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PART 1/2

COMMISSION STAFF WORKING DOCUMENT

FITNESS CHECK

on EU Legislation on legal migration

{SWD(2019) 1056 final}

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GLOSSARY

<i>Term or acronym</i>	<i>Meaning or definition</i>
BCD	EU Blue Card Directive (2009/50/EC)
CJEU	Court of Justice of the European Union
EAM	European Agenda on Migration
ECHR/ECtHR	European Convention on Human Rights/European Court of Human Rights
EESC	European Economic and Social Committee
EMN	European Migration Network
FRD	Family Reunification Directive (2003/86/EC)
ICT - ICTD	Intra-Corporate Transfer - Intra-Corporate Transferees Directive (2014/66/EU)
LTRD	Long-Term Residents Directive (2003/109/EC)
MS	EU Member State
NGO	non-governmental organisation
OPC	open public consultation
RD	Researchers Directive (2005/71/EC)
SD	Students Directive (2004/114/EC)
SPD	Single Permit Directive (2011/98/EU)
S&RD	Students and Researchers Directive (EU) 2016/801
SWD	Seasonal Workers Directive (2014/36/EU)
TCN	third-country national
TFEU	Treaty on the Functioning of the European Union

1 INTRODUCTION

1.1 Context and purpose of the evaluation

The need for a common EU framework on legal migration emerged at the end of the 1990s with the abolition of internal border controls within the EU and the creation of the Schengen area¹. In this new context, the migration decisions of one Member State would affect other Member States, so it was deemed necessary to establish a set of minimum guarantees in relation to the conditions and procedures for allowing third-country nationals to enter and reside in the EU, and to lay down their rights following admission.

From the perspective of the Member States and EU citizens, common EU rules in this area were seen as offering a guarantee that other Member States would apply the same or similar rules, for example on security checks, grounds for refusal and withdrawal of permits (e.g. in cases of fraud or non-compliance with entry conditions), and working conditions (to avoid a situation where third-country workers would undercut labour standards).

The political framework identifying the main needs to be addressed – and the objectives to be achieved – by this new policy was established at the **Tampere European Council** in October 1999. The Tampere conclusions provided for the creation of an ‘area of freedom, security and justice’ and the development of a ‘common EU asylum and migration policy’².

As regards legal migration, they stressed that the EU had to ‘ensure **fair treatment** of third-country nationals who reside legally on the territory of its Member States’ and develop a ‘more vigorous **integration** policy [*that*] should aim at granting them rights and obligations comparable to those of EU citizens’. The need for the ‘approximation of national legislations on the **conditions for admission and residence** of third-country nationals’ was also acknowledged, ‘based on a shared assessment of the **economic and demographic developments** within the Union, as well as the situation in the countries of origin’.

While these needs and objectives remain fully valid today, the EU’s geopolitical context has evolved and become more complex, and migration is now one of the central topics on the political agenda in many Member States. In particular, in recent years the EU has seen a significant increase in irregular migration flows³ and asylum applications⁴, and although the number of irregular arrivals to the EU has most recently been reduced, migratory pressure will likely continue in the years to come. This has had a considerable impact on the perception of, and narratives surrounding, migration in several EU countries. It has also shifted the focus – at both national and EU level – onto the need to prevent, or at least reduce, irregular migratory flows, through measures to:

¹ Today, the Schengen area encompasses all EU Member States except Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom. Bulgaria and Romania are currently in the process of joining the area. Four non-EU countries (Iceland, Norway, Switzerland and Liechtenstein) have also joined.

² Tampere European Council, 1999, Presidency Conclusions, point 18.

³ In 2015-2017, around 2.5 million illegal border crossings were detected between border crossing points. Source: Frontex Risk Analysis Network (FRAN).

⁴ In 2015-2017, 3.1 million asylum requests were made in the EU. 2.7 million decisions were taken and asylum – resulting in international protection (or humanitarian) status – was granted in 1.4 million cases (53 %).

- strengthen control of the EU’s external borders;
- establish a more effective, well-functioning common asylum system; and
- ensure the return of those migrants with no legal right to stay⁵.

At the same time, the EU continues to face long-term socio-economic and demographic challenges (e.g. a shrinking working age population, skills and labour shortages in key economic sectors), which will need to be addressed *inter alia* through a well-managed legal migration policy, as underlined in the 2015 European Agenda on Migration⁶. The need for a comprehensive and balanced migration policy was reiterated most recently by the Commission in its Communication on *Enhancing legal pathways to Europe: an indispensable part of a balanced and comprehensive migration policy*⁷ and its latest Progress Report on the Implementation of the European Agenda on Migration⁸.

In addition, the need for the EU to cooperate with other countries in the management of migratory flows has grown steadily in recent years, putting migration at the top of the EU’s **external relations agenda** with key countries of origin and transit⁹.

This ‘fitness check’ has confirmed that the change of the political context has also had an impact on the developments in the legal migration policy. Though it was not possible to establish a clear link between recent trends in irregular migration flows on the one hand and legal migration flows on the other, it has confirmed that the sharper political focus on addressing irregular migration has made it more and more difficult to develop an EU policy on legal migration, particularly beyond the highly skilled migrants.

This fitness check does not seek to assess EU migration policy as a whole. The focus of the evaluation is to assess **the existing EU legislation on legal migration** in the light of current and future challenges, with a view to identifying issues, gaps and inconsistencies, and to outlining, where appropriate, ways of simplifying and streamlining the current EU framework in order to improve the management of legal migration flows¹⁰.

The findings of the fitness check will be used as a basis for assessing what legislative and non-legislative action might be required to improve the coherence of the legal migration legislation, and its effective and efficient application.

⁵ For more information on such measures, see: https://ec.europa.eu/home-affairs/index_en and https://ec.europa.eu/commission/priorities/migration_en

⁶ COM(2015) 240 final, 13.5.2015.

⁷ COM(2018) 635 final, 12.9.2018.

⁸ COM(2019)126 final, 6.3.2019.

⁹ See Commission and European External Action Service Communication on *A new partnership framework with third countries under the European agenda on migration* (COM(2016) 385 final, 7.6.2016).

¹⁰ See COM(2015) 240 final, footnote 38.

1.2 Scope of the evaluation

Legal migration is part of the **EU's overall policy framework on asylum and immigration** established under Title V, Chapter 2 of the Treaty on the Functioning of the European Union (TFEU), whereby the EU can set common rules on:

- the entry and residence of third-country nationals (TCNs) into the EU for different periods of time and different reasons; and
- harmonised checks at the external borders.

Figure 1 summarises the various situations covered under the main policy areas that make up the overall policy framework under Title V TFEU.

Figure 1. Main policy areas under Title V TFEU

Short-stay visas and border checks <i>Article 77 TFEU</i>	Legal migration <i>Article 79(2)(a) and (b) TFEU</i>	Asylum <i>Article 78 TFEU</i>	Irregular migration and return <i>Article 79(2)(c) TFEU</i>
<ul style="list-style-type: none"> - Conditions and procedures for entry and stay for short-term periods (90 days within a period of 180 days), including the issuance of short-stay (Schengen) visas; - Harmonised rules on external border controls. 	<ul style="list-style-type: none"> - Conditions and procedures for entry and stay for long-term periods, and for different reasons (work, study, research, family reunification). 	<ul style="list-style-type: none"> - Conditions and procedures for obtaining refugee and subsidiary protection status, temporary protection and standards of reception; - Criteria for determining which Member State is responsible for asylum applications. 	<ul style="list-style-type: none"> - Measures to prevent and combat irregular migration, unauthorised residence and trafficking; - Conditions and procedures for removal and repatriation of TCNs without authorisation to stay in the EU.

Figure 2 gives an indication of the magnitude of the main mobility and migration flows to the EU in 2015-2017. While the different sets of data are not comparable, the relative flows for legal migration appear significant.

Figure 2. Main mobility and migration flows to the EU (EU-25¹¹, 2015-2017)¹²

Short-stay visas and border checks <i>Schengen MS (2015-2017)</i>	Legal migration <i>EU-25 (2015-2017)</i>	Asylum <i>EU-25 (2015-2017)</i>	Irregular migration and return <i>EU-25 (2017)</i>
approx. 14 600 000 short-stay Schengen visas issued in 2017; 401 865 refusals of entry at border crossings (land, air, sea); 204 750 illegal border crossings detected between border-crossing points by country (2017); 511 050 (2016); 1 822 179 (2015).	2 534 117 first permits for all reasons (education, family, work, ‘other’) in 2017. (2 411 946 in 2016; 1 904 419 in 2015); 1 670 556 first permits for education, family-joining TCNs, work ¹³ in 2017 (1 414 028 in 2016; 1 206 852 in 2015).	671 305 asylum applications (2017); 1 212 750 (2016); 1 258 475 (2015).	559 985 TCNs found to be illegally present; 456 900 TCNs ordered to leave; 173 290 TCNs returned.

While this fitness check does not assess directly the EU legislation and policy on other aspects of migration, such as the prevention of irregular migration, return, asylum, border controls and visas, legal migration policy interacts with all those areas. The numerous links between those policy areas and the EU legal migration *acquis* are therefore also examined (see Section 5.2.3).

Legal migration is an area of **shared competence** between the EU and its Member States. The current EU legal migration framework is laid down in several ‘**sectoral**’ **Directives** covering different categories of third-country nationals and regulating different stages of the migration process. However, as explained in detail in Section 5, those Directives are limited in terms of their personal scope¹⁴ and the degree of harmonisation that they ensure (e.g. they include many ‘may’ clauses and in some cases allow for parallel national schemes). Also, it is important to take into account that the TFEU (Article 79(5)) preserves Member States’ right to determine the volumes of admission for economic migration, which can therefore not be fixed or influenced by EU legislation.

¹¹ Unless specified otherwise, data and statistics refer to the ‘EU-25’ (all Member States except UK, IE and DK, since the EU legal migration *acquis* does not apply to them).

¹² Source: Eurostat database, 27.11.2018, [migr_resfirst] and [migr_resfam]. Visa: European Commission, DG Migration and Home Affairs, Schengen visa statistics; illegal border crossings: FRAN; asylum: [migr_asyappctza]; refused entry, irregular migration and return: [migr_eirfs], [migr_eipre], [migr_eiord], [migr_eirtn].

¹³ Estimate of the number of permits covered by the legal migration Directives, excluding ‘other’ and family joining EU nationals (see Figures 8 and 17).

¹⁴ For the coverage in terms of personal scope, see Figure 11, Section 3.2.

This fitness check does not assess directly the Member States' legislation on the residual legal migration categories and aspects not covered by EU rules. However, it does examine the interaction between EU and national rules, which is key to assess the relevance, coherence and effectiveness of the measures established at EU level.

When this fitness check was first announced¹⁵, its scope was limited to three Directives¹⁶. However, in the light of the 2015 European Agenda on Migration, it was decided that it should be extended to the **whole EU *acquis* on legal migration**, i.e. the following **nine Directives**¹⁷:

- Council Directive 2003/86/EC of 22 September 2003 on the right to **family reunification** (FRD);
- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are **long-term residents** (LTRD);
- Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of **studies, pupil exchange, unremunerated training or voluntary service** (SD);
- Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of **scientific research** (RD);
- Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of **highly qualified employment (EU Blue Card Directive – BCD)**;
- Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a **single application procedure for a single permit** for third-country nationals to reside and work in the territory of a Member State and on a **common set of rights for third-country workers** legally residing in a Member State (SPD);
- Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as **seasonal workers** (SWD);
- Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an **intra-corporate transfer** (ICTD); and
- Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purpose of **research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing** (recast) (S&RD).

¹⁵ A Fitness Check on legal migration was first announced in the 2013 REFIT Communication COM(2013) 685 final, and then confirmed in the 2014 REFIT Scoreboard SWD(2014)192, and in the 2015 "Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook" SWD(2015) 110 final.

¹⁶ The EU Blue Card, Long-Term Residents and Single Permit Directives.

¹⁷ The recast Directive on Students and Researchers repealed and replaced the old Students and Researchers Directives.

In terms of **geographical scope**, the fitness check covers **25 EU Member States**, i.e. all Member States except Denmark¹⁸, Ireland and the UK¹⁹, which have used their Treaty-based right to not opt in to or to opt out of implementation of the Directives.

In terms of **temporal scope**, it covers the period from the entry into force of the Treaty of Amsterdam (1999), which established a more robust legal basis for migration policy on the basis of which the Directives were adopted.

The five key evaluation criteria of **relevance, coherence, effectiveness, efficiency** and **EU added value** have been applied. However, the three Directives adopted most recently have been evaluated only partially, since a full assessment of their effectiveness, efficiency and EU added value was not feasible or appropriate for the following reasons:

- the deadlines for transposing the Directives adopted in 2014 (**SWD** and **ICTD**) did not expire until the second half of 2016 and the first statistics on their uptake were not made available until mid-2018. It is therefore not yet possible to evaluate their effectiveness, efficiency and EU added value; and
- the SD and RD were recast in 2016 as **Directive (EU) 2016/801**, as part of a REFIT activity to streamline them. While it is not possible fully to evaluate the new Directive (the transposition deadline expired in May 2018), the evaluation of the SD and the RD, and the impact assessment of the recast Directive have been fed into this fitness check.

Finally, the **EU Blue Card Directive (2009/50/EC)** was identified in 2014 as a high priority for review and, as a result of which the Commission tabled a proposal for a new Directive (accompanied by an impact assessment) on 7 June 2016²⁰. Therefore, the supporting study does not fully address the Directive currently in force, but the evaluative evidence in the impact assessment carried out in the context of the proposal has been fed into this fitness check.

¹⁸ In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark.

¹⁹ In accordance with Articles 1 and 2 of the Protocol (No 21) on the position of the United Kingdom and Ireland.

²⁰ COM(2016) 378 final.

2 BACKGROUND TO THE INITIATIVE

2.1 Description of the Directives and their intervention logic

Article 79(1) TFEU sets out the **general objectives of EU common immigration policy**, as follows:

- ensuring, at all stages, the **efficient management of migration flows**;
- the **fair treatment of third-country nationals** residing legally in Member States; and
- the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

The nine legal migration Directives adopted between 2003 and 2016 seek to achieve the first two objectives²¹.

By regulating the migration of TCNs who can help fill shortages in the EU labour market, the legal migration Directives also contribute to another general EU objective: **to foster competitiveness and growth in the EU**. That objective has been central in the development of all labour migration Directives, starting with the 2001 proposal for a horizontal ‘economic migration Directive’, which was eventually withdrawn in 2005 (see Section 5.1.1), and all subsequent sectoral Directives (in particular, the BCD, ICTD, SWD and S&RD). The 2015 European Agenda on Migration states that ‘migration will increasingly be an important way to enhance the sustainability of our welfare system and to ensure sustainable growth of the EU economy’, so ‘it is important to have in place a clear and rigorous common system, which reflects the EU interest, including by maintaining Europe as an attractive destination for migrants’.

2.1.1 General and specific objectives

The overall EU legal migration *acquis* has thus been developed to achieve **three overarching general objectives** and a series of more specific but horizontal objectives (across two or more Directives):

1. ensuring the **efficient management of migration flows in the EU** through the approximation and harmonisation of Member States’ national legislation, by:
 - establishing **common admission and residence conditions**, including for initial admission, rejection, withdrawal and renewals of permits (FRD, BCD, ICTD, SWD, SD, RD and S&RD);
 - establishing fair and transparent **application procedures** for the issuing of residence permits²² (all Directives); and

²¹ Article 79(2)(a) and (b) TFEU provide the legal basis for the EU legislator to adopt measures on ‘the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification’ and on ‘the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States’.

- ensuring **easier controls of the legality of residence and employment** through a combined permit, thereby preventing overstaying;
2. ensuring **fair treatment** of TCNs subject to the EU legal migration *acquis*, by:
- granting **rights comparable, or as close as possible**, to those of EU citizens, through **equal treatment** clauses (all Directives apart from SD and FRD – although family members and students who have the right to work are covered by the SPD) and **other rights** based on the permit (access to employment);
 - **reducing unfair competition** between Member States' own nationals and TCNs through equal treatment (all Directives ensuring equal treatment of workers: LTRD, BCD, SPD, SWD, ICTD and S&RD) and specific measures for **preventing exploitation** of workers (SWD, ICTD);
 - promoting **integration and socio-economic cohesion** (directly FRD and LTRD, indirectly all Directives with equal treatment provisions); and
 - protecting **family life** (FRD, LTRD, BCD, RD, ICTD and S&RD in relation to researchers); and
3. strengthening the **EU's competitiveness and economic growth**²³, by:
- **addressing labour and skills shortages** in the EU labour market (BCD, SWD, ICTD, RD and S&RD);
 - **attracting and retaining** certain categories of TCNs, including talented and highly skilled workers (BCD, SD, RD, S&RD and ICTD);
 - enhancing the **knowledge economy** in the EU (BCD, SD, RD, S&RD and ICTD); and
 - facilitating and promoting **intra-EU mobility** (LTRD, BCD, RD, ICTD and S&RD).

Figure 3 shows the overall and specific objectives as referred to in the respective Directive's recitals (x) and how they have been further assessed in terms of effectiveness (blue) in Section 5.3 and Annex 7:

²² Throughout this document, the general term 'residence permits' also covers other types of authorisation issued under the legal migration Directives (SWD and S&RD) which are not residence permits (short-stay visas, work permits and long-stay visas).

²³ Some aspects of this objective remain largely under national competence, including the possibility of determining how many economic migrants are admitted and carrying out labour market tests (relevant for the Directives regulating admission for the purposes of economic migration).

Figure 3. Overall and specific objectives

Overall and specific objectives	FRD	LTRD	SD	RD	BCD	SPD	SWD	ICTD	S&R D	Overall objective		
1. Ensuring efficient management of migration flows in the EU through the approximation and harmonisation of MS national legislation										1	2	3
Establishing common admission and residence conditions, including for initial admission, rejection, withdrawal and renewal of permits	X	X	X	X	X		X	X	X	X		X
Establishing fair and transparent application procedures	X	X	X	X	X	X	X	X	X	X	X	X
Ensuring easier control of the legality of residence and employment through a combined permit, thereby preventing overstaying						X	X		X	X		
2. Ensuring fair treatment of TCNs subject to the EU legal migration <i>acquis</i>												
Granting rights comparable, or as close as possible, to EU citizens', through equal treatment and other rights based on the permit (e.g. to employment)		X		X	X	X	X	X	X	X	X	
Reducing unfair competition between MS nationals and TCNs, resulting from exploitation of TCNs	X	X	X	X	X	X	X	X	X		X	X
Promoting integration and socio-economic cohesion	X	X								X	X	
Protection of family life	X	X		X	X			X	X	X	X	
3. Strengthening the EU's competitiveness and economic growth												
Addressing labour shortages in the EU labour market					X		X	X		X		X
Attracting and retaining certain categories of TCN, including talented and highly skilled workers			X	X	X			X	X	X	X	X
Enhancing the knowledge economy in the EU, ensuring mutual enrichment and promoting familiarity among cultures				X	X			X	X	X		X
Facilitating and promoting intra-EU mobility		X		X	X			X	X	X	X	X

2.1.2 Intervention logic

In essence, the Directives cover the entry and residence conditions, and the rights in different phases of the migration process (**material scope**) of some categories of TCNs (**personal scope**). This has led to complex interaction between EU rules, on the one hand, and national rules that cover the remaining categories of TCNs or aspects not harmonised under EU law, on the other.

Figures 4 and 5 illustrate the **intervention logic** of the EU framework on legal migration. Figure 4 highlights the linkages between the Directives in terms of **objectives, inputs, outputs** and intended **results** and **impacts**. Figure 5 highlights the degrees to which the Directives cover the **eight main phases of the migration process**, as established for the purpose of the practical application study²⁴.

The **interaction between the personal and material scope** of the Directives is further explored in Section 5 in the analysis on relevance (gaps in personal and material scope²⁵) and effectiveness. The **interaction between the legal migration *acquis* and other EU policies and instruments** is examined in Section 5.2.3 (external coherence).

²⁴ ICF (2018) Annex 2A (Evidence practical application).

²⁵ See also Annex 6 (detailed relevance analysis).

Figure 4. Overall intervention logic

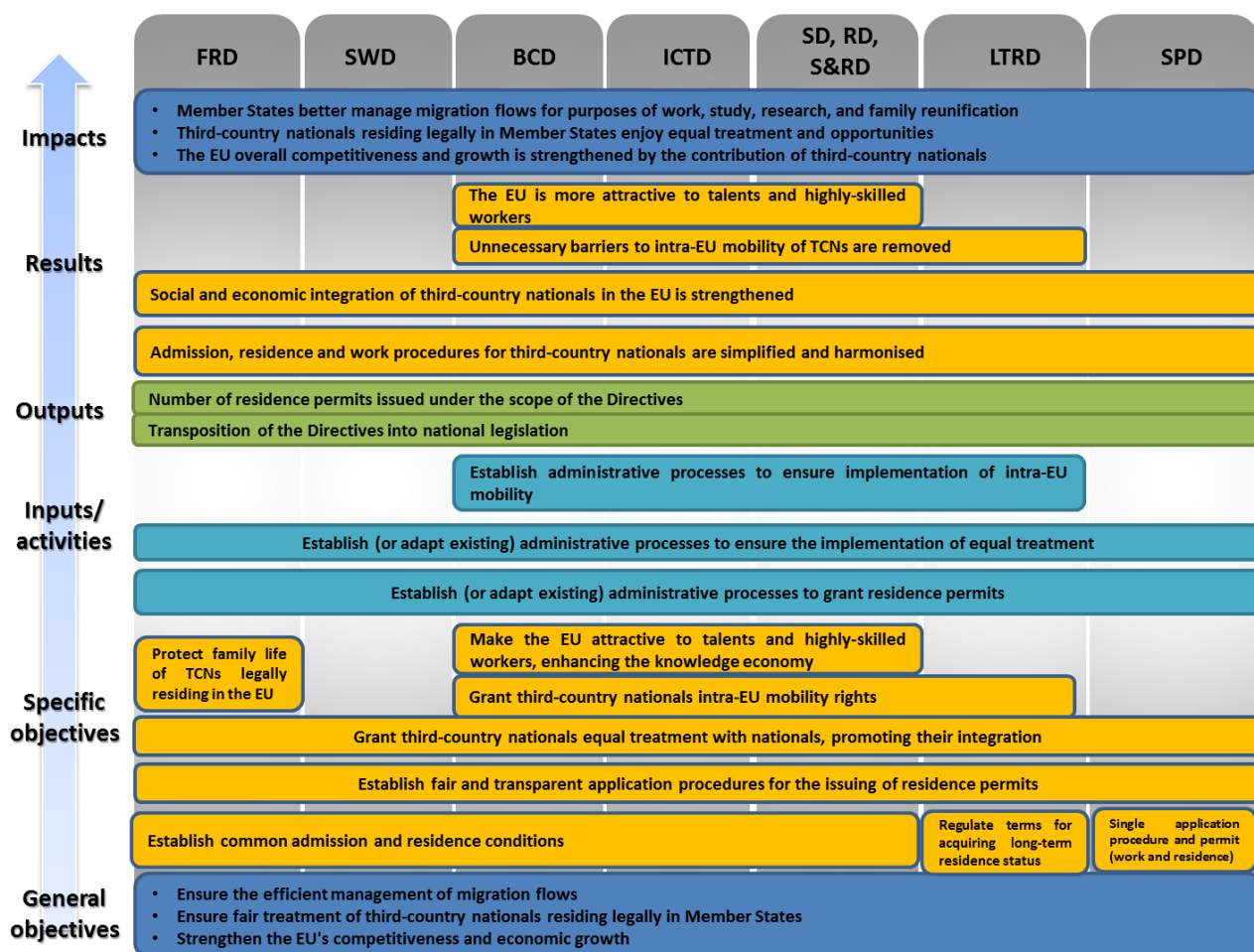
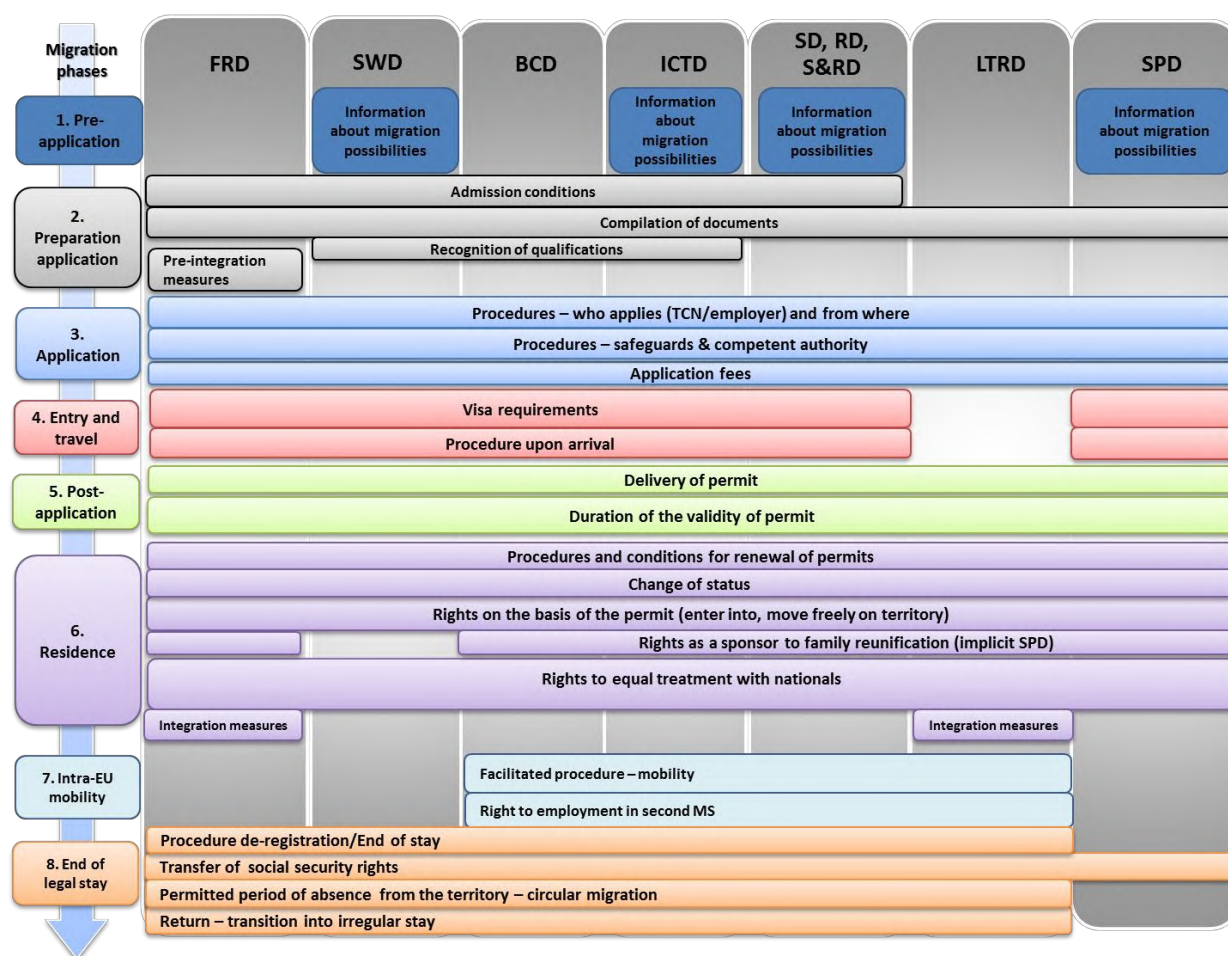


