asylum and return legislation, and more broadly need to comply with the EU's and Member States obligations under the Charter, such as the prohibition of torture, inhuman or degrading treatment or punishment and the related principle of *non-refoulement*.

4.6.1. International protection

International protection, that is protection as a refugee or a beneficiary of subsidiary protection, as well as a beneficiary of temporary protection, could link with Talent Partnerships or the Talent Pool, as the pilot does already with those under temporary protection. The interlinkages discussed here are partly inspired by the Blue Card Directive Recast.²⁰¹ Notably, the Common European Asylum System (CEAS) legislation comprises the EU Qualification Directive on the definitions and standards of treatment for refugees and beneficiaries of subsidiary protection.²⁰² Other Directives cover temporary protection,²⁰³ asylum procedures,²⁰⁴ and reception conditions for asylum seekers, including some socio-economic rights.²⁰⁵

EU law in this area reflects and further develops international refugee law. The Qualification Directive defines the concept of persecution,²⁰⁶ includes a non-exhaustive list of acts of persecution,²⁰⁷ and adds precisions to the five Convention grounds.²⁰⁸ On the other hand, EU law expands protection by introducing an additional protection status; subsidiary protection. This status is 'subsidiary' to refugee status which must be given precedence.²⁰⁹ In brief,



²⁰¹ Article 9.4 and 9.5 BCD 2021/1883/EU.

²⁰² See EU Qualification Directive.

²⁰³ Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof [2001] OJ L212/12 (TPD).

²⁰⁴ See 2013 Asylum Procedures Directive.

²⁰⁵ Council Directive 2013/33/EU of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection [2013] OJ L180/96.

²⁰⁶ See EU Qualification Directive, art 9(1).

²⁰⁷ See *ibid* art 9(2).

²⁰⁸ See *ibid* art 10.

²⁰⁹ See *ibid*, recital 33; 2013 Asylum Procedures Directive, art 10(2).

subsidiary protection encompasses categories that fall outside the refugee definition, based on Member States' obligations under international and European human rights law.²¹⁰

The EU asylum and return acquis potentially links with the Talent Partnerships in three ways. First, as we mentioned above, the Commission envisages organising the entry of TCNs in need of international protection through the Talent Partnerships. This would also link with the workings of the Union Resettlement Framework that is currently under negotiation for the stage of identification, whereas entry would be operationalised through the legal migration acquis. Regardless of their mode of entry, refugees and forced migrants could apply for international protection based on their protection needs at any point once in the EU. In addition, any decision on return upon the potential expiry of the legal migration scheme would be conditional on respect for fundamental rights, refugee law, and the return acquis, including the principle of non-refoulement and the right to seek asylum.

The second way the Talent Partnerships could link with the EU asylum acquis is the case of so-called claims *sur place*. The Qualification Directive recognises that a 'well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin'.²¹¹ This means that while third country nationals may enter the EU to work or study through the Talent Partnership framework, a change in the situation in the country of origin, for example a deep political shift or the eruption of armed conflict, could impact their situation and protection needs. This could again lead to an application for international protection in the EU, meaning again that any decision on return upon the expiry of the legal migration scheme would be conditioned on respect for fundamental rights, refugee law, and the return acquis, including the principle of non-refoulement and the right to seek asylum.

The third way the EU asylum and return acquis link with the Talent Partnerships is through the inclusion of beneficiaries of international or temporary protection in the Talent Pool. This means that other beneficiaries of international protection (i.e. refugees and beneficiaries of subsidiary protection), could be included in the Talent Pool in future to facilitate their integration.

Box 6: Beneficiaries of temporary protection and their access to the labour market

The integration into Member States' labour markets of beneficiaries of temporary protection from Ukraine has been hugely successful. This is partly facilitated through the Talent Pool Pilot. Temporary protection will however expire, as it has a three-year maximum upper limit (if all extensions foreseen under the TPD are used). At that stage, beneficiaries will be able to request asylum in the EU and any decisions on return would be conditioned on respect for fundamental rights, refugee law, and the return acquis, including the principle of non-refoulement and the right to seek asylum. They will fall within the scope of the Reception Conditions Directive (RCD).

Beneficiaries of temporary protection, many of whom have found employment in the EU, also need to remain in legal employment. This should be legally arranged either through the Council decision that ends the application of the TPD, or at the expiry of the maximum foreseeable period of the TPD which is three years. In one way or another, Ukrainians currently in legal employment in the EU should not suddenly find themselves unable to continue working legally when the TPD regime ends.

²¹⁰ See EU Qualification Directive art 15; Case C-465/07, *Elgafaji v Staatssecretaris van Justitie*, [2009], EU:C:2009:94; Case C-285/12, *Diakité v Commissaire général aux réfugiés et aux apatrides*, [2014], EU:C:2014:39; Case C-542/13, *M'Bodj v État belge*, [2014], EU:C:2014:2452.

²¹¹ Qualification Directive, Article 5.1

We argue that Ukrainians should not fall within the regime of article 15 of the RCD, because this would entail a step back in their legal position in the EU, with possible waiting time before picking up employment again.

1. We recommend addressing their future right to work in the EU in the Reception Conditions Directive by adding an article 15(4) stating that "Access to the labour market shall not be withdrawn where applicants have had prior access to the labour market under the TPD."
2. We also recommend that the period of stay under the TPD should count towards a LTR permit. To this end Article 4(5) should include, besides long-stay visa holders and residence permit holders, periods of stay as beneficiaries of temporary protection.

4.6.2. Multiple policy intersections

Beyond the links with EU's asylum and return *acquis*, the talent Partnerships intersects with multiple policies, such as European development²¹², sustainability, inclusive growth, education, skills and the recognition of qualifications.

As already stated, we welcome the European Commission's plan for a proposal for a **Directive on the recognition of qualifications of TCNs**, which is a necessary step towards effectively developing further both the Talent Partnerships and the Talent Pool.

The Talent Partnerships and Talent Pool are in effect migrant worker recruitment tools and as such intersect with **fair recruitment** and should take note of the Global Compact for Migration (GCM) and ILO Fair Recruitment Initiative (FRI) launched in 2014 as part of the 2014 ILO Fair Migration Agenda.²¹³ This then engages the fundamental right to **transparent and predictable information** on working conditions (in the EU Social Pillar and recently codified in Directive 2019/1152/EU). Those TCNs participating in, for instance, the Talent Partnerships are highly dependent on the organisations running the project, as well as on the processing times for a Single Permit application which, as the evaluations of Pilot Talent Partnerships shows, is highly uncertain. Yet they have to have information on the starting date of their employment, tax and social security obligations, the costs of living etc. to plan their lives. The parties involved in the Partnerships and the Pool must provide migrants with solid information on the extent to which they offer legal migration pathways into the EU and/or job opportunities for TCNs already in the EU. Our assessment is that both instruments are, in their current form, overstating their prospects for both mobility and employment. Furthermore, the Commission's proposal to add yet another portal as recommended by the OECD²¹⁴ (Talent Attraction Portal), building on the EU Immigration Portal, would add to the number of possibly underused online tools. A proper evaluation of the actual use and relevance of the EU Immigration Portal, as well as the Talent Pool and other portals and websites, and the extent to which the provided information is accurate and up-to-date is essential before further Portals are developed.

Finally, we note that the Talent Partnerships in particular are framed as development tools, supposedly facilitating a triple win for migrants, (employers in) countries of destination, and countries of origin. This is the development angle, yet we miss a fundamental discussion on how the Partnerships and the Pool link to current global development related challenges. The focus appears to remain on filling –

²¹² Dempster Tesfaye 2022; Dempster, Gálvez, Reva, Cassandra, Dempster and Zimmer 2022.

²¹³ ILO 2014.

²¹⁴ OECD 2019.

sometimes contested – labour shortages in the EU while the challenge of, for instance, climate change mobility is not addressed. The ILO argues for “planned and chosen migration, which adheres to international standards, can become a meaningful climate resilience and adaptation strategy for sending and receiving communities.”²¹⁵ From a fundamental rights perspective, we recommend **climate resilience should be firmly integrated** among the priorities of the talent Partnerships (and possible Talent Pool), and not the EU return policy, nor the labour market demands of (not necessarily sustainable) businesses in the EU.

4.7. Conclusion & Recommendations

Following from the above, we formulate six main recommendations with regard to the Talent Partnerships and Talent Pool.

- 1) The Parliament should fully engage with the intricate interplay between the operationalisation of the Talent Partnerships and the legal migration *acquis*. In this sense, if the efficiency of these schemes is to be guaranteed, it should also pursue:
 - the prompt adoption of a directive on the recognition of qualifications of third country nationals to be tabled by the European Commission in 2023 according to its roadmap;
 - the establishment of simplified processes for those partaking in Talent Partnerships, such as inserting fast-track processing in the recast SPD; and
 - integration of similar preferential regimes regarding the operational elements of the Talent Partnership schemes in future amendments of relevant EU instruments, such as the SRD.
- 2) The Parliament and the Commission should fully engage with the intricate interplay between the Talent Partnerships and the Talent Pool and EU asylum and return *acquis* through monitoring their implementation at the national level.
 - Irrespective of their mode of entry, returns of TCNs at the expiry of a given scheme should respect the right to request asylum and other key guarantees such as the principle of *non-refoulement*. This includes, but is not limited to, the potential entry of beneficiaries of international protection through a Talent Partnership.
 - In case of beneficiaries of temporary protection, their continuous right of access to the labour market (and use of the Talent Pool) should be secured.
- 3) The Parliament should guard over the interplay between the Talent Partnerships and Talent Pool and EU social policy and as well as ILO fair recruitment goals.
 - Incorporate the Partnerships and the Pool in a legislative tool (the SPD for instance) which would oblige all parties involved to engage fair recruitment methods; and
 - ensure sufficient information is provided to potential migrant workers on their rights as workers and as migrants
- 4) The Parliament should strive to ensure the democratic legitimacy and democratic accountability of the Talent Partnerships.
- 5) The Parliament should strive to ensure the effectiveness of Talent Partnerships.
 - Ensure scalability in terms of their duration and level of participation; and

²¹⁵ ILO events on labour migration and climate Change 7-18 November 2022 COP27, [ILO Live - Climate mobility and labour migration in a just transition](#).

- Contest the conditionality framing which undermines the effectiveness of Talent Partnerships, especially in that it creates significant risks for the private sector.
- 6) See to it that the Talent Partnerships and the Talent Pool promote sustainable growth and support the EU's goals for a green transition and sustainable development.

5. THE FORWARD-LOOKING PILLAR

This chapter investigates the Commission's ideas on potential avenues for legal migration to the EU in the medium to longer term, specifically in the areas of care, youth and innovation. We present an up-to-date state of play regarding the Commission's step-by-step approach and academic literature on these topics. In the absence of concrete legislative proposals, yet with an eye for legal and practical coherence, we present ways to integrate care, youth and innovation migration into existing legal migration and towards legislative or policy proposals that are fully consistent with EU fundamental rights as well as other legal obligations and policies.

5.1. Long-term Care migration

5.1.1. The state of play

There are three issues we deal with in this section: (1) labour shortages in a field which is not particularly popular with domestic or even EU workers yet requires skilled work; (2) lack of popularity caused at least in part because of low wages, difficult working conditions, consumer expectations about flexibility of the work force and poor career prospects; and (3) the importance of ensuring that EU labour standards in the field are not undermined by increasing reliance on migrant workers.

The labour shortages in long-term care are among the broader health care shortages noted by the World Health Organisation (WHO). The WHO predicts a shortage of 18 million health care workers by 2030 globally.²¹⁶ In 2020, the International Council of Nurses (ICN) and the WHO saw a shortfall of 6 million nurses increased with another 4 million (10 million overall) due to retiring nurses²¹⁷ and the Institute for Health Metrics and Evaluation recently concluded that 30 million new nurses are needed to provide the level of care as we now know it, of a total 43 million new health care workers needed globally.²¹⁸ The OECD has concluded that the need for health care workers in general in the OECD countries is unlikely to be fully met by training local workers; migrant work is likely to be part of the solution.²¹⁹ The solution should also include training more health care workers nationally to cater to OECD countries' needs, instead of relying on other (Global South) countries to train nurses for them.²²⁰ OECD countries should invest in training abroad to make available the skilled work force not available in their own work force.²²¹ Training programs for refugees and displaced persons must also be part of the mix. OECD countries should also try harder to retain care workers through better pay, better working conditions, and doing more to facilitate a work/life balance. To this end, the European

²¹⁶ Report of the expert group WHO 2016.

²¹⁷ See also <https://www.icn.ch/news/nursing-workforce-crisis-looms-expected-six-million-shortfall-will-be-increased-more-four>.

²¹⁸ See also <https://www.healthdata.org/news-release/worldwide-shortage-health-workers-threatens-effective-health-coverage>.

²¹⁹ OECD 2019a.

²²⁰ Statements made at the 2020 Metropolis International Conference in Berlin 6 September 2022 by Marc Pearson, OECD and Howard Catton, International Council of Nurses, Switzerland.

²²¹ Aiken, Linda, Buchan, Sochalski, Nichols, and Powell 2004.

Commission has initiated a Communication on a European care strategy and two proposals for Council Recommendations, one of which one long-term care (LTC).²²²

The design and maturity of LTC systems vary a lot across the EU, but all countries face **common challenges**: the need to provide accessible, affordable and high-quality care against the background of a growing demand for health and social care and staff shortages in an ageing population.²²³ Migrant workers, and particularly women, form a significant part of the LTC workforce.²²⁴ During the COVID-19 crisis, LTC emerged as an essential service provided by key workers. Together with limited investment in the sector, difficult working conditions and resulting staff shortages, ensuring continuity of care services during the pandemic became a challenge.²²⁵ Moreover, this predominantly female workforce is in many countries undervalued, a root cause of many workers leaving the sector shortly after entering it.

There is room for further automation, robotisation and engaging digital technologies in the LTC sector, although engaging technology in LTC is “accompanied by crucial social, ethical and occupational implications, many of which are still an open debate.”²²⁶ The effectiveness, acceptance and efficiency of robotisation and digital technologies are, however, understudied.²²⁷ It has also been suggested that governments should try to adjust their aging populations’ care needs. Yet, even if all other measures are engaged to the full, it is likely that labour migration of health care workers is still necessary to fill some shortages. It is against the background of this health care deficit that we analyse the available options for the European Parliament and the Council to drive the European Commission towards developing forward-looking *migration policy tools* as a solution to shortages in the chosen health care sector of LTC.

In the Talent & Skills Communication, the Commission announces it will begin mapping the admission conditions and rights of LTC workers from non-EU countries in different Member States and the needs in this regard, with a view to exploring the added value and feasibility of developing an EU-level admission scheme to attract such workers.²²⁸ LTC is defined at EU level as “a range of healthcare and social care services and assistance, for people who, as a result of mental and/or physical frailty and/or disability and/or old age, over an extended period of time depend on help with daily living activities, and/or need some permanent nursing care”.²²⁹ Member States struggle to attract and retain LTC workers. In the LTC sector, up to 7 million job openings for health associate professionals and personal

²²² European Commission 2022a.

²²³ European Commission 2022a. On the topic, European Parliament 2021a and 2021f: the European Parliament delivered resolutions on (i) ‘Old continent growing older and the impact of ageing on society’ and (ii) ‘Reversing demographic trends in EU regions using cohesion policy instruments’.

²²⁴ 4.5% of workers in LTC are from outside the EU: Eurofound 2020, Long-term care workforce: employment and working conditions, <https://www.eurofound.europa.eu/publications/customised-report/2020/long-term-care-workforce-employment-and-working-conditions>; Immigrant Key Workers: Their Contribution to Europe’s COVID-19 Response JRC 2020: <https://ec.europa.eu/jrc/en/news/crucial-contribution-migrant-workers-europes-coronavirus-response>: migrants represented 10.3% of personal care workers.

²²⁵ Eurofound 2020.

²²⁶ Joint Research Council 2021.

²²⁷ Krick, Huter, Domhoff, Schmidt, Rothgang, and Wolf-Ostermann (2019).

²²⁸ With the exception of highly qualified care workers covered by the EU Blue Card Directive 2009/52, revised in Directive 2021/1883/EU.

²²⁹ European Commission 2021b.

care workers²³⁰ are expected to emerge by 2030,²³¹ and will be only partly filled from within the EU labour market. With the increased aging of Member States' populations, addressing labour shortages in the LTC is urgently needed.