Figure 5. Intervention logic in relation to the eight ‘migration phases’

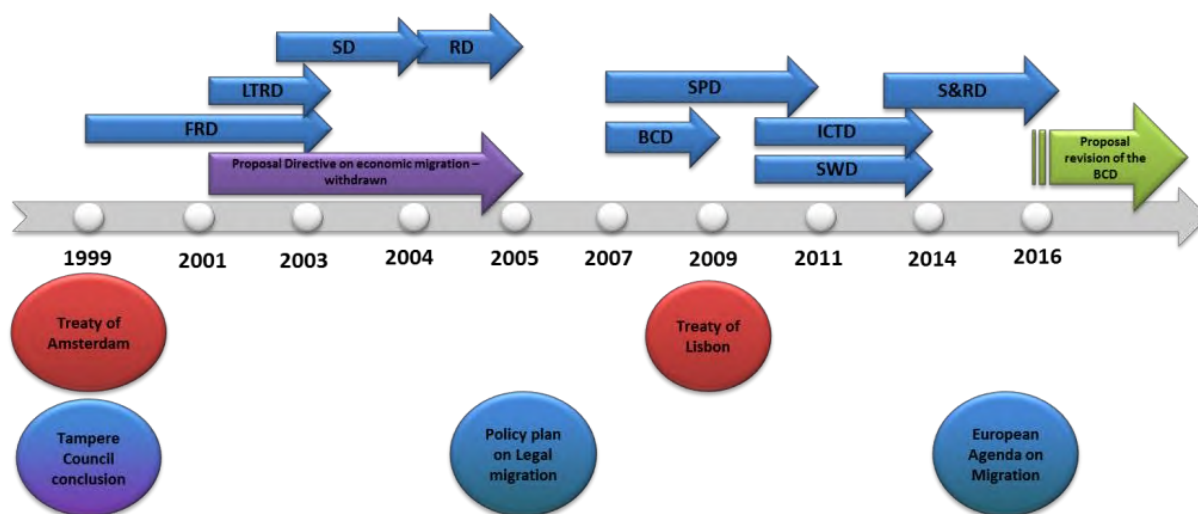


2.2 Description of the situation of migration management in the reference period

The baseline year chosen for this evaluation (1999) marks the start of the development of a **common EU immigration policy** with the entry into force of the **Amsterdam Treaty**. However, since the nine Directives were adopted at different points in time (between 2003 and 2016), specific baseline years are used for the Directive-specific analysis. Where baseline information is available, the evaluation uses the date of proposal or adoption of the Directive. Elsewhere, other points of comparison (relating findings to expected achievements) have been used (see Annexes 3 and 7).

Figure 6 shows a **timeline** for the development of legal migration policy in 1999-2016, including the main relevant Treaty changes, policy documents, and proposal and adoption dates for the Directives.

Figure 6. Key events in the reference period



Note: Arrows indicate the time period between the Commission proposal and adoption by the legislator.

2.2.1 Qualitative baseline (legislative baseline)

Before common rules on legal migration were adopted at EU level, most Member States had different types of national rules on economic migration, family reunification, long-term residents, migration for study and research, and other purposes.

Economic migration

With regard to economic migration, the late 1990s saw significant changes in immigration policy at national level and an influx of migrants coming to the EU for employment (especially highly skilled)²⁶. Traditional countries of emigration such as EL, IT, PT and ES were becoming countries of immigration. Other countries that had adopted a ‘zero immigration’ policy since the 1970s abandoned this policy in favour of a more open approach, e.g. Germany adopted a ‘green card’ system to attract TCNs in the IT sector and later in other sectors²⁷. There was a growing political consensus on the benefits of labour migration in addressing population ageing and skills shortages in key economic sectors²⁸.

Rules on **admission conditions, types of permit, application procedures and access to the labour market** varied across the EU; for example:

- most Member States issued different types of (usually temporary and often non-renewable) permit, for different sectors of the labour market;
- four Member States (AT, EL, ES and IT) applied quota systems;

²⁶ Schneider, H (2005).

²⁷ Wiesbrok, A., *Legal migration to the European Union*, Martinus Nijhoff (Leiden/Boston, 2010), p. 40.

²⁸ Wiesbrok, A., *op cit*, pp. 146-150.

- in the absence of EU legislation requiring a single application procedure, some Member States required separate applications for residence permits and work permits²⁹; and
- most Member States allowed TCNs to fill vacancies only where no national or EU citizen was available.

Rules for the admission of self-employed migrants generally varied even more, with some Member States requiring only a residence permit and others requiring both a residence and a work permit, with different eligibility criteria³⁰. Also, TCN workers' **rights** varied significantly, depending in general on the length of time that they had been residing and contributing to the social security system. For example, in several countries (e.g. NL, DE and AT) TCNs on temporary residence permits had very limited social rights³¹.

Family reunification

Prior to the adoption of the FRD, all Member States recognised either a right to family reunification in their national law or the discretionary possibility of family reunification, depending on the category and legal status of TCNs. The conditions for granting the right to family reunification varied significantly across Member States, in particular as regards:

- the requirement to have minimum resources (different standards and definitions);
- the qualifying period (from one to five years);
- the personal scope (nuclear or extended family; age of children); and
- application of a quota system (AT only)³².

Long-term residents

All Member States had in place a permanent or long-term residence status³³. While the grounds for obtaining the status did not vary significantly, some Member States retained discretion even where the applicant fulfilled all the conditions laid down in law. There were more differences with regard to the rights attached to the status, with some Member States granting almost full equal treatment on access to the labour market, social security and education, and others opting for more restrictive systems. Naturally, those national statuses could not facilitate intra-EU mobility.

Students and researchers

At the start of the reference period, admission policies for **study** purposes or **vocational training** were comparatively open and consistent across the Member States. However,

²⁹ According to the impact assessment for the SPD (SEC(2007) 1408), some Member States (CY, DE, EE, EL, ES, FI, FR, IT, NL, PT, LV, RO, UK and PL) already had (or were planning to have) a single application procedure, while others (AT, BG, BE, CZ, HU, IE, LT, SI and SK) used separate procedures for obtaining work and residence permits.

³⁰ Ecotec Research and Consulting Limited (2001).

³¹ *Ibid.*

³² Explanatory memorandum for the FRD proposal (COM(1999) 638 final).

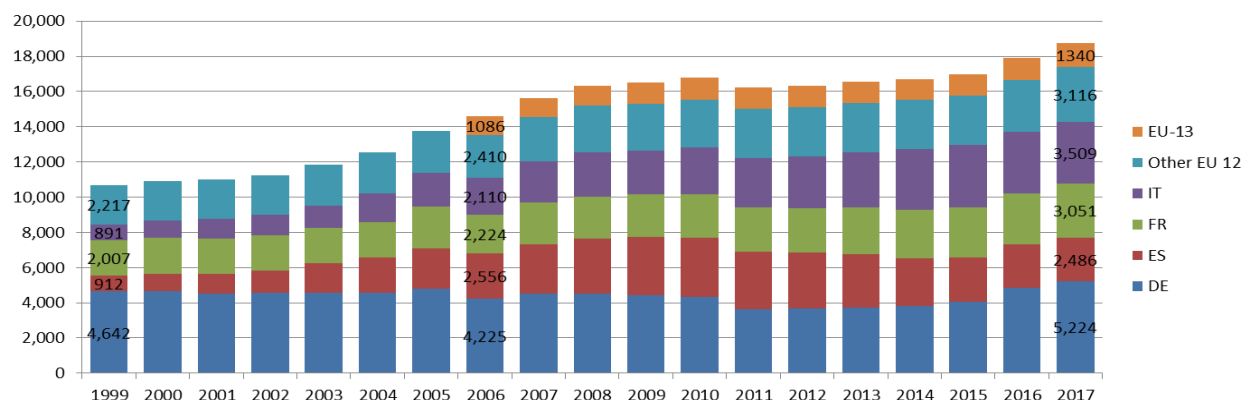
³³ Groenendijk, Guild & Barzilay (2000).

regulation and procedures varied³⁴. Some Member States distinguished between **paid and unpaid traineeships** for immigration purposes, while others did not. Member States also varied in terms of whether unpaid trainees were required to obtain a work permit in addition to the residence permit. With regard to **au pairs**, not all Member States had defined this category in their national law; some did not require au pairs to have a work permit³⁵. While most Member States had adopted measures to facilitate the admission of **researchers**, only two had introduced specific residence permits. Some did not require a work permit in addition to the residence permit, while others did. Associated rights also varied³⁶.

2.2.2 Quantitative baseline (statistical stocks and flows baseline)³⁷

While the general baseline for the fitness check is 1999, the point of comparison for each Directive is the time of its proposal (see Figure 6). Comparable data on the number of permits issued (flow) at EU level are not available for the whole reference period, since reporting to Eurostat only began with 2008 data³⁸. Figure 7 presents **developments in the population of TCNs** residing in the EU-25 in 1999-2017, showing that the majority were in four Member States³⁹:

Figure 7. Non-EU citizens in EU-25 Member States (1999-2017), thousands (stock)⁴⁰



Since 2008, EU-wide comparable data on the total number of valid permits held by TCNs residing in the EU-25 are available (collected by Eurostat), broken down by specific reason for their migration (work, family, study and ‘other’, including permanent residence). Figure 8 shows that, among the **18.7 million⁴¹ holders of valid residence permits at the end of 2017**,

³⁴ ICMPD (2000).

³⁵ *Ibid.*

³⁶ First implementation report on *A mobility strategy for the European research area* (SEC(2003) 146).

³⁷ For more detailed statistics relating to each Directive and each Member State, see Annex 9.

³⁸ Regulation (EC) No 862/2007 on statistics on migration and international protection.

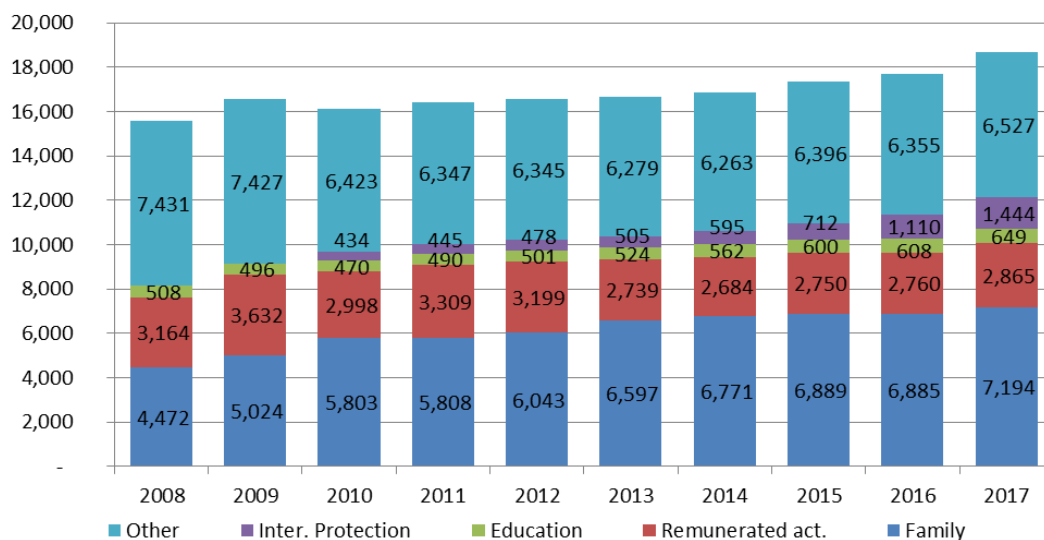
³⁹ If data for all 28 Member States were considered, the UK would appear as an additional top country in terms of the number of resident TCNs (2.4 million), just after Spain (2.5 million).

⁴⁰ Source: Eurostat Population Statistics [migr_pop1ctz, extracted on 6 April 2018] and DG HOME estimates for missing values. ‘EU-12’ refers to older EU-15 Member States bound by the legal migration Directives. ‘EU-13’ refers to Member States that joined the EU in 2004, 2007 and 2013. See Annex 9.1 for a detailed explanation.

⁴¹ For the EU-28 (without Denmark, which does not provide Eurostat with data on this), the number was 19.5 million (end 2017). For a detailed analysis of developments as regards residence permits, see <http://publications.jrc.ec.europa.eu/repository/bitstream/JRC107078/kjna28685enn.pdf>

the largest category of TCN is family migrants (7.2 million)⁴², followed by other reasons (6.5 million, *see details below*), labour migrants (2.9 million), beneficiaries of international protection (1.4 million) and those holding education-related permits (649 000).

Figure 8. Stock of valid residence permits by reason, EU-25 (2008-2017), thousands⁴³



The very large ‘**other**’ section (6.5 million at the end of 2017) includes a variety of categories of TCN, for whom administrative practices vary across Member States, so a precise breakdown is not possible. It includes permanent residents (who may or may not be working), non-active persons (e.g. pensioners, children not yet in education) and people granted national protection or other national status⁴⁴.

⁴² This figure includes all family migrants, not only those falling in the scope of the FRD, i.e. also TCN family members of mobile and non-mobile EU citizens.

⁴³ Source: Eurostat, table [migr_resvalid], extracted on 22 December 2018. Notes: (1) Before 2010, valid permits relating to international protection were included in the ‘other’ category; (2) No data for HR before 2013. The number of beneficiaries of international protection in this chart does not include those with humanitarian protection provided under national law, who are covered in the category ‘other’.

⁴⁴ It may also include valid permits held by TCNs who originally came for work or family reasons, but for whom the administrations can no longer determine the reason for the original permit, and permits held by citizens of Iceland, Norway, Liechtenstein and Switzerland.

3 IMPLEMENTATION / STATE OF PLAY

While the impact on national legal systems has differed across Member States, the legal migration Directives generally required Member States to introduce new rules or to amend existing national laws on migration management and other relevant matters (e.g. labour law, social security). The Commission carried out transposition assessments after the deadline for implementation of each Directive and launched a number of formal infringement and pre-infringement proceedings, in particular through the EU Pilot system. In addition, the Court of Justice of the European Union (CJEU) has delivered a number of preliminary rulings on several of the Directives' provisions⁴⁵.

Section 3.1 highlights the main issues relating to the **transposition and implementation** of the Directives. Implementation reports for the FRD, LTRD and SPD⁴⁶ are published in parallel with this staff working document. **Annex 9** contains **key statistics on residence permits** issued as a consequence of the implementation of the various Directives. **Annex 8** gives a detailed overview of **how the Directives are applied in practice** across the Member States in the various phases of the migration process⁴⁷.

3.1 Transposition and implementation – state of play

Family Reunification Directive (2003/86/EC)

In 2008, the first implementation report on the FRD⁴⁸ identified a number of cross-cutting issues of incorrect transposition or misapplication and concluded that the Directive had had a limited impact on harmonisation in the field of family reunification. In 2011, the Commission published a green paper⁴⁹ to gather information on the practical application and impact of the Directive, and opinions on how to have more effective rules at EU level. As a follow-up, in 2014 it adopted a Communication on guidance for the application of the Directive⁵⁰, which Member States and practitioners regard as a useful interpretation and implementation tool⁵¹.

The second implementation report (2019)⁵² highlights that the implementation of the FRD across the EU has improved, thanks to Member States' efforts and a number of CJEU judgments. However, some problematic issues remain, such as:

- the way in which Member States apply integration measures;
- the 'stable and regular resources' requirement;
- the need to take into account the best interests of the child;

⁴⁵ For a full list of relevant case-law, see Annex 10.

⁴⁶ SPD: COM(2019)160; LTRD: COM(2019)161; FRD: COM(2019)162.

⁴⁷ On the basis of the practical implementation study carried out by ICF (2018, Annex 2a).

⁴⁸ COM(2008) 610.

⁴⁹ COM(2011) 735.

⁵⁰ *Guidance for the application of Directive 2003/86/EC* (COM(2014) 0210 final).

⁵¹ See Annex 2 on stakeholder consultations.

⁵² COM(2019) 162 .

- the more favourable provisions for the family reunification of refugees; and
- the restrictive application of some ‘may’ clauses.

Long-Term Residents Directive (2003/109/EC)

In 2011, the Commission’s first implementation report on the LTRD⁵³ highlighted a general lack of information among TCNs about LTR status and the rights attached to it. The report also pointed to a number of deficiencies in the transposition of the Directive.

The second implementation report (2019)⁵⁴ shows that implementation across the EU has improved, partly thanks to the numerous infringement proceedings launched by the Commission and to judgments issued by the CJEU. However, some outstanding issues continue to undermine the full achievement of the Directive’s main objectives. In particular, most Member States have not actively promoted the use of the EU LTR status and continue almost exclusively to issue national long-term residence permits unless TCNs explicitly ask for the EU status. In 2017, around 3.1 million TCNs held an EU LTR permit in the EU-25, compared to around 7.1 million holding a national LTR permit⁵⁵.

Moreover, only few long-term residents have exercised the right to move to other Member States, *inter alia* because:

- in some cases the exercise of this right is subject to as many conditions as a new application for a residence permit;
- the competent national administrations are not sufficiently familiar with the procedures; or
- they find it difficult to cooperate with their counterparts in other Member States.

EU Blue Card Directive (2009/50/EC)

The first implementation report on the BCD⁵⁶ identified wide variations between Member States in the number of EU Blue Cards granted, due to policy choices by Member States who apply and promote the EU Blue Card in considerably different ways and, in some cases, favour their parallel national schemes. The Directive sets only minimum standards and leaves Member States considerable leeway in the form of discretionary provisions and references to national legislation. The report also found a number of deficiencies in transposition. The conclusion was that the EU Blue Card did not achieve its potential for adding value to the competing and complementary national schemes for highly skilled workers.

For these reasons, in 2016 the Commission put forward a proposal for a new EU Blue Card Directive⁵⁷ (currently under negotiation) based on a more harmonised, simplified and

⁵³ COM(2011) 585.

⁵⁴ COM(2019) 161.

⁵⁵ Eurostat [migr_reslong], data extracted on 18 September 2018.

⁵⁶ COM(2014) 287 final.

⁵⁷ COM(2016) 378 final.

streamlined approach to attracting highly skilled workers through a more efficient, clearer and less bureaucratic EU-wide scheme.

Single Permit Directive (2011/98/EU)

The first implementation report on the SPD (2019)⁵⁸ 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 TCN;
 - 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.

Seasonal Workers Directive (2014/36/EU)

Following expiry of the deadline for transposing the SWD (30 September 2016), the Commission launched infringement proceedings against 20 Member States⁵⁹ for failure to communicate their transposition measures, followed by four reasoned opinions⁶⁰. As regards one Member State (BE), a decision was taken to bring a case before the Court of Justice. As of 1 January 2019, of the 25 Member States bound by the Directive, only one (BE) was still in the process of transposing it.

Intra-Corporate Transferees Directive (2014/66/EU)

Following expiry of the deadline for transposing the ICTD (29 November 2016), the Commission launched infringement proceedings against 17 Member States⁶¹ for failure to communicate their transposition measures, followed by three reasoned opinions⁶². As of 1 January 2019, of the 25 Member States bound by the Directive, only one (BE) was still in the process of transposing it.

Students and Researchers Directive ((EU) 2016/801)

The implementation reports on the RD and SD⁶³ showed a number of weaknesses concerning key issues such as admission procedures, including visas, rights and procedural safeguards.

⁵⁸ COM(2019) 160.

⁵⁹ BE, CZ, DE, EE, FR, HR, CY, LV, LT, LU, MT, NL, AT, PL, PT, RO, SI, SK, FI and SE.

⁶⁰ BE, HR, FI and SE.

⁶¹ AT, BE, CY, CZ, DE, EL, FI, FR, HR, LT, LV, LU, PL, PT, SE, SI and SK.

⁶² BE, FI, and SE.

⁶³ COM(2011) 901 final, COM(2011) 587 final.

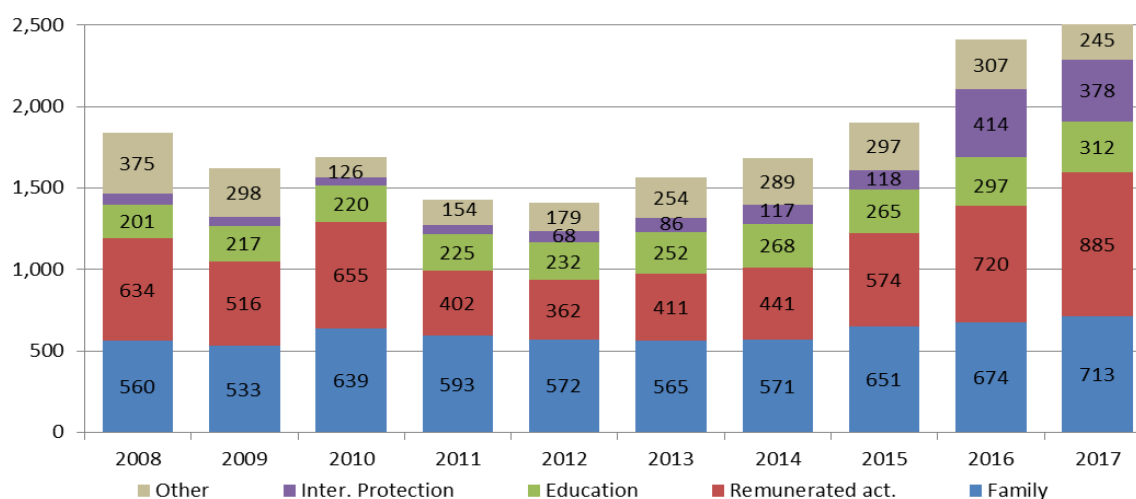
They found that the rules were insufficiently clear or binding, not always fully coherent with existing EU funding programmes and sometimes failed to address the practical difficulties that applicants face.

In response, the Commission put forward a proposal in 2013 for a recast Directive that would overcome the implementation challenges and modernise the rules on the admission and residence of TCN students and researchers. It was adopted on 11 May 2016 and the transposition deadline was 23 May 2018. On 19 July 2018, the Commission launched infringement proceedings against 17 Member States⁶⁴ for failure to communicate their transposition measures.

3.2 Statistical analysis of the implementation of the Directives

The effects of the introduction of the FRD, LTRD, SD and RD cannot be measured in a comparable way across the Member States prior to 2008, due to the lack of Eurostat data for that period⁶⁵. Figures 9 and 10 show the development in the **number of first permits issued every year in the EU-25 since 2008 for different reasons**, corresponding to the numbers of permits issued under the different Directives.