The LTC sector is one where there is a clear benefit to acting at EU level in respect of regulating the migrant worker care industry, the migrant worker rights including to intra-EU mobility, and the employer obligations. If nothing is done, a myriad of entry schemes will continue to be developed at the national level, and these do not necessarily align with the **ethical standards of recruitment** as promoted by the World Health Organization in the **Global Code of Practice on the International Recruitment of Health Personnel**.²³² The EU needs to act to guarantee dignity for all, to allow the aging population in need of care to age with dignity²³³, and to offer LTC migrant workers *delivering* care a dignified life in the EU.

There is a push to overcome the problems through labour migration, which is seen as a partial solution to some issues: (1) migrant workers with limited rights to change employers or to legal residence are a more stable labour force for employers and more willing to accept current wages and working conditions; (2) between professional and private employers, regulating the sector is particularly difficult not least because the work often involves living in the home of the care recipient where the employee can find themselves under increasing pressure to be flexible; and (3) migrant workers with professional skills obtained in another country can be employed at a level inferior to that of their qualifications in the destination state. From a migrant rights perspective, the two big asks are a secure residence permit and family reunification.

5.1.2. Policy intersections

In the EU context, addressing health care professionals shortages in the EU Member States is a joint competence; neither health care nor migration policy is the Commission's sole competence. From our analysis we observe that regulating migration of LTC migrant work intersects with multiple other policy fields relating to education, training and integration as well as the recognition of qualifications and skills of third-country national LTC workers.

Education, Training & Integration

According to the OECD, educational and training requirements for *personal care workers* are low. The minimum education requirement varies from vocational training (Hungary, Latvia, Luxembourg, the Netherlands) to a high school certificate (Belgium and Sweden) or a technical qualification after high school (Malta and Estonia after 2020). The OECD found that very few EU countries (Denmark and Germany) have developed a career structure for LTC workers, which can be problematic when, for example, workers are required to administer medication. The OECD points out that *nurses* usually have high education, but not necessarily specialised geriatric care training. Therefore, nurses in LTC may lack important knowledge in health care for specific conditions of elderly people. The OECD thus suggests

²³⁰ The use of informal care varies from around 30% to around 85% across Member States. Formal long-term care is typically provided by a qualified workforce and may be delivered in different settings (residential care, formal home care or semi-residential care). Formal long-term care workers include social care workers (such as personal care workers or counsellors) and healthcare workers (such as geriatric nurses or other nurses) as well as specific groups such as live-in carers (workers living in the household of the care recipient and providing care support). The large majority of formal long-term care workers are personal carers, and the bulk of the workforce is employed in residential care. Most long-term care workers have a medium level of educational attainment. See European Commission 2021b.

²³¹ European Commission 2021b.

²³² WHO 2010.

²³³ European Parliament 2021f.

increasing geriatric care training for nursing students.²³⁴ If anything, the OECD study underscores the difficulty of matching educational attainment and training of migrant LTC workers with the diverse educational requirements in the Member States. It seems to us a long-term endeavour to have, for instance, an educational program set up in the Philippines to cater to the requirements of all Member States together. This means Member State specific training programs are more likely to be successful than an EU approach to training. Without denying that alignment of the requirements of LTC workers would be beneficial to the overall availability of LTC workers in the EU, we argue that from a migration law perspective it is preferable that the European Parliament draws attention to two other aspects of training: language and integration.

A recent literature review by *Smith e.a. (2022)* finds that language and communication competencies as well as structured integration programs are highly valued by migrant nurses and destination healthcare employers.²³⁵ All 56 studies evaluated by Smith e.a. highlight communication proficiency as an important aspect of nurse migration. Some migrant nurses may experience discrimination from patients, other nurses and from service users.²³⁶ This can be, for instance, because of their accent or (perceived) deficiencies in language skills.²³⁷ The importance of language is an argument against a common EU training program in countries of origin, given the wide variety of languages spoken in the EU. Based on the studies reviewed by Smith et al, communication, cultural synthesis and clinical integration are useful features of integration programmes.

In sum, good language preparation, employer support in general and especially in case of discrimination, as well as integration programmes can be part of a set of requirements defining ethical recruitment and ‘onboarding’ of migrant LTC workers.

Recognition of qualifications and skills and making them transferable

The Directive on the recognition of professional qualifications 2005/36/EC provides for the automatic recognition of professional qualifications acquired within EU Member States.²³⁸ However, “(t)his Directive does not create an obstacle to the possibility of Member States recognising, in accordance with their rules, the professional qualifications *acquired outside the territory of the European Union* by third country nationals. All recognition should respect in any case minimum training conditions for certain professions”.²³⁹ Indeed, the training and qualifications required to work in the health sector vary considerably from one Member State to another, reducing the mobility of a migrant worker employed in one Member State to work in another Member State. To do so the worker will have to obtain an equivalence of diploma or training if he wishes to work in that Member State. However, this equivalence is not valid in all the countries of the European Union. So, for example, recognition of skills and qualifications acquired in the Philippines by the German authorities is not transferable to another EU Member State.

²³⁴ OECD 2020b.

²³⁵ Smith, Herinek, Woodward-Kron and Ewers 2022.

²³⁶ Lauxen, Larsen and Slotala, 2019, referenced by Smith e.a. 2022.

²³⁷ Ugiagbe, Liu, Markowski and Allan. 2022.

²³⁸ Smith e.a. 2022.

²³⁹ Recital 10 Directive 2005/36/EC.

Any EU level scheme to attract care workers should include an agenda towards harmonization of recognition of qualifications in the Member States. We thus welcome the European Commission's plan to develop such a Directive.²⁴⁰

Calls under the Erasmus+ programme can support sectoral cooperation on LTC skills recognition (e.g. Alliance for sectoral cooperation on skills). The Skills Agenda for Europe 2016 introduced a blueprint for sectoral cooperation on skills. The Commission has since selected 21 projects under the Erasmus+ programme that are implementing the Blueprint, which do not include LTC skills.²⁴¹ **The European Parliament can support initiatives towards developing LTC as a sector up for sectoral cooperation on skills in a skills partnership under the Pact for Skills for the long-term care sector.**²⁴²

As suggested by the European Commission in the European Care Strategy (2022) of 7 September 2022, under the European Skills Agenda partnerships should take up training the digital skills of health workers, including nurses, and should bring forward data on current and future skills needs and trends for the LTC sector.²⁴³ This data can be helpful to the European Parliament and/or the European Commission in making a substantiated effort to convince the Member States to add, for instance, an Annex to the EU Blue Card Directive for shortage occupations in the health care sector.

5.1.3. Selected Member States' positions

Next, we discuss the position of selected Member States on long-term care migration, based on data on EU Member States that was presented at events on this topic, supported by additional desk research.

Germany was one of the very first countries to transfer this provision of the WHO Code of Practice on the International Recruitment of Health Personnel into its national legislation. Since 2013 the active recruitment of doctors and nurses from countries with insufficient health personnel is prohibited in Germany and can cost a private recruitment agency a fine of up to €30,000. Bilateral and private recruitment activities have to be approved by the Federal Employment Agency (Bundesagentur für Arbeit). Currently, ten such bilateral agreements are in force.²⁴⁴ Earlier, in 2012 – 2016 Germany²⁴⁵ developed recruitment activities targeting nurses from Serbia, Bosnia Herzegovina, the Philippines, and Vietnam within the so-called Triple Win Programme. The following countries are currently participating in the Triple Win program: Bosnia-Herzegovina, India (Kerala), Indonesia, Tunisia and the Philippines.²⁴⁶ According to Ulrich Dietz, Head of the MoH Department for Health Personnel from Abroad, Migration and Integration, cited by *Pillars of Health*: “nowadays 75% of the immigrating health personnel are being recruited via private agencies, 15% via governmental recruitment programmes

²⁴⁰ In the Commission's Work programme for 2023, published on 8 Nov 2022, a proposal for a directive on recognition of qualifications acquired in third countries is announced on p. 11, see https://ec.europa.eu/info/sites/default/files/cwp_2023.pdf, last accessed 11 November 2022.

²⁴¹ EU programme for education, training, youth and sport.

²⁴² European Commission 2022a.

²⁴³ In cooperation with CEDEFOP and its Skills Online Vacancy Analysis Tool for Europe (Skills OVATE). Skills-OVATE offers detailed information on the jobs and skills employers demand based on online job advertisements (OJAs) in 28 European countries, powered by CEDEFOP and Eurostat.

²⁴⁴ Bosnia-Herzegovina (Triple Win, signed in 2014); Brazil (DeFa, “Fair Recruitment”, signed in 2021); Columbia (“Fair Recruitment”, signed in 2021); Dominican Republic (“Fair Recruitment”); India, Kerala (Triple Win, BA, “Fair Recruitment”, signed in 2021); Indonesia (Triple Win, BA, “Fair Recruitment”, signed in 2021); Mexico (BA, DeFa, “Fair Recruitment”, signed in 2019); Philippines (Triple Win, DeFa, “Fair Recruitment”, signed in 2013); Tunisia (Triple Win, signed in 2013); Vietnam (“Fair Recruitment”, Ministry of Economic Affairs, signed in 2012), source: Pillars of Health, 2022, pp. 31-32.

²⁴⁵ We are grateful to Prof. Petra Bendel, Chair of the Expert Council on Integration and Migration & Professor at the Institute of Political Science, Friedrich Alexander for her valuable input.

²⁴⁶ Pillars of Health 2022, pp. 31-32 and 34-35. Note that Pillars of Health is a lobby alliance of EU-based organisations that aim to contribute o.a. to equal access to health care for all and to identify ways to address the negative effects of health care migration and recruitment.

and the rest is coming on individual initiative.” The dominant role of private recruiters is confirmed by government authorities. According to the Pillars of Health report the practices of private recruitment agencies often border the unethical. Supposedly, hospitals as well as recruitment agents transfer financial risks of international recruitment onto the migration workers “involving costs of about 15,000 euros” and use contracts which are in violation of German labour law. For example, nurses committed themselves to pay back costs of about 15,000 euros if they quit their jobs before a period of five years. Christiane Brors, a law professor at Oldenburg University, argues the clause is invalid, stating ‘This is modern debt bondage’.²⁴⁷

To address abusive practices the German DKF quality seal “Fair Recruitment Nursing Germany” has been developed.²⁴⁸ DKF is a private initiative of recruitment agencies in the health care sector that developed a quality seal intended to document minimum standards for employers or private agencies active in the cross-border recruitment of health professionals from outside the EU. It is based on the WHO code of practice and good social integration practices. From the NGO side, the seal is criticized because the selection process does not take into account the distribution and density of health personnel in the countries of origin.²⁴⁹

Finland has for some time given private agencies the green light to organise the recruitment of foreign nurses.²⁵⁰ They set up a school in the Philippines (and also in Hong Kong and the UAE) to train nurses, mainly in Finnish language skills. The nurses invested their time for a year of preparation and, upon arrival in Finland, found themselves in jobs doing work that did not meet their expectations. Their position in the care hierarchy was not what they were used to as fully trained nurses. The scheme was heavily criticized by labour unions.²⁵¹

Austria is in the process of developing a circular migration scheme in relation to its health sector, as it is also facing labour shortages (especially nurses and *Pflegeassistent/in*, healthcare assistants).²⁵² In August 2022, the Austrian health Minister declared that the only solution to this problem is to attract foreign professionals. In addition, the Austrian government announced a €1 billion reform package to improve the working conditions of health care professionals, including an increase in nurses' salaries. However, the minister did not specify how they would attract foreign workers. Currently, obtaining a visa and equivalence of qualifications to practise medicine and work in the health sector in Austria are long and costly procedures. Another issue to address is discrimination. Previously, migrant care workers from Slovakia and Romania have stated that they felt discriminated against in Austria.²⁵³

In the announced scheme, nurses who complete professional training will receive substantially more points for accessing the so-called Rot Weiss Rot (RWR) residence permit in the future. Older professionals will receive more points facilitating the entry of nurses 40 to 50 years old. Applicants for the RWR residence permit must reach a certain number of points based on criteria such as age and training to obtain the permit. The government promised that the recognition of foreign training would be simplified and accelerated. However, nurses should be able to work as health care aides until their foreign credentials are officially recognized in the future.²⁵⁴

²⁴⁷ Pillars of Health 2022, pp. 31-32.

²⁴⁸ <https://www.globogate-concept.de/en/about>, presented by its founder Thomas Gehrig at the 25th Metropolis Conference in Berlin, September 2022.

²⁴⁹ Pillars of Health 2022, pp. 36-38.

²⁵⁰ See for instance Vartianinen et al 2016.

²⁵¹ See <https://scandasia.com/finlands-nurses-union-super-criticize-the-move-to-recruit-nurses-from-the-philippines/>.

²⁵² See [Austria-wide shortage occupations \(migration.gv.at\)](#).

²⁵³ See [Migrant care workers from Slovakia, Romania discriminated against in Austria – EURACTIV.com](#).

²⁵⁴ Previdelli 2022.

Moreover, Austria has special regulations for live-in care work. The Home Care Act (Hausbetreuungsgesetz) introduced the position of "personal caregiver" (Personenbetreuerin) and regulates minimum training requirements and working conditions for the position.²⁵⁵ However, the rules on work and rest hours apply only to caregivers with employment contracts, not to self-employed caregivers (who represent the majority).²⁵⁶

From a recent report of the Dutch Advisory Council on Migration on 'careful' labour migration policy into **the Netherlands**, we draw the following two examples.²⁵⁷ Firstly, the City of Amsterdam set out to **engage family migrants**. In March 2020, the City of Amsterdam, in partnership with House of Skills launched the spouses program for the spouses of highly skilled migrants in the Netherlands under the national highly skilled migrants scheme. The program is currently being revised and made available to all international job seekers in the Amsterdam region. From a poll conducted by the municipality among this group of family migrants, 32,280 responded to be interested in working in healthcare or education, the majority of whom had training and experience in these sectors and planned to stay in the Netherlands for more than six years. The municipality has taken up matching these family migrants to employers in the region. Secondly, Intermediary Yomema developed a **study and work program for Indonesian nurses**, recruiting them on the basis of a Memorandum of Understanding with Indonesian trained nurses who are attending a four-year bachelor's degree program in nursing at Avans+ in the Netherlands. As part of their studies, the students are undertaking an internship for sixteen hours per week. In addition, they work sixteen hours per week (the maximum allowed in the Netherlands under the Students and Researchers Directive 2016/801/EU) in a nursing or care home or in home care. Hence, they 'work' 32 hours and study 8 hours. After completion of their studies, the nurses have a search period of one year, to find a job in the Netherlands. In order to stay on after the search year they have to find a job that qualifies under the national highly skilled migration scheme.

Moreover, we want to draw attention to domestic (care) workers at work across the EU **without a legal right of residence**.²⁵⁸ The informality and precarity in the sector are also acknowledged by the European Commission in its 2022 Care Strategy. People without right of residence - also known as undocumented workers - are not included in the calculations of unused labour potential, even though they may be willing and able to work in LTC jobs, and often already do so. According to *Horn e.a.* (2019) 11% of German households with a needy elderly person engage 24-hour care at home by live-in migrants, in large majority from CEE EU Member States, working informally.²⁵⁹ This amounts to about 200,000 households. It is estimated that more than half of them (some estimates are as high as 90%) are hired through informal networks and employed informally.²⁶⁰

The ILO estimated that in 2010 in Northern, Southern and Western Europe, over 50% of domestic workers were migrant workers, of whom the majority were undocumented. Recent data on the number of irregularly staying LTC migrant workers is not (yet) available. Horizon Europe has funded research to deliver such data on the number of irregularly staying migrants in Europe in the near future.²⁶¹ We flag that the EU labour force can be increased by enabling migrant workers who are irregularly present, and their family members, to reside and work lawfully. Indeed, research on the effects of the COVID-19

²⁵⁵ ris.bka.gv.at

²⁵⁶ Böcker and Bruquetas Callejo 2019, pp. 16-17.

²⁵⁷ ACVZ 2022.

²⁵⁸ Kuhlmann, Burau, Falkenbach, Klasa and Pavolini 2020.

²⁵⁹ Horn, Schweppe, Böcker and Bruquetas-Callejo 2019.

²⁶⁰ Böcker and Bruquetas-Callejo 2019.