Figure 9. First permits issued in EU-25 by main reason, 2008-2017 (thousands)⁶⁶

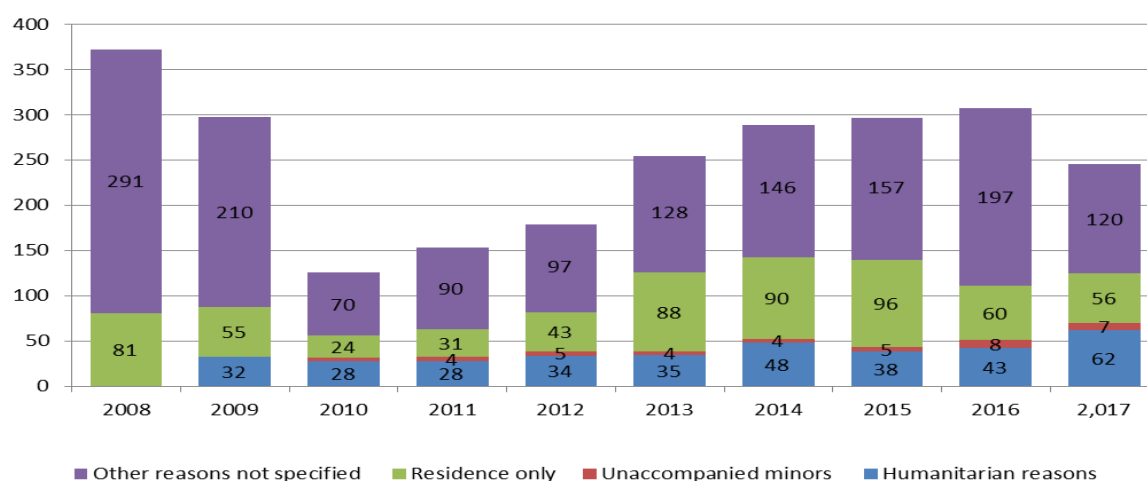


⁶⁴ BE, CZ, EL, ES, FR, HR, CY, LV, LT, LU, HU, AT, PL, RO, SI, SE and FI.

⁶⁵ As from 2008, Eurostat can provide more reliable and EU-wide comparable data on permits issued for different reasons. There are problems as regards the robustness of the data (Section 4.2 and Annex 3). See Annex 9 for more detailed data.

⁶⁶ Source: Eurostat (migr_resfirst and migr_resoth), 25.9.2018. Missing data: HR for 2008-2012; LU for 2008. If EU-28 is considered, 3.1 million first residence permits were issued in 2017. The number of beneficiaries of international protection in this chart does not include those with humanitarian protection provided under national law, who are covered in the category 'other'.

Figure 10. First permits issued in EU-25 for other reasons, 2008–2017 (thousands)⁶⁷

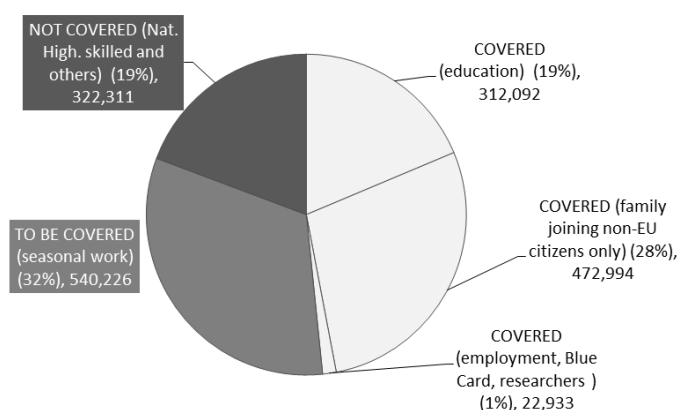


For some Directives (BCD, SPD), specific data are available on the number of first permits issued by year from 2011 and 2013 respectively; information on the number of TCNs holding EU LTR permits is also available (see detailed graphs in Annex 9).

Figure 11 shows the proportion of all residence permits issued in 2017 for work, education and family reasons that are covered by EU rules, in terms of: a) **admission conditions**; b) **admission procedures**; c) **equal treatment**.

Figure 11. Proportion of (first) residence permits (2017) covered (or not) by EU legislation in terms of admission conditions, admission procedures and equal treatment, EU-25 (all relevant reasons – family, education, work)

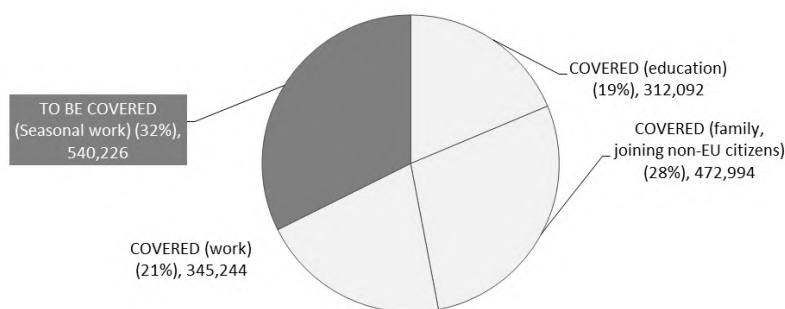
a) Admission conditions⁶⁸



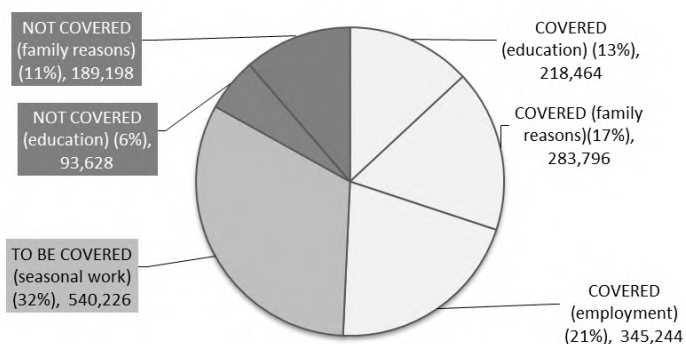
⁶⁷ Source: Eurostat (migr_resoth), 25.9.2018. To a large extent, this category falls outside the scope of this fitness check, as do permits issued on grounds of international protection. The ‘other reasons’ exclude permits granted for ‘international protection’ (see previous chart). ‘Victims of trafficking in human beings’ have been included in the ‘other reasons not specified’ category due to the very low numbers involved (on average around 1 000 permits a year in 2010–2017). The EU-25 aggregate excludes HR from 2009 to 2012.

⁶⁸ Source: DG HOME calculations based on Eurostat, [migr_resfirst], [migr_resocc] and [migr_resfam], 25.9.18. Figures do not include residence permits issued for family reunification/formation with EU citizens or for ‘other reasons’.

b) Admission procedures⁶⁹



c) Equal treatment⁷⁰



This shows that:

- a) EU rules on **admission conditions** currently cover 48 % of all permits issued for work, study and family reasons, and they will cover up to 81 % once the SWD is fully implemented;
- b) EU rules on **admission procedures** currently cover 68 % of all permits issued for work, study and family reasons, and they will cover up to 100 % once the SWD is fully implemented; and
- c) EU rules on **equal treatment** currently cover 51 % of all permits issued for work, study and family reasons, and they will cover up to 83 % once the SWD is fully implemented. The remaining 17 % (around 283 000 people) who are not covered may be family members and students who are not considered workers (children or non-working students) and are therefore not reported as such under the SPD.

Annexes 7 (Effectiveness) and 9 (Statistics) contain further analysis and explanations of these figures.

⁶⁹ Source: DG HOME calculations based on Eurostat, [migr_resfirst], [migr_resocc] and [migr_resfam], 25.9.18. Figures do not include residence permits issued for family reunification/formation with EU citizens or for 'other reasons'.

⁷⁰ Source: DG HOME calculations based on Eurostat, [migr_resfirst], [migr_resocc], [migr_resfam] and [migr_resing], 6.12.18. Figures do not include residence permits issued for family reunification/formation with EU citizens or for 'other reasons'. The proportions are estimated on the basis of the SPD statistics.

4 METHOD

4.1 Methodology and sources used

The evaluation was conducted using various methods and informed by the triangulation of a range of sources, including evidence and opinions gathered by external studies, open and targeted consultation of stakeholders, reviews of complaints and infringement cases, case-law, expert views, desk research and statistics.

The Commission services (DG HOME in consultation with other DGs) carried out an initial **legal analysis** of the internal, external and Directive-specific intervention logics, and a ‘gap analysis’ in relation to categories of TCN and aspects not covered by the EU rules. The findings were triangulated with the statistical analysis, the assessment of the Member States’ transposition of the Directives and a comprehensive survey of the practical implementation of the Directives in all relevant Member States (see Annexes 1 and 10 for more details).

The evaluation was supported by a comprehensive **study** carried out for the Commission by an external contractor in 2016-2018⁷¹. A complete list of other studies and sources of information used can be found in **Annex 10**. The findings of an extensive **open public consultation (OPC)** and a set of **targeted consultation** activities further supported the evaluation (see Annex 2). A reasonable overall response rate was registered for the OPC, providing insights into the views of TCNs, who were the subject of specific outreach efforts, including through social media adverts and civil society networks. Targeted consultations and national research and consultation on practical implementation complemented the OPC to ensure a robust evidence base.

The initial plan was broadly maintained as regards the structure of the evaluation questions.

4.2 Limitations and robustness of findings

No adequate data were found to support a fully quantified economic analysis and Member States themselves confirmed they had carried out no economic analysis of the implementation of the Directives. The economic analysis supporting the evaluation of effectiveness, efficiency and EU added value is therefore primarily qualitative. Different counterfactual analysis approaches were considered, but not developed further, due to the difficulty in finding relevant datasets that would enable meaningful unbiased comparison.

The initial plan was to entail case studies specifically analysing the migration flows and processes from 10 representative third countries, enabling more in-depth analysis of particular aspects of migration. However, due to the limited replies in the OPC and the lack of response from targeted actors from those countries, this approach was eventually abandoned. Nevertheless, the evaluation did benefit from the OPC replies of TCNs living outside the EU.

⁷¹ ICF (2018), *Study in support of the fitness check and compliance assessment of existing legal migration Directives*. See Annexes 1.5 and 3 for methodology and deliverables.

Their views are reflected throughout the evaluation (without identifying their countries of origin).

One of the main limitations of the fitness check stems from the many **exogenous (e.g. economic, social, political, environmental) factors** influencing the management of migration flows and the fact that Member States can determine the volumes of admission of economic migrants. Also, the fact that most Member States already had procedures and admission schemes pre-existing the introduction of common EU rules makes it difficult to isolate and measure the impact of the EU legal migration *acquis*.

Various **factors relating to the implementation** of the Directives limited the precision of the evaluation, in particular:

- the large margin for manoeuvre, due to the many options included in the Directives; and
- the significant time-lag (partly due to transposition delays) between the adoption of a Directive and its actual implementation⁷².

In view of the recent implementation dates, only a **partial evaluation** was possible in the case of some Directives (SWD, ICTD and S&RD). This had a twofold impact:

- the effects of these Directives could not be taken into account in the effectiveness and efficiency analysis; and
- the evaluation did not cover seasonal workers, who account for a relative large proportion of permits issued for the purpose of work.

However, the SWD, ICTD and S&RD are analysed in relation to relevance and coherence, and to some extent EU added value.

There is limited available information on the **baseline situation** in terms of pre-existing legal statuses and numbers of relevant TCNs, partly because the proposals for the first Directives (FRD, LTRD, SD and RD) were not accompanied by impact assessments. In addition, harmonised EU-wide data are not available for permits issued prior to 2008⁷³. Nevertheless, harmonised pre-2008 population data (even if not directly comparable with residence permits statistics) were used to estimate the development of stocks of migrants in the reference period. For the efficiency analysis, the Commission issued a European Migration Network (EMN) *ad hoc* request for such data from Member States, but only partial replies were received.

Poor data availability affected the analysis of the current situation, partly because not all relevant statistics are gathered in relation to residence permits⁷⁴. There is also a lack of relevant academic literature with reliable econometric analyses distinguishing the impacts of the Directives as compared with the previous situation, and on the impact of certain external factors on the management of migration flows.

⁷² For instance, the SPD was not fully transposed by SI, RO and ES until 2015 and was fully transposed by BE only at the end of 2018. The BCD was not transposed by SE and LT until 2013.

⁷³ See Annex 9.

⁷⁴ E.g. on intra-EU mobility, family reunification with non-mobile EU citizens.

5 ANALYSIS AND ANSWERS TO THE EVALUATION QUESTIONS

5.1 Relevance

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

5.1.1 Relevance of the objectives of the Directives for addressing current and future needs

Between 1999 and 2004, in order to achieve the objectives in Article 79(1) TFEU (see Section 2), the Commission put forward proposals for Directives on family reunification, long-term residents, admission for economic purposes, and for students and researchers, and also proposed the adoption of an overall ‘open method of coordination on immigration policy’⁷⁵. However, while the four proposals on family reunification, students, researchers and long-term residents were adopted between 2003 and 2005, the framework Directive on economic migration⁷⁶, covering both employed and self-employed activities, failed to attract the then-required unanimous agreement in the Council and was eventually withdrawn in 2005⁷⁷. The development of an open method of coordination was also abandoned.

In response, the Commission decided to pursue a **sectoral approach to economic migration**, regulating the conditions for the entry and residence of distinct categories of labour migrants⁷⁸. This approach was justified to provide for sufficient flexibility to meet the different needs of national labour markets, and led the Commission to propose:

- three sectoral Directives, covering:
 - highly qualified workers;
 - seasonal workers; and
 - intra-corporate transferees; and
- a framework Directive (the SPD) guaranteeing a common framework of rights for TCNs in legal employment and already admitted in a Member State.

Those Directives were adopted in different phases between 2009 and 2014, following lengthy negotiations⁷⁹. In the case of the SPD, the original objective in the Commission’s proposal of introducing a single application procedure in a ‘one-stop shop’ system, reducing

⁷⁵ Communication from the Commission to the Council and the European Parliament on *An open method of coordination for the Community immigration policy* (COM(2001) 387 final).

⁷⁶ Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities (COM(2001) 386 final).

⁷⁷ COM(2005) 462 final.

⁷⁸ Commission Communication on a *Policy plan on legal migration* (COM(2005) 669 final).

⁷⁹ BCD in 2009, SPD in 2011, SWD and ICTD in 2014. The Commission further proposed a recast of the Students and Researchers Directives in 2013, in particular to extend the scope to remunerated trainees, and a revision of the BCD in June 2016 to improve its effectiveness and attractiveness.

administrative burden and cost for the national administration, third-country workers and their employers, was weakened in the adopted Directive⁸⁰.

In 2010, the Commission proposed bypassing the sectoral approach and consolidating the legal migration legislation in an '**immigration code**', in order to 'maximise the positive effects of legal immigration for the benefit of all stakeholders and [...] strengthen the Union's competitiveness'⁸¹. However, the proposal was not taken up and subsequent Directives continued to follow the sectoral approach.

The objectives of the EU legal migration *acquis* – or rather their importance in the overall narrative on migration – have evolved over the years. While the earlier Directives focused on ensuring the integration of TCNs, giving them rights as close as possible to those of EU citizens and enhancing their intra-EU mobility, the focus has gradually shifted towards ensuring efficient management of the flows of migrants that the EU economy 'needs'. Specifically, the focus of the most recent Directives (including the 2016 proposal to revise the BCD) has mainly been on attracting and retaining certain TCNs (particularly the highly skilled, including students and researchers), in order to enhance the EU's economic competitiveness and growth⁸².

From a policy perspective, this shift was confirmed in the **2015 European Agenda on Migration**, which highlighted the aim of making the EU an attractive destination for skilled TCNs, having regard to its 'long term economic and demographic challenges'. In the available demographic and economic data, a number of factors point to a significant **shrinking of the EU's working-age population** (15 to 64 year-olds) and its **labour force**, which could result in an **increased need for TCN workers** in the medium and long term. The projected increase in life expectancy in Europe⁸³, coupled with decreasing fertility rates and the **ageing of the EU population**, is likely to lead to a decline of the labour force (in both relative and absolute terms), despite positive net migration to the EU⁸⁴.

With regard to employment, however, the legal migration Directives tend to focus on the migration of highly skilled workers (with the exception of seasonal workers). The same largely applies to current policy choices across the Member States, even though this may not be appropriate in the light of future labour gaps. The consultation process highlighted the concerns of business representatives in this respect. For example, the projected growth in the old-age dependency ratio⁸⁵ in Europe will increase demand for primary care workers and the

⁸⁰ Comparison between Article 4 in the proposal for the SPD (COM(2007) 638 final) and Articles 4 and 5 of the adopted Directive.

⁸¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *Delivering an area of freedom, security and justice for Europe's citizens – Action plan implementing the Stockholm programme* (COM/2010/0171 final).

⁸² However, the most recent Directives provide for more far-reaching rights for TCNs than the earlier ones, mainly due to the European Parliament's influence in the legislative process.

⁸³ *The 2018 Ageing Report: Underlying assumptions and projection methodologies*, European Commission (2018). A 2015-based projection assumes an increase in life expectancy at birth of 7.8 years for men and 6.6 years for women over the 2016-2070 projection period.

⁸⁴ *Ibid.*

⁸⁵ According to the *2018 Ageing Report*, the old-age dependency ratio (people aged 65 and above relative to those aged 15 to 64) in the EU is projected to increase by 21.6 pp over the projection period, from 29.6 % in

continued rise in the number of women entering the workforce⁸⁶ might result in higher demand for childcare workers. Both of these factors could point to **a future need for low and medium skilled third-country workers** in order to meet demand in the domestic and care sectors.

Facilitating the **intra-EU mobility of TCNs** (in particular workers) across Member States remains very relevant in the EU Single Market as a tool to address skills and labour shortages across Member States more quickly and flexibly, and to respond to the needs of multinational companies in terms of mobility of staff across subsidiaries in Member States.

Beyond the economic and demographic rationale highlighted above, as confirmed by all consulted stakeholders, the **fair treatment of TCNs** remains very relevant to ensure their **effective integration** in the host country and overall societal cohesion. Fair and effective rules on **family reunification** also play an important role in fostering integration.

The evaluation also analysed the relevance of the Directives with respect to the **socio-economic, environmental (including climate change) and security factors** that are expected to be the main drivers of migration to the EU in the short/medium term (2030). These drivers are projected to affect the EU directly or the regions from which migration to the EU will stem⁸⁷. In this context, the main challenge in order to address these drivers and their consequences, for both the EU and its Member States, will be to have in place at the same time:

- effective channels for legal migration;
- an effective policy on preventing irregular migration and on return; and
- effective cooperation with countries of origin.

In conclusion, **all the initial objectives remain relevant** with regard to both current and future EU needs and across the various migration phases; this was confirmed by the evidence gathered in the context of this fitness check, including the feedback from stakeholders.

The stakeholders who participated in the **consultation** confirmed the relevance of EU-level intervention in the area of legal migration, although focusing on different aspects. On the one hand, TCNs consulted through the OPC noted that the current EU rules on entering, and living and working in, the EU are too restrictive with respect to their needs, and civil society organisations and social partners called for stronger action at EU level, via new legislation and enhanced enforcement. On the other hand, Member States' representatives confirmed the relevance of the Directives to their needs, especially in cases where immigration law was previously under-developed. However, they also tend to consider that current EU legislation is sufficient and that implementation should be the priority.

In the OPC, some categories of respondent called for a restrictive migration policy that prioritises the needs of EU nationals over those of TCNs (mainly individual respondents),

2016 to 51.2 % in 2070. This implies that the EU would go from having 3.3 working-age people for every person aged over 65 years to only two working-age persons.

⁸⁶ *Ibid.*

⁸⁷ ICF (2018), Annex 1Biii (Drivers).

others emphasised the need to protect vulnerable TCNs and avoid labour exploitation (civil society organisations) and to ensure better recognition of formal qualifications to avoid skills mismatches and over-qualification (academia).

The relevance of the **Directives' specific objectives** is further analysed in **Annex 6**.

5.1.2 Relevance of the material scope of the Directives

From the evidence gathered in this fitness check, organised according to the phases of the migration process, we can conclude that the provisions (material scope) of the Directives are still relevant. At the same time, it would appear that **the material scope is insufficient to achieve fully all relevant objectives**. Some key findings are illustrated below⁸⁸.

Pre-application (information and documentation)

Not all Directives include such provisions. Only the four more recent ones (SPD, SWD, ICTD and S&RD) explicitly require Member States to provide TCNs and, where relevant, their employers (SPD) and host entity (ICTD) with access to information. However, even for those Directives, the practical implementation study and the consultation revealed problems with regard to the availability, quality and completeness of information in some Member States. Such shortcomings in transparency can be an obstacle for the applicant and may lead to additional costs (see below on effectiveness and efficiency).

Application

All Directives have established **application procedures**, which are relevant to ensuring legal certainty, fairness and transparency of the process for all stakeholders. The practical implementation study confirmed that such measures remain relevant, although some gaps were also identified. For instance, not all Directives contain provisions on **application fees** (not the FRD, LTRD, RD and BCD) and, even where they do (SD, SPD, ICTD, SWD and S&RD), the provisions are not uniform. It was found (on the basis of a number of complaints, preliminary CJEU rulings⁸⁹ and an EU-wide survey⁹⁰) that some Member States still charge disproportionately high fees, which (as confirmed by the OPC) may represent an obstacle to attracting and retaining migrants.

The Directives set limits on the **procedural time** between submission of an application and the issuing of a decision. However, the practical application study revealed that additional time is often required to physically deliver the permit, which is not regulated by the Directives.

⁸⁸ See Annex 8 for a detailed analysis of the practical implementation issues affecting relevance.

⁸⁹ Judgments in Case C-508/10, *Commission v. Netherlands* (26 April 2012) and Case C-309/14, *CGIL & INCA* (2 September 2015),

⁹⁰ EMN inform (2014). Applicable fees for issuance of residence permits to TCNs.

Complaints also revealed situations where applicants are left without an effective **redress** mechanism if a formal deadline passes without a decision being taken (**‘administrative silence’**). Member States take various approaches: in some, administrative silence implies tacit rejection, in some tacit approval, and in others, redress procedures can be triggered immediately. Such diverse application shows that addressing this issue remains relevant to establishing efficient and fair procedures.

In interviews, some TCNs reported difficulties with the **recognition of professional qualifications** in some Member States. The procedures are generally time-consuming and complex.

Entry and travel

Most of the Directives (FRD, RD, BCD, ICTD, SWD and S&RD) require Member States to facilitate the issuing of the visa needed to enter their territory in order to receive the actual residence permit. In some cases, Member States issue short-stay visas for that purpose, in others a long-stay visa. In most cases, **visa procedures** are not regulated by the Directives and the deadlines for issuing decisions on permits do not take account of the time needed to obtain a visa.

The practical application study show that the time required to apply for a visa sometimes extends considerably the overall time of the application. Moreover, complaints showed that a TCN can be denied admission because the entry visa is rejected or delayed, even though the substantive conditions for issuing a permit had in principle been fulfilled⁹¹. There is a need for clear provisions that ensure coordination between the two processes, so as to provide for fair and transparent procedures (see also section on external coherence).

Residence

All the Directives (apart from the FRD and the SD⁹²) contain **equal treatment** provisions. The OPC showed that TCNs are significantly more concerned than Member States’ authorities about shortcomings in equal treatment. Perceptions vary, for instance regarding:

- problems with **social security benefits**, e.g. **family benefits** for TCNs who stay less than 12 months in a Member State, those working on the basis of a visa or only for permanent residents;
- ineffective enforcement of equal treatment in relation to **working conditions** (concerns raised by various stakeholders as regards the exploitation of third-country workers); and
- undue **discrimination in terms of access to employment** for LTRs.

⁹¹ However, this was clarified in the *Ben Alaya* judgment, where the CJEU clearly stated that no admission conditions can be imposed other than those listed in the Directives.

⁹² However, family members and students are covered by the SPD when they are allowed to work.

Intra-EU mobility

Five of the Directives contain rules on intra-EU mobility. While this is a relevant objective, available data are not sufficient to measure the extent to which such provisions are used and the Directives do not cover all types of intra-EU mobility for TCNs adequately. Also, only the most recent Directives (ICTD and S&RD) contain the most advanced provisions in this area and we do not yet have data on their actual use by TCNs.

End of legal stay

In sectors such as healthcare, some countries of origin express concern that their educated professionals are being recruited by Member States at the expense of their own healthcare systems. The **promotion of circular migration and prevention of brain drain** are relevant operational objectives of the Directives, but explicit provisions on ethical recruitment are limited to the BCD⁹³.

However, the evaluation, including stakeholder feedback, produced no evidence that current EU legislation is problematic in this respect. Similarly, the LTRD and BCD contain provisions facilitating circular migration for TCNs who have settled in the EU, but these are limited, allowing TCNs to make only short-term visits to third countries without running the risk of losing their status. The SWD and LTRD make provision for facilitating TCNs' re-entry to the EU following a stay abroad. Finally, some Member States allow TCNs to **export pensions** when they leave the EU only where there is a bilateral agreement with the third country in question.

5.1.3 Relevance of the personal scope of the Directives

Overall, the evaluation showed that **the personal scope of the Directives remains relevant**. However, due to the sectoral approach (see above), the EU has exercised its competence only with regard to **some categories** of TCN. Therefore, the EU rules do not cover all TCNs legally residing in the EU-25 (around 18.7 million at the end of 2017). This means that the personal scope of the Directives **does not fully address some of the needs highlighted above** (Section 5.1.1).

Nevertheless, it should be borne in mind that legally residing migrants who are not covered under EU rules are issued residence permits under national law. Also, TCN workers (and those authorised to work) whose admission conditions are not harmonised at EU level are partly covered by the SPD, as regards the (single) application procedure and equal treatment rights.

⁹³ *Brain drain to brain gain: Supporting the WHO global code of practice on international recruitment of health personnel for better management of health worker migration.*

The following section analyses the **main categories of TCN whom the EU legal migration *acquis* covers only partially or not at all** in terms of relevance to the policy objectives⁹⁴. The impact of this limited personal scope on the effectiveness of the *acquis* is further examined in Section 5.3.

A. Economic migration

In the field of economic migration, EU rules cover the following main categories only partially or not at all:

- low/medium-skilled workers;
- the self-employed;
- international service providers;
- investors;
- ‘highly mobile’ workers; and
- jobseekers.

Apart from the first category (which is quite broad), these groups concern a limited number of TCNs. Since no EU-level schemes exist for these categories, Member States do not report systematically data to Eurostat, so it was not possible to quantify them for the purpose of this evaluation.

Low/medium-skilled workers

As highlighted above, in the coming decades the EU economy and labour market are likely to suffer from a shortage of low/medium-skilled workers in specific sectors, particularly in the area of services. At EU level, although the SPD has introduced procedural safeguards and certain rights (including equal treatment with nationals) for all workers, no harmonised instrument lays down admission conditions for this category of TCN (the only exception being the SWD, which applies to a few sectors of the economy – those dependent on the passing of the seasons – and for temporary periods only). Otherwise, Member States use national migration channels to satisfy this type of labour demand and some have adopted flexible labour market tests, or preferential channels, for occupations identified as being ‘in need’ (i.e. shortage occupations). In 2017, this affected around 290 000 people (33 % of all first permits issued for remunerated reasons)⁹⁵.

In the **stakeholder consultation**, NGOs and representatives of social partners (both trade unions and employers) confirmed the importance of attracting non-EU workers with different skills levels and the need for EU legislation⁹⁶. While recognising the difficulties relating to any new legislative initiative in this area, they called for more to be done at EU level. Most stakeholders consulted (including the EESC, some MEPs, civil society and social partners’ representatives) questioned the adequacy of the sectoral approach, arguing that it limits the availability of legal channels to Europe and the matching of skills (at all levels) with jobs available. The representatives of Member States and some business organisations considered

⁹⁴ See Annex 6 for a more detailed analysis.

⁹⁵ See Figure 1.10 and Annexes 7 and 9 for further analysis in relation to effectiveness.

⁹⁶ E.g. Business Europe called for the scope of existing Directives, in particular the ICTD, to be extended to medium-skilled workers.

that admission conditions for these categories are better regulated at national level, as domestic legislation can react more quickly than EU legislation to changing needs. In this respect, the OECD has pointed out that there are also means at EU level of building flexibility into the legislative framework, e.g. using implementing or delegating acts⁹⁷. Civil society organisations and sectoral employers' associations⁹⁸ underlined the **specificities of the socio-medical, care and domestic service sectors**, which are not always fully regulated in several Member States and where the fact that employers are, in many cases, individuals rather than companies complicates labour relations and the upholding of individual rights. In the light of worker shortages in some Member States, some suggested that consideration should be given to facilitations such as allowing work during the application process (so as to ease the recognition of qualifications) and to the gender dimension.

Self-employed people and entrepreneurs

The 'self-employed' category covers anyone working outside an employer-based relationship. None of the legal migration Directives grants the self-employed admission to the EU in their own right. The LTRD and FRD grant the holders of the relevant permits⁹⁹ the right to work in self-employed activities and the S&RD includes this as an option for Member States as regards students. The ICTD, SPD and SWD explicitly exclude self-employed workers from their scope.

The absence of a specific entry route at EU level for self-employed TCNs means that they have to rely on national permits to enter the EU, with Member States recently focusing on attracting highly skilled entrepreneurs seeking to set up innovative businesses/start-ups.

In response to the OPC question on the attractiveness of the EU to specific categories of TCN, only 36 % of respondents considered the EU attractive to TCNs seeking to start a business, as compared, for example, with 70 % who considered it attractive to students and researchers. Individual respondents pointed out, for example, that freelancers needed to have a contract to be able to reside in one Member State, even if their freelance work generated sufficient revenue, underlining the inadequacy of such rules in modern economies.

In general terms, divergent views emerged from the consultation:

- some stakeholders suggested that EU-level action should be considered, since the absence of an EU-wide scheme to attract TCN entrepreneurs (in particular in innovative sectors) might prevent the EU from being seen as a front-runner in the global race to attract talent and new companies. Also, the existing barriers to intra-EU mobility may discourage initiatives that project the EU as a single market. The stakeholders that shared this perspective (in particular, representatives of ecosystems of entrepreneurs, some business organisations and experts) suggested that there should be an EU-wide scheme to attract self-employed people and/or entrepreneurs,

⁹⁷ OECD and EU (2016), *Recruiting immigrant workers: Europe 2016*, OECD Publishing, Paris, p. 276.

⁹⁸ e.g. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/legal-migration/201712_contribution_legal_migration_consultation_fr.pdf

⁹⁹ In its 2016 proposal to amend the BCD, the Commission proposed that this right be given to blue card holders.

with some proposing that these should be covered by a single instrument that also covered jobseekers¹⁰⁰; however

- other stakeholders called for the maintenance of a national approach in this area. Some business representatives, in particular, considered that a range of competing national models is a welcome ‘incubator’ for testing different creative solutions in this fast-evolving field. The majority of Member States’ representatives did not support an EU-level initiative for this category of TCNs.

A specific issue in this area is that self-employed TCNs who are legally residing in a Member State are currently not allowed to provide **cross-border services**, since no such EU rules have been adopted under Article 56(2) TFEU¹⁰¹. Self-employed TCNs are therefore debarred from cross-border activities throughout the internal market, but they may partly benefit from this freedom by setting up an EU company within the meaning of Article 54 TFEU¹⁰².

Service providers from outside the EU (trade-related service providers)

The EU legal migration *acquis* does not cover some categories of TCNs who come to a Member State to provide services: contractual service suppliers, independent professionals, business sellers and visitors who are covered by international trade commitments (GATS ‘mode 4’¹⁰³ on the temporary movement of persons for the purpose of providing services and the EU’s free-trade agreements concluded by the EU with third countries) and are not covered by the ICTD. For such categories, admission and immigration remain regulated at national level¹⁰⁴.

This leads to a potential discrepancy between internationally agreed trade rules and commitments, on the one hand, and immigration rules, on the other, as confirmed by a specific study carried out to underpin this evaluation¹⁰⁵. Independent professionals, whom some Member States currently treat as self-employed, deserve special attention, as they do not integrate into the EU labour market. This concern was raised in the consultation process, especially by experts and some Member States’ representatives.

Investors

Entry and residence for investment purposes is not regulated at EU level. Investment can take different forms:

¹⁰⁰ In the Legal Migration Expert Group, the European Network of Migrant Women claimed that the absence of rules for the self-employed had a disproportionate impact on female migrants.

¹⁰¹ In 1999, the Commission proposed a Directive extending the freedom to provide cross-border services to TCNs (COM(1999) 3 final), but the Council did not adopt the proposal.

¹⁰² In this case, the EU company provides the service, not the TCN who owns the company.

¹⁰³ Trade in services can take several forms and is therefore categorised, in accordance with the General Agreement on Trade in Services (GATS), in four distinct modes of supply. Mode 4 requires the presence of a natural person in the territory of the trading partner and hence intersects with migration policy. WTO members have tabled commitments in different forms, but the EU recognises the most common categories of mode-4 service supplier.

¹⁰⁴ EMN (2015), *Admitting TCNs for business purposes*. An impact analysis of the legal gap would require a breakdown into relevant categories of businessperson. Statistics on the issuing of C-type or D-type visas tend to cover wider groups of TCNs, making it difficult to identify with accuracy the relevant categories analysed.

¹⁰⁵ S. Tans (2018).

- capital investment in a company or in credit or financial institutions' instruments (e.g. investment funds or trust funds);
- investment in immovable property;
- investment in government bonds;
- donation or endowment of an activity contributing to the public good; and
- one-time contributions to the State budget.

These schemes differ from those concerning the self-employed or entrepreneurs, since they are centred on a financial contribution (in whatever form) and do not require the active participation of the permit holder in an identified business.

Primarily designed to attract investment, these permits are not new (although many have been revived since the 2008 financial crisis) and their evolution is not linear: they have sometimes been introduced, then repealed or amended significantly, which shows the difficulty of designing and implementing them efficiently. While attracting investment may be a legitimate aim for a country, such schemes are not risk-free from a security, money-laundering, corruption and tax evasion perspective and they have on occasion been linked to cases of (cross-border) corruption, influence-peddling, money-laundering and possible infiltration of organised crime in the licit economy. In the consultation, some experts highlighted problems in tracking the origin of foreign investors' wealth.

To assess the relevance of this legal channel and whether action is necessary at EU level, a detailed mapping of existing schemes is required, accompanied by analysis of their risks and benefits. This should cover security and reputational risks, but also links between such schemes and the acquisition of EU citizenship. It should also be accompanied by a thorough reflection on how to make the schemes risk-proof. A Commission report adopted on 23 January 2019¹⁰⁶ concluded that this has not been feasible to date, because of a lack of transparency regarding statistics on permits granted by Member States. The report (which also covers the acquisition of citizenship by investment) stresses that, in the light of the risks inherent to such schemes (in relation to the acquisition of residence and citizenship), the Commission will monitor closely Member States' efforts to ensure greater transparency and better governance in their implementation, including by setting up a group of experts.

Highly mobile workers

This category typically includes **mobile transport workers** (across transport modes) and **touring artists**, i.e. third-country workers who regularly have to work in several Member States and stay in each Member State for short periods (from a few days to three months). For these workers, it is not clear which Member State should issue a work permit and enforce their rights, including equal treatment rights¹⁰⁷. On the one hand, a national work permit or

¹⁰⁶ *Investor citizenship and residence schemes in the European Union*, report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (COM(2019) 12 final, 23.1.2019).

¹⁰⁷ EU-wide statistics on the proportion of third-country mobile transport workers are not available, partly because in some cases permits are not issued in the first place, so no statistics can be collected. Estimates from different sectors show that third-country workers make up approximately 2.5 % in the road haulage

long-stay visa issued by a Member State does not authorise work in other Member States. On the other hand, a visa issued under the Visa Code (short-stay visas for up to 90 days in an 180-day period) does not *per se* entail an authorisation to work. Moreover, the overall duration of allowed stay under a Schengen visa often needs to be exceeded for this category of worker, which leads to overstaying¹⁰⁸.

In practice, these workers are not effectively covered either under the legal migration or the visa *acquis*, which may lead to situations where equal treatment (e.g. as regards working conditions) is not ensured by EU law. This is problematic given the cross-border nature of these categories, which means that they cannot be fully regulated at national level. The proportion of third-country workers in transport sectors (i.e. road transport, shipping, aviation) is low, but there are indications that it is increasing, although available data are partial¹⁰⁹. In the **consultation** process, general support emerged – including from Member States’ authorities – for considering this as a relevant gap. Two EU-level trade unions representing aviation personnel¹¹⁰ argued that the absence of specific arrangements tailored to the needs of aircrew of EU-registered aircraft heightened the risk of downward pressure on salaries.

The organisation representing employers in the music and arts industry¹¹¹ underlined that the nature of the work involves a lot of travelling between Member States and stays that may exceed the 90 days allowed in Schengen countries; EU law does not satisfy these requirements and national legislation is inconsistent. Similar issues arise for the self-employed in the sector, whose travel needs are similar. A 2014 Commission proposal for a Regulation for a touring visa¹¹², which was aimed at regulating *inter alia* the intra-EU movement of touring artists, was withdrawn in July 2018 due to a lack of support from Member States¹¹³.

Jobseekers

There are currently no EU rules regulating admission for the purpose of **job seeking**. All the labour migration Directives (and also, to a large extent, Member States’ national migration schemes) are based on a demand-driven approach, i.e. the existence of a job contract or offer as a pre-condition for admission. This means that, in practice, TCNs who want to look for a job in the EU have to use existing general pathways under national or EU law, such as short-stay visas. With regard to the possibility of job seeking for TCNs already resident in the EU on other grounds, the BCD allows EU Blue Card holders who become unemployed to look for another job for three months. The S&RD has introduced the possibility for students and researchers to reside for the purpose of job seeking (or setting up a business) for up to nine months after the end of their study or research.

sector and 2.3-6.8 % in inland water transport in three Member States where data are available. (BE, DE, NL). No data are available for intra-EU maritime shipping or aviation (see Annex 6.7 for details).

¹⁰⁸ On the interaction with the visa *acquis*, see Annex 5.2.

¹⁰⁹ See SWD Annex 6.9 (gap analysis) and ICF (2018) Annex 4B.

¹¹⁰ Contributions to the OPC from the European Cockpit Association (ECA) and the European Transport Workers Federation (ETF).

¹¹¹ Pearle contribution to the OPC.

¹¹² COM(2014) 163 final.

¹¹³ OJ C 233, 4.7.2018, p. 6–7.

In the consultation process, experts underlined that, since they cannot rely on a sponsor or a contract for admission (a requirement for all existing EU-level schemes for economic migration, e.g. BCD), TCNs intending to enter the EU to seek a job are in a similar situation to self-employed people. For this reason, some business organisations pointed to the potential benefits of introducing schemes that would allow job seeking by TCNs, with the European Association of Craft, Small and Medium-sized Enterprises (UAPME) suggesting the setting-up of an EU-wide talent pool for TCNs interested in migrating to the EU, based on a points-based system and available to smaller businesses without the capacity for direct recruitment from non-EU countries¹¹⁴.

B. Non-economic migration

Family migration

In the field of family migration, two main categories of TCN are not covered by EU legal migration rules:

- third-country family members of non-mobile EU citizens; and
- family members of beneficiaries of subsidiary protection (BSPs).

Family reunification of **third-country family members of non-mobile EU citizens** is currently regulated at Member State level, as it does not fall within the scope of either the FRD (which covers third-country family members of TCNs)¹¹⁵ or the Free Movement of Persons Directive¹¹⁶ (which covers family members of mobile EU citizens). In 2017, a total of 237 386 TCNs joined an EU family member. Although data are not broken down by the situation of the EU citizens (mobile or non-mobile), since only 3.6 % of EU citizens are ‘mobile’¹¹⁷ it can be assumed that the vast majority of this family migration concerns EU citizens who are ‘non-mobile’. This situation may result in reverse discrimination where, owing to the coexistence of EU law and national law on family reunification, Member States may treat their own ‘non-mobile’ nationals less favourably than the ‘mobile’ ones or TCNs covered by the FRD. This was raised by several experts in the consultation process.

Many contributors to the consultation – including TCN respondents to the OPC, civil society representatives consulted on various occasions, the EESC and MEPs – argued that family reunification for family members other than those covered by the FRD, e.g. non-married partners and dependent descendants or ascendants, should always be accepted (current rules make it optional for Member States). On the other hand, the Member States’ representatives considered that the current rules on family reunification should not be changed.

Another issue is that the FRD offers **facilitated family reunification** for family members of refugees, but not for **family members of beneficiaries of subsidiary protection (BSPs)**¹¹⁸,

¹¹⁴ UAPME contribution to the OPC.

¹¹⁵ The scope of the Commission’s 1999 proposal on the FRD included third-country family members of non-mobile EU citizens. However, this was not supported by Member States and was therefore not included in the adopted Directive.

¹¹⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

¹¹⁷ Citizens of working age (15-64) in the EU-25.

¹¹⁸ The criteria to qualify for the status of refugee or BSP are established in the Asylum Qualification Directive (2011/95/EU).

even though the Commission's guidance on application of the FRD¹¹⁹ encourages Member States to adopt rules that grant similar family reunification rights to refugees and BSPs. In the consultation, the UNHCR questioned whether this difference of treatment remains justified, given that BSPs' humanitarian needs are no different from refugees'¹²⁰.

Third-country nationals who are not returned

Currently, the legal status of TCNs who are not returned and for whom there is not a reasonable prospect of removal (sometimes referred to as 'non-removable returnees')¹²¹ may vary in Member States, ranging from irregular status, *de facto* toleration and formal toleration (e.g. *Duldung*¹²² in Germany) to specific temporary residence permits (i.e. following regularisation). The Return Directive¹²³ requires Member States to take all necessary measures to enforce return decisions and thus also regularly to review individual cases to assess whether a prospect of removal exists or other measures should be taken. It is estimated that this issue concerns up to 300 000 TCNs a year¹²⁴.

Next to return, which is the main action to be enforced, a possible alternative is to grant an authorisation or right to stay ('**regularisation**'), which is currently governed by national rules. At political level, the European Council agreed in 2008¹²⁵ to use only case-by-case regularisation, under national law, for humanitarian or economic reasons. As regards the conduct of case-by-case regularisations, in its *Return Handbook*¹²⁶ the Commission recommended a number of non-binding assessment criteria that Member States could take into account, in particular:

- the (cooperative/non-cooperative) attitude of the migrant;
- the length of actual stay in the Member State;
- integration efforts;
- personal conduct;
- family links;
- humanitarian considerations;
- the likelihood of return in the foreseeable future;

¹¹⁹ COM(2014) 210 final.

¹²⁰ UNHCR contributions to the consultation process, including the OPC.

¹²¹ The main reasons include:

- failure of removal efforts due to lack of identification;
- problems in obtaining papers from third countries;
- postponement due to the non-refoulement principle;
- health; and
- unavailability of appropriate means of transport.

¹²² A certificate confirming temporary suspension of deportation, on the basis of which further rights (including a right to work) may be granted. *Duldung* does not confer a legal right to stay, but merely constitutes toleration of an irregular stay.

¹²³ Directive 2008/115/EC.

¹²⁴ Lutz, F. (2018), p. 30.

¹²⁵ European Pact on Immigration and Asylum (24 September 2008).

¹²⁶ Annex to the Commission Recommendation establishing a common *Return Handbook* to be used by Member States' competent authorities when carrying out return-related tasks (C(2017) 6505).

- the need to avoid rewarding irregularity; and
- the impact of regularisation measures on migration patterns of prospective (irregular) migrants.

In the consultation process, several stakeholders (in particular, the EESC, experts and civil society organisations) called for more to be done at EU level on the issue of regularisation, with some proposing the drafting of guidelines to Member States, focusing on good practices. Others (including the representatives of national labour inspectorates) referred to the impact on undeclared work. On the other hand, Member States' experts argued that more EU-level action in this area could risk creating pull factors for irregular migration and expressed a preference for dealing with the status of these TCNs on a discretionary basis at national level¹²⁷.

5.2 Coherence

5.2.1 Internal coherence

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

As outlined in the intervention logic, there is **overall coherence and complementarity in the objectives** of the legal migration Directives (see Figures 3 and 4). In particular, the legal migration *acquis* has had a significant effect in terms of **ensuring a degree of harmonisation and coherence** in admission criteria, procedures and TCNs' rights, including in some cases the right to intra-EU mobility. The CJEU's interpretative clarifications on a number of important issues have contributed to that.

Nevertheless, the evaluation showed that the legal migration *acquis* as developed to date presents a number of **specific internal coherence issues**, most of them due to:

- the sectoral approach, which has (unavoidably) led to 'specialised' Directives regulating the specific needs and features of the categories covered; and
- the origins of the Directives, each of which had its own peculiarities, policy constraints and negotiation history¹²⁸.

This has undoubtedly affected the way in which the substantial provisions have been eventually adopted, but also, more generally, the overall **clarity and consistency of terminology** used in the Directives: similar issues are frequently addressed using different

¹²⁷ Lutz, F., pp. 47-49.

¹²⁸ For instance, the FRD, LTRD and BCD were adopted by the Council alone by unanimity with only 12 Member States involved in adoption, while the latest Directives were adopted by qualified majority by the Parliament and Council as co-legislators, with 25 Member States involved. The SPD stands out for having possibly the most complicated negotiation history, which is reflected in the final wording of many of its provisions. See for example: Y. Pascouau, S. McLoughlin, European Policy Centre.

wording and varying legislative formulations are used to address comparable issues (e.g. general clauses vs. detailed enumerations).

According to the analysis carried out for this evaluation, some of these internal coherence issues have had an **impact on the actual attainment of the objectives of the Directives** and/or created **unnecessary administrative burdens**, although in some cases the variations can be justified by differences in the scope and objectives of each Directive (for more in-depth analysis of the impact of this issue, see the effectiveness and efficiency sections).

The main findings of the analysis are outlined below, according to the main objectives that are affected, while a **detailed internal coherence analysis** is provided in **Annex 5.1**.

a) Establish fair and transparent application procedures for issuing residence permits

There are some **overlaps in the scope** of the Directives, in particular between the SPD and the sectoral Directives. It is sometimes unclear whether it is possible to **accumulate different legal migration statuses** in one or more Member States (this is particularly relevant for beneficiaries of international protection). Also, while only the LTRD and the BCD explicitly allow **parallel national schemes**, in some cases Member States have national rules covering situations that fall partly within and partly outside the scope of the FRD, S&RD, SWD and ICTD, thus creating uncertainty as to which set of rules should apply.

Apart from the S&RD and the SWD (which also provide for different types of authorisation), all the Directives provide that TCNs are to be granted a **residence permit**; however, this is without prejudice to the obligation to obtain a **visa to enter the territory** of the Member State if the residence permit is not issued outside the Member State (most Member States do not allow their consulates in non-EU countries to issue residence permits).

The provisions on **procedural rules**, such as on access to information, the submission of applications, processing times and deadlines, redress and fees, have created a degree of legal certainty for applicants, in particular in Member States that did not previously have well-developed procedures in place (several Member States' representatives recognised this in the consultation process). However, significant **differences in the specific procedural rules** across the Directives were identified as creating legal uncertainty and administrative burdens for both TCN applicants and national administrations.

b) Establish common admission and residence conditions

The rules on **admission conditions** vary across the Directives. In some cases, the differences are a logical reflection of the specific situation of the categories covered, e.g. specific salary thresholds are not necessary when regulating the admission of students or family reunification. In other cases, the differences are due mainly to the different adoption histories of each Directive and may create unnecessary administrative burden for applicants and

administrations; this is the case, for example, as regards the different clauses on the requirement to have ‘sufficient resources’.

Six Directives (FRD, LTRD, BCD, SWD, ICTD and S&RD) include varying and sometimes lengthy provisions on **grounds for rejection**; seven (FRD, LTRD, RD, BCD, SWD, ICTD and S&RD) include different provisions on **grounds for withdrawal** or loss of status, ranging from general clauses to very specific reasons. While some of these differences, including the use of ‘may’ clauses, can be explained by the different nature of the status, it is not always clear why some grounds do not apply to all statuses.

c) Ensure fair treatment for TCNs covered by the legal migration acquis

Provisions on **equal treatment**, one of the core aspects of most of the Directives and a key objective of the legislation, are almost unanimously considered a **positive contribution** of the EU legislation. The consultation process generally confirmed this. However, there are different rules in each Directive and specific restrictions, most of which reflect a differentiation between categories of TCN (e.g. highly skilled vs. less skilled) and lengths of stay. For example, given the temporary nature of seasonal work, the SWD allows Member States to limit access to certain social security provisions such as family and unemployment benefits.

In certain cases, this differentiation seems to be rather the result of negotiations with Member States in view of the specificities of their national systems. For example, the FRD does not grant equal treatment, although those covered by this status and who are allowed to work benefit from the SPD¹²⁹.

The five Directives providing a right of **access to education and vocational training** allow for different restrictions. Some appear justifiable, e.g. the restriction in the SPD whereby the right can be limited to those who are in employment or are registered as unemployed, or that in the SWD whereby it can be limited to education and training linked to the specific employment activity. However, it is more difficult to explain other restrictions that appear in one or more Directives (but not in others), such as those in the LTRD and the SPD relating to language proficiency and specific educational conditions.

There are terminological inconsistencies as regards **access to social security benefits**. Some Directives (SPD, SWD and S&RD) refer to branches of social security as defined in Regulation (EC) No 883/2004¹³⁰ and others (LTRD, BCD) to provisions in national law. The possibility of restricting access to social security benefits also varies among the Directives, in particular as regards the required minimum stay in the Member States (six to nine months). The LTRD is the only Directive that provides for equal treatment also with regard to social

¹²⁹ For more in-depth analysis of the impact of this differentiation on the achievement of the fair treatment objective, see the effectiveness analysis in Section 5.3.2.

¹³⁰ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1).

assistance (this wider scope is justified by the fact that LTR status can be obtained by TCNs only after five years of lawful residence in a Member State). Some incoherencies have also been identified with regard to the **export of pensions**. The ICTD refers to the payment of old age, invalidity and death statutory pensions, the BCD to statutory pensions in respect of old age and the SWD to statutory pensions (based on previous employment). The LTRD contains no provisions on the right to export pensions to a third country.