²⁶¹ See e.g. the MIRREM project by Prof. Albert Kraller, <https://www.donau-uni.ac.at/en/university/faculties/business-globalization/departments/migration-globalization/news-events/news/2022/horizon-europe---mirrem.html>.

measures on irregularly staying workers' socio-economic well-being brought to light that they are keen on obtaining a legal status, working formally, and paying taxes.²⁶²

In July 2022 the German government approved a bill to regularise irregular migrants, known as the "*Chancen-Aufenthaltsrecht*", presented to the German Parliament in September 2022. Migrants who have lived in Germany for five years without having received a decision on whether they may stay or not, excluding those with a criminal record or who have provided false information, will receive a temporary residence permit. Within a year of receiving the permit, they must deliver evidence of being integrated, which means that they have sufficient language skills and can support themselves. They will then receive a permanent residence permit.²⁶³

We suggest that probably among the greatest unmet needs which gives rise to irregular migration is the need for LTC nursing assistants to allow the disabled/elderly to remain in their own homes. It would be a typical 'triple win' if these workers would receive legal residence and education to increase skills (administering medicine etc.) and possibly obtain nursing qualifications *and* the needs of the disabled/elderly would be met.

To conclude, based on this cursory investigation of schemes used in selected EU Member States, we see at least seven 'regulatory' models in use, each with its own (limited) set of rights for the LTC workers involved:

- 1) public-private partnerships including bilateral agreements (DE);
- 2) private partnerships (FI, NL, DE);
- 3) a private seal to assure fair recruitment (DE);
- 4) points based system and/or shortage occupations lists (AU);²⁶⁴
- 5) a study and work scheme (NL);
- 6) the use of informally employed EU nationals as well as irregularly staying TCN live-in care givers (DE, but probably all over the EU); and
- 7) regularisation based on labour market integration (DE).²⁶⁵

5.1.4. Legal coherence fundamental rights

Any scheme to be developed at the EU level should consider legal coherence with fundamental rights enshrined in international and EU law. As already mentioned, the Member States should be held to the 2010 **WHO Code of Practice on the International Recruitment of Healthcare Personnel**.²⁶⁶ The Code focuses on, among others ethical international recruitment and fair treatment of migrant health workers.²⁶⁷

Reviewing existing recruitment mechanisms to guarantee that they are fair and ethical is also one of the commitments made by the EU Member States in the UN Global Compact on Migration:²⁶⁸ "Improve

²⁶² De Lange e.a. Migration Workers in the Frontline during the COVID-19 pandemic (*forthcoming*).

²⁶³ ILO 2015, p. 64.

²⁶⁴ The way Member States define shortage-occupations varies across MS, on this topic see European Migration Network 2015.

²⁶⁵ Other countries where such regularisations are applied include Italy, Spain and Ireland.

²⁶⁶ Adopted in 2010 at the 63rd World Health Assembly (WHA Res 63.16). The WHO Global Code of Practice on the International Recruitment of Health Personnel seeks to strengthen the understanding and ethical management of international health personnel recruitment through improved data, information, and international cooperation.

²⁶⁷ Van de Pas, Mans, De Ponte and Dambisya. 2016.

²⁶⁸ OHCHR and migration. 2018, para.22.

regulations on public and private recruitment agencies in order to align them with international guidelines and best practices, and prohibit recruiters and employers from charging or shifting recruitment fees or related costs to migrant workers in order to prevent debt bondage, exploitation and forced labour, including by establishing mandatory, enforceable mechanisms for effective regulation and monitoring of the recruitment industry".²⁶⁹ The international guidelines referred to include the **ILO's General principles and operational guidelines for fair recruitment** (2016). Building on these guidelines, recruitment fees and related costs defined as "any fees or costs incurred in the recruitment process in order for workers to secure employment or placement, regardless of the manner, timing or location of their imposition or collection".²⁷⁰ The ILO Standards prescribe that recruitment fees or related costs should not be collected from workers by an employer, their subsidiaries, labour recruiters or other third parties providing related services.

A prohibition to charge migrant workers directly or indirectly for recruitment costs is also enshrined in article 7(1) ILO Convention 181 on Private Employment Agencies Convention and the ILO Domestic Workers Convention 189.²⁷¹ Its article 15(1) bans deducting fees charged by private employment agencies from the remuneration of (migrant) domestic workers.²⁷² Although allocating recruitment fees to workers is prohibited, it is recognised that national legislation has the flexibility to allow workers to be charged costs related to the recruitment process, subject to conditions such as full disclosure to the worker of the costs before the job is accepted.²⁷³

The EU and its Member States should crack down on recruitment fees. If it does not, it will allow the development of an (unregulated) migration industry as economic sector that lives off these fees, which is not far from human trafficking. If such fee structures are part and parcel of a state enforced requirement to stay with one employer, labour migration schemes start to look like state sponsored trafficking. Obviously, this should be avoided at all costs and can be avoided through careful rights-based legislation of LTC migration, and its subsequent enforcement.

According to the **EU Charter of Fundamental Rights and the European Pillar of Social Rights**, all workers (in employment) in the EU, regardless of their nationality or immigration status, should have access to decent working conditions.²⁷⁴ Indeed, article 31 of the Charter stipulates that:

1. *Every worker has the right to working conditions which respect his or her health, safety and dignity.*
2. *Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.*

Some of the Directives constituting the Social Pillar are applicable to TCNs, even if irregularly staying.²⁷⁵ However, not all Directives on Social Rights are applicable to TCNs. Although the 48-hour week should be considered the absolute maximum (see Working Time Directive 2005/36/EC) this Directive is only applicable to nationals of the Member States.²⁷⁶ Minimum standards for normal working hours, weekly and daily rest periods, paid annual leave and guarantees for night work are thus not applicable. According to PICUM, the CJEU case-law on the Working Time Directive provides a useful framework for

²⁶⁹ OHCHR and migration. 2018, para. 22.c.

²⁷⁰ ILO 2019.

²⁷¹ Ratified and in force in the following EUMS: Belgium, Finland, Germany, Ireland, Italy, Malta, Portugal, Sweden as well as EEA Member State Norway

²⁷² ILO Convention No. 189 appears to legitimise charging recruitment fees to workers, as long as they are not deducted from wages, contrary to other instruments of international law, see De Sena 2021.

²⁷³ ILO Convention No. 189, Annex, II B (11).

²⁷⁴ PICUM 2021, p. 24.

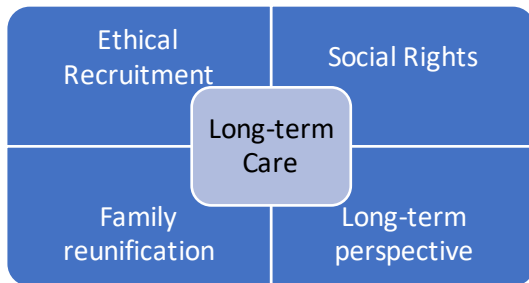
²⁷⁵ For an overview see PICUM 2022.

²⁷⁶ Directive 2005/36/EC; See article 2(1) on this limited scope.

challenging the constant and taken-for-granted availability of live-in LTC workers.²⁷⁷ True, but the scope of the Directive does not include TCNs. Any instrument on LTC migration should, in all decency, declare applicable such social protection rights. This should also include, as discussed earlier, a reference to Directive 2019/1152/EU on Transparent and Predictable Working Conditions.

Furthermore, we want to stress the importance of a right to family reunification for care workers, in order to allow them to raise their children while also providing an essential service to EU citizens in need of LTC.

5.1.5. Recommendations coherent with the legal migration domain



Legal pathways for LTC workers are regulated at national level by a patchwork of rules and conditions.²⁷⁸ An overall EU framework is desperately missing. The EU can and should support dignified admission conditions and procedures for LTC migrant workers entering the EU and support their rights to remain and acquire long-term residence.

Our research finds that the overall objective of any EU legislation must first articulate that labour migration is part of a wider set of measures to address labour market shortages in the LTC sector. Secondly, any legislation must aim at benefitting Member States *and* the countries of origin, must provide dignity of those *receiving care* as well as the migrant workers *offering care*. Thirdly, such legislation must ensure ethical recruitment, which also means recruiters have to remain mindful of the risks of brain drain. Fourthly, it should cater to the demands of employers for high standards of training and, finally, the integration of LTC migrant workers. The added value of the EU is in defining the rights of LTC migrant workers, cross-border skills recognition, their eventual intra-EU mobility, and long-term residence rights.

We suggest the European Institutions consider the following instruments, all to a large extent coherent with the legal migration domain as it stands.

Firstly, we suggest, to avoid expanding the patchwork, that LTC should be included in the Blue Card Directive, requiring a sector-specific derogation from the level of qualifications necessary to qualify for a Blue Card. Alternatively, a new Directive can be proposed on entry conditions and rights of LTC migrants into the EU, drawing from the Blue Card Directive 2021/1883/EU in respect of entry conditions, procedures, and rights and protection, including instructions for facilitating intra-EU mobility of third-country health-care workers. The Blue Card is preferable (rather than the Seasonal Workers or the Au Pair scheme) because of the long-term migration rights it offers. The EU need for long-term care is – under the current circumstances – set to continue growing until 2050 at least, so it does not make sense to make use of a temporary migration scheme. The foreseen study proposed by the European Commission in the package can contribute to substantial arguments towards adding jobs in the care sector to the Annex with the Blue Card Directive 2021/1883/EU, as was proposed by the European Commission during the negotiations on that Directive but cancelled due to Member States' objections. The Blue Card Directive already addresses ethical recruitment and allows for the refusal of a Blue Card in case of brain drain. The Directive should also oblige Member States to transfer the WHO Code of Practice on the International Recruitment of Health Personnel into national legislation. Further research can contribute to increasing awareness of the effects of shortages and the

²⁷⁷ PICUM 2021, pp. 39-40. Reference is made to the *SIMAP*, *Jaeger* and *Matzak* cases.

²⁷⁸ Joint Research Council 2021.

need for a dignified migration policy for LTC migrant workers instead of the current 'pioneering' approach.

Moreover, in any legislative instrument on the topic, we suggest derogating from the Family Reunification Directive and, as is the case in the Blue Card Directive, granting family members direct access to the labour market. Member States should be encouraged to offer a framework for dual career opportunities for spouses in care or other shortage occupations (see the example from Amsterdam, the Netherlands). In the fact that LTC workers invest considerably in their employability in the EU (language, skills, integration), we see justification for an expedited access to Long-Term Residence and a secure right to remain (after 3 years). It would seem the least an aging society in need of care can offer the people willing to take up the task.

However, in case migration schemes for LTC workers would only be temporary, which we would not recommend from a migrant rights perspective, inspiration can be drawn from the model of EU au pair migration in Directive 2016/801/EU as well as Seasonal labour according to Directive 2014/36/EU. Both cover short-term employment (for a maximum of one year or nine months). As stated, we think the preparation for LTC migration is too time-consuming and costly to have sufficient 'return on investment' for migrants and employers alike. This could be addressed by, for instance, extending the duration of stay to a minimum of two years.

In any legislative instrument on the topic, we suggest including an option for in-country application (regularisation) for those LTC workers already present in the EU and previously at work in undeclared or otherwise precarious conditions. Offering this option addresses a reality noted by the European Commission in its recent communication on an EU Care Strategy.²⁷⁹ Alternatively, and at a minimum, we suggest taking on board the recommendations by Fox-Ruhs & Ruhs (2022) towards a Directive on designing a right to a temporary 'redress' permit in case of complaints of labour exploitation, and spelling out the social rights of irregular migrants.²⁸⁰

In the case of no legislative action, national labour migration schemes remain in force. These in all likelihood fall within the scope of the Single Permit Directive setting useful standards on the procedure, rights and enforcement. As explained above in the chapter on the SPD, we suggest adding to the recast SPD a reference to the ILO and WHO norms on fair recruitment as already present in the Blue Card Directive.

The proposed EU Talent Pool could potentially facilitate better matching of LTC workers with employers in EU Member States. Potentially, this instrument could contribute to making both migrant workers and employers less dependant on the recruitment industry. To this end the European Parliament can also support initiatives towards developing LTC as a sector eligible for sectoral cooperation on skills in a *skills partnership under the Pact for Skills for the long-term care sector*. As said, the Commission's goal to harmonize the recognition of qualifications in one Member State can facilitate easier access to the profession in another Member State and enhance intra-EU mobility.

Alternatively, sector specific parameters for talent partnerships could be designed focussing on LTC to harmonize to a certain extent national LTC schemes. Talent Partnerships could support our main objectives, by promoting the training of LTC workers in the country of origin, combined with a broader cooperation with partner countries, among others in developing ways in which foreign professionals and diaspora can contribute to creating opportunities in the country of origin. This would also help mitigate the risk of brain drain in the care sectors of countries of origin. We would, however, not

²⁷⁹ European Commission 2022a.

²⁸⁰ Fox-Ruhs and Ruhs 2022, pp. 75-77.

propose temporary rights of stay (or so-called ‘circular’ schemes) given the investment into the language and skills by both migrants and employers. If it is a match, the migrant should be offered a track to EU long-term residence.

Finally, as the EP has done before, we suggest it calls on the Commission and the Member States to pursue a Health in All Policies approach, assessing the health impact of policy choices in all relevant areas, including (restrictive) migration policy.²⁸¹

Our proposal for a Directive on harmonizing the conditions of entry and stay for migrant LTC workers has financial implications for the EU budget, developing the scheme involves costs. However, if such a proposal were to include a regularisation or in-country application procedure for already present TCN and would grant immediate access to the labour market for family members, there would also be financial benefits. *Not* having care workers available at all is likely to be even more costly than developing a dignified entry scheme for LTC migrant workers.

5.2. Youth migration

5.2.1. The state of play

The European Commission wants to explore the feasibility of developing a European Youth Mobility Scheme.²⁸² To this end, they aim to test various options, in particular for agreements with non-EU countries enabling reciprocity. Such schemes, also known as a “working holiday visa”, already exist in most EU Member States and grant the opportunity for young TCNs (aged between 18 and 30 or sometimes 35 years) to obtain a temporary residence permit (one year) in an EU Member State, travel and perform work; for a full overview of Youth Mobility Schemes, we refer to the recent work by Frelak & Katsiaficas.²⁸³ Some examples will be discussed below.

The literature on Youth Mobility Schemes for third-country nationals *into the EU* is scarce.²⁸⁴ The literature on EU youth mobility is predominantly about mobility of EU Youth *within the EU*.²⁸⁵ Most of the literature on youth mobility schemes is on Australia, New Zealand, and Canada.²⁸⁶ Helleiner critiques the Canadian scheme for Irish working holiday makers as “linked to classed and racialized migration and dominant ideologies of nationalized belonging”.²⁸⁷ Indeed, a cursory look at the participating countries does show an overrepresentation of western countries (which include Japan and South-Korea), and countries with post-colonial ties. Reilly questioned this policy objective in the Australian case, where in 2015, the number of Working Holiday visas was over 200,000 annually, and the migrants were significant participants in low-skilled work in Australia.²⁸⁸ Reilly makes a strong argument to return to a program offering a cultural experience for young migrants and that work under the scheme should be limited to avoid abuse in the workplace. He also argues that labour shortages should be filled using “dedicated labour migration schemes, which are properly designed to address

²⁸¹ European Parliament 2021f, para. 24.

²⁸² European Commission 2022d, pp. 19-20.

²⁸³ For an overview: Frelak and Katsiaficas 2022. Table 1 depicts Existing European Country Youth Mobility Schemes. We could not trace information on working holiday visa in force in the EUMS to an EU website like https://immigration-portal.ec.europa.eu/index_en, because the category is not listed. We checked some of the data made available on commercial websites with Member State government websites and found inaccuracies on the commercial websites, assuming the government websites were correct; we did not verify this with the actual legislation.

²⁸⁴ Carr 1998. The same appears true for au pairing or international students as workers, but see for instance Stenum (2011); Maury 2020 who discusses TCN student-migrants in exploitative work environments in Finland and De Lange, 2015.

²⁸⁵ Haldimann, Heers and Rérat 2021; King 2018.

²⁸⁶ See for instance Chen, Lu, Chang 2009; Brennan 2014.

²⁸⁷ Helleiner 2017.