Only the FRD and LTRD provide for a ‘general’ equal treatment right in relation to **access to employment and self-employment**. For the remaining categories of TCN (except students), access to employment is restricted to the purpose for which the TCN has been admitted. The restrictions are category-specific and thus vary; for example:

- EU Blue Card holders have access to highly qualified employment only and cannot become self-employed; and
- ICTs only have the right to exercise the specific employment activity for which they have been transferred and do not have access to other jobs.

d) Promote and facilitate intra-EU mobility

The LTRD, BCD, ICTD, SD, RD and S&RD contain different provisions on **intra-EU mobility**. The most important finding from the legal comparison is that the earlier Directives (in particular the LTRD and BCD) facilitate mobility to a limited extent only, since Member States may check almost the same conditions as on a first application.

A number of stakeholders in the consultation confirmed that this mobility seems to be generally overlooked by national authorities, which instead often require full application procedures. Aiming at a more efficient process, the more recent Directives, particularly the ICTD and the S&RD, grant more far-reaching mobility rights to ICTs, students and researchers, so implementation of those provisions may in some cases (and under certain conditions) lead to *de facto* mutual recognition of national residence permits between Member States.

e) Protect family life

Apart from the horizontal Directive (FRD), special provisions on **family reunification** can be found in the RD, BCD, ICTD and S&RD (for researchers). The overall logic across the *acquis* is that more favourable provisions on family reunification are provided for categories for which it is an attractive factor (e.g. highly skilled workers, researchers).

The consultation confirmed that experts and business representatives consider that highly skilled workers are more likely to come to work in the EU if their partners can accompany them and have easy access to the labour market. The absence of more favourable family reunification rules from the LTRD can be partly explained by the fact that the right to family reunification is mostly exercised during the first few years of migration, i.e. before the acquisition of LTR status.

Conclusions from the stakeholder consultation on coherence issues

In dedicated consultations with Member States, civil society representatives and experts¹³¹, there was general agreement that different rules create different standards for different categories of TCN and on the existence of certain **inconsistencies across the Directives**, in particular on:

- equal treatment;
- wage thresholds and labour standards;
- deadlines and processing time;
- the duration of short-term mobility;
- access to information;
- access to work for family members; and
- admission conditions.

In this respect, some Member States affirmed that even small divergences may have a negative impact on the overall efficiency of the migration management system.

Stakeholders also identified **overlaps**, in particular when the same category of migrants is covered by different pieces of legislation, including national schemes, and this adds to legal uncertainty. Business organisations stressed that this complexity has a disproportionate impact on SMEs.

5.2.2 Coherence in Member States' implementation

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

Different national implementation choices

Evidence from the practical application study¹³² showed that the existence of different national implementation choices has contributed to certain inconsistencies. In particular, the **different implementation** of the numerous clauses of the *acquis* that leave discretion to the Member States (**'may' clauses**) has had an impact on the overall coherence of the framework. The Directives contain around 50 such clauses: some allow Member States to take a more 'restrictive' approach, e.g. by adding requirements, requiring documentary evidence or

¹³¹ Including in the Economic Migration Expert Group, which involves experts and representatives of social partners, civil society and international organisations.

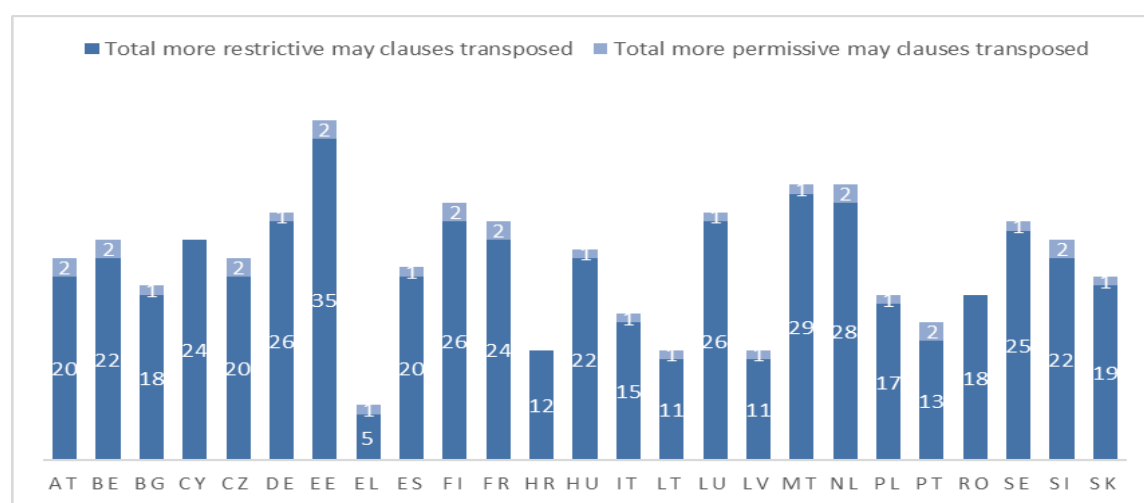
¹³² ICF (2018) Annex 2A (Evidence practical application).

restricting equal treatment rights¹³³; others allow Member States to take more favourable measures for TCNs, e.g. by enabling them to apply for permits in the territory of the Member State concerned.

Although such diverse implementation is in accordance with the Directives, it creates *de facto* substantial differences in Member States' practices, which in turn can lead to inconsistent implementation of the *acquis* throughout the EU (for further analysis, see Section 5.3 and the 'may' clauses transposition tables for each migration phase in Annex 8).

Figure 12 shows the total number of transposed 'may' clauses by Member State. According to the analysis carried out for this fitness check¹³⁴, Member States have largely opted to implement the more restrictive 'may' clauses.

Figure 12. 'May' clauses transposed in Member States



National parallel schemes

An important aspect of coherence between the EU and national legal migration frameworks is the **coexistence of EU and national permits**. National parallel schemes are currently allowed under the LTRD and the BCD.

a) LTR Directive

Harmonisation of the terms for acquiring LTR status is an explicit objective of the LTRD. However, the Directive also allows Member States in parallel to continue issuing national permits of permanent or unlimited validity. A 2016 survey¹³⁵ and Eurostat data¹³⁶ indicate that the **harmonisation efforts have not been entirely successful**. Only four Member States (AT,

¹³³ e.g. with regard to the SPD, nine Member States have transposed 'may' clauses in Article 12(2) restricting equal treatment as regards access to university grants, limiting family benefits and restricting access to housing.

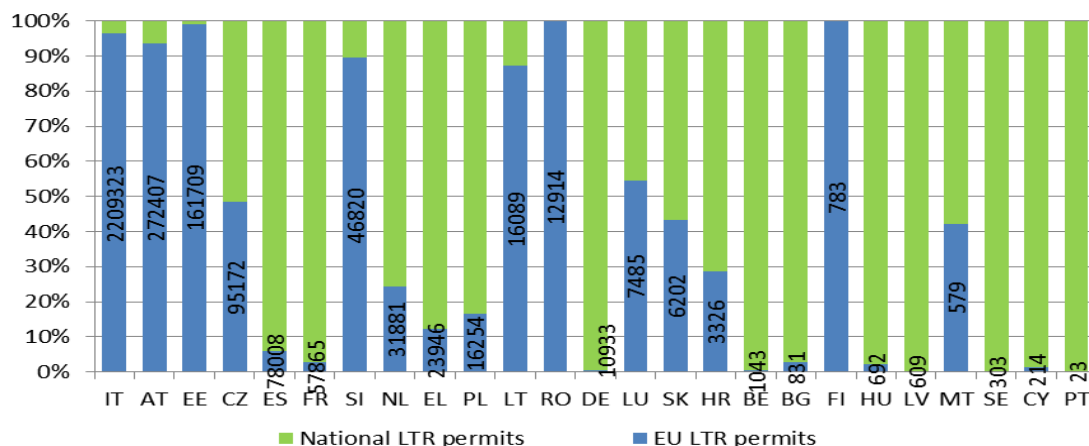
¹³⁴ ICF (2018), *Fitness check on legal migration – Task IV: final evaluation report*.

¹³⁵ EMN *ad hoc* query no. 2016.1000 on national residence permits of permanent or unlimited validity.

¹³⁶ Eurostat, 2016 [migr_reslong].

IT, LU and RO) no longer have national schemes, some have quite a fragmented framework (different national long-term or permanent residence permits issued on different grounds) and almost all others have issued very few EU LTR permits compared with national ones.

Figure 13. Distribution of EU LTR permits vs. national permits, 2017 (by Member State)¹³⁷



Furthermore, national permits are not always issued under conditions that are more favourable than those applying to the EU LTR permit; in some cases, they provide fewer rights, which in practice may mean that TCNs who would fulfil the conditions to be LTRs will not have access to the rights provided by EU LTR status. The OPC confirmed that both TCNs and competent national authorities are not sufficiently informed on EU LTR status and that burdensome procedures may be a deterrent to its application and use.

b) EU Blue Card Directive

According to the evidence provided for the impact assessment for the proposal to revise the BCD¹³⁸, the existence of parallel rules for the same objective (i.e. to attract more highly skilled people) is neither effective nor efficient. The complexity of the current regulatory framework for recruiting the same category of highly skilled worker creates costs and administrative burden, not only for the individuals concerned but also for employers, in particular SMEs, which have fewer resources than large companies to invest in support services (e.g. immigration lawyers). The competent Member State authorities would also find it easier to apply a single clear set of rules when examining applications from highly skilled workers. This is one of the factors that led the Commission to propose the abolition of parallel national schemes and introduce elements to improve the flexibility and attractiveness of the EU-wide scheme¹³⁹.

¹³⁷ Source: Eurostat [migr_reslong]. The data label indicates the absolute numbers of holders of EU LTR permits in each Member State (blue part) and the rest of the bar (green) the holders of national permanent residence permits.

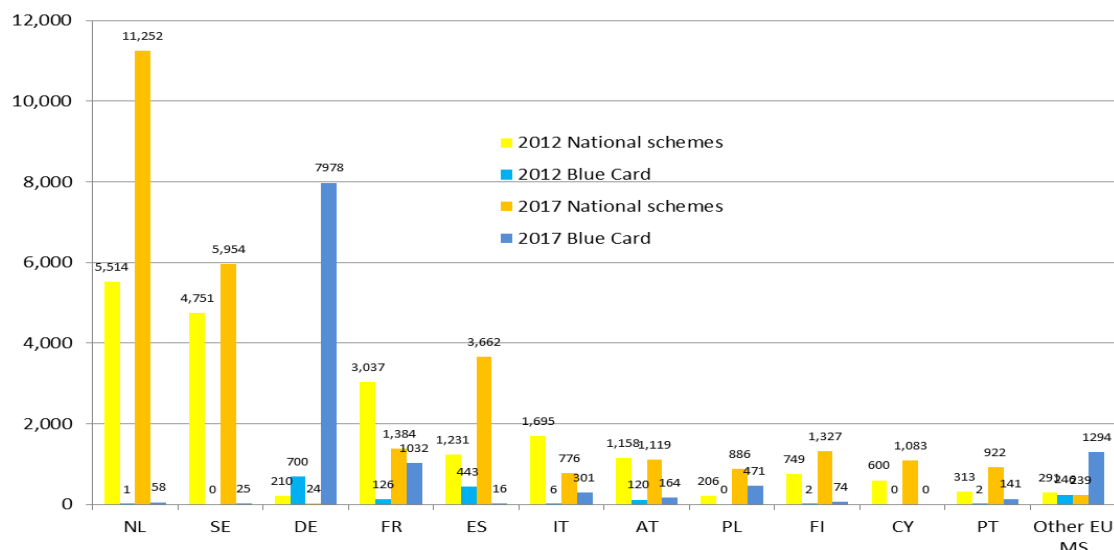
¹³⁸ SWD(2016) 193 final.

¹³⁹ In particular:

- a lower salary threshold, including for recent graduates;

Figure 14 shows the numbers of EU Blue Cards and national permits for highly skilled workers issued by the Member States from 2008 to 2017. While an increase can be seen for both types of permit, the relative proportion of BCD permits remains low and the vast majority are issued in one Member State (DE).

Figure 14. EU Blue Cards and national permits for highly-skilled workers issued as first permits by Member States, 2012 and 2017¹⁴⁰



The question of whether or not to allow parallel national schemes when the EU adopts common rules has been (and generally remains) highly controversial, including in the context of the ongoing EU Blue Card negotiations. Many Member States want to be able to maintain or introduce national schemes, since they consider this essential in order to have sufficient flexibility to address the changing needs of their national labour markets. On the other hand, the European Parliament has strongly opposed that, pleading for a harmonised European approach as the best way of attracting highly skilled workers to the EU¹⁴¹.

Other stakeholders are divided on the issue, as emerged clearly from consultations in the context of the EU Blue Card impact assessment. While over 53 % of respondents to the public consultation¹⁴² considered that one unified and visible EU-wide scheme without parallel national schemes would make the EU as a whole more attractive for highly qualified migrant workers, views depend on the type of stakeholder. Employers' views were split (around 43 % supported a unified EU-wide scheme, while around 40 % preferred to keep national schemes),

- simpler procedures for recognising qualifications;
- shorter processing deadlines; and
- easier access to a Member State's labour market and to long-term residence.

The new proposal would also considerably facilitate the intra-EU mobility of EU blue card holders.

¹⁴⁰ Source: Eurostat [[migr_resocc](#)], 25.9.2018. 'Other EU MS' refers to the other Member States applying the BCD.

¹⁴¹ The current EU Blue Card Directive was adopted just before the entry into force of the Lisbon Treaty, so the EP was not yet co-legislator and provided a (non-binding) opinion.

¹⁴² See the OPC carried out in the preparation of the proposal to revise the BCD.

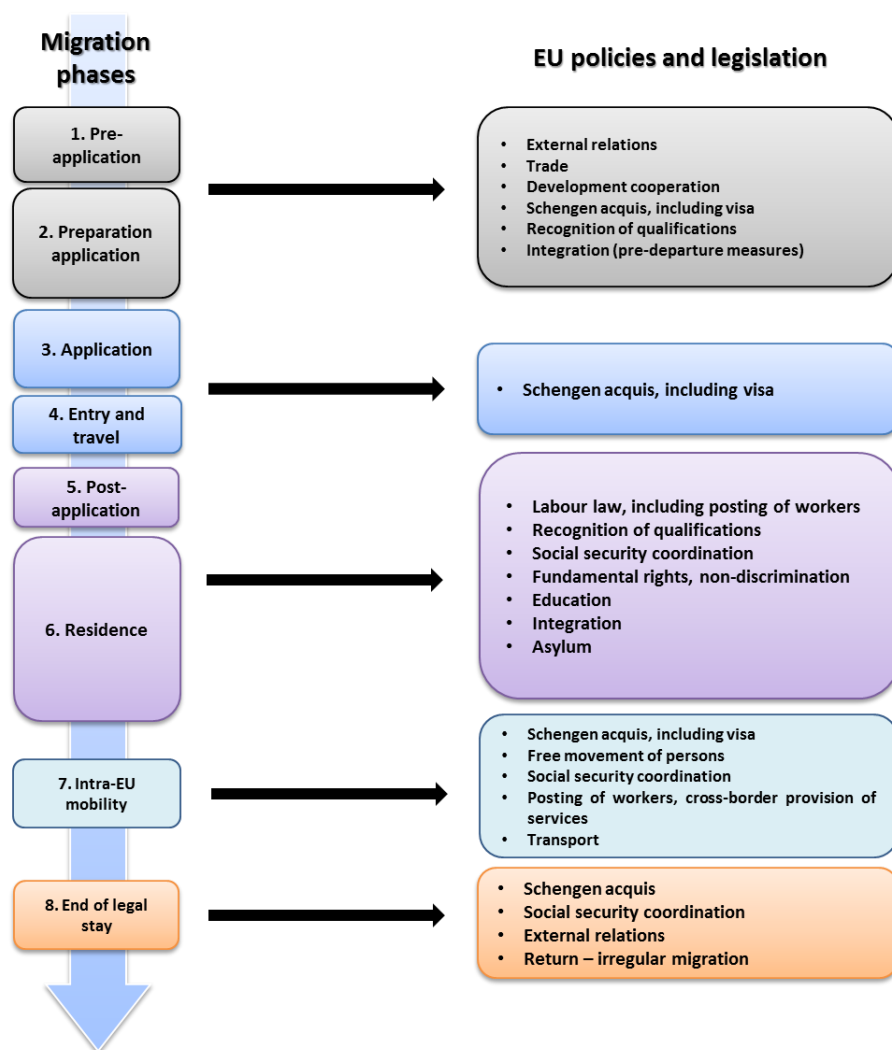
almost 60 % of academics and NGOs supported an EU-wide scheme only, while the majority of public authorities (60 %) preferred national schemes.

5.2.3 External coherence

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

The legal migration Directives interact with many other areas of EU policy and legislation, including the broader fields of migration and home affairs, justice and fundamental rights, employment, education and external relations. This analysis aims to highlight the key synergies and possible inconsistencies with those policies; the main conclusions are outlined below, while a **detailed external coherence analysis** is provided in **Annex 5.2**. Figure 15 indicates how the above policies are relevant to the different phases of the migration process:

Figure 15. External coherence intervention logic graph



A. Other home affairs policies

EU integration policy

Providing TCNs with fair treatment and rights through binding legal migration rules is a key factor for integration. Integration policy is of particular relevance during the residence phase, while some Member States also apply integration tests (language tests, civic knowledge tests) as part of the application procedure (pre-departure measures). One important aspect of interaction is the requirement for integration measures (included in the FRD and the LTRD), which Member State may choose to impose for the groups covered by the Directives. Studies¹⁴³ show that practices vary considerably across Member States; some have introduced mandatory integration programmes and requirements, others have voluntary programmes and the findings give a mixed picture as to the usefulness of such programmes, particularly the mandatory ones¹⁴⁴. However, several stakeholders, including the EESC, Member States and civil society representatives, recognised the value of the LTRD for the integration process.

The *limitations of rights* allowed in the Directives, notably as regards early access to work and waiting periods for family reunification, may be considered negative from an integration angle and from an economic perspective. Several civil society organisations argued this in the consultation process. However, these limitations may be justified by other considerations, such as a perceived need to protect national labour markets, avoid undue pull factors and uphold high levels of social welfare for the host country's nationals. The current situation is the result of these conflicting policy interests.

Incentives and support measures under EU integration policy (e.g. financial support, mutual learning between Member States) may *improve access to rights* under the legal migration Directives. For instance, projects aimed at the self-empowerment of migrants can help to make their access to their rights a reality.

EU asylum policy

The EU asylum *acquis* and the legal migration *acquis* are to a large extent stand-alone legal regimes. In the consultation process, there were several calls, in particular from some Members of the European Parliament and Member States' representatives, for keeping the two strands distinct. However, certain overlaps and coherence issues emerged, mainly as regards the rules on family reunification. Several stakeholders (in particular, representatives of the UNHCR and other civil society organisations) called for the more favourable family reunification rules currently granted only to refugees to be extended to BSPs (see Section 5.1.3.B); whereas Member States' representatives expressed general opposition to changes in the family reunification rules. Other aspects that emerged from the analysis are the possible challenges posed by dual status, in particular as regards:

¹⁴³ EMN synthesis report for *Focused study 2016: Family reunification of TCNs in the EU plus Norway*.

¹⁴⁴ See Annex 5, Section 5.2.1 for more details and Annex 7 on effectiveness.

- refugees who have also acquired LTR status;
- differences in the rights granted under the two *acquis*, including labour market access; and
- the situation of beneficiaries of purely national protection statuses¹⁴⁵.

Schengen acquis, including visa policy

The Schengen *acquis* consists of a wide range of legislation adopted to implement the Schengen Agreement¹⁴⁶. With the Amsterdam Treaty, it was decided to incorporate the whole (inter-governmental) Schengen *acquis* into EU law. The resultant legislation covers borders policy¹⁴⁷, visa policy¹⁴⁸, police cooperation, judicial cooperation, the databases supporting those policies¹⁴⁹, and funding¹⁵⁰. The origins of the Schengen *acquis* go back far further than those of the EU legal migration *acquis*, but the two have recently grown in parallel and influenced each other, interacting in a number of areas.

While the Schengen *acquis* covers the **conditions of entry of TCNs coming to the EU for less than 90 days**¹⁵¹, the legal migration *acquis* mostly regulates the admission and residence of those coming for more than 90 days, with the exception of the SWD, which also regulates admission for stays of less than 90 days.

The Schengen Convention allows Member States to extend TCNs' stay beyond 90 days in accordance with bilateral agreements concluded before its entry into force and notified to the Commission (Article 20(2)). Such **bilateral visa waivers** thus allow certain TCNs to stay more than 90 days without having to apply for a residence permit or a long-stay visa, thereby possibly circumventing the visa and EU legal migration *acquis*. However, once the Entry/Exit System enters into operation, extensions of the short stay under such agreements will be recorded in the latest relevant entry/exit record linked to the TCN's individual file, normally at the explicit request of the TCN. In its 2018 Communication on *Adapting the common visa policy to new challenges*¹⁵², the Commission indicated that further analysis of bilateral visa

¹⁴⁵ TCNs with a national humanitarian status (8 % of those granted protection in the EU in 2016, 15 % in 2017) are currently covered by national law only when it comes to determining their rights, since they are explicitly excluded from the scope of the SPD and none of the asylum Directives provides relevant rights.

¹⁴⁶ The original Schengen Agreement was signed in 1985 between the Benelux countries, Germany and France. The 1990 Convention implementing the Schengen Agreement put in place concrete policies on the abolition of internal borders, the issuance of uniform visas and other common rules. In 1999, the Treaty of Amsterdam incorporated the Schengen *acquis* into EU law.

¹⁴⁷ In particular, the Schengen Borders Code (Regulation (EU) 2016/399) and the Decision on a simplified regime for the control of persons at the external borders (Decision No 565/2014/EU).

¹⁴⁸ In particular, the Visa Code (Regulation (EC) No 810/2009), the Regulation on the uniform format for visas (Regulation (EC) No 1683/95) and the Regulation listing the third countries whose nationals must be in possession of visas (Regulation (EC) No 539/2001).

¹⁴⁹ The Schengen Information System, the Entry-Exit System, the Visa Information System.

¹⁵⁰ The Internal Security Fund.

¹⁵¹ Under the Visa Code, a short-stay visa issued by one of the Schengen states entitles its holder to travel for up to 90 days in any 180-day period.

¹⁵² COM(2018) 251 final.

waiver agreements is needed. The Commission will launch a reflection on the possible form and scope of a future EU instrument to replace them, *inter alia* by studying options for visa-free stays of over 90 days for nationals of selected third countries. The Communication also stressed the need to look at the coherence between visa and legal migration policies, and commitments made in other policy areas, notably trade agreements, to analyse how to strengthen synergies in particular with regard to service providers.

The **Schengen Information System (SIS)** also plays a role in the legal migration *acquis*. Article 25(1) of the Schengen Convention provides that ‘where a Member State considers issuing a residence permit, it shall systematically carry out a search in the Schengen Information System’ (all legal migration Directives provide that TCNs who are a threat to public policy, public security and public health are not to be granted admission – a SIS alert can be an indication of such a threat).

There are also important interactions with regard to the rules on **intra-EU mobility**. Under Article 21 of the Schengen Convention, TCNs who hold valid residence permits or long-stay visas issued by one of the Member States may move freely for up to 90 days in any 180-day period. However, the ICTD and the S&RD have to date provided for **more favourable mobility provisions** as regards the duration of stay in other Member States. Independently of the Schengen *acquis*, they allow TCNs covered under their rules to move and work across Member States for longer periods¹⁵³. To address the unavoidable complexity of these rules when TCNs cross an external border, the Commission has amended the *Practical handbook for border guards* accordingly¹⁵⁴.

EU policy on irregular migration

One of the main interactions between the legal migration and the irregular migration *acquis* relates to situations of transition from legal to irregular status, and *vice versa*.

In the first situation, the most relevant piece of legislation is the **Return Directive**¹⁵⁵, which complements the legal migration Directives by establishing rules for returning TCNs who do not, or no longer, have authorisation or a right to stay in the EU. The analysis has shown that, in spite of this complementarity, there are still gaps, namely:

- the practical challenges faced by Member States in conducting ‘taking back’ procedures to another Member State in respect of a TCN with a permit to stay in that State; and

¹⁵³ The ICTD allows for a stay of up to 90 days per Member State in a second Member State. Under the S&RD, researchers are entitled to stay for up to six months in a second Member State. Students who are covered by a Union or multilateral programme that comprises mobility measures or by an agreement between two or more higher education institutions are entitled to stay for up to 360 days in a second Member State.

¹⁵⁴ *Practical handbook for border guards (Schengen Handbook)* (C(2006) 5186 final).

¹⁵⁵ Directive 2008/115/EC.

- the lack of options faced by a Member State when a TCN who has a residence permit in another Member State takes advantage of the Schengen area by repeatedly coming back irregularly to the Member State in which he/she has been issued with a return decision¹⁵⁶.

The situation of **TCNs who are not returned** and for whom there is not a reasonable prospect of removal is currently decided solely at national level. The range of approaches for dealing with those third country nationals may constitute an incentive for secondary movements, since such migrants may try to move to the Member States that offer the best conditions of stay. In addition, some stakeholders (in particular civil society organisations)¹⁵⁷ have argued that the large numbers of TCNs in such a situation, with few rights and limited possibility to work, contribute to a negative public perception of migration and undermines public acceptance of a sustainable EU migration policy as a whole, and that common standards granting at least certain categories of TCN a right to work could help to alleviate this phenomenon. However, Member States expressed concern that such an approach could become a pull factor for irregular migration (see also Section 5.1.3).

Another important means of addressing one of the pull factors of irregular migration is EU action against the illegal employment of illegally staying migrants, as regulated by the **Employers Sanctions Directive**¹⁵⁸, which provides for:

- sanctions (including criminal penalties) against abusive employers;
- monitoring and inspections; and
- the protection of exploited workers' rights (e.g. back-payments, facilitation of complaints).

This Directive allows Member States not to prohibit the employment of illegally staying TCNs whose removal has been postponed and who are allowed to work in accordance with national law; this is notably the case of TCNs who, although illegally staying, have been granted a tolerated status accompanying the postponement of removal.

B. Free movement, non-discrimination and fundamental rights

The construction of an area of freedom, security and justice under Title V TFEU, including the setting-up of a common immigration policy, is based on the full respect of **fundamental rights**. However, the EU Charter of Fundamental Rights (CFREU) and the European Convention on Human Rights (ECHR) give guidance on the possibilities and limits for the legitimate differentiation of TCNs' rights as opposed to EU citizens' rights.

¹⁵⁶ Currently, these 'taking-back' procedures lack a harmonised procedural framework; Member States have raised this as a practical problem in contact group meetings with the Commission.

¹⁵⁷ See [report on the fourth meeting of the European Migration Forum](#) and the conclusions of Workshop 3a.

¹⁵⁸ Directive 2009/52/EC (Employers Sanctions Directive).

Article 18 TFEU (interdiction of any discrimination on grounds of nationality) has been interpreted by the CJEU as allowing for different treatment of EU citizens and third-country nationals¹⁵⁹. Article 21 of the Charter (non-discrimination on other grounds than nationality) does not mention discrimination based on nationality and the EU anti-discrimination Directives (2000/78/EC and 2000/43/EC) both contain a provision according to which the Directives do not cover differences of treatment based on nationality and are without prejudice to provisions and conditions relating to the entry into and residence of TCNs in the territory of Member States. It results that *different treatment of TCNs is not per se illegal* unless such differing treatment constitutes discrimination based on race or ethnic origin.

However, according to the CJEU case-law, the principle of equality enshrined in Article 20 of the Charter is still applicable to TCNs, which implies that any different treatment of TCNs in respect to nationals of Member States must be justified by a legitimate objective and be proportionate¹⁶⁰. While it can be understood and accepted that migrants do not enjoy the same level of rights than citizens, it is important that the differentiation of rights can be explained and justified by legitimate considerations and that it is done in a proportionate manner¹⁶¹. The legal migration Directives establish how far TCNs enjoy – or do not enjoy – rights similar to those enjoyed by the host country nationals. They can therefore be characterised as a fine-tuning of legitimate differences in treatment.

Differences in treatment between EU citizens and TCNs in relation to **intra-EU mobility rights** do not give rise to coherence issues, as differentiations on the basis of nationality between EU citizens and TCNs are not prohibited *per se* and, in any case, the freedom of movement of the former derives from the Treaty (Articles 21 and 45 TFEU), whereas the right of the latter to intra-EU mobility derives from secondary legislation adopted under Article 79(2)(b) TFEU.

While no inconsistencies have been identified between EU legal migration and free movement legislation, synergies have been found in some cases, e.g. the CJEU has sometimes applied its case-law on the **Free Movement Directive**¹⁶² (by analogy) to similar provisions in the migration *acquis*.

The current EU legal migration *acquis* also fully respects the **right to family life**, as set out in Article 7 CFREU and Article 8 ECHR, and goes beyond the minimum requirements of ECtHR case-law. Nevertheless, as noted in Section 5.1.3, there is currently a gap concerning the admission of third-country family members when the sponsor is a non-mobile EU citizen (and thus does not fall within the scope of any EU legislation).

¹⁵⁹ See Judgment of the CJEU of the 4 June 2009, *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, C-22/08 and C-23/08, para. 51-52.

¹⁶⁰ For instance, the CJEU has considered that a civic integration obligation does not infringe equality before the law enshrined in Article 20 of the Charter, in the *P and S case*, C-579/13, para. 41-43.

¹⁶¹ See Judgment of the CJEU of 22 May 2014, *Wolfgang Glatzel v Freistaat Bayern*, C-356/12, para. 43.

¹⁶² Directive 2004/38/EC.

The EU legal migration *acquis* also respects the **right to property** (Article 17 of the Charter), which includes as well the right to receive social benefits for which the beneficiary has paid contributions¹⁶³ (for implementation, see relevant analysis on equal treatment in Sections 5.2 and 5.3).

C. Employment policies

Employment and labour policies have significant interactions with the migration *acquis*, particularly with regard to labour migration.

First, labour migration is one means of potentially addressing skills and labour shortages in a country's labour market, together with policies aimed at upskilling the domestic labour force and increasing productivity and labour market participation¹⁶⁴. Therefore, it is essential to ensure close coordination between skills and employment policies, on the one hand, and (labour) migration policy, on the other. Currently, this coordination is ensured to some extent only and mostly in a 'protection' perspective, e.g. the possibility of applying a labour market test to limit the impact on EU labour markets of admitting third-country workers.

Secondly, most policy and legal instruments developed in the area of employment are not limited to EU citizens and are therefore relevant also to TCNs. For example, the European employment strategy¹⁶⁵ and the European pillar of social rights¹⁶⁶ also cover TCNs. The recently proposed European Labour Authority Regulation¹⁶⁷ also covers mobile TCNs. The European Social Fund (ESF) benefits TCNs, including refugees and asylum seekers, by helping them integrate into the labour market, and favours the social inclusion of vulnerable migrants¹⁶⁸.

In terms of legislation, with few exceptions, EU labour law has a broad personal scope, covering all individuals employed in the EU, whether or not they are EU citizens. This applies, for example, to all Directives on:

- working conditions (including health and safety at work, working time and temporary agency work);
- the information to be provided to workers; and
- the posting of workers.

¹⁶³ The ECtHR has ruled that depriving a person from his/her entitlements to social security benefits on the basis of nationality was contrary to his/her right to property (where social benefits result from paid contributions) and constituted discrimination (see *Gaygusuz v. Austria*, 17371/90, ECtHRs, 16 Sept 1996; *Niedzwiecki v. Germany*, 58453/00, ECHR, 25 October 2005).

¹⁶⁴ See, for example, the *Report on employment and social developments in Europe* (2017).

¹⁶⁵ *Guidelines for the employment policies of the Member States* (COM(2017) 677 final).

¹⁶⁶ https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en

¹⁶⁷ Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority (ELA), (COM(2018)131 final). However, the ELA will have competence for cross-border cases only.

¹⁶⁸ The ESF legal basis allows addressing all relevant groups – both EU and non-EU nationals - according to mainstreamed employment, skills and social inclusion challenges.

This means that all the rights and safeguards enshrined in such instruments also apply to third-country workers and contribute to their fair treatment in the EU. However, other instruments, which are closely linked to the free movement of workers and thus concern EU citizens only, do not apply to TCNs. This is the case, for example, of the rules on social security coordination – a specific Regulation had to be adopted to extend their scope to TCNs moving within the EU¹⁶⁹.

As regards **facilitation of labour mobility and job-matching** within the EU, the main relevant instrument is the EURES Regulation¹⁷⁰, which is also linked to the free movement of workers and applies mainly to EU citizens. However, a recital in the Regulation invites Member States to ‘give the same access to any third-country national benefiting, in accordance with Union and national law, from equal treatment with their own nationals in that field’.

In practice, national arrangements exist to make sure that TCNs legally residing in a Member State have access to the services provided by the public employment services to facilitate their intra-EU mobility; this was confirmed by the national public employment services participating in the consultation process. However, the automated job-matching provided by EURES and the related advice function provided to users are currently limited to EU citizens.

Posting of workers

TCNs *residing in the EU* are covered by the **Posted Workers Directive** (PWD)¹⁷¹ when posted to a Member State other than the one that issued them with a permit or visa, whereas the **ICTD** covers highly qualified third-country workers *residing in third countries* and posted to the EU, so their labour contract is with the employer based in a third country. The Directives’ provisions on the workers’ rights are broadly aligned, with one exception: Member States can check upon admission that the level of the remuneration of the ICT is ‘not less favourable’ than that granted to nationals of the host Member State occupying comparable positions¹⁷². This is aimed at avoiding abuse and ensuring better protection for ICTs.

The PWD is nationality-neutral: this means that it covers TCNs employed by a company in one Member State and posted to another, in the same way as EU citizens. The PWD does not regulate, or affect rules on, visas and other immigration requirements, but some CJEU case-

¹⁶⁹ Regulation (EU) No 1231/2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to TCNs who are not already covered by these Regulations solely on the ground of their nationality.

¹⁷⁰ Regulation (EU) 2016/589 of the European Parliament and of the Council of 13 April 2016 on a European network of employment services (EURES), workers’ access to mobility services and the further integration of labour markets, and amending Regulations (EU) No 492/2011 and (EU) No 1296/2013 (OJ L 107, 22.4.2016, p. 1).

¹⁷¹ Directive 96/71/EC (Posted Workers Directive), as amended by Directive (EU) 2018/957.

¹⁷² The implementation of the revised PWD will ensure that posted workers receive all elements of remuneration, including different allowances if such rules exist in the host Member States.

law¹⁷³ has sought to clarify the relation between the two. Lastly, TCNs posted from outside the EU, in cases that do not fall within the scope of the ICTD (see Section 5.1), are currently not covered by EU legislation, except for the general principle that undertakings in third countries should not be treated more favourably than Member States' undertakings (Article 1(4) PWD).

Coordination of social security systems

The EU rules on the coordination of social security interact with legal migration rules in various ways:

- they identify the branches of social security to be covered by the relevant **equal treatment** provisions in the legal migration Directives¹⁷⁴; and
- the Regulation¹⁷⁵ extending the scope of the social security coordination rules to TCNs allows mobile TCNs to benefit from the EU social security coordination rules when they move between Member States.

However, as social security coordination rules apply in cross-border situations and the legal migration framework regulates primarily situations limited to one Member State, this might lead to inconsistencies between the two frameworks (see Annex 5, Section 5.2.6.2).

Prevention of abuse and exploitation

Preventing the abuse and exploitation of legally residing TCNs is highly relevant in relation to the overall objectives of the legal migration *acquis* and an aspect underlined by most stakeholders consulted, in particular the EESC, trade unions and civil society representatives. The equal treatment provisions of the legal migration Directives are an important tool in this respect, but they address the problem only partially, since they do not cover all TCNs who work in the EU (e.g. the self-employed are excluded) and in some cases they are subject to limitations. Moreover, the legal migration Directives – except the SWD –

¹⁷³ See, for example, the judgments in Cases C-43/93 *Vander Elst* and C-445/03 *Commission v Luxembourg*. In those cases, the Court took the view that workers who were regularly and habitually employed by a service provider established in a Member State (country of origin) could be posted to another Member State (host country) without being subject in the latter State to administrative formalities, such as the obligation to obtain a work permit.

¹⁷⁴ Article 3 of Regulation (EC) No 883/2004 establishes that the coordination rules apply to 10 branches of social security, namely:

- a) sickness benefits;
- b) maternity and equivalent paternity benefits;
- c) invalidity benefits;
- d) old-age benefits;
- e) survivors' benefits;
- f) benefits in respect of accidents at work and occupational diseases;
- g) death grants;
- h) unemployment benefits;
- i) pre-retirement benefits; and
- j) family benefits.

¹⁷⁵ Regulation (EU) No 1231/2010.

do not require Member States to provide for monitoring mechanisms (e.g. inspections), sanctions against employers who do not comply with the equal treatment provisions or specific protections such as the right to decent housing.

Other EU policies and legislation therefore also play a very important role in addressing certain aspects of the problem. The **European platform on undeclared work**¹⁷⁶ considers migrant workers as particularly vulnerable to the effects of undeclared work (in which both legally residing TCNs and EU nationals may be involved) and supports strengthening of Member States' capacity to ensure equal treatment, notably as regards pay and working conditions, social security and tax benefits. The measures provided for in the **Anti-Trafficking Directive**¹⁷⁷ also benefit victims of trafficking who are holders of a residence permit under the legal migration Directives. The **Employers Sanctions Directive** also protects the rights of exploited workers who are irregular migrants.

D. EU policies on education, research, qualifications and skills

Higher education and research policy

In recent years, EU higher education policy has experienced a drive to greater internationalisation, supporting the mobility of students, staff and researchers as a way to develop their experience and skills. In this context, the regulation of admission conditions for students and researchers, and of their rights (particularly the right to intra-EU mobility) is crucial.

Difficulties in securing visas for foreign Erasmus+ scholars or in moving easily from one European university to another are among the main reasons that led the Commission to propose a revision of the SD and the RD. The new S&RD provides, *inter alia*, for:

- more flexible admission conditions;
- enhanced rights to intra-EU mobility (particularly for researchers); and
- the possibility for TCNs to stay for nine months after completion of their studies or research to look for a job or set up a business.

In consultation interviews, several national education authorities confirmed the importance of attracting students and researchers to the EU in the framework of the internationalisation strategy and as a means of financing universities and science. They emphasised that the S&RD is relevant for their needs, in particular with regard to the extended right of access to employment and self-employment, and intra-EU mobility. This was confirmed by the European Trade Union Committee for Education¹⁷⁸, which emphasised that the internationalisation of European higher education is essential for universities, students and staff.

¹⁷⁶ Established by Decision (EU) 2016/344.

¹⁷⁷ Directive 2011/36/EU.

¹⁷⁸ ETUC contribution to the public consultation.

Recognition of professional qualifications and diplomas, transparency and validation of skills

Directive 2005/36/EC on the **recognition of professional qualifications** facilitates the automatic recognition of EU qualifications for the exercising of certain regulated professions (e.g. nurses, doctors, architects) in the Member States and provides a general framework for the recognition of the qualifications for other professions in the EU. It is also relevant for TCNs and for the functioning of the intra-EU mobility arrangements in the legal migration Directives, as it grants easier recognition in a second Member State if a third-country qualification was previously recognised in a first Member State where an occupation has been exercised for at least three years.

Thanks to the equal treatment provisions in the legal migration Directives, TCNs who are already legally residing in a Member State can benefit from the recognition of qualifications they have obtained in another Member State or elsewhere under the same conditions as EU nationals. However, the main gap in the current legislation is that during the application and intra-EU mobility phases (when the TCN is most likely to apply for a job in a Member State where he/she does not reside and when the recognition is therefore most needed), no EU legal provisions cover the recognition of the professional qualifications that TCNs have obtained in a third country or another Member State. Depending on the laws of the country of destination, TCNs may therefore face more onerous requirements than EU citizens holding similar EU qualifications.

There is **no automatic EU-wide recognition of academic diplomas** obtained in third countries. However, the Council of Europe/UNESCO Lisbon Recognition Convention¹⁷⁹ aims to guide recognition practice in 54 signatory countries, supported by the ENIC-NARIC network¹⁸⁰.

In May 2018, the Commission presented a proposal for a Council Recommendation on promoting automatic mutual recognition of higher education and upper secondary education and training qualifications and the outcomes of learning periods abroad. On 26 November 2018, the Council unanimously adopted the Recommendation in which Member States make a political commitment towards achieving automatic mutual recognition of higher and upper secondary education qualifications and the outcomes of learning periods abroad by 2025, which also covers TCNs who hold a qualification from one Member State and move to another Member State¹⁸¹. However, as uncertainty as to the value of foreign qualification is the main obstacle, the situation for those holding third-country diplomas depends mainly on whether the signatory has developed tools to identify and assess the value of foreign qualifications. There is currently no EU-wide tool to assess the value of foreign qualifications or to share information across Member States about the outcomes of any procedures.

¹⁷⁹ The [Convention on the recognition of qualifications concerning higher education in the European region](#) was adopted on 8-11 April 1997 and since then ratified by all EU Member States.

¹⁸⁰ European national information centres (ENICs) in all signatory countries of the Lisbon Recognition Convention and national academic recognition information centres NARICs).

¹⁸¹ COM(2018) 270 final, recital 11.

Beyond formal qualifications, several non-legislative measures have been developed at EU level to facilitate the transparency and comparability of qualification frameworks (as a step to facilitating formal recognition) and the validation of non-formal skills. In particular, in the context of the **2016 EU skills agenda**, a new (May 2017) Recommendation on the European qualification framework (**EQF**) involves enhancing the use of the EQF as a reference point for third countries, helping to improve mutual understanding of qualification systems¹⁸². In the consultation process, the European Training Foundation proposed concrete action to improve the situation, in particular to encourage Member States to use the EQF when implementing the current Directives or future legislation. Also, an EU Skills Profile Tool for third-country nationals was launched in 2017. This is an online multilingual tool helping to identify and map skills and qualifications of TCNs. It is currently being rolled-out with organisations that directly support refugees and asylum seekers¹⁸³.

One important element in the validation of non-formal skills is the **Europass framework**¹⁸⁴, which was also revised in 2018. While this is mainly aimed at facilitating intra-EU mobility, it can also facilitate the documentation of the skills of TCNs, in particular those already residing in the EU¹⁸⁵.

Migration Research funded under the Framework Programmes for Research and Innovation

The work funded under the Framework Programmes for Research and Innovation, such as Horizon 2020, is very relevant in the development of EU legal migration policy¹⁸⁶. Coherence should be maximised to the best extent possible with the findings of the research financed, whose aim is to develop relevant research to provide information to policymakers.

E. EU external policies

The Global Approach to Migration and Mobility and the Partnership Framework

By the very nature of migration, its management requires the EU to interact and cooperate with the countries from which the migrants originate and through which they transit. Clearly, various aspects of EU **external policies** (in particular on **development and trade**) have an impact on migration and there are therefore numerous interactions, and often synergies with the legal migration *acquis*.

Building on the 2005 Global Approach to Migration and Mobility¹⁸⁷, the EU has put in place a partnership framework approach under the European Agenda on Migration¹⁸⁸, which reiterated the need for a comprehensive approach on migration management, putting

¹⁸² See recommendation 13 in the Council Recommendation of 22 May 2017 on the EQF for lifelong learning.

¹⁸³ <https://ec.europa.eu/migrantskills>

¹⁸⁴ <https://europass.cedefop.europa.eu>

¹⁸⁵ See, in particular, points d and g in Article 3(2) of the Europass Decision ((EU) 2018/646).

¹⁸⁶ See e.g. the Horizon 2020 Work programme 2018-2020, https://ec.europa.eu/research/participants/data/ref/h2020/wp/2018-2020/main/h2020-wp1820-societies_en.pdf

¹⁸⁷ https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en

¹⁸⁸ COM(2016) 385 final.

migration at the top of the external relations agenda with key countries of origin and transit. However, the ‘legal migration pillar’ of this comprehensive approach has always been (and is likely, for the foreseeable future, to remain) difficult to develop and implement. This is due, in the first place, to the fact that the competence on the numbers of migrants to admit for economic purposes is in the hands of the Member States, as well as to some Member States’ desire to maintain privileged bilateral relations with specific third countries.

The implementation of the Joint Valletta Action Plan with African countries¹⁸⁹ and the initial difficulties in launching pilot projects on legal migration with selected third countries¹⁹⁰ have confirmed the difficulty of ‘Europeanising’ the issue, even just in terms of coordinating national offers and projects at EU level. Nevertheless, legal pathways are an essential element of the EU’s migration management, as a disincentive to use irregular routes, and a demonstration of the EU’s commitment to genuine long-term partnerships with countries of origin and transit, allowing to establish a cooperative, ‘win-win’ relationship addressing both parties’ interests.

The EU’s external policies are also relevant to addressing **climate change and environmentally induced migration**¹⁹¹. While the adaptation responses would include measures such as international protection and resettlement, the wider migration and development perspective as set out in EU external policies is of relevance in this context, including the need to foster mobility and facilitate labour migration.

Development cooperation

Legal migration has important synergies with EU development policy: migrants have the potential to generate various forms of human, social and financial ‘capital’ that can be transferred to, and contribute to the development of, their countries of origin. The development impact of migration can be positive if the migrants’ social, financial, human and cultural capital is recognised and if they are better protected and integrated along their migratory routes¹⁹². This is why it is essential to promote synergies between the two policies, e.g. by continuing to implement initiatives to reduce transfer costs for remittances, enhancing dialogue with diasporas and **preventing brain drain**.

On this latter aspect, since the 2005 Communication on *Migration and development*, the Commission has encouraged Member States to develop mechanisms to limit active recruitment when it may harm certain targeted developing countries, and to support the

¹⁸⁹ https://www.consilium.europa.eu/media/21839/action_plan_en.pdf

¹⁹⁰ This initiative was launched by the Commission in its Communication on *The delivery of the European Agenda on Migration* (COM(2017) 558 final). As of March 2019, three pilot projects have been launched/are being implemented and two others are under evaluation.

¹⁹¹ See European Commission, *Climate change, environmental degradation and migration* (SWD(2013) 138 final).

¹⁹² Commission Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Migration and development: some concrete orientations* (COM(2005) 390 final) and SEC(2011) 1353 final.

voluntary adoption and implementation of the WHO code of practice on the international recruitment of health personnel. In terms of the legal migration *acquis*, only the BCD explicitly provides Member States with options for ensuring ethical recruitment in sectors suffering from a lack of personnel in developing countries, but it does not provide for the specification of enforcement mechanisms. In any case, this issue did not emerge as particularly problematic in the stakeholder consultations.

Circular migration could create a ‘triple win’ scenario – and also help to attenuate brain drain – provided that it leads to empowerment, training opportunities, the portability of migrants’ knowledge and skills, and enhanced employability on their return. It is explicitly facilitated in the SWD, which requires each Member State to facilitate the re-entry of seasonal workers whom it has admitted at least once in the previous five years.

Trade policy

The main interaction of the legal migration Directives with EU trade policy relates to the entry and stay of natural persons for business purposes and service provision under the WTO/GATS and the trade in services chapters of bilateral free-trade agreements.

Free-trade agreements, in particular those negotiated by the EU, tend to steer clear of migration policies by adopting different vocabulary (‘professionals’ vs. ‘workers’, ‘mobility’ vs. ‘migration’) and underlining the temporary nature and specific purpose of stays. However, the effects of their liberalisation measures on the entry and temporary stay of natural persons for business purposes can be hampered if adequate admission policies are not put in place in the host countries. In general, rules on the admission of TCN service suppliers (apart from ICTs) remain fragmented and vary by country (see Section 5.1), as confirmed in the consultation by experts, business representatives and some Member States.

Non-reciprocity of the legal migration acquis

A crucial point that emerged from the evaluation is that **EU legal migration law is ‘non-reciprocal’**. Unlike the rules on short-stay visas (which involve specific mechanisms to ensure reciprocity of treatment for EU nationals when lists of ‘visa-free’ and ‘visa-required’ third countries are drawn up), legal migration rules do not require third countries to ensure the same treatment for EU nationals migrating there for study, work or other purposes.

Under EU legal migration law, all TCNs are subject to the same rules and those who fulfil the requirements set out in the Directives are admitted, irrespective of their country of origin. However, most legal migration Directives allow Member States (or the EU as a whole) to keep in place *more favourable provisions* to nationals of certain third countries under existing bilateral or multilateral agreements, but they do not allow for the application of *less favourable provisions*. Therefore, while the current *acquis* gives the EU the option of granting more favourable treatment as an incentive in the context of its overall bilateral relations with third countries (i.e. facilitate legal migration in return for well-functioning cooperation in

other fields, such as readmission), doing the opposite would require a fundamental change of the existing legal migration Directives..

In the context of recent irregular migration challenges, repeated political calls have been made¹⁹³ for the EU and the Member States to use appropriate leverage tools to facilitate third countries' cooperation on readmission. In response, in March 2018 the Commission put forward a proposal amending the Visa Code¹⁹⁴, *inter alia* by establishing a clear link between the visa issuance policy towards a third country and the extent of its cooperation on readmission.

5.3 Effectiveness

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

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

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

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

The legal migration Directives have three overarching policy objectives:

1. to ensure the **efficient management of migration flows in the EU** through the approximation and harmonisation of Member States' national legislation;
2. to ensure **fair treatment** for categories of TCN subject to the EU legal migration *acquis*; and
3. to strengthen the **EU's competitiveness and economic growth**.

These general objectives, and the more specific objectives (see Section 2.1.1), interact and are mutually reinforcing. The effectiveness analysis of the first two objectives focuses on measuring the direct impact of the Directives, by comparing it either to the baseline or to the intended effect. As the third objective is broader, the Directives contribute to its achievement in a more limited way, by helping to address EU labour and skills shortages through legal migration.

The effectiveness analysis aimed to establish:

¹⁹³ JHA Council Conclusions of 8-9 June 2017 and European Council meeting of 22 and 23 June 2017.

¹⁹⁴ COM(2018) 252 final.

- the extent to which the above objectives have been achieved, taking into account the implementation of the relevant Directives (i.e. FRD, LTRD, SD, RD, SPD and BCD)¹⁹⁵;
- the impact of the *acquis* in the achievement of the objectives, considering the limitations of the Directives in terms of both material and personal scope; and
- the impact of external factors beyond the remit of EU legal migration policy, bearing in mind the difficulty of disentangling the effects of the legal migration Directives from the overall impact of migratory flows¹⁹⁶.