²⁸⁸ Reilly 2015.

labour shortages in the economy.²⁸⁹ Others theorize this type of mobility as a form of tourism²⁹⁰ or a means to fill labour shortages. Sumption et al. argue that YMSs that act as work-permit programmes for low-skilled jobs risk exploitation. Effective enforcement of labour standards is necessary to negate exploitation.²⁹¹

Besides the risk of abuse at work, there is legal uncertainty for working holiday youth. Robertson explains how the Holiday scheme is a first step in a long migration trajectory which she calls 'staggered' migration.²⁹² After the Working Holiday, youth transition into residence as a student or some other temporary work-related permit, to finally gain more permanent residence. The Youth Mobility Schemes risk creating what Li calls 'indentured temporality', which is a suspension or delay in migrants' desired trajectories towards a more secure residence permit.²⁹³

An alternative mobility scheme that has developed over recent years and is popular among third-country national youths is the 'digital nomad visa.' The literature on this phenomenon is abundant.²⁹⁴ Digital nomads have importance to the tourism industry as they earn their salary abroad (USA for instance) their spending capacity is often higher than the area they visit to work remotely on their laptop. Both Youth Mobility and Digital Nomadism can be seen as a form of tourism; both are temporary and while the nomad does not need to work in the receiving countries labour market, access to that labour market is attractive for mobile youth *and* employers looking for temporary workforce.

The main takeaway from this literature is that if the EU or its Member States want *labour* migrants, they should develop a labour migration scheme and not promote Working Holiday Schemes or Youth Mobility Schemes where work is or can easily become the central objective, while it does not grant the youth any security of residence.

5.2.2. Legal and practical coherence

In the absence of concrete legislative proposals, yet with an eye for legal and practical coherence we have investigated ways to integrate youth migration in the existing legal migration acquis. **We consider it most coherent to add a Youth Mobility Scheme to the Students and Researchers Directive 2016/801.** The Directive already harmonizes a voluntary scheme for conditions of entry to the EU, and for residence for a period exceeding 90 days, for the purpose of training or voluntary service, pupil exchange schemes or educational projects and au pairing. This would allow, as the Commission suggests, Member States to set the entry conditions, and we would further note that it allows them to list the countries with which the Member State has entered into an agreement to guarantee reciprocity. It would offer procedural rights, equal treatment and labour market access rights.

If the parameters of the schemes are harmonised in Directive 2016/801, this would offer a coherent legal framework for different categories of TCNs coming to the EU. It would simplify and streamline the existing national schemes into a single instrument of sorts (recital 2 dir. 2016/801). It would be to the mutual enrichment for migrants, countries of origin and the Member State concerned, while strengthening cultural links and enhancing cultural diversity (recital 3 + 7). Moreover it would improve linguistic skills, develop their knowledge of and cultural links with MS, and demand their fair treatment (recital 23, now on au pairing). In addition, recital 37 already articulates that the objective of the scheme

²⁸⁹ Reilly 2015; see also Li 2022.

²⁹⁰ Brennan 2014.

²⁹¹ Sumption, Fernández-Reino 2018.

²⁹² Robertson 2019.

²⁹³ Li 2022.

²⁹⁴ Angiello 2022.

is *not* to regulate the admission and residence of TCNs for the purpose of employment and it does *not* aim to harmonise national laws or practices with respect to workers' status and that the Member State should retain the right to determine volumes of admissions of the category or categories concerned in accordance with Article 79(5) TFEU. Recital 54 calls for *fair treatment of TCNs* and recitals 61 + 62 call for the protection of human rights under the Charter of Fundamental Rights of the European Union.

In a similar fashion, we see a clear congruence with existing provision on volumes of admissions (article 6); the general conditions in article 7 (a) (c) (d) (e) are the same as already valid for holiday workers; Art 16 (1)(b) regarding au pairs already sets a similar requirement of age: 18-30 years old; Art 14 (2) regarding volunteers already allows Member States to set a age limits; Art 11 defines specific requirements for students in many ways similar as those for working holiday youth; article 16(5) regarding au pairs: already sets a maximum number of hours of work that can be done as an au pair. The same is now done in agreements for working holidays; article 18 sets the time limits to the several target groups of the directive. Such a limit could be added for working holidays (1-2 years); article 22 defines the equal treatment rights. Article 36 requires that if the Member States levy fees, these be proportionate.

An innovation would be intra-EU mobility. We find it difficult to imagine how this would come into effect given the important role of bilateralism. It could require that the EU enters into the YMS agreements with third countries for the whole of the EU territory, like it does with trade agreements. Yet from the perspective of protection of the youth this does not seem the most preferable option.

Although the schemes are usually temporary, we would suggest offering a fast track into a single permit. **In addition, such a scheme could be developed simultaneously with a scheme to facilitate so-called 'digital nomads' to remain legally in EUMSs for a certain period of time. Both schemes would service tourism and less so fill labour market shortages.**

In general, TCNs may only apply for a Working holiday scheme in the presence of a bilateral agreement with the country of origin.²⁹⁵ TCNs wishing to have a working holiday in the Schengen area require a National Visa (type D) to enter, reside and work in the country of destination, and they can travel according to the 90/180 rule in the rest of the Schengen Area. Secondly, candidates must meet a set of requirements specifically determined for each state party (e.g. level of education acquired).²⁹⁶ Participation is limited to one stay per candidate. The targeted age is young adults between 18 and 30 years old, with some exceptions.²⁹⁷ They are not to be accompanied by family members. They must provide a round ticket or evidence of sufficient means and pay the required fees. Additional requirements are allowed under the bilateral agreements the scheme is based on. Although the duration of the working holiday visa may differ depending on the concluded agreement, candidates are in most cases granted a residence permit *and* work permit for 12 months and/or permission to engage in a study course, training or language course of the duration of 4-6 months. Young adults may travel abroad without a job offer, but the obtained work permit only allows them to engage in temporary work, sometimes only during six months only. It is usually a non-extendable permit although, also because of the COVID-19 pandemic and the impossibility to travel home, some countries allow for extensions. From the literature we take it that in Australia and New Zealand this possibility to

²⁹⁵ There are great differences in the number of concluded bilateral agreements by the Schengen countries. For a recent overview (updated: 8 March 2022) consult www.twomonkeystravelfgroup.com.

²⁹⁶ South-Korea requires all applicants from the U.S. to be college students or recent graduates (within one year after graduation), www.overseas.mofa.go.kr.

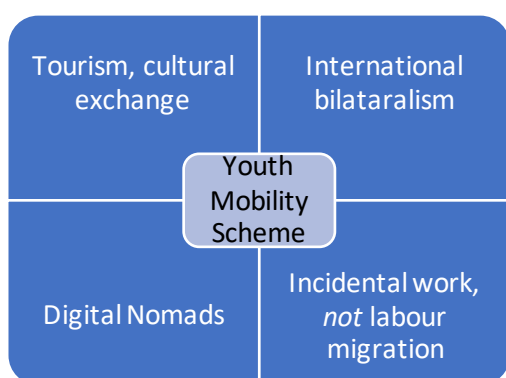
²⁹⁷ For instance, people coming from Canada, Denmark, France, Ireland, Italy into Australia can be 18-35 years old, www.immi.homeaffairs.gov.au; Mexicans going into Canada have to be 18-19 years old, www.ircc.canada.ca; Applicants from Argentina, Canada, Chile, Czech Republic, Finland, Hungary, Slovakia, Uruguay going into New Zealand 18-35 years old, www.immigration.govt.nz.

extend the permit has made the scheme relevant to filling up labour shortages more than one of cultural exchange.²⁹⁸

In the EU context, **Portugal** for instance allows for a one-year working holiday visa, yet limits the months of work permit free labour to 6 months and allows for 4 months of study.²⁹⁹ Argentinian applicants must hold tertiary qualifications, or have successfully completed at least two years of undergraduate university study; this educational attainment requirement does not, for instance, apply to Japanese candidates coming to Portugal. **The Netherlands'** main purpose of working holiday visa is to stimulate cultural exchange amongst young people, much like with au pairing. In order to finance the travel abroad, *incidental work* is permitted, without requiring a work permit.³⁰⁰ The Netherlands has set annual caps in the cases of Argentina, Hong Kong, South-Korea, Taiwan and Uruguay at 100 participants; in case of Japan the cap is set at 200 participants. Note that in 2018 the Netherlands tried to prevent the scheme from becoming an alternative to filling shortages by limiting the duration of employed to a maximum of 12 weeks with the same employer, making the scheme into a 'job carousel'.³⁰¹ Within a year, the restriction was reversed because this interpretation of 'incidental labour' was not in line with the interpretation given by the partner countries in its reciprocal exchange programs. A full-time annual job contract is not currently permitted, a restriction seen in other schemes as well. This restriction is, according to the Dutch government, to underscore that the main purpose should be cultural exchange and not employment, study or family reunification.³⁰² Yet, it makes their employment more precarious.

The question has been raised whether a youth mobility scheme for EU nationals going to the **UK** could be the 'panacea for ending free movement?' and addressing business demands for migrant workers.³⁰³ The UK scheme suffers from limitations such as not allowing for self-employment. The UK scheme is now open only to those from Australia, Canada, Monaco, New Zealand, San Marino & Iceland, and with a ballot system for young people from Hong Kong, Japan, South Korea & Taiwan.³⁰⁴ Despite announcing in 2018 that it would be extended to include EU countries, this has not yet come into fruition.³⁰⁵

In sum, the original purpose of the working holiday programs has been the cultural enrichment of



young adults coming from selected, often wealthy, countries involved in bilateral agreements.³⁰⁶ It is a way to stimulate tourism and, in that sense, has an overlap with 'Digital Nomad' facilities. Nonetheless, the current role of the scheme (and its often unrestricted permission to work) as a tool for filling labour shortages must not be overlooked.

5.2.3. Fundamental Rights

Again in the absence of concrete proposals, a comprehensive fundamental rights compliance

²⁹⁸ Opara 2018, p. 28, 30, 31, 35, 36 and 41; Zhu a.o. 2020, p. 408; Li 2022, p. 555.

²⁹⁹ See [Youth Mobility - Necessary Documentation - National Visas - Visa \(mne.gov.pt\)](https://mne.gov.pt/youth-mobility-necessary-documentation-national-visas-visa)

³⁰⁰ See <https://ind.nl/nl/verblijfsvergunningen/au-pair-en-uitwisseling/verblijfsvergunning-working-holiday-aanvragen>.

³⁰¹ Dutch Official Gazette 2018, no. 310.

³⁰² Dutch Official Gazette 2019, no. 297.

³⁰³ Consterdine 2019. Sumption e.a. 2018 discuss implications of an EU-UK YMS compared to work permit programmes for low-skilled jobs.

³⁰⁴ UK Gov. 'Youth Mobility Scheme visa.' <https://www.gov.uk/youth-mobility/eligibility>.

³⁰⁵ Robins 2022.

³⁰⁶ Shaheer a.o. 2021, p. 331.

assessment would be premature. Yet it is key to ensure that any legislative or policy proposals are **fully consistent with EU fundamental rights** as well as other legal obligations and policies. Here we map some policy intersections to be considered, especially considering migrants' fundamental rights.³⁰⁷

The Working Holiday Visas find their sole legal basis in bilateral agreements, allowing contractual freedom to create inequalities in mobility rights and thus in the personal development opportunities of young adults.³⁰⁸ In this regard, a number of remarks should be made. First, participation is dependent on the existence of such bilateral agreements with the country of residence. There are great differences in the number of concluded agreements, leading to unequal possibilities to obtain a temporary residence and work permit. Moreover, the participating countries mostly include wealthier countries leaving room to assume, as is done extensively in the literature on the topic, the political and ethnical preferences of the schemes.³⁰⁹ Second, agreed volumes of admission included in the bilateral agreements create unequal opportunities amongst participating countries. Third, from the literature we take that the protection of holiday workers against human rights breaches is insufficient and has not yet been addressed in legal instruments.³¹⁰

To address the insufficient protection of youth, any EU instrument in this field should address the need to provide information and opening accessible complaint mechanisms for participants, at the least, as are made available under the SPD Recast, hopefully shifted up to the level of protection offered to seasonal workers in the SWD.

Finally, as does the Commission in the Communication³¹¹, we make reference to the EU Trade Agreements. This is relevant in respect of explicitly safeguarding the human rights commitments of the EU Member States in the bilateral agreement the YMS are based on.³¹² Here we would like to reiterate that our concern is not just with the treatment of European youth abroad. We draw attention to the understudied topic of the treatment of TCN youth in the EU to avoid these schemes from becoming just another 'unintended' facility for low-waged labour migration.³¹³

5.2.4. Conclusion & Recommendations

We think a general framework for Young TCNs to live and work in the EU for a limited period of time is first and foremost a **relevant instrument for cultural exchange and an efficient instrument** to allow young adults to investigate if they want to live and work in Europe. Participants in the scheme may find a job that qualifies for a single permit, blue card or similar national scheme during their stay which probably makes this a more efficient tool to match talent than the digital Talent Pool. This could also resolve barriers experienced by SME to access foreign talent. In case of labour shortages in certain sectors, municipalities could even set up job fairs to this end targeting mobile TCN youth to remain

³⁰⁷ In respect of those rights we flag here the Council of Europe's Partial Agreement on Youth Mobility through the Youth Card, first adopted in 1991, revised in 2003, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e11ff. The agreement does not give a right to mobility but it is aimed at developing a Youth Card for young people under the age of 26 with a view to facilitating their mobility as well as their access to various goods and services to the benefit of personal and cultural development, see <https://eyca.org/>, last accessed 11 November 2022.

³⁰⁸ Helleiner 2017, p. 300.

³⁰⁹ Helleiner 2017, p. 302.

³¹⁰ Opara 2021, pp. 869-884.

³¹¹ European Commission 2022d, p. 20.

³¹² See for instance on the labour rights reforms in Vietnam following the EU-Vietnam Trade Agreement, Marslev and Staritz. 2022.

³¹³ Noteworthy, these exchange programs are not even mentioned in a recent ILO study on Global trends in employment of Youth, see ILO 2020.

after their exchange year. Besides switching into a labour migration scheme, these being young people arriving without family, it is also likely that they may want to switch into a status as a family member.

However, it can also be an efficient yet unethical instrument to address labour shortages in low-waged jobs that require little training, for instance in restaurants and bars or harvesting. Given the educational attainment often required to participate in the schemes, it means high skilled people are engaged in rather low-waged jobs, which is an obvious deskilling. In addition, given that there is, to our current knowledge, little attention for the protection of the participants in the workplace, we find it an unsuitable tool to address skills shortages. In short, if the EU and its Member States want labour migration schemes, then design labour migration schemes. Without proper labour migration schemes, schemes intended for cultural exchange are, in all likelihood, open for misuse, as has been the case with au pairing.

For starters, the European Parliament can push the Commission for research into the actual functioning of existing Youth Mobility Schemes in the Member States; besides the varying conditions, we feel it would also be relevant to survey participants in these schemes across the EU on their experience, type of jobs performed, working conditions, knowledge of available complaint mechanisms etcetera. Also relevant would be to trace their stay-rates, and the purpose and experience of staying. A comparison with existing au-pairing schemes or digital nomad visas would seem useful.

If the parameters of the existing schemes are harmonised, Directive 2016/801 would offer a coherent legal framework. A novelty would be intra EU-mobility beyond the 90/180 days visa free travel within the Schengen area, though this would also require solid safeguards against abuse of the scheme. From a rights-based perspective, the time spent in the EU under such a temporary scheme should eventually count towards long-term residence.

5.3. Migration for innovation

5.3.1. The state of play

The Commission finds that EU Measures could further facilitate the access of innovative entrepreneurs and start-up founders to the EU single market by supporting their admission and the creation of their business.³¹⁴ According to the Commission, migrant entrepreneurs' creativity and innovation capacity should be reinforced. "In particular, support measures and policy initiatives should help attract talented would-be entrepreneurs wishing to create global companies based in Europe."³¹⁵ In its *Action Plan for Integration and Inclusion* the Commission recognizes that migrant entrepreneurs "face several challenges, such as a lack of networks, difficulties in accessing credit and insufficient knowledge of the regulatory and financial framework".³¹⁶ Moreover, in its *Entrepreneurship 2020 Action Plan*, the European Commission called on Member States to develop policies to encourage entrepreneurship among migrants already admitted and to consider their potential for the creation of businesses and jobs.³¹⁷ Again, in the *Industrial Strategy for a globally competitive, green and digital Europe*, launched on 10 March 2020, the European Commission reiterates the need to renew focus on innovation, investment and skills, yet does not make reference to the potential of migrant entrepreneurs.³¹⁸

The EU Competitiveness Council has called for exploring an European start-up visa scheme to, amongst others, improve the EU's attractiveness for innovators. To this end the European Migration Network

³¹⁴ European Commission 2022d, pp. 20-22.

³¹⁵ Ibid, referring to European Commission 2011a at p. 25.

³¹⁶ Action Plan (COM(2020) 758 final), p. 11.

³¹⁷ European Commission 2012.

³¹⁸ European Commission 2020c.

mapped a plethora of admission schemes for ‘start-ups’ and ‘innovative entrepreneurs’ that have been developed within the EU.³¹⁹ According to EMN, while primarily an economic policy perspective, “attracting start-ups is also in line with the broader objectives of EU migration policy, such as tackling demographic change and satisfying labour market needs.”³²⁰ The notions of ‘start-up’ and ‘innovative entrepreneurship’ mirror an environment where individuals are motivated to innovate, create new products or services, and to take risks. Entrepreneurship can have a beneficial impact on the economy through job creation, innovation and investment. Start-up admission schemes thus generally aim at fuelling economic growth, innovation, and making the country more competitive in the globalised knowledge economy. Finally, the OECD has recently reiterated that if the EU is to remain a globally competitive player, it must find better ways to attract and retain innovative entrepreneurs.³²¹

The academic literature on migration policies for start-ups is a subdivision of a larger body of migration and business studies literature on immigrant and refugee entrepreneurship.³²² Immigration policies are but one incentive or barrier for immigrant entrepreneurs to set up their business abroad and have until recently, remained understudied.³²³ In 2015, Sumption found that “(i)migrant entrepreneurs are among the most desirable of these highly skilled newcomers —especially immigrants behind high-tech and high-growth start-ups that policymakers find particularly appealing. Most governments want to boost entrepreneurship, but reliable and feasible policies to do so have proved elusive.”³²⁴ Developing start-up residence permit schemes requires states to depart from the more traditional employer sponsored labour migration scheme. In the absence of a specific scheme for the self-employed, Sumption has warned that immigrants who enter on temporary work or study visas and want to start a business might need to wait several years for permanent residence before they can actually become entrepreneurial, stifling their potential as job creators or seeing them take their business plans elsewhere. From a comparative study on entry policies in France, Germany and the Netherlands, De Lange has found that Member States that do have entry policies for the self-employed may still not be welcoming innovative start-ups.³²⁵ De Lange concludes that any “future EU policy on welcoming immigrant entrepreneurs must set standards for a large variety of entrepreneurs, allow for the economic interest to be broadly defined and have, at the least, transparent and practical procedures.” For instance, a permanent residence permit after three years could make the scheme attractive. **This suggestion goes beyond the Commission’s intent on developing a scheme for *innovative start-ups* only. A migration scheme for only innovative start-ups would be a (too) narrow approach.**

Solano, in a study of immigration policies in the EU and OECD countries, offers two warnings on the development of such targeted policies. First, it must be recognized that other conditions than migration policy may affect migrants’ entrepreneurial paths. For instance, the role of entrepreneurship support mechanisms, e.g. incubators and accelerators, including university-incubators, consultants, legal advisors, accountants, bookkeepers and bankers is key in navigating immigration *and* business policies and cannot be neglected in the development of any policy in this field.³²⁶ Further research is needed into how both the migration and business industry as well as EU and national regulations that

³¹⁹ European Migration Network 2019.

³²⁰ Ibid.

³²¹ OECD 2020a.

³²² For a recent overview of the literature see Dabić, Vlačić, Dana, Sahasranamam and Glinka 2020. Specifically on refugee entrepreneurship see for instance: Desai, Naudé, and Stel 2021; De Lange, Berntsen, Hanoeman, and Haidar 2021. Specially on start-ups see for instance Terstriep, David, Ruthemeier and Elo 2022; ACVZ 2020.

³²³ ACVZ 2020. See for a recent overview Solano 2021.

³²⁴ Sumption 2012.

³²⁵ De Lange 2018.

³²⁶ Dabic e.a. 2020, p. 34. Berntsen, De Lange, Kalaš and Hanoeman 2022.

are not directly addressed to migrant entrepreneurs affect the policy objective of the EC to be attractive to innovative entrepreneurs. Such other regulation can include, for instance municipal planning laws (and communication on them in the national language only).³²⁷ Wider private advisory and public regulatory infrastructures should be critically taken into account when legislating entry and integration policies for migrant entrepreneurs. Without covering the wider infrastructures, these entrepreneurs face the same procedural barriers as applicants of single permits do, e.g. extra procedures prior and after admission that make success difficult. Moreover, the current proposal has a focus on innovative start-ups while the OECD, for example, underscore the relevance of social entrepreneurs for the innovations needed in the future.³²⁸

Thus, the research agenda this literature proposes could offer the European Commission necessary insights to develop a balanced policy for a wider range of entrepreneurs; we recommend the Council and the European Parliament to push for this research agenda.

5.3.2. Selected Member States position

Innovation through entrepreneurship is framed as an entry condition for TCNs *and* as something that is needed, thereby making innovative migrant entrepreneurs a subcategory of the so-called 'war on talent'. The call for business innovation translates into migration policies for start-ups, such as have been developed by, for instance **France** (French Tech Ticket), the **Spanish** program for foreign start-ups and entrepreneurs (Rising Start-up Spain). Scale-Up Europe advocates for further development of such schemes to attract 'tech giants' to Europe.³²⁹ Other EU Member States explicitly prefer start-ups and entrepreneurs in sectors that **address contemporary global challenges**, such as climate change, and advanced technological change, which actually means they equate 'innovation' and sustainability goals.³³⁰

Here we would like to note that even very welcoming policy initiatives need to come with an accessible procedure. In France for instance, the delays for getting an appointment to submit a visa applications makes the schemes available only to those TCNs that do not require a long-term visa or are already in the country.³³¹ The political message of carrying a restrictive migration policy does not combine well with the accessibility and attractiveness of welcoming schemes; this is a 'position' the Member States cannot afford if they want to attract talent, yet it is a failure not easily addressed in EU migration law. Procedural safeguards such as a maximum number of days to adopt and notify a decision do not come with an EU sanction on tardiness or, even more difficult to handle, delays in facilitating the actual application. A smooth and fully digitalized procedure might be a minimum requirement if the EU Member States want to attract innovative talent. Positive experiences with the **Estonian** e-government can serve as an example.

5.3.3. Legal and practical coherence and alternatives

In the history of migration into the EU, the inclusion of access to the EU market for the self-employed was a key component of the CEEC Agreements and other agreements from the 1990s to open up gradually freer mobility. The outcomes were generally very positive allowing movement of persons

³²⁷ De Lange, Berntsen, Hanoeman, and Kalas 2019.

³²⁸ See <https://www.oecd-forum.org/posts/migrant-entrepreneurship-opportunities-for-societal-renewal>, Impact Hub and The Human Safety Net 2021.

³²⁹ European Migration Network 2022.

³³⁰ European Migration Network 2019.

³³¹ See The Connexion 2022, ['We've given up': French visa application appointment delays continue \(connexionfrance.com\)](https://www.connexionfrance.com/).

without competition in labour markets.³³² These can serve as examples for any future legislation in this field.

The current AFSJ acquis on legal migration includes refugee, migrant *and* immigrant entrepreneurship in a variety of instruments (see figure 2 below), including integration policies to promote refugee and migrant entrepreneurship, the recently adopted Blue Card Directive to stimulate ‘expatpreneurship’, so-called expats turning into entrepreneurs or, in this case, developing as entrepreneurs while still in employment, TCN students who can be entrepreneurs while they study or set up a business during their search period after finalizing their studies, and LTR as mobile self-employed workers. To stimulate entrepreneurship of the already present migrant population, search periods could be extended for former TCN students and researchers selected by prestigious (university) incubator programs, or a residence permit for Blue Card holders transitioning into a ‘Business Blue Card’ could be introduced. As discussed in Chapter 3, the mobility of LTR self-employed can be facilitated with tailored business programs, even if they are often establishing small enterprises in typical ethnic sectors, a new vegan fast food chain might be just as innovative as an IT entrepreneur. Yet, no institutions seem to engage with the LTR entrepreneurs at work in Europe’s kitchens, butcheries, cleaning services and phone stores.³³³

Figure 2: Entrepreneurship integration and immigration in the EU context

Integration Policies	EU Legal Migration law on expat- & student-preneurs	EU and national Legal Migration law on establishing immigrant entrepreneurs	(Trade) Agreements on the Right to establishment
<ul style="list-style-type: none"> • Refugee & Migrant Entrepreneurs (AMIF) 	<ul style="list-style-type: none"> • Revised Blue Card Directive art. 15(5) • SRD art. 24(1) 	<ul style="list-style-type: none"> • ICT Directive (minor share holder) • SRD art. 25(1) • LTR Directive art. 14(2)(a) • National startup and entrepreneurship programs 	<ul style="list-style-type: none"> • CEEC Association Agreements, e.g. Georgia, Moldova, Ukraine • EC-Turkey Additional Protocol 1973 • EU Trade Agreements e.g. Japan, Cariforum.

Source: De Lange, *Odyssey Summer School presentation 2022*.

In the forward-looking pillar, the EC does not make reference to mobility into the EU of independent professionals or business founders- two categories close to the start-ups founders and entrepreneurs- whose temporary entry and stay in the EU falls within the ambit of most EU foreign trade agreements (FTA). The FTA are international law and the MS, under such agreement often are obliged to offer (temporary) entry schemes and market access for these categories of entrepreneurs. Research by De Lange et al (2021) commissioned by the European Commission shows not all Member States have such entry categories in place in their national law or policy or information on the availability of the schemes is difficult to access.³³⁴ Although entering into such FTA is the sole competence of the European

³³² Guild 2001; Böcker and Guild 2002.

³³³ To our knowledge there is little research on their number and their activities, these examples came forward from Dutch case law.

³³⁴ De Lange, Tans and Azhar 2021.

Union³³⁵ for transparent implementation of the FTA, and more, De Lange et al recommend a **Directive on the conditions of entry and residence (short-term and long-term) of third-country nationals for the purpose of self-employment, entrepreneurship and for start-up founders**. It would be the most comprehensive way forward. Alternatively, and as a minimum the design of entry procedures into the Member State for (innovative start-up) entrepreneurs should become a separate chapter of the SPD. By including them in the scope of the SPD, the right to equal treatment also covers the self-employed. Alternatively, the status quo will have Member States compete against each other over innovative start-ups with migration and/or tax or other economic policies but with few instruments for the EU to develop its policy goals as listed in the introduction of this section.

We also draw attention to the intersection with the proposed **exclusion of investors from the Long-term residence Directive**. The framing of investors as unwanted can have negative impact on start-up founders' choice for the EU as their destination. Branding of countries is an important vehicle in the start-up 'ecosystem' and a possible negative intersections with the exclusion of investors from the LTR status has, to our knowledge, not been investigated. The negative effects (and legality) of this relatively recent EP initiated and stimulated policy move, should be carefully and systematically considered before it is codified.

Moreover, the intersection with the **Regulation on Foreign Direct Investments** has to be considered in any scheme on immigrant (start-up) entrepreneurs.³³⁶ According to this the recitals to this Regulation, foreign direct investment contributes to the Union's growth by enhancing its competitiveness, creating jobs and economies of scale, bringing in capital, technologies, innovation and expertise. Yet, article 3(5) of the Treaty on European Union (TEU) specifies that the Union, in its relations with the wider world, shall uphold and promote its values and interests and contribute to the protection of its citizens. Under World Trade Organization (WTO) commitments in the trade and investment agreements the Union and the Members States may adopt restrictive measures relating to foreign direct investment on the grounds of security or public order, subject to certain requirements. The framework established by this Regulation relates to foreign direct investments into the Union. A 'foreign investor' is a TCN or an undertaking of a third country, intending to make or having made a foreign direct investment.³³⁷ This *can* be a wealthy TCN start-up founder, entitled to set up a business under an FTA or, in the absence thereof, an entrepreneurial TCN the EC's forward-looking pillar aims to welcome.

5.3.4. Fundamental rights coherence

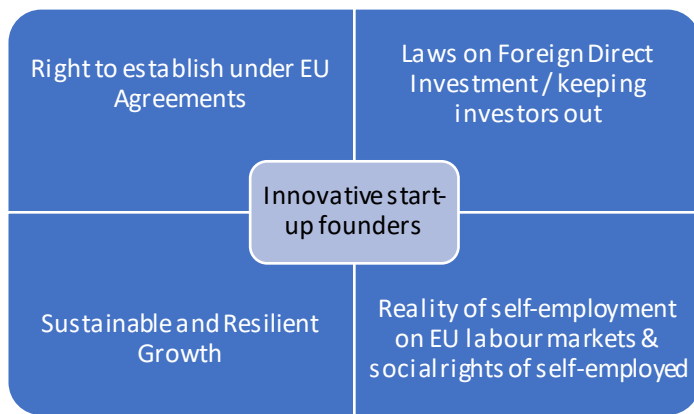
The UNCTAD guide argues that entrepreneurship can be an effective way to include migrants and refugees in local economies, by sharing their knowledge and entrepreneurial spirit, and creating new market opportunities and cross-border networks. Entrepreneurship can also be part of the long-term solutions needed to address the consequences of large movements of forcibly displaced persons, in addition to the important measures that are put in place to cope with the immediate effects of humanitarian crises. Perhaps lessons can be learned from the experience of the arrival of many people fleeing Ukraine into many Member States and what were the consequences if these beneficiaries of temporary protection were not excluded from certain forms of (self-)employment.

The creation of economic opportunities for all, with the purpose of leaving no one behind, is among the top priorities of the UN 2030 Agenda for Sustainable Development.

³³⁵ Articles 206 and 212 TFEU.

³³⁶ Regulation (EU) 2019/452.

³³⁷ Article 2.2 Regulation 2019/452.



As discussed in the section on long-term care migration, ethical recruitment is another fundamental issue that, if not done properly, jeopardizes fundamental rights of self-employed migrants. This is also relevant for the recruitment industry of start-ups. Although likely to regard highly qualified TCN with the financial assets to hire their own legal advisors, research shows that start-up founders can be vulnerable immigrants just the same,

for instance because they are highly dependable on their facilitator for their residence status.³³⁸

5.3.5. Conclusions and Recommendations

In sum, we recommend further research and, eventually a Directive defining conditions, procedures and rights of migrant entrepreneurs in general, and not just innovative entrepreneurs.

5.4. Other policy options

In Section 5.2 on long-term care migration, we alluded to a Directive facilitating on the regularisation of currently 'undocumented' irregularly staying migrant workers at work in the EU care sector, in personal care, babysitters, or minders of elderly in need of assistance. This can be done by, for instance, allowing applications from within the EU territory for (long-term) care work or other shortage occupations. Thanks to irregular care workers, parents of young children can work full-time and the elderly can remain independently in their homes longer. We identify their regularisation as an important policy option to address future skills 'needs' missing from the European Commission's proposal. Politically sensitive, yes, maybe. Yet, as Fox-Ruhs and Ruhs (2022) point out in their recent study commissioned for the LIBE Committee, the reality of their contribution to the EU economy cannot be denied.³³⁹ If respect for human dignity is taken seriously, any forward-looking labour migration policy demands such action.

5.5. Conclusions and recommendations on care, youth and innovation

Each of the topics of the **forward-looking pillar requires further research**. This research should take a rights-based approach and consider the protection of the TCNs involved in care, youth and in innovation migration. Importantly, it should engage an integrated policy approach considering regulation and infrastructures beyond mere migration policy. In addition, we believe a Directive articulating the rights of TCNs without legal residence as proposed by Fox-Ruhs and Ruhs (2022) *and* setting parameters for regularisation procedures, is a necessity for any community that claims to offer dignity for all the people present on its territory.

The European Parliament and the Council can and should push for **legislative proposals that offer a strong protection** of the TCNs' rights, including family reunification, allow for relevant intra-EU mobility, offer strong pathways towards secure residence status as LTR in the EU, *and* offer effective protection against abusive practices.

³³⁸ ACVZ 2020.

³³⁹ Fox-Ruhs and Ruhs 2022.