Figure 16 gives an indication of the legal baseline in the Member States for the main provisions of the Directives, prior to their introduction.

Figure 16. Qualitative baseline legal status – existence of schemes at the time of the relevant proposals

Directive ¹⁹⁷ Type of provision	FRD (1999) (EU-12) ¹⁹⁸	LTRD (2000) (EU-12)	SD (2001) (EU-12)	RD (2004) (EU-12)	BCD (2007) (EU-24)	SPD (2007) (EU-24)
Specific admission conditions	All Member States had schemes, but there was no specific legal instrument in EL, CY, MT and RO.	All Member States had a scheme providing some kind of permanent residence status.	All Member States had relatively open admission policies for TCNs for <u>study</u> purposes or vocational training. Two distinguished between paid and unpaid <u>traineeships</u> . Two had not defined this category in their statutory law prior to the adoption of the Directive. In four, <u>au</u>	Six Member States did not have specific schemes. Four had no specific legislation.	All Member States had schemes in place for admitting TCNs for purpose of work. 14 did not have specific schemes for the highly skilled.	N/A

¹⁹⁵ The effectiveness analysis does not cover the SWD, ICTD and S&RD, given their recent entry into force and the lack of implementation experience by Member States.

¹⁹⁶ See Annex 7 for more details and background on the various aspects.

¹⁹⁷ Baseline year of the Directive = year of the proposal.

¹⁹⁸ 'EU-12' refers to the Member States at the time, excluding DK, IE and UK.

			<u>pairs</u> were not required to have a work permit.			
Single application procedure & single permit (SPD) Harmonised procedures and safeguards.	No other baseline information found.	No other baseline information found.	Students were required separate work and residence permits in over half of the Member States (see SPD requirement or combined permits). No other baseline information found.	No other baseline information found.	No other baseline information found.	10 Member States had a single application procedure for a combined permit.
Equal treatment	N/A	Almost all Member States offered long-term residents the same or similar social security rights as their own nationals (while AT, EL and LU granted social assistance to nationals only).	N/A	No information found		Working conditions and education were generally granted in all Member States. 17 Member States did not exclude TCNs from social security benefits (but only DE, CZ, ES FI, PT and SK allowed for the export of statutory pensions to third countries). Access to public services was limited in most Member States (TCNs seem to have had widespread access in EL, FR and IT only).

5.3.1 Ensure the efficient management of migration flows in the EU through the approximation and harmonisation of Member States' national legislation

The Directives introduced common admission and residence conditions, and fair and transparent application procedures, in order to achieve more efficient management of migration flows. A direct consequence of this objective is establishing a level playing-field *between* and *within* Member States. Harmonised admission conditions and rights help to avoid distortions of the internal market as a result of different rules between Member States, and within Member States they help to prevent unequal treatment of TCNs.

Although several of the rules on admission and residence conditions, application procedures and procedural safeguards were already in place in the Member States by the time of adoption of the respective proposals (see Figure 16), the implementation of the Directives has led to a certain approximation and harmonisation of such rules. However, the limitations linked to the sectoral approach, the maintenance of parallel national schemes and the existence of numerous optional clauses have led to some fragmentation in the way the Directives are implemented and hampered to a certain extent the full achievement of this objective.

Admission conditions

The main purpose of achieving efficient management of migration flows is to ensure that TCNs enter and reside in the EU on comparable grounds, regardless of the Member State of destination, and to avoid distortions of competition between Member States. Common admission conditions are important, given the rights to short-term or long-term intra-EU mobility provided by the Directives¹⁹⁹, and they also provide TCNs with more legal certainty and predictability.

All Member States have transposed common conditions for the admission of TCNs into national law and this has increased legal certainty for applicants, authorities and businesses²⁰⁰, since Member States are not allowed to establish additional conditions, as confirmed by the CJEU in *Ben Alaya*²⁰¹. With the exception of the admission and residence conditions under the BCD and LTRD (which allow parallel national schemes), the Directives have been found to fully cover their intended target groups.

Nevertheless, the full achievement of the objective of ensuring the efficient management of migration flows through common EU-level admission conditions has been hampered by a number of factors:

- Firstly, the Directives introduced **admission conditions** only for some categories of TCNs. This, together with the possibility to keep **parallel national schemes** for certain categories covered by the EU rules implied that a large number of TCNs can be

¹⁹⁹ For details on intra-EU mobility, see the sections on internal and external coherence (Schengen mobility).

²⁰⁰ See Annex 7 for the detailed analysis.

²⁰¹ Judgment of 10 September 2014 in Case C-491/13.

admitted in the territory of the different Member States under different (not harmonised) conditions.

When considering all reasons for migration, around half (48 %) of all TCNs granted a residence permit are covered by EU rules on **admission conditions** (see Figure 11.a), while the figure for those *admitted for work reasons* (Annex 7, Figure 2) is less than 3 %, since the Directive that covers the second largest group (after seasonal workers) of those admitted for work (the SPD) does not include admission conditions. However, the proportion of permits covered by EU admission conditions is expected to increase substantially with the full implementation of the SWD and the ICTD²⁰². Despite the Directives' seemingly limited impact on the number of permits granted, it should be noted that the intention of the legislator was to harmonise admission conditions for certain economic migrants, while allowing the continued use of national economic migration schemes.

- Secondly, as highlighted in Section 5.2, the Directives include many '**may**' **clauses**, so that a TCN has to fulfil more (or less) stringent admission conditions depending on the Member State of destination (e.g. the FRD provides that Member States *may* require the sponsor to have resided for two years before having the right to be joined by a family member; some Member States have transposed this option²⁰³); the same applies with regard to 'optional' grounds for refusal.
- Thirdly, the **practical application** of the Directives varies significantly across Member States²⁰⁴; for instance, there are discrepancies in the way Member State authorities verify compliance with admission conditions, in terms of documents and evidence required²⁰⁵. In the consultation process, stakeholders underlined three main factors hindering the effectiveness of the legislation:
 - the complexity and segmentation deriving from the coexistence of specific schemes for different categories of migrants;
 - the lack of harmonisation; and
 - the difficulties relating to intra-EU mobility.
- Finally, a number of external factors (in particular, policies on visas, employment and the recognition of qualifications) affect the achievement of the objective being

²⁰² The current statistics on work reasons include up to 2017 national schemes for **seasonal workers**, most of which the SWD should cover once it is fully implemented (around 56 % of permits for work reasons). Although the SWD should have been fully implemented in 2017 and statistics on the number of permits issued in 2017 should have been reported in 2018, only a handful of Member States reported such statistics. Most importantly, Poland did not. Polish data on seasonal work permits issued presents a significant bias on the measurement of the proportion of migrant flows covered by the evaluated Directives and the data currently reported to Eurostat [migr_resocc] do not necessarily comply with the SWD definitions of seasonal work. Poland was late in transposing the Directive and the Commission initiated infringement proceedings to address this. The extent to which the permits currently reported as seasonal work will be covered by the SWD or SPD in the following years remains uncertain in this fitness check. See Annex 9.3 for further analysis.

²⁰³ COM(2019) 162, Second implementation report of the FRD, Article 8(1).

²⁰⁴ See Annex 8 and ICF (2018), Annex 2A (Evidence practical application).

²⁰⁵ See Annex 8 for more details.

assessed, by interacting with different aspects of the admission conditions²⁰⁶. In terms of the personal scope coverage of this objective, some stakeholders underlined the impact of the high number of asylum seekers arriving in the EU in recent years and their subsequent access to undeclared labour. In particular in some southern Member States, this has coincided with fewer labour migrants being admitted. However, statistical evidence shows that on aggregate²⁰⁷ the number of migrants admitted to the EU for work has increased since 2014 and 2015.

In conclusion, while the legal migration *acquis* has contributed significantly towards an efficient management of migration flows and hence created a level playing-field for family reunification, education and research (thanks to its comprehensive coverage of these categories and CJEU case-law), it has made less of a contribution for economic migration, mainly due to its more limited personal coverage in terms of admission conditions for workers.

Admission procedures and other procedural requirements

The provisions on application procedures contribute to the overall objective of an efficient management of migration flows by introducing transparent and comparable procedures across the Member States (e.g. ‘one-stop shop’, fixed deadlines) and contributing to the fair treatment of TCNs (procedural safeguards improving legal certainty for the applicant TCN, employers and host organisations). The provisions on the issuing of combined work and residence permits facilitate controls on the legality of residence and employment, thereby contributing to the overall objective of an efficient management of migration flows in terms of the transparency and preventing exploitation.

Baseline information on the admission procedures is limited for most Directives, with the exception of the SPD, which introduced a **single application procedure** for the adoption of a combined permit authorising both work and residence. At the time of the SPD proposal, just under half of the Member States had a single application procedure leading to a single permit in place or planned²⁰⁸. In more than half, students needed separate permits to be allowed to work. The implementation of the Directive shows that the situation has considerably improved: all Member States now apply the combined permit principle, and most have introduced a single application procedure²⁰⁹. All Member States have also implemented the admission procedures and procedural safeguards contained in the other Directives evaluated here.

²⁰⁶ See Section 5.2.3 and Annex 5.2.

²⁰⁷ See Annex 7, Section 4.1 showing aggregated data with and without PL and IT data. PL data on seasonal work permits contribute most to the increase, but also when Polish data are disregarded there is an increase. IT shows the biggest drop in the number of permits from 2008 to 2017 (270 000 to 8 400).

²⁰⁸ Impact assessment of the SPD (SEC(2007) 1408).

²⁰⁹ One infringement case relating to non-transposition of the SPD remains before the CJEU (BE).

The proportion of TCNs covered by EU rules in terms of **admission procedures** (see Figure 11.b) shows good coverage of the target groups (68 %) ²¹⁰. This is due to the SPD, which also covers permits issued under national law for the purpose of work, and to seasonal workers accounting for the most part of the remaining proportion.

The single application procedure has led to significant **procedural simplification** and **more efficient management of applications**. As confirmed by a number of stakeholders, in particular many Member States ²¹¹, the SPD has had a positive impact, e.g. shorter time for taking decisions and improved monitoring ²¹². Half of the third-country respondents to the OPC signalled that the application procedures are not an obstacle to migration, but a very large majority still considered the costs and time needed to be problematic.

The overall objective of ensuring the **efficient management** of migration flows has been hampered by a number of factors and **a degree of complexity and diversity** remains. For instance, the Directives allow Member States to determine whether the first application can be made in the Member State and/or only from outside, and whether applications for the purpose of work must be submitted by the employer and/or the TCN. Different models have been developed. The limited personal scope of the SPD means that for certain categories of TCN (e.g. self-employed workers or, optionally, TCNs authorised to work for up to six months), the procedures and the obligation on Member States to issue a single permit combining residence and work do not necessarily apply.

The interaction of the legal migration *acquis* with the **visa procedures** sometimes undermines the **simplification** objective of the single application procedure. This is the case, in particular, with the procedure for applying for an initial ‘entry visa’ (as required by the majority of Member States that do not issue residence permits outside their territory), which is outside the scope of the SPD. As a result, visa requirements can duplicate administrative checks and *de facto* extend the overall time needed to obtain the permit. A number of Member States have **additional administrative procedures** (e.g. ‘labour market authorisations’ or obligations to register with local, tax and social security authorities) that can undermine the simplification objective in some cases. Lastly, the implementation of the **single application procedure** appears problematic in a few Member States where different administrative steps are involved ²¹³. A minority of TCNs responding to the OPC (34 %) had to contact only one authority in their application process.

The Directives have not harmonised the **level of administrative fees** that Member States require for handling applications for residence permits, although the most recent Directives (as

²¹⁰ Coverage will be close to 100 % once the SWD is fully implemented, given that only a few categories of work permit are excluded from the scope of the Single Permit Directive, e.g. the self-employed, seafarers and posted workers will still not be covered in terms of admission procedures.

²¹¹ Meeting of the contact group on legal migration, 18 May 2017 (10 out of 21 Member States represented).

²¹² The purpose of a single permit is to enable monitoring of the legality of stay and work, e.g. during workplace inspection, complementing other EU (and national) policies to prevent irregular migration, undeclared work and labour exploitation.

²¹³ The Commission has entered into dialogue with these Member States as part of the enforcement of the SPD.

from the SPD) require fees to be proportionate and not excessive, a principle that was introduced following a CJEU judgment relating to the LTRD²¹⁴. Although fees varied greatly across Member States²¹⁵ and the CJEU found them to be disproportionate and excessive in some cases, the Member States in question have since lowered the most excessive fees. In the OPC, 57 % of TCNs referred to fees as an obstacle in their application process. This implementation issue thus hampers the full achievement of the objective of ensuring the efficient management of migration flows.

The Directives introduced a number of **procedural safeguards** (deadlines for handling applications, obligations to notify administrative decisions and rights of appeal against those decisions), which almost all Member States have transposed correctly. This has improved legal certainty for applicants and authorities. Nevertheless, some problems remain also in that respect²¹⁶:

- a few Member States have not established clear deadlines for the processing of applications;
- applicants experience long delays in some Member States;
- in some cases, the right to appeal against the rejection of an application is not effective, as a result of unclear and lengthy administrative or judicial procedures;
- the consequences of administrative silence are not always clear; and
- the additional time required for delivery of the permit adds to the processing time.

In conclusion, the objective of establishing approximated and harmonised admission procedures has been relatively well achieved, but the extent to which this has contributed to efficiency gains is more difficult to measure.

5.3.2 *Ensure fair treatment for categories of TCNs subject to the EU legal migration acquis*

The legal migration *acquis* has pursued this general objective mostly by establishing the principle of **equal treatment** with nationals of the host Member State. With particular regard to workers, ensuring that all Member States treat third-country workers like their own nationals helps to reduce labour exploitation and avoid distortion of competition.

The specific objectives related to **promoting integration** and **ensuring the right to family life** also contribute to this general objective.

Interaction with other EU policies (e.g. on labour law, social security coordination and the recognition of qualifications) also contributes to the achievement of the objective.

²¹⁴ Judgment of 26 April 2012 in Case C-508/10, *Commission v Netherlands*.

²¹⁵ EMN inform (2014), Applicable fees for issuance of residence permits to TCNs.

²¹⁶ Evidence from practical application, conformity assessment and complaints.

Equal treatment

Four of the Directives examined under the effectiveness criterion (LTRD, RD, BCD and SPD) contain provisions on equal treatment. FRD and SD permit holders are granted equal treatment if they are authorised to work and are thus covered by the SPD²¹⁷. Of the TCNs who are granted a residence permit for various reasons, 51 % are covered by EU rules on equal treatment (83 % if seasonal workers are included – Figure 11.c). Some family members (those not allowed to work, e.g. minors and other family members in the first year of residence) and exceptional categories of worker not covered by the SPD and other Directives do not benefit fully from equal treatment under EU law.

The baseline information available for the four above-mentioned Directives indicates that, prior to their adoption, Member States granted the right to equal treatment in several areas, albeit with some exceptions (e.g. social security benefits for holders of temporary permits in several Member States). The legal implementation analysis has shown that all Member States have largely addressed these gaps when transposing the Directives. The practical application study found that the Directives had had an **overall positive impact on the level of TCNs' rights**, although some concerns remain.

The majority of TCNs responding to the OPC agree that they enjoy equal treatment with regard to:

- tax benefits;
- freedom to join organisations representing workers or employers;
- advice services provided by employment services (over 70 %);
- access to education and vocational training;
- access to goods and services; and
- recognition of qualifications (over 60 %).

About half of the respondents felt they had been treated differently as regards working conditions (51 %) and access to social security (56 %). The achievements in terms of equal treatment were also underlined by other stakeholders, in particular in the EESC survey among social partners and civil society in targeted EU countries²¹⁸.

A few **transposition and implementation issues** remain²¹⁹, partly undermining the attainment of the overarching objective of ensuring fair treatment. Problems have been identified in particular with regard to social security benefits, access to public goods and services, and the recognition of professional qualifications, on which some Member States grant full equal

²¹⁷ Articles 12(1) and 3.1(b) and (c) SPD.

²¹⁸ *State of implementation of legal migration legislation*, EESC opinion (2017).

²¹⁹ Highlighted in the implementation reports of the Directives (see Section 3.1).

treatment only to permanent residents²²⁰ or those staying more than 12 months. As regards the export of pensions, some Member States have limited equal treatment to cases where there are bilateral agreements with countries of origin.

The coherence analysis showed up **differences** between the Directives' equal treatment provisions and some specific restrictions, in particular with regard to access to employment, education and vocational training, social security and housing.

Some **stakeholders** (trade unions and civil society organisations) consider that these differences, in particular the higher level of protection for highly skilled migrants as compared with the low/medium-skilled, hamper achievement of the overall objective of granting fair treatment to legally residing TCNs. Some even expressed the more radical view that the systematic differential treatment inherent in the sectoral approach followed by the Directives constitutes 'unlawful discrimination', since the inequality of treatment between different categories of TCN could not always be justified as necessary, proportionate and legitimate²²¹. In this context, it should be stressed (see Annex 5, Section 2.5 for more detail) that different treatment of TCNs is not *per se* illegal under international and EU law, and that Member States can legitimately differentiate rights granted to persons on the basis of their citizenship, provided they do so on the basis of an objective justification (i.e. with a view to achieving a legitimate objective of general interest) and in a proportionate manner²²².

As we saw in Section 5.2.1, the Directives differ significantly in their provisions on **access to the labour market**. Member States' practices differ in terms of how closely a permit is linked to a specific job, which influences whether permit holders have to apply for a new permit if they want to change employment. A number of TCNs replying to the OPC underlined the **obstacles related to the change of status or renewals**, pointing to more burdensome procedures than for initial admission (in terms of verification as to whether they still satisfy the conditions for granting the permit). The practical application study found that the procedure for renewing a permit varies and takes from 20 to 120 days, thus leading to extended periods of uncertainty for applicants. Some stakeholders (e.g. EESC, European Migration Forum) consider that migrant workers' dependence on their employer when a permit is to be renewed runs counter to the fair treatment objective and raises the risk of exploitation (see below).

Reducing unfair competition between Member State's own nationals and TCNs, and preventing exploitation

The Directives help to **reduce unfair competition** between national and third-country workers, and prevent exploitation of the latter, in particular by establishing equal treatment

²²⁰ Judgment of 21 June 2017 in Case C-449/16, *Martinez Silva*, where the CJEU found illegitimate an Italian law that excluded single permit holders from the right to receive a family benefit.

²²¹ *The cost of non-Europe in the area of legal migration*, CEPS (forthcoming).

²²² The CJEU has yet to conclude that any of the legal migration Directives are unlawful in that respect (see, in particular, the judgment of 27 June 2006 in Case C-540/03).

rights in terms of working conditions, freedom of affiliation and access to social security and tax benefits, but also by **facilitating control of the legality of stay and work** on the basis of the combined single permit. These provisions are intended to complement other EU and national policies to combat exploitation.

Exploitation of TCNs remains a significant phenomenon, but (as with other illicit activities) the extent of the problem is difficult to measure²²³. The sectors most affected appear to be transport, construction, agriculture, domestic care and other service sectors. TCNs are found to be more vulnerable than nationals, since complaining (e.g. about deducted salaries, working hours, confiscated passports) can lead to the termination of their working relationship and thus the withdrawal of their residence permits, or obstacles to their renewal. Stakeholders expressed particular concern about the exploitation of lower-skilled workers (civil society organisations) and social dumping in transport (trade unions). Two thirds of the TCNs participating in the OPC indicated that TCNs face discrimination in their working conditions *vis-à-vis* EU nationals.

The impact of the legal migration *acquis* on preventing labour exploitation was acknowledged by some stakeholders, in particular representatives of the Senior Labour Inspectors Committee (SLIC), who underlined Member States' enhanced efforts to improve monitoring and inspection activities, and also some best practices, e.g. joint inspections with law enforcement authorities, out-of-court settlement of labour disputes and mechanisms for the integration of migrants.

At the same time, the role of the legal migration Directives in preventing exploitation should not be overestimated. They were intended to complement other measures in this respect and their relatively limited impact must be seen in the context of other policies that have a more direct impact, in particular labour market policies (including enforcement of labour law) and policies addressing pull factors for irregular migration, such as the Employers Sanctions Directive²²⁴. There is evidence that well-regulated labour markets with strong government oversight and welfare provisions prevent irregular migration, overstaying, and the exploitation and abuse of legally staying migrants²²⁵.

Lastly, it is worth mentioning that the **SWD**, which the effectiveness analysis does not cover due to its recent adoption, contains particularly protective measures in addition to equal treatment rights (e.g. minimum requirements on accommodation, the possibility of changing employer, encouragement to carry out labour inspections, obligation to set up complaints mechanisms, etc.). Once fully and effectively implemented, these should help prevent the labour exploitation of TCN seasonal workers.

²²³ FRA (2015), *Severe labour exploitation*; ILO (2012), *Forced labour: an EU problem*. ILO data report 616 000 victims of labour exploitation in 2012, but only 1 in 27 cases are reported.

²²⁴ See Section 5.2.3 for more details.

²²⁵ *European migrations: Dynamics, drivers and the role of policies* (2018).

Integration

Integration has been a key objective of the EU's legal migration policy from the outset: the Tampere conclusions established that the EU should develop a more vigorous integration policy aimed at granting TCNs rights and obligations comparable to those of EU citizens. The equal treatment provisions in the Directives and the provisions promoting family reunification have contributed to the achievement of this objective.

Although the Treaty explicitly rules out the possibility of the EU harmonising national legislation on integration, it allows for the provision of support and incentives for Member States' action in this area. A number of tools have been developed to this end, e.g. the European Integration Network, which fosters exchanges of best practices and mutual learning activities between Member States, and funding measures supported by the Asylum, Migration and Integration Fund (AMIF)²²⁶.

Two Directives (the LTRD and FRD) also provide for specific measures relating to integration, such as the possibility for Member States to impose pre-departure integration conditions/measures for family members and integration conditions prior to the acquisition of LTR status. Only a few Member States have introduced pre-departure conditions in the form of language courses, but more have introduced language and civic education courses after admission²²⁷. This is confirmed by the OPC, where only a few TCN respondents (2 %) reported that they had been subject to pre-departure integration measures, while a quarter confirmed that there were integration measures (mostly language courses) once they were in the EU.

Evidence on the effectiveness of such measures is mixed: it is undisputed that acquisition of the language contributes to effective integration in the host country, but the benefits of compulsory pre-entry conditions are less certain. A number of complaints highlighted problems relating to high costs and difficulties for applicants to attend language courses, and the fact that sufficient account is not always taken of personal circumstances (e.g. illiteracy, caring responsibilities, illness and disability). Generally, there seems to be some public support in most Member States for more integration measures, including mandatory orientation or language measures on arrival and before migration²²⁸, though not necessarily as a pre-condition for admission.

Available data on integration outcomes show that the integration of TCNs is not fully achieved in most Member States. On aggregate, TCNs remain worse off than EU citizens in terms of

²²⁶ For an overview of actions and measures at EU level, and funding, see:
https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/integration_en
See also the European website on integration:
<https://ec.europa.eu/migrant-integration/index.cfm?action=furl.go&go=/home?lang=en>

²²⁷ See Annex 5, Section 5.2.1.

²²⁸ See Special Eurobarometer 469, *Integration of immigrants in the EU*, Section 3.2.

employment, education and social inclusion²²⁹. There are differences among Member States as regards how TCNs fare in national labour markets, e.g. in terms of employment rates²³⁰. However, the contribution of the legal migration Directives to this objective is positive (in particular the LTRD), but limited, since other factors and policies at both EU and national level (e.g. education, labour and social inclusion policies, as well as labour market dynamics and changes in the structure of demand for skills) have a much greater impact.

Protection of family life

The protection of family life is the key objective of the FRD and of specific rules on family reunification in other Directives.

Family reunification is one of the main reasons for admission of TCNs into the EU and the number of family members admitted has risen each year since 2008²³¹. The scale of family reunification is not primarily decided by the implementation of the FRD itself, but by the number of TCNs who are admitted to the EU for other reasons and become ‘sponsors’ (including beneficiaries of international protection). Most Member States had rules for admission of family members prior to the adoption of the Directive, but the rules and the type of family members and sponsors differed.

The evaluation confirmed that all Member States have generally transposed the FRD and the complementary provisions on family reunification in other Directives correctly. While not fully harmonising the conditions and procedures, EU rules (as interpreted by the CJEU) have increased the legal certainty and predictability of the family reunification process, thereby limiting the discretion of Member States. This was generally acknowledged by stakeholders in the consultation process.

However, some evidence from practical implementation shows that the achievement of this objective is hampered by some Member States’ practices²³², such as:

- high fees;
- non-respect of deadlines for assessing applications;
- difficulties in proving family ties (e.g. requirements for DNA tests); and
- ‘sufficient resources’ requirements (high income thresholds).