- Welcome the European Commission's plan to propose a Directive on the recognition of Qualifications of TCNs;
- Develop a chapter on care workers in the Blue Card Directive 2021/1883/EU or a separate Directive for care work;
- Include a youth mobility scheme in Directive 2016/801/EU;
- Develop a Directive on the entry conditions and rights for migrant entrepreneurs generally and not just for innovative startups; and
- Develop a Directive which offers already present migrant workers
 - 1) a two year permit in case of a complaint made about non-compliance with their social and labour rights and conditions at work;
 - 2) an in-country application procedure into legal residence and permanent right to stay; and
 - 3) a mapping of existing social rights of irregular migrants under the EU Social Pillar.

6. CONCLUSIONS AND RECOMMENDATIONS

6.1. Conclusions

The Commission's Legal Migration Package presented in its *Communication on Attracting skills and talent to the EU* is an important step in improving the legal migration acquis. Yet, our in-depth analysis of the Package as to the proposals' effectiveness, efficiency, legal and practical coherence, and fundamental rights compliance finds room for improvement. Positive measures are, for instance, the opportunity offered to holders of a Single Permit to change employers, if proper conditions are defined. Equally positive is the removal of the assessment of the labour market for LTRs who want to move to a second Member State. In addition, as the recognition of qualifications obtained outside the EU is frequently highlighted as a practical obstacle to labour migration, we welcome the Commission's plans to develop a Directive to that end in 2023, as presented in November 2022.

The European Commission makes a strong case for labour migration for demographic, political, and economic reasons. The Commission presents the package as a sustainable EU policy on legal migration. However, how the three key pillars of the package contribute to 'sustainability' remains unaddressed. Sustainability is used as a buzz word, not a conceptual foundation for a migration policy that can contribute to solving contemporary and/or future crises. The environmental challenges faced globally, and the role of European industry, appear to be absent from the European Commission's migration policy discourse. The extent to which labour migration can positively contribute to the necessary transitions towards resilient and sustainable economies remains *terra incognita*. A socially sustainable policy would need to draw from intersecting policy fields relating to a wider societal well-being in the EU Member States as well as countries of origin, today as well as taking into account the needs of future generations. Such an approach calls for different economic rationales, to protect the environment, healthy 'farm to fork' supply chains, the energy transition etc. While the package speaks of sustainability, we sorely miss a narrative of sustainable EU migration policy. Sustainability must also apply to TCN migrants. For them, sustainability needs to be defined in terms of rights and future prospects. To improve the opportunities for TCN migrants in the EU to be mobile and go where there is work and opportunity to develop their skills and talent rather than being obliged to stay put waiting for the opportunity to gain citizenship, is a sustainable measure. Improving the right to intra-EU mobility by abolishing the labour market test is one of the most important changes of the proposed Long-Term Residence Directive recast. Were this intra-EU mobility right to be deleted during the negotiations, we would strongly question the social sustainability agenda of the European legislature.

Coherence within the legal migration acquis was one of the objectives of the package on attracting skills and talent to the EU. Throughout this study we have highlighted multiple opportunities to improve this coherence. Especially the recently adopted revised Blue Card Directive has much more to offer with respect to efficient procedures, proportionality and individual assessments, migrant rights' including rights of family members and rights to remain in the EU. The Single Permit Directive is silent on the grounds for refusal, withdrawal or nonrenewal of a single permit, leaving third-country nationals at the whim of Member States' implementation and employers. We present recommendations to incorporate these grounds for refusal or withdrawal in the Single Permit Directive. We also recommend to include in the Single Permit Directive a fast-track procedure for the Talent Partnerships to integrate that instrument in the package in a more coherent way. When investigating policy options for long-term care migration and migrant entrepreneurship integrating them into existing directives, such as the Blue Card Directive, should be the preferred option, so as not to reinvent the wheel. Youth mobility can be legislated coherently in the Students and Researchers Directive, with schemes like volunteering

and au pairing. And if more low and medium skilled jobs are to be filled by migrants, labour migration policy for low and medium skilled jobs must be designed.

A coherent and rights-based intersection of legal migration pathways and international protection is missing. Beneficiaries of international protection and temporary protection remain excluded from the scope of the Single Permit Directive, which makes the system incoherent, inefficient, and not as rights-based as it claims to be. We also see opportunities for more coherence in offering forcibly displaced TCNs access to the Talent Pool and developing Partnerships targeting such populations. The efforts of the European Commission to pilot the Talent Pool with Ukrainian displaced persons in a few EU Member States is to be praised. Yet, we have pointed out that measures are needed to secure the legal employment of Ukrainians in case the temporary protection status ends by a Council Decision or expiration of the three years protection. The successful inclusion of many forcibly displaced Ukrainians on the European labour market would come to an end were the Reception Conditions Directive to apply unchanged, it could put their right to access the labour market on hold.

We noted throughout the study that coherence with other fields of EU law, such as the social pillar of rights, can be improved. In terminology, in awareness of the social rights of (undocumented) TCN migrant workers, as well as in the enforcement of these rights, the Employer Sanctions Directive and the Seasonal Workers Directive have more to offer than the proposed Single Permit Directive. Aligning the legal migration acquis with social rights, such as the Directive on transparent and predictable working conditions and the recently adopted Minimum Wage Directive, would improve efficiency and effectiveness of enforcement of these rights and the protection of migrant workers against abusive working relations.

We also raised the importance of benefitting from (long-term) care workers already present in the EU territory, but without legal residence. This can be done by, for instance, allowing applications from within the EU territory for (long-term) care work or other shortage occupations. Many so-called 'undocumented' irregularly staying migrants offer care services to families and elderly people in need in the EU. Although some of the social rights directives apply to them, there is little awareness of their rights, nor is their security of residence, opportunity to reunite with their family, or to build-up rights towards more permanent residence in the EU guaranteed. They have sought-after care skills and their endeavour to care for Europeans, in jobs Europeans prefer not to perform, should be rewarded with legal residence, or, at a minimum, a two-year residence permit in case of complaints made over abusive labour relations, as suggested by Fox-Ruhs and Ruhs (2022) in their recent study commissioned for the LIBE Committee. An option for the regularisation of their status and upskilling of home care workers already present in the EU would in all probability be a less costly choice than recruitment abroad.

From our study of caselaw in selected Member States on the functioning of the Single Permit Directive and the Long-Term Residence Directive, we identified issues not addressed in the recast proposals. Such issues also did not come forward in the Commission's fitness checks. We reveal legal and practical incoherence, such as excluding certain TCNs from the scope of the Single Permit Directive in national law or practice, defining means of subsistence requirements not in conformity with CJEU case law, obstructing the proper functioning of derogations from the Long-Term Residence Directive. In respect of the right to equality under the Single Permit Directive, one Member State has been adamant in denying third-country nationals equal rights. However, in most Member States participating in our study, there was little caselaw on the topic of legal migration. We thus welcome the proposed new articles in the Single Permit on monitoring and facilitating complaints and legal redress and reiterate that *everyone* has a fundamental right to an effective remedy under article 47 of the EU Fundamental Rights Charter.

Finally, the European Commission has chosen to recast the two Directives instead of enforcing Member State compliance through infringement procedures. To support monitoring of Member State compliance, both proposals step up the Member State's obligations to report on their application of the Directive. The statistics to be provided under the Blue Card Directive are, however, more elaborate. We recommend expansion of the reporting obligations in the two recast proposals towards better monitoring and, if needed, better enforcement in the future.

We believe the alternative choices we have provided on the two legislative proposals could be implemented at no extra cost. On the contrary, not implementing those choices is likely to be more costly because the talent and skills of the people already present in the EU would be underused; however, the size of this study did not allow for a full assessment of this supposition. The costs for the Talent Pool in the operational pillar have been analysed by the OECD. The Talent Partnerships are costly, yet may eventually result in more skilled migratory movement. Costs of the forward-looking pillar, once proposals are tabled, will need a full study. Such a study on the costs of preparing for long-term care migration, which can be high, should consider the trade-offs of, for example, automation, also considering EU patients' right to care. We suggest that an option for in-country applications for a selected group of migrants already present in the EU (possibly regularising informal stay and employment) would be less costly. Also the costs of upskilling of home care workers already present in the EU would be a less costly choice. Again, any future evaluation of the costs of labour migration would need to consider the trade-offs between sustainable, rights-based labour migration and alternatives such as raising salaries, automation, offshoring, or re-evaluating employers' and Member States' 'needs'.

6.2. Recommendations

We have formulated multiple recommendations. Core recommendations are highlighted in boxes and presented at the end of each chapter in a concise manner, foremost directed to the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE), and the Council.

Legislative Pillar: Single Permit Directive

- 1) Keep the original recitals.
- 2) Define who is a TCN worker.
- 3) Expand the scope to include beneficiaries of international protection and temporary protection.
- 4) Harmonize and improve the procedural safeguards by obliging the competent authority to **adopt and notify** a decision... "within 90 days maximum".
- 5) Safeguard **that both employer and migrant receive notification**, and the migrant receives *both* the physical card *and* a digital version.
- 6) Limit **the number of extensions** for 'exceptional circumstances' to once only.
- 7) Include a fast-track procedure to **support the Talent Partnerships** and possibly also the future Talent Pool for them to be effective legal pathways.
- 8) Add grounds of refusal, withdrawal and non-renewal on public policy and public security.
- 9) Alternatively, if grounds for withdrawal or non-renewal remain at the discretion of the Member States, do not allow Member States to hold a TCN responsible for the minor misconduct of the employer.

- 10) At a minimum, include that Member States shall take into account the specific circumstances of the case and respect the principle of proportionality.
- 11) Add ethical recruitment as a ground for refusal.
- 12) Adjust article 11 on the right to change employer to include an obligatory notification procedure and possibly define the sectoral limit to move during the first year(s).
- 13) Make explicit reference to article 47 of the Charter of Fundamental Rights on access to an effective remedy and to a fair trial.
- 14) **Protect TCNs with a single permit against abusive labour relations** at least at the same level as TCNs at work under the scope of the Seasonal Workers Directive and informally employed under the scope of the Employer Sanctions Directive.
- 15) For the purpose of policy making and enforcement, see to it that the quality and uniformity of **the statistics delivered improve**.

Legislative Pillar: Long-Term Residence Directive

- 1) Keep the recitals in place.
- 2) Limit waiting time for an LTR permit, reduce residence requirements.
- 3) Allow for exceptions regarding the five-year period for protected persons.
- 4) Include beneficiaries of temporary protection, and address their future rights.
- 5) Clarify derogations towards circular migration.
- 6) Reconsider the exclusion of investors.
- 7) Provide equal access to social protection and social assistance.
- 8) Encourage the intra-EU mobility of TCNs.
- 9) To avoid administrative barriers, explicitly enter "mobile EU long-term resident" on the (digital) LTR residence card.
- 10) Facilitate family reunification in a consolidated way.

Operational Pillar

- 1) Engage with the intricate interplay between the operationalisation of the Talent Partnerships and the legal migration *acquis*.
- 2) Give priority to the adoption of a directive on the recognition of qualifications of third country nationals to be tabled by the European Commission in 2023 according to its roadmap.
- 3) Establish simplified processes for those partaking in Talent Partnerships in the SPD.
- 4) Integrate similar preferential regimes in future amendments of relevant EU instruments, such as the SRD.
- 5) Engage with the intricate interplay between the Talent Partnerships and the Talent Pool and EU asylum and return *acquis*.
- 6) Irrespective of their mode of entry, returns of TCNs at the expiry of a given scheme should respect the right to request asylum and other key guarantees such as the principle of non-refoulement. This includes, but is not limited to, the potential entry of beneficiaries of international protection through a Talent Partnership.

- 7) In case of the beneficiaries of temporary protection, their continuous right of access to the labour market (and use of the Talent Pool) should be secured.
- 8) Guard over the interplay between the Talent Partnerships and Talent Pool and EU social policy and as well as ILO fair recruitment goals.
- 9) Incorporate the Partnerships and Pool in a legislative tool (the SPD for instance) which obliges all parties involved to engage fair recruitment methods.
- 10) Ensure sufficient information is provided to potential migrant workers on their rights as workers and as migrants.
- 11) Strive to ensure the democratic legitimacy and democratic accountability of the Talent Partnerships.
- 12) The Parliament should strive to ensure the effectiveness of Talent Partnerships.
- 13) Ensure scalability in terms of their duration and level of participation.
- 14) Contest the conditionality framing which undermines the effectiveness of Talent Partnerships, especially in that it creates significant risks for the private sector.
- 15) Ensure that the Talent Partnerships and the Talent Pool promote sustainable growth and support the EU's goals for a green transition and sustainable development.

Forward-Looking Pillar

- 1) Develop a chapter on care workers in the Blue Card Directive 2021/1883/EU or a separate Directive for care work.
- 2) Include a youth mobility scheme in Directive 2016/801/EU.
- 3) Develop a Directive on the entry conditions and rights for migrant entrepreneurs generally and not just for innovative startups.
- 4) Develop a Directive for (home care) migrant workers already present in the EU.

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ANNEX I: METHODOLOGY

Our methodology is a combination of doctrinal legal research with empirical qualitative and quantitative research methods. This mixed-methods framework allowed us to provide a deep insight into the proposed legal framework and the policy implications of the non-legislative proposals. The primary method was desk research of primary and secondary sources, including relevant legislation and case law, official declarations, policy documents, statistics, implementation reports, fitness checks and previous studies submitted to the European Parliament. The Odysseus network and related networks of experts and stakeholders provided access to relevant sources at domestic level. Furthermore, a legal analysis was performed of relevant fundamental rights instruments, such as CJEU judgements, ILO conventions, and the UN Global Compact on Migration and Asylum. The desk research also included scholarly literature.

Within the Odysseus Network, a concise questionnaire was distributed among 24 Member States (excluding Ireland and Denmark) to collect data on caselaw regarding the efficiency and effectiveness of the Directives and possible improvements to existing bottlenecks. In total 12 questionnaires were returned (50% response rate) (Table 2).

Table 2: Respondents to interviews (all Odysseus Network Members, except Portugal)

EU Member State	Expert	Position
AU	Ulrike Brandl	Ass. Prof. at the Department of Public Law, Public International Law and European Union Law, Faculty of Law, University of Salzburg
BU	Valeria Ilareva	Chairperson Foundation for Access to Rights - FAR
BE	Jean-Yves Carlier	Professor, Centre Charles de Visscher pour le droit international et européen (CeDIE)
CR	Iris Golder Lang	Jean Monnet Professor of EU Law, UNESCO Chair on Free Movement of People, Migration and Inter-Cultural Dialogue, Faculty of Law, University of Zagreb
DE	Daniel Thym	Professor of Public, European and International Law, University of Konstanz; Director of the University's Research Centre for Immigration & Asylum Law (FZAA)
GR	Costas Papadimitriou	Professor of Labour Law and European Labour Law, Law School of Athens
HU	Nagy Boldizsár	Associate Professor, Central European University, International Relations Department, Budapest
IT	Alessia Di Pascale	Assistant Professor of European Law CRC Migration and Human Rights. University Degli Studi di Milano
LU	Catherine Warin	Docteure en Droit ; Avocate au Barreau de Luxembourg
NL	Tesseltje de Lange	Professor of European Migration Law, Radboud University Nijmegen

PO	Barbara Mikołajczyk	Professor at the Faculty of Law and Administration of the University of Silesia in Katowice, Poland. She is the head of the Department of International Public Law and European Law.
PT	Erica Silva	Technical Expert, Government of Portugal
SL	Saša Zagorc	Dean and Professor at the Faculty of Law University of Ljubljana

A total of 15 online semi-structured interviews, conversations or email correspondences with experts and key actors at EU level and in selected Member States, were conducted (Table 3). The meeting with Dutch lawyer Julien Luscuere was held on October 15, 2022 with a total of eight Dutch immigration lawyers, and Dr. Helen Oostrom-Staples (Tilburg University). It was a focus group style exchange of experience on the practice of intra-EU mobility of LTR under article 14 LTRD.

Table 3: Respondents to interviews

Name	Function	EU/MS
Rimma Abadjan	Lawyer at Deloitte Legal	EU/BE
Liesbeth van Amersfoort	Policy Advisor UWV	NL
Jo Antoons	Attorney and Managing Partner Fragomen	EU/BE
Edwin Atema	Labour Unionist	EU/NL
Jonathan Chaloff	OECD (personal title)	EU
Izabela Florczak	Ass. Prof. Institute of Social Security Law and Social policy	PL
Imke van Garderingen	Labour Unionist / PhD researcher, Free University	EU/NL
Lilana Keith	Policy Advisor PICUM	EU
Mieke Vanlaer	Progress Lawyers	EU/BE
Julien Luscuere	Lawyer at Julien Luscuere Advocaten	NL
Veronika Casteur Petrzalkova	Market Director Foreign, Accent Jobs for People	EU/BE
Miriam Quené	Antwerp University	EU
Raffaella Greco Tonegutti	Lead expert Migration and Development, ENABEL Belgian development agency	EU/BE
Mia Mckenzie	IOM-MATCH (Talent partnership)	EU/NL
Zvezda Vankova	Lund University	EU

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ANNEX II: CASELAW ON THE SINGLE PERMIT DIRECTIVE

Here we examine the caselaw on the Single Permit Directive in chronological order, setting out the issues, the facts and the reasoning of the CJEU in its judgments. Each of the four decisions so far, reveal different aspects of the issue of equal treatment. All stem from Italy, hence we start with a discussion of the Italian caselaw.

*Italian caselaw*³⁴⁰

Directive 2011/98/EU, transposed by the Italian legislator in Legislative Decree no. 40/2014, has been the subject of a lively jurisprudential debate. The questions submitted to the national courts have concerned the possibility to frame social assistance measures (as provided for by Italian law) within the EU concept of social security and the violation of the principle of equal treatment (where access to these measures was made conditional on holding a long-term residence permit).

The Italian legislature in fact failed to transpose Article 12 of the directive and did not make use of the margin of appreciation provided for by it, which would have allowed it to impose restrictions on equal treatment, including in matters of social security. On that basis, the INPS - Istituto Nazionale di Previdenza Sociale (National Social Security Institute) developed an orientation denying the childbirth allowance (provided for by Article 1(125) of Law No 190 of 2014) to TCNs who, although not holding a long-term residence permit (hereinafter referred to as "LTR permit"), were nevertheless in possession of a residence permit of another type (e.g. for family reasons) authorising them to work in Italy.

Several Italian courts³⁴¹ have noted the conflict between the Italian legislation and Article 12 of Directive 2011/98/EU, considering the latter to be immediately applicable, and have therefore found the INPS conduct discriminatory and affirmed its duty to proceed with the disapplication of the Italian rule.

As for the Superior Courts, the Constitutional Court initially dismissed the questions of constitutionality of Article 74 of Legislative Decree No. 151 of 26 March 2001.³⁴² This provision made conditional the payment of maternity allowance to holding an LTR permit. The question was initially declared inadmissible also on the grounds that the applicants had not taken into consideration the EU framework, recognising that by virtue of the direct applicability of Article 12 of the directive, they could have obtained adequate protection through the disapplication of the Italian rule that conflicted with it. The Constitutional Court was also asked about the legitimacy of the national legislation concerning the requirements for access to the so-called 'reddito di cittadinanza' (citizenship income).³⁴³ However, in this case, the Court answered in the negative, considering that the measure is not only of a welfare nature, but pursues a multiplicity of active labour policy objectives.

Subsequently, the Court of Cassation and the Constitutional Court turned to the Court of Justice of the European Union for a ruling on the compatibility with the EU directive of the Italian legislation, where, respectively, it excludes from the calculation of TCNs family members those residing abroad for the

³⁴⁰ We are thankful for the elaborate Italian questionnaire by Alessia Di Pascale Ph.D.

³⁴¹ Tribunale Alessandria sez. lav., 25/05/2015, (ud. 25/05/2015, dep. 25/05/2015), n.1725. Tribunale Bergamo sez. lav., 19/07/2016, (ud. 19/07/2016, dep. 19/07/2016). Tribunale Bergamo sez. lav., 22/09/2016, (ud. 21/09/2016, dep. 22/09/2016). Tribunale Modena sez. lav., 30/09/2016, (ud. 30/09/2016, dep. 30/09/2016), Tribunale Milano sez. lav., 02/12/2016, (ud. 01/12/2016, dep. 02/12/2016); Tribunale Milano sez. lav., 05/12/2016, (ud. 02/12/2016, dep. 05/12/2016); Tribunale Milano sez. lav., 09/12/2016, (ud. 05/12/2016, dep. 09/12/2016); Tribunale Milano sez. lav., 14/04/2017, (ud. 13/04/2017, dep. 14/04/2017). Tribunale La Spezia, 01/06/2017; Tribunale Brescia sez. lav., 06/06/2017; Tribunale Milano sez. lav., 06/09/2017; Tribunale Milano sez. lav., 28/02/2018; Corte appello Torino sez. lav., 27/11/2018, n.575; Corte appello Torino sez. lav., 13/07/2019, n.609.

³⁴² Corte Costituzionale, 04/05/2017, n.95; Corte Costituzionale, 15/03/2019, n.52.

³⁴³ Citizenship income: is an economic support conditional on beneficiaries' acceptance of a work integration pathway.

purposes of the allocation of the family allowance³⁴⁴ and where it does not extend to foreigners holding the single permit the above-mentioned benefits, already granted to foreigners holding an EU long-term residence permit.³⁴⁵

The CJEU ruled in both cases that the Italian rule was not in conformity with EU law³⁴⁶. The CJEU also found that the Italian rule (law no. 448 of 23 December 1998) denying maternity allowance to households with more than three children not holding at least a single residence permit for work of at least six months was contrary to EU law.³⁴⁷

Finally, March 2022, the Italian Constitutional Court³⁴⁸ declared unlawful the provisions that exclude TCNs not holding an LTR permit from birth allowance, i.e. TCNs who have been admitted under EU or national law employment schemes and TCNs who have been admitted for purposes other than employment under EU or national law, who are allowed to work.

CJEU caselaw

The relationship of social benefits in the Directive with the EU Regulation on coordination of social security, Regulation 883/2004, is a constant theme through all the judgments. It takes a primary position in the third case where that relationship is found to be central to the application of Article 24 of the Charter to the directive.³⁴⁹ On one occasion, the Italian authorities sought to argue that third country nationals who hold permits issued for reasons other than work are outside the scope of Article 12. The CJEU found this to be an incorrect interpretation of the Directive. One of the judgments also covers the equal treatment provision in the Long-term residents directive (as well as Blue Card and Qualification) but we will not deal with that here as it belongs in the section on Directive 2003/109 and makes better sense in the context of that directive.

The first reference from a court in Genoa in July 2017³⁵⁰ begins the investigation of the application of Article 3 Directive 883/2004 (social security coordination) and whether it is determinant to Articles 2, 3 and 12 SPD. The subject matter was an Italian social benefit available to families with at least three children under 18 and an income below a specified amount. This benefit was originally limited, under national law, to Italian nationals but was extended to EU citizens in 2000, beneficiaries of international protection in 2007 and in 2013 to holders of long-term residence permits and family members of EU citizens (presumably third country nationals).

The facts of the first case are fairly straight forward. Member State Martinez Silva, a third country national holding a work permit valid for more than six months, applied for the big family social benefit as she fulfilled the conditions. Her application was rejected on the ground that she did not have a long-term residence permit (a requirement of the national legislation). Further, the authorities argued that the SPD was only programmatic in nature (so not binding) and in any event did not include maintenance payments which they claimed this benefit to be. The authorities also added that the applicant had not been resident in Italy for five years, though the relevance of this time period is not self-evident from the perspective of EU law. Member State Martinez Silva appealed. The first instance tribunal found in favour of the state. However, on appeal, the national court found that the

³⁴⁴ Cassazione civile sez. lav., 01/04/2019, n.9022.

³⁴⁵ Corte Costituzionale, 15/03/2019, n.50; Corte Costituzionale, 30/07/2020, n.182

³⁴⁶ Cassazione civile sez. lav., 08/04/2021, n.9379; ECJ, Judgment of 02/09/2021, INPS, case C-350/20;

³⁴⁷ ECJ, Judgment 21/06/2017, *Martnez Silva*, case C-449.

³⁴⁸ Corte Costituzionale, 04/03/2022, n.54

³⁴⁹ While the CJEU makes reference to the Charter, it does not mention the judgment in *Dhahbi* of the ECtHR which is particularly relevant as it places the right to equal treatment in access to social benefits in the context of the ECHR, 8 April 2014, App No 17120/09.

³⁵⁰ Case C-449/16, *Martinez Silva*, [2017], EU:C:2017:485.

compatibility of national law with the directive was not clear in particular as the social benefit appeared to come within the scope of Article 3(1)(j) Regulation 883/2004 on the coordination of social security and so also within Article 12(1)(e) of the directive and referred the matter to the CJEU. No Member State intervened in the case.

The CJEU had already handed down a ground-breaking judgment on equal treatment for third country nationals which interpreted EU law as inclusive of third country nationals who are not specifically excluded from equal treatment provisions.³⁵¹ Thus, it was not complicated for it to accept the national appeal court's assessment that Member State Martinez Silva was within the scope of the SPD as she was working and had permission to work for more than six months as required by the directive. Thus, the question it interpreted was the scope of Article 12(1)(e). Following a long line of its caselaw regarding EU citizens, the CJEU found that a determination of which benefits fall within the scope of Regulation 883/2004 is based essentially on the constituent elements of the particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit (or not) by national legislation. Further, and again on the basis of caselaw, the CJEU found that a benefit may be regarded as a social security benefit if it is granted to recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and concerns one of the risks expressly listed in Article 3(1) of Regulation 883/2004. The fact that an assessment must be made of the facts of the applicant's situation (e.g. number of children and income) does not render it discretionary and thus outside the scope of the Regulation. Further, the means of financing the benefit are irrelevant to its categorisation. The CJEU held that the specific big family benefit at issue, designed to alleviate financial burdens relating to maintenance of children comes with the Regulation. The next question was whether the interpretation of the scope of Article 3 of the Regulation is applicable to Article 12(1)(e) SPD. The CJEU simply found that it did without any need to go into great depth.

Instead, the CJEU considered the exception contained in Article 12(2)(b) SPD by which Member States may limit the rights conferred on third country workers by Article 12(1)(e) except for those who are in employment or who have been employed for a minimum period of six months and are registered as unemployed. The provision also allows Member States to refuse family benefits to (a) third-country nationals who have been authorised to work for a period not exceeding six months, (b) third-country nationals who have been admitted for the purpose of study, and (c) third-country nationals who are allowed to work in the state on the basis of a visa. In accordance with its caselaw, the CJEU held that a Member State which wishes to rely on such an exception must state clearly that they are planning to do so which Italy had not done.³⁵² This finding left the door open to the Italian authorities (and other Member States' authorities) to remedy the situation (from their perspective) and to make the necessary clear statement of reliance on the exception to remove third country nationals in the situations set out Article 12(2)(b) SPD from the scope of the benefits. However, it may be that such exclusions would not be particularly valuable as the third country nationals seeking to rely on the equal treatment provision may well not be caught by them. Only very short stay workers (under six months) students and workers admitted on visas (which are usually converted fairly quickly to single permits in the common format).³⁵³

The second case³⁵⁴ which came before the court was referred in 2019 and decided on 25 November 2020. Again, no other Member State intervened in the case. At issue were social benefits in the form of

³⁵¹ Case C-571/10, *Kamberaj*, [2012], EU:C:2012:233.

³⁵² Case C-571/10, *Kamberaj*, [2012], EU:C:2012:233.

³⁵³ Council Regulation (EC) No 1030/2002.

³⁵⁴ Case C-302/19, *W.S.*, [2020], EU:C:2020:957 referred by the Italian Supreme Court of Cassation.

family allowances under a law which was the successor of that which was in question in the *Martinez Silva* judgment. The benefit, however, had been transformed by the authorities into a mixed one, partly social security within the Regulation but partly discretionary to protect those physically or mentally infirm and children thus categorised as social assistance. The coordination of social security under the regulation makes special provision for social assistance which is not subject to the equal treatment requirement either in the regulation or the directive. However, the CJEU did not need to deal with the question of whether the benefit was within the scope of the regulation as a social security benefit as this had already been positively determined by the Italian Supreme Court. We will come back to the issue of benefits which are mixed, containing both elements of social security and social assistance, shortly.

The facts were somewhat more complex and the question at issue one of sensitivity among the Member States: the calculation and provision of family allowances on the basis of the inclusion of family members living outside the EU. A Sri Lankan national had been working in Italy under a national work permit since 2011. This was transformed into a Single Permit in 2015. His wife and two children appear to have lived primarily with him but went for extended periods back to Sri Lanka (including a period of almost two years - July 2014 to June 2016). The social benefits office refused to pay the applicant a family maintenance benefit for the periods of absence from the EU of the wife and children. Similarly, the office confirmed that if it had calculated the family benefit for the Sri Lankan excluding his family members in Sri Lanka the result would be a zero benefit entitlement. The applicant appealed against the decision and succeeded at first instance where the court found the decision inconsistent with the SPD. The social benefits authorities appealed the decision whereupon the appeal court referred the matter to the CJEU. The CJEU (re)formulated the national court's question as one regarding the territorial scope of the SPD: are single permit holders' family members who are not residing in the territory of (any) Member State but in a third country entitled to the family benefits on the ground of equality where a national of the Member State's family members who reside in a third country are taken into account and the benefit paid.

Again, the CJEU determined that the general rule of Article 12(1)(e) as regards a social security benefit coupled with the equality right of SPD means that single permit holders must be treated in the same way as nationals of the state, including as regards family benefits where the family members are living in a third country. Only the exception contained in Article 12(2)(b) could be used to produce a different result. Once again, the CJEU held that a Member State can only rely on the exception if the authorities in the Member State concerned responsible for the implementation of the directive have stated clearly that they intended to rely on it. This was not the case on the facts. But even if the Italian authorities had made a clear statement that they would be applying the exception, it is highly unlikely that it would have caught the Sri Lankan in its scope. He had already been working in Italy on a single permit since 2015 (so obviously working for more than six months and clearly not working on the basis of a visa) and there was no indication that he was a student. The CJEU noted that the SPD does permit limits to equal treatment as regards tax advantages where the family members in respect of which the benefit is sought live outside the EU but this is not extended to social security. Thus, the CJEU inferred that the legislator did not intend to exclude single permit holders from equal treatment in social security benefits for family members abroad (as it had only done so regarding tax advantages).³⁵⁵ The CJEU considered some rather contradictory statements in the recitals which had not been transformed into provisions of the Directive but which could be read contrary to the CJEU's finding. It therefore

³⁵⁵ There is a single reference to possibly temporary residence outside the EU of family members in para. 35 but it not picked up again as regards the duration of the residence of family members outside the EU.

specifically noted that recitals have no legally binding force and cannot be relied upon to displace a provision of a Directive.

The Italian government argued that the objective of the equal treatment provision in the SPD is to facilitate integration and thus social benefits should be paid for family members living in the EU. It also noted that an additional exception exists in the Long-term residents directive and so could by extension apply to the SPD. The CJEU considered this argument specious, if the legislator wanted an exception to apply it must put it in the Directive, it cannot be inferred from elsewhere. The only grounds on which social security benefits can be refused as regards family members outside the EU are those contained in Article 12(2)(b). This applies both to non-payment of the benefit and to a reduction on the basis of the absence of family members. Similarly, although the national law makes the family member the beneficiary while the directive makes it the principal the worker, a Member State cannot reduce or refuse social security benefits to the family member on this ground (that is to say who is the beneficiary). Once again in this case, the question of the exceptions in Article 12(2)(b) SPD was raised. However, as the Italian authorities had not made use of the exception, its limits were not interpreted.

The next CJEU decision came this time from the constitutional court which made a reference in July 2020, determined on 2 September 2021. In 2014 the Italian government introduced a childbirth allowance to encourage the birth rate and contribute to the cost of it. This supplements a maternity allowance which has been in place since 2001. The personal scope was limited to Italians, EU citizens and long-term resident third country nationals. Eight applicants challenged the refusal to grant them the childbirth allowance on the basis that they were only holders of a single permit, not permanent residence. The Italian Supreme Court of Cassation found that the exclusion of the single permit holders was contrary to the constitution and the (EU) Charter and referred the matter to the Constitutional Court. Before the Constitutional Court, the applicants argued that their exclusion was not only contrary to the constitution but also to Article 12 SPD. The constitutional question was of some magnitude in Italy, but details of which are beyond the scope of this section. Interestingly, the referring court requested the application of the urgency procedure on the basis that there was a substantial legal debate in Italy on the subject. The CJEU considered that the reasons for applying the urgency procedure were not fulfilled but the matter was referred to the CJEU Grand Chamber. For the first time, the Italian government argued that the applicants were outside the scope of the directive as while they had the right to work and did work, they had not been granted residence permits for this purpose and so should be classified as outside the scope of the Directive. The CJEU was unimpressed by this argument which runs counter to the actual wording of Article 12 SPD.