²²⁹ In 2017, the employment rate of TCNs (aged 20-64) in the EU-28 was 57.4 %, 15.4 pp below the rate for host-country nationals (72.8 %) (Eurostat). In 2016, around 38.8 % of TCNs (aged 18 and over) were at risk of (monetary) poverty, as compared with 15.5 % host-country nationals. Lastly, in 2017 TCNs (aged 25-54) were much more likely to have achieved at most a lower secondary level of education (42.7 %) than host-country citizens (18.4 %). Eurostat portal on integration: <http://ec.europa.eu/eurostat/web/migrant-integration/data/database>

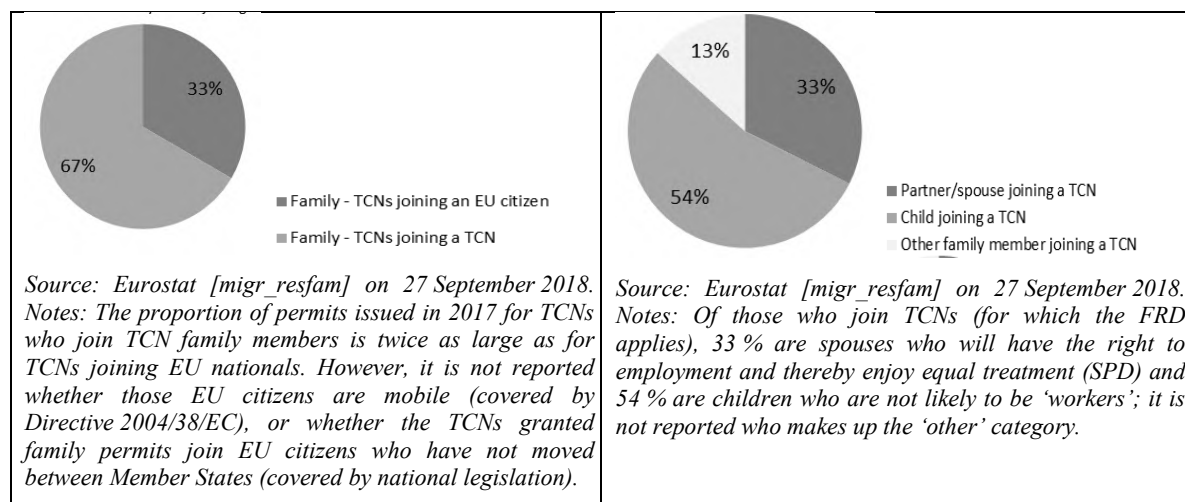
²³⁰ *Patterns of immigrants’ integration in European labour markets*, JRC technical report (2017).

²³¹ See Section 2.2.2 and Annex 9.

²³² For a recent analysis of Member States’ practices, see EMN (2016), Synthesis report – *Family reunification of third-country nationals in the EU plus Norway: national practices*.

There are some important gaps in EU legislation, in particular as regards third-country family members joining non-mobile EU citizens and BSPs. For the first category, this is reflected in the relatively high number of complaints received by the Commission. On the other hand, the impact of the FRD is amplified by many Member States' decision to go beyond the minimum requirement of allowing core family member reunification (spouse, dependent children).

Figure 17. Proportion of permits issued for family reasons that are covered by EU legal migration Directives



5.3.3 Strengthen the EU's competitiveness and economic growth

This objective differs in nature from the other objectives analysed in this fitness check, since it is not directly linked to the management of migration, but relates to the impact that (labour) migration has on the EU economy and job market.

The legal migration Directives (in particular, those on labour migration and researchers) provide a framework for attracting and retaining skilled workforce and talent and, as a result, help to fill labour and skills shortages across the EU labour market. Also, their equal treatment provisions help prevent downward pressure on salaries and working conditions, which could have a negative effect on social cohesion and lead to unfair competition and social dumping in Member States.

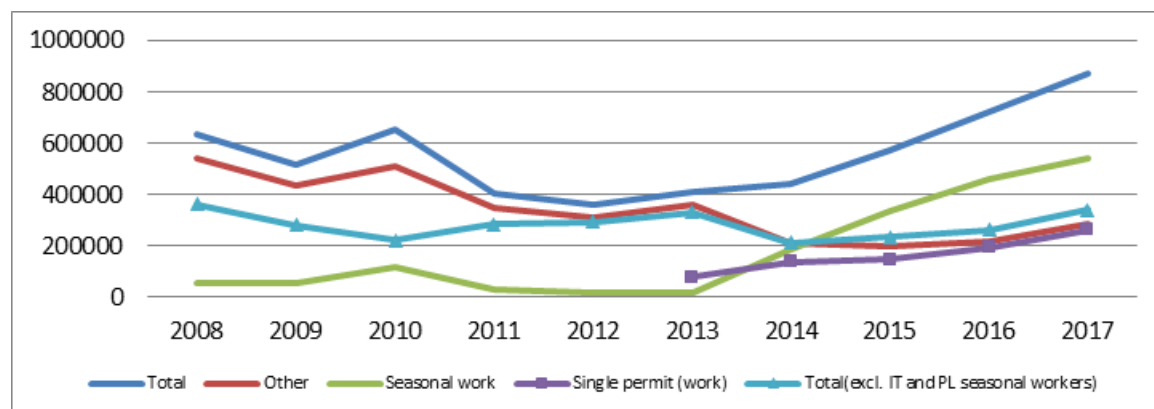
Addressing labour and skills shortages in the EU labour market

In 2017, around 18.7 million TCNs held valid work permits in the EU-25 (around 4 % of the overall EU-25 population of around 435 million). In terms of labour force, the proportion is slightly larger, given that TCNs are more likely to be of working age: in 2017, around 9.1 million TCNs were economically active²³³, making up 4.4 % of the 207 million economically active population in the EU-25, as compared with 3.8 % in 2007 (7.7 million out of 201 million). This proportion varies widely across EU-25 countries.

²³³ Eurostat, EU-LFS [lfsa_pganws].

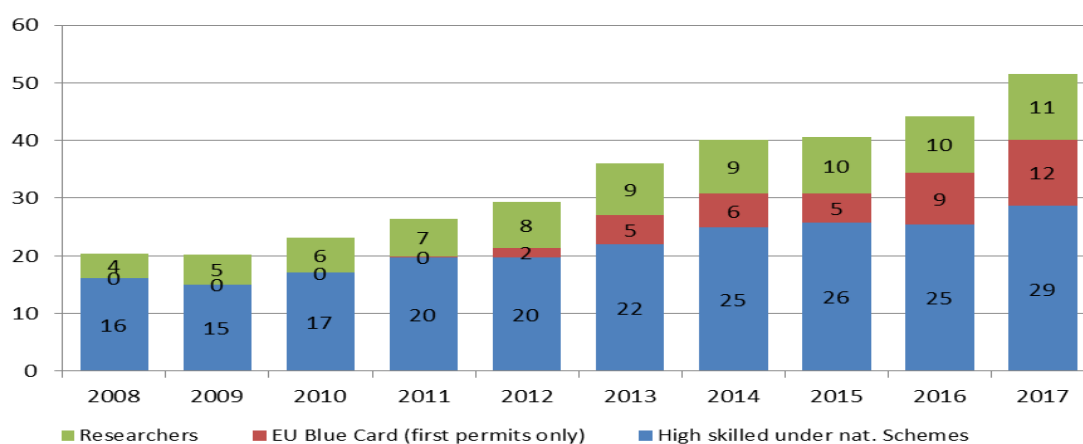
The number of TCNs admitted for work fell after the 2008 financial and economic crisis, and again after 2011, but has risen steadily since 2014 for most categories. In particular, the number of highly skilled workers and researchers admitted has risen steadily each year since 2008.

Figure 18. First permits issued for remunerated activities since 2008 – all first permits issued for work and for ‘other’ purposes, all single permits issued for work and seasonal work purposes (EU-25)



Source: Eurostat [migr_ressoc], [migr_resing] Extracted 18 September 2018. For SPD, 2017 data for remunerated activities from AT, BE and EL are missing.

Figure 19. First permits issued for highly skilled work (national highly skilled, total HSW), BCD and researchers in EU-25 countries (thousands)



Source: Eurostat, [migr_resocc], Data extracted 27.09.2018

There is evidence that migrants from third countries helped to maintain the growth of the labour force between 2005 and 2015. At least half of the overall *net* growth of the labour force over that period can be related to recent migrants from third countries²³⁴, who therefore made a key contribution to the growth of the labour force, in various sectors.

²³⁴ Calculations based on Table 1 in Spielvogel, G. and M. Meghnagi (2018), ‘The contribution of migration to the dynamics of the labour force in OECD countries: 2005-2015’, *OECD Social, employment and migration working papers*, No. 203, OECD Publishing.

This contribution will continue to play a crucial role in the **future**. According to recent projections²³⁵, the working-age population in the EU will decrease significantly, from 333 million in 2016 to 292 million in 2070. As a result, labour supply will decline because of the projected drop of the working-age population: total labour supply for those aged 20 to 64 in the EU is projected to fall by 9.6 % over 2016-70, of which 2% by 2030 and a further 7.8% over the same period²³⁶. This development would be even worse in a hypothetical case of zero migration, but the decline in the labour force would be less in a scenario where net migration rates double²³⁷. Moreover, the European economy is expected to undergo an accentuation of the trend whereby the main driver for growth is the **service sector**²³⁸, meaning the skills demanded will change.

A recent study based on Eurostat population projections estimated that EU-28 production or output (real GDP) in 2060 would be 23 % lower without migration than with migration, and that the EU's annual growth rate could fall over the long term (2013-2060) from 1.5 % to less than 1 %²³⁹. The efficient management of migratory flows, especially in relation to labour migrants, is therefore a crucial challenge for the future growth of the EU economy²⁴⁰.

At the same time, the contribution of the legal migration *acquis* to achieving this objective has **limits** and it is difficult to measure the direct impact of the Directives. Many factors influence economic migration and the attractiveness of a country/region as a migration destination; these include:

- economic, labour market and fiscal policies;
- individual choices and preferences; and
- language(s) spoken and diaspora in the country of destination.

The economic migration Directives have a limited personal scope and a limited level of harmonisation (including many 'may' clauses and the possibility of parallel national schemes in some cases). Moreover, the Treaty reserves to the Member States the right to determine the **volumes of admission for economic migration**, which can therefore not be determined or influenced by EU legislation.

In quantitative terms, due to the sectoral approach for economic migration (Figure 11.a), until 2016 the **EU-harmonised admission conditions** covered only a small proportion of economic

²³⁵ According to the CEPAM medium (SSP2) scenario in terms of demographic behaviours and migration, European Commission (2018) Joint Research Centre.

²³⁶ If labour-force participation rates (for each gender, age and education group) remained constant, *ibid*.

²³⁷ See details in Annex 9.5.

²³⁸ *Future skill needs in Europe: critical labour force trends*, Cedefop (2016).

²³⁹ JRC, Mongelli I., Ciscar J-C., 'Economic consequences of zero international migration in the EU', *JRC Science for policy report* (2018).

²⁴⁰ This challenge will also have to address the specific obstacles that TCNs face in the labour market and the fact that their employment rate is much lower than the employment rate of host-country nationals in most Member States. This is due to lower activity rates, especially among migrant women, and higher unemployment among economically active TCNs. See Eurostat [Ifsa_ergan] and ICF (2018), Annex 1Bii (Statistics), Section 2.1.5.

migrants admitted to the EU²⁴¹. Statistics show that remunerated activities are the basis for about a third of all first permits issued each year in the EU²⁴² and it has to be borne in mind that people migrating for other purposes (e.g. family reunification or studies) may also subsequently become part of the labour force.

In addition, the needs of the labour market are matched with the supply of third-country workers essentially at national level and Member States can apply labour market tests (to verify that the post cannot be filled by people already in the labour market) or specific conditions (i.e. salary thresholds or specific annual quotas of migrant workers to admit). As seen in Section 5.2.3, the EU-wide tool to facilitate job-matching across the EU (EURES) does not fully cover TCNs. The Commission is currently exploring the possibility of developing specific job-matching mechanisms for TCNs in the future²⁴³.

In the consultation process, while recognising the advantages of the EU legislation, most Member States' representatives argued that admission conditions for labour migrants are best established at national level to enable flexible responses to the needs of national labour markets. Some large business associations agreed, while others acknowledged the benefits of harmonised conditions. Business representatives stressed the importance of compliance with migration rules, but said that procedures can be lengthy, cumbersome and costly²⁴⁴, and there is a need for facilitated intra-EU mobility for third-country workers. Experts and business representatives called for more to be done at EU level to attract other categories of labour migrant, such as service providers with different levels of qualifications²⁴⁵ (other than those covered by the ICTD) and low/medium-skilled workers, as this would reduce the substantial costs related to admission that small companies find difficult to cover²⁴⁶.

Attracting and retaining certain categories of TCN

The Directives are aimed at **attracting and retaining** highly qualified workers (BCD and ICTD) and researchers (RD and S&RD)²⁴⁷. Their implementation has contributed to some extent to achieving these objectives, but the direct impact is difficult to measure.

On aggregate, the number of **highly skilled workers** (admitted under national schemes and the BCD) and **researchers** increased steadily over the reference period. Although the number of EU Blue Cards issued increased from about 3 600 in 2012 to around 24 000 in 2017 (mostly

²⁴¹ With the full application of the SWD and the ICTD, this proportion is expected to increase significantly. Also, the majority of third-country workers, including those admitted to the EU under national rules, are covered by the SPD and therefore by common admission procedures and a set of common rights.

²⁴² Section 3.2 and Annex 9.

²⁴³ *Report on labour migration policies and the role of 'expression of interest' models and matching mechanisms*, OECD (2018).

²⁴⁴ Worldwide ERC (2015 survey) and impact assessment of revision of BCD (SWD(2016) 193), Annex 9.

²⁴⁵ Business Europe contribution to the OPC.

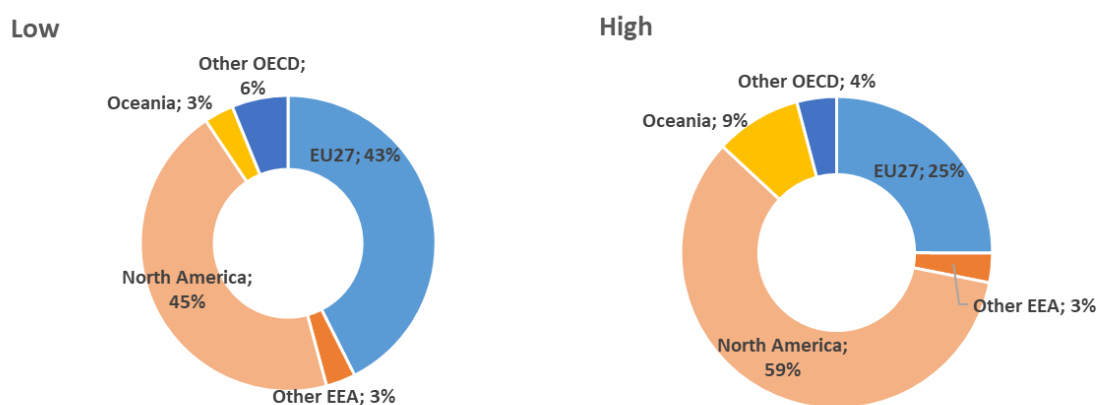
²⁴⁶ UAPME contribution to the OPC.

²⁴⁷ Member States are to communicate the first statistics on the number of ICT permits issued from 2017.

issued in one Member State)²⁴⁸, the BCD scheme is not considered to be sufficiently successful²⁴⁹. The number of residence permits issued to **researchers** more than doubled, from 4 200 in 2008 to 11 400 in 2017²⁵⁰. However, it is difficult to establish a causal link between these flows and the Directives, as other factors (e.g. Member States' increased attractiveness for international researchers) are important.

Highly skilled migrants play an important role in boosting the competitiveness and growth of the host countries and have a positive effect on innovation by improving the diversity of the workforce²⁵¹. However, to date **the EU has been less successful than other OECD countries in attracting highly skilled migrants**. Of all migrants residing in OECD countries in 2015-2016, only 25 % of those with a high level of education chose an EU destination; the remainder chose mainly to go to the United States, Canada and Australia. EU Member States have also been less successful than the USA, Canada and New Zealand when it comes to **retaining** migrants²⁵².

Figure 20. Distribution of foreign-born residents with low versus high level of education, by OECD destination country, 2015-2016 (%)²⁵³



In the stakeholder consultation, business representatives, experts and representatives of ecosystems for entrepreneurs agreed that common admission conditions and rights influence individual choices of destination country and the decisions of businesses with a global outreach on where to recruit TCNs. These stakeholders underlined in particular the importance of family reunification and intra-EU mobility rights, the latter being ensured only by EU-level

²⁴⁸ Eurostat [migr_resbc1]; the EU blue card data refer to first permits only, thus excluding status changers.

²⁴⁹ For this reason, the Commission proposed its revision in June 2016. See SWD(2016) 193 (impact assessment for revised BCD).

²⁵⁰ Around one quarter of this increase is due to the gradual increase in the number of EU Member States reporting data while the remaining part (around three quarters) corresponds to a 'real' increase in the number of researchers.

²⁵¹ See impact assessment for revised BCD.

²⁵² *Recruiting immigrant workers: Europe 2016*, OECD and EU (2016), OECD Publishing, Paris.

²⁵³ Source: Database on immigrants in the OECD countries (DIOC), 2015-2016. Note: EU refers to EU-28 without Croatia (due to missing data). For Iceland, Japan, New Zealand and Turkey, data are from DIOC 2010-2011. For the EU, only non-EU immigrants are included.

legislation. Representatives of ecosystems pointed to the absence of intra-EU mobility rights as a major downside for ‘start-up visas’ in some Member States.

Enhancing the knowledge economy in the European Union

This is a specific objective relevant to the BCD, the ICTD, the SD, the RD and the recast S&RD²⁵⁴. Overall, increasing the pool of highly educated people coming to the EU would have a positive impact on the capacity of European companies, research institutions and public bodies to invest in research and development and would benefit the EU’s performance on research and innovation. Highly qualified workers, students and researchers contribute to this objective directly and indirectly through multiplier effects, as a form of mutual enrichment for both the migrants and the Member State’s institutions and companies concerned.

Statistical evidence shows an increase in the number of TCNs admitted for study and research since 2008 (Annex 9). Since no parallel national schemes are allowed for these categories of migrant, all such TCNs are in principle covered by the Directives. It is not possible to establish the role that the adoption of EU rules played in the increase, since there are many relevant external factors – such as the image and quality of education and research in the Member States.

On the other hand, **stay rates** appear to be rather low. The OECD²⁵⁵ estimates that stay rates of non-EU students in the EU varied between 16.4 % and 29.1 % in 2010-2012. An important measure that could contribute to enhancing the EU’s knowledge economy is to allow third-country students and researchers to stay after completing their studies or research while seeking to enter the EU labour market: this way, their acquired knowledge and skills can benefit the host country²⁵⁶. The fact that the SD and RD did not regulate this aspect was identified as a factor hampering their effectiveness, so the recast S&RD introduced the right for students and researchers to stay for at least nine months for the purpose of job-seeking or entrepreneurship.

Given the low number of EU Blue Cards issued in the first few years and their uneven distribution in the EU, it is unlikely that the BCD has contributed significantly to the objective. The impact assessment for the revision of the BCD showed that the high salary threshold has a detrimental impact on attracting and retaining young talent, since recent (tertiary) graduates tend to earn less on entering the labour market than the average tertiary-educated worker²⁵⁷.

Implementation of the **ICTD** and the **S&RD** is expected to enhance the knowledge economy in the EU, thanks to:

²⁵⁴ The effectiveness of the ICTD and the S&RD is not assessed, given their recent adoption.

²⁵⁵ Weisser, R. (OECD 2016).

²⁵⁶ Impact assessment for the recast S&RD (SWD(2013) 151). Proposal for a review of the BCD (SWD(2016) 378).

²⁵⁷ See Section 4.2.2 of Annex 7 to the impact assessment for the revision of the BCD (SWD(2016) 193).

- flexible admission conditions;
- the rights provided; and
- the far-reaching provisions on intra-EU mobility.

This was confirmed in the consultation process, in particular with regard to the S&RD, which education authorities considered as responding to their current needs.

Facilitating and promoting intra-EU mobility

The OECD has highlighted the importance of effective intra-EU mobility rules, stressing that the EU-wide labour market may be more attractive for TCNs than individual national markets, but that its attractiveness is bound up with the effectiveness of mobility provisions²⁵⁸. Companies operating across the EU also value provisions that facilitate the mobility of foreign workers²⁵⁹.

Six Directives²⁶⁰ established rules on intra-EU mobility, granting TCNs facilitated access to residence in a second Member State. However, the practical implementation analysis of the LTRD, SD, RD and BCD shows that intra-EU mobility procedures are often not very different from first-admission procedures (see also Section 3.3 and Annex 8) and therefore not fully effective. This is confirmed by complaints received by the Commission on legal and practical obstacles to exercise mobility to another Member State, and by comments made in the course of the consultation process.

There is limited statistical evidence to measure the use of intra-EU mobility procedures by TCNs, as Member States do not systematically collect data indicating whether a TCN has previously resided in another Member State²⁶¹. Nevertheless, some indications emerge from an EMN study²⁶² revealing that 1.2-3.7 % of all ‘mobile persons’ are TCNs, i.e. considerably fewer than the proportion of TCNs in the population (4 %). The study highlighted several barriers to intra-EU mobility, which could explain the relatively low mobility rates among TCNs, but also found that the overall mobility of TCNs appeared to be growing. However, it stressed the difficulty of measuring the influence of the Directives’ provisions on this trend. Some research has found a positive causal link between LTR status and intra-EU mobility,

²⁵⁸ *Recruiting immigrant workers*, OECD and EU (2016).

²⁵⁹ See OPC for the recast BCD.

²⁶⁰ LTRD, SD, RD, BCD, ICTD and S&RD. The effectiveness of the ICTD and the S&RD is not assessed due to their recent adoption.

²⁶¹ Eurostat’s EU Labour Force Survey includes questions on the residence of the respondents one year earlier, thus providing an estimate of the mobility of the workforce. However, the likelihood of a newly arrived mobile TCN being among the people sampled in the survey is low (and in the future this question will be discontinued). The usefulness of this variable to estimate TCNs’ mobility is therefore uncertain and it has not been used in this fitness check. While the method underestimates mobility in all categories, TCNs are about half as likely as EU nationals to be mobile within the EU. Highly educated individuals are more likely to be mobile than other migrants – a pattern also found in EU national populations, where those with a tertiary education are generally more mobile than the workforce at large (OECD, 2016).

²⁶² EMN (2013) study on intra-EU mobility of TCNs.

implying that if legal and practical constraints are reduced, the mobility of TCNs will probably increase²⁶³.

The stakeholder consultation confirmed the numerous challenges in the exercise of intra-EU mobility, which range from the lack of information provided by official sources to the non-transferability of social security benefits to third countries. A third of the third-country respondents to the OPC said that they had encountered problems in getting a residence permit in a second Member State; the reasons included:

- the number of documents required (85 %);
- the insecurity brought about by the delay in receiving a new permit after the first has expired (83 %);
- the high costs of the permit (74 %);
- the difficulties in getting their qualifications recognised (66 %);
- the challenges in finding a job in the second country (66 %); and
- the length of the procedure (58 %).

These percentages are higher than the proportions of TCNs referring to these factors as obstacles to their first application to enter the EU.

5.4 Efficiency

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

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

The efficiency criterion was assessed from various perspectives. The costs and benefits of implementing the Directives are core components of the efficiency analysis. However, given the methodological challenges in quantifying and monetising them, they are mainly addressed from a qualitative perspective, with an attempt to monetise a selected number of direct administrative costs and benefits.

The potential simplification is also partially assessed, in particular by reviewing some of the Member States' most efficient practices in implementing the Directives. Annex 4 sets out a more detailed typology of the costs and benefits per migration phase, and indicates the extent to which economic data were identified.

This analysis therefore addresses the efficiency criteria from four main perspectives:

- a) the types of costs and benefits involved in implementing the Directives;

²⁶³ Poeschel, F. (2016).

- b) how they are distributed by stakeholders;
- c) whether there are differences in costs and benefits between Member States; and
- d) whether more efficient practices can be highlighted²⁶⁴.

5.4.1 Available evidence and main limitations

The analysis faced several challenges linked to difficulties in identifying, quantifying and subsequently monetising the marginal effect of the introduction of the Directives. For instance, it is difficult to disentangle the economic and social impacts (and thus also the costs and benefits) specifically linked to the legal migration Directives from the overall impacts of migration flows. Likewise, the distribution of impacts among stakeholders was difficult to quantify. The limited personal scope of the Directives and numerous external factors influence the efficiency of the management of migration flows; for example, trends in economic growth, language, labour market institutions and the attractiveness of education and research systems have a significant impact on migration choices for the purpose of work or study.

This is coupled with a severe shortage of relevant data at EU and national level. A review²⁶⁵ revealed a significant gap in terms of relevant economic literature and data on the implementation of the Directives. The consultation strategy therefore placed specific emphasis on collecting such data. Member States stated²⁶⁶ that no national studies of the costs and benefits linked to the implementation of the Directives are available²⁶⁷. This is partly because they are not required to report them to the Commission.

An EMN *ad hoc* query showed that very few Member States collect specific data on the average time²⁶⁸ for processing permit applications, the number of applications rejected or the associated costs and benefits. As a consequence, this efficiency assessment largely relies on the partial information gathered through the evaluation and consultation process.

Lastly, while studies