For the first time, the CJEU dealt with the question of the relationship of the Directive with Article 34 Charter, the entitlement to social security benefits. The Charter provision applies to everyone residing and moving legally within the EU, which includes single permit holders thus raising the question whether Article 12 SPD must be read as subject to Article 34 Charter. Article 34 of the Charter 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 EU law and national laws and practices. It applies to everyone residing and moving legally within the EU. Further, Article 3(1) of the SPD states that third country nationals within its scope are to enjoy equal treatment with nationals of the Member State where they reside with regard to branches of social security, as defined in Regulation 883/2004. The CJEU considered the linking of the regulation and SPD critical. By virtue of the reference of Regulation 883/2004, it found that Article 12(1)(e) SPD gives specific expression to the entitlement to social security benefits provided for in Article 34(1) and (2) of the Charter. This may seem a little convoluted – does the CJEU really need to make the equal treatment provision in the SPD pass through

Regulation 883/2004 in order for the Charter to apply? This leaves open the question whether without the reference to the regulation, the Charter might not be applicable to the directive, though this seems rather odd.

On the scope of the Directive, the CJEU confirmed that Article 12(1) applied equally to those admitted for work under the SPD as well as those admitted for some other purposes but permitted to work and issued a permit under Regulation 1030/2002 (see above). The CJEU insisted that the provision is not limited to ensuring equal treatment for holders of a single work permit but also applies to all holders of a residence permit for purposes other than to work, who have been given access to the labour market in the host Member State. However, for a benefit to come within the scope of the Directive, it must be within the scope of the Regulation. Referring, among others, to its judgment in the *Martinez Silva* judgment, the CJEU confirmed that this was the case regarding benefits that are granted automatically to families meeting objective criteria relating in particular to their size, income and capital resources, without any individual and discretionary assessment of personal needs, and that are intended to meet family expenses. These must be regarded as social security benefits. The CJEU examined the elements of the benefit in question and held that it is one which is granted automatically to households satisfying certain legally defined, objective criteria, without any individual and discretionary assessment of the applicant's personal needs. Of interest more to social security experts, the CJEU also took the opportunity to confirm its caselaw that benefits with a dual use also come within the scope of the regulation. Thus being (a) a social security benefit and (b) within the scope of the regulation, the childbirth allowance must be accorded to third country nationals within the scope of Article 12 of the SPD on the basis of non-discrimination with nationals of the Member State.

Once again, the CJEU noted that Italy did not use the exception possible under Article 12(2)(b) to limit the scope of social benefits, notwithstanding the fact that the terms of the exception are so limited.

The fourth decision of the CJEU, ASGI/APN,³⁵⁶ was referred by a Milan tribunal in September 2020 and decided on 28 October 2021. As in respect of the other cases, no other Member State intervened. It concerns a number of directives in the AFSJ, including the single permit, the Long-term residents directive, Blue Card and qualification directive (regarding beneficiaries of international protection). At the core of the matter before the national court was the meaning of equal treatment with nationals of the Member State in each of those measures. The wording of each of the directives is somewhat different and the CJEU would focus on these differences in its judgment.

In 2016 Italy introduced what is called a family card for families of Italian or EU citizens who have at least three children of not more than 26 years of age living in the same household. The card entitles the holder to discounts on the purchase of goods and services and to price reductions offered by public bodies and private entities participating in the initiative. In 2020, ASGI, a non-governmental organisation which acts for the interests of third country nationals in Italy, requested the government to disapply the limitation of access to these cards as regards other third country nationals with a residence status in the country (beyond long term residents). The relevant ministry did not reply to the request, so ASGI brought an action before the Milan tribunal. ASGI argued that the family card was a form of social security, social assistance, social protection, social welfare, access to goods and services or family benefits, all terms used in the various directives (as well as Regulation 883/2004). Needless to say, this omnibus challenge needed to be unpacked in order to resolve the issue of equal treatment. For the purposes of SPD, either Article 12(1)(e) (social security) or (g) (access to goods and services) were relevant (or possibly both). The CJEU stated from the beginning that Article 12(1)(e) single permit and Article 14(1)(e) Blue Card are within the scope of Regulation 883/2004 (repeating the criteria

³⁵⁶ Case C-462/20, *B.M.*, [2021], EU:C:2021:982.

necessary for this purpose as set out above). The second question resolved by the CJEU was whether the benefit, the family card, comes within Regulation 883/2004. For this purpose, the CJEU held that in Article

1(z) of the regulation, the term 'family benefit' means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances. However, examining the constituent elements of the family card, the CJEU found that it was not a benefit which is a public contribution in the form of a contribution by society towards family expenses and therefore does not come within the scope of the regulation. Instead, the family card was a sort of price reduction card to which public and private sector actors could subscribe or not. The consequence was that the family card, not being within the scope of the regulation is also not within the scope of Article 12(1)(e) of the SPD.

Having excluded family cards from the field of social security, the CJEU then had to consider whether its limitation to citizens and long-term residents offended against the right to equal treatment in the provision of goods and services protected by Article 12(1)(g). Examining once again the content and purpose of the family card, the CJEU found that the legislation does deprive third country nationals enjoying the right to equal treatment under the Directive of access to those goods and services and their supply on the same conditions as those enjoyed by Italian nationals and so is contrary to the provision. Finally, the CJEU notes that the Italian authorities had not relied on the possible derogations in Article 12(2)(b) (i), a refrain which the CJEU has repeated in every judgment notwithstanding the narrowness of the exceptions possible which makes that provision really not very interesting for state authorities seeking to cut costs.

ANNEX III: STATISTICS

Table 1: Number of Newly issued Single Permits and total valid periods 2017-2021

Country	2017_new	2017_tot	2018_new	2018_tot	2019_new	2019_tot	2020_new	2020_tot	2021_new	2021_tot	Average % new SPs
Belgium		0		0		0		0	3.129	6.864	45,59%
Bulgaria	145	307	277	450	472	706	469	877	900	1.413	50,89%
Czechia	12.202	19.293									40,45%
Germany	50.878	62.694	65.549	79.591	160.575	160.575	14.553	15.221			86,89%
Estonia	1.532	2.701	1.791	3.209	2.102	3.572	2.035	3.086	2.290	3.590	62,21%
Greece			0	0							n/a
Spain	33.589	101.918	40.155	109.001	49.465	124.113	60.331	129.620	91.840	171.114	36,44%
France	23.143	117.607	28.590	113.594	66.267	172.121	27.058	142.064	37.563	177.539	21,74%
Croatia	6.542	8.940	23.754	30.641	46.586	65.848	31.760	61.556	31.655	65.438	56,89%
Italy	1.911	335.276	1.775	306.447	1.745	286.054	94	218.981	7.401	247.621	1,77%
Cyprus	8.068	19.457	9.632	23.163	10.505	23.404	7.844	22.820	9.800	25.909	37,42%
Latvia	2.125	5.282	3.590	7.783	4.412	10.198	2.534	9.597	3.685	11.175	41,30%
Lithuania	7.097	10.145	9.148	15.292	17.911	28.291	19.073	32.346	14.573	38.844	52,70%
Luxembourg	1.098	2.755	1.243	2.778	1.556	3.373	369	949	1.425	3.636	37,30%
Hungary	14.264	20.414	31.417	41.748	38.511	52.794	31.553	48.447			68,47%
Malta	5.446	10.925	9.911	19.639	12.441	28.923	6.210	28.790			40,35%
Netherlands	1.333	2.613	1.655	2.399	2.511	4.306	1.318	2.937	1.256	3.281	46,08%
Austria		5.846	0	5.314	2.658	5.170	1.732	5.187	3.781	8.420	25,94%
Poland	43.151	59.381	58.872	63.165	61.638	90.644	28.344	63.640	43.098	89.956	64,93%
Portugal	6.607	29.473	20.129	35.727	20.111	35.685	32.438	81.144	38.314	82.979	33,43%
Romania	2.448	5.783	4.141	8.368	14.512	20.383	10.141	25.025	17.351	33.027	48,36%
Slovenia	12.235	24.070	20.938	39.263	20.271	48.506	9.847	45.998	17.839	47.397	42,73%
Slovakia	5.357	7.458	11.072	16.001	16.087	23.248	6.647	15.705			56,15%
Finland	6.278	13.503	6.413	13.901	15.137	21.211	13.753	14.973			52,93%
Sweden	16.085	27.357	21.520	35.200			13.896	29.040	17.980	34.193	57,91%

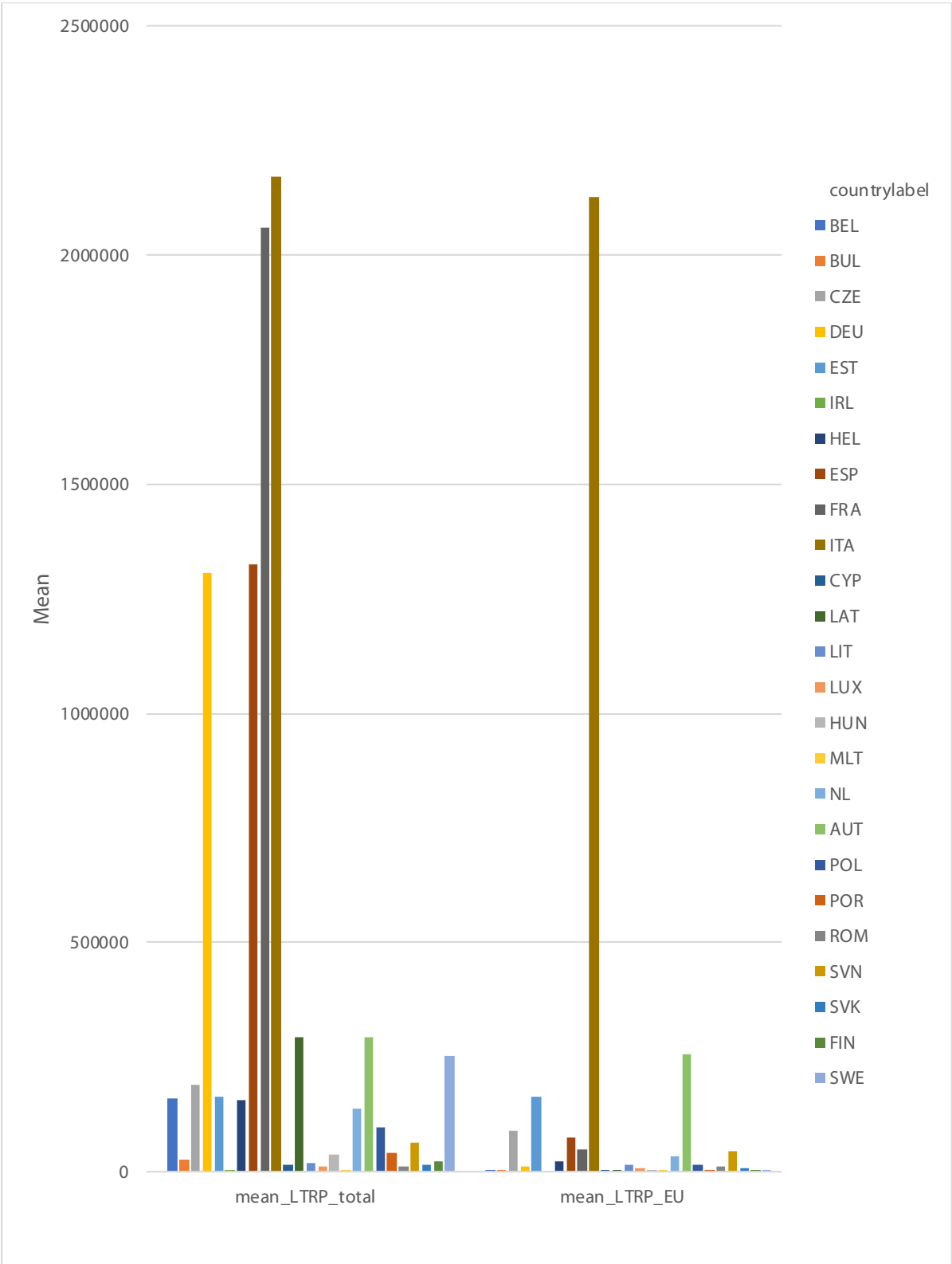
Source: EUROSTAT

Table 2: Number of newly issued EU Long Term Residence Permits and the total of valid EU and national permits per year 2017-2021

Country	2017_EU	2017_total	2018_EU	2018-total	2019_EU	2019_total	2020_EU	2020_total	2021_EU	2021_total
Belgium	1.043	194.872	1.381	192.055	1.891	191.063	2.557	193.360	2.884	221.170
Bulgaria	831	31.578	1.367	33.524	2.235	45.236	3.077	51.723	3.561	59.803
Czechia	95.172	196.904	96.648	200.798	98.217	205.660	100.042	210.066	103.685	217.560
Denmark	:	:	:	:	:	:	:	:	:	:
Germany	10.933	2.333.478	11.964	2.345.124	13.215	2.369.156	14.536	2.392.624	:	:
Estonia	161.709	163.188	158.758	160.294	155.936	157.461	153.773	155.181	149.649	150.969
Ireland	0	1.484	0	1.272	0	1.125	0	1.051	0	1.219
Greece	23.946	194.712	28.510	197.597	31.324	188.229	35.776	167.871	39.421	198.082
Spain	78.008	1.314.314	81.793	1.315.847	85.485	1.322.579	86.168	1.517.431	:	:
France	57.865	2.082.038	61.147	2.115.301	65.276	2.153.101	67.858	2.243.626	76.044	2.373.778
Croatia	3.326	11.647	4.079	11.492	4.862	11.508	5.034	11.347	4.924	11.297
Italy	2.209.323	2.293.099	2.099.223	2.099.223	2.099.223	2.099.223	2.004.773	2.004.773	2.003.931	2.003.931
Cyprus	214	17.397	213	22.440	193	27.168	204	28.450	201	29.477
Latvia	609	286.547	684	278.301	793	270.587	921	262.996	1.086	247.718
Lithuania	16.089	18.444	:	18.193	15.934	18.358	15.915	18.359	15.777	18.756
Luxembourg	7.485	13.754	6.553	13.928	5.814	14.173	5.385	14.471	5.007	15.376
Hungary	692	50.975	715	50.506	1.989	66.665	2.222	71.475	:	:
Malta	579	1.374	599	1.751	636	2.541	596	3.250	698	13.183
Netherlands	31.881	131.506	35.287	140.444	38.390	153.870	40.670	168.220	43.477	170.296
Austria	272.407	291.374	286.198	299.009	295.103	307.174	299.547	311.246	306.068	311.309
Poland	16.254	97.972	16.911	111.894	16.333	128.492	18.884	136.249	23.004	154.729
Portugal	23	53.281	2.694	87.775	2.652	90.917	2.428	86.910	2.309	81.130
Romania	12.914	12.914	13.436	13.436	13.581	13.581	13.763	13.763	14.876	14.876
Slovenia	46.820	52.251	47.868	53.135	48.994	88.425	50.541	92.865	52.904	98.390
Slovakia	6.202	14.298	7.114	15.364	8.170	16.695	9.804	18.684	11.677	22.451
Finland	783	783	895	895	708	44.376	357	35.983	1.127	124.500
Sweden	303	388.656	490	391.555	742	370.378	959	337.571	1.111	309.488

Source: EUROSTAT MIGR_RESLONG

Figure 1: Total (EU and National) and EU Long-Term Residence Permit (per Member State 2012-2021)



Source: EUROSTAT MIGR_RESLONG

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, assesses the European Commission's 2022 legal migration package on effectiveness, efficiency, legal and practical coherence, and fundamental rights compliance. The study finds that a more coherent and ambitious rights-based legal migration agenda is warranted. In the EU struggle for skilled and talented third-country national workers, social obligations, climate change, and sustainable growth cannot be disregarded.

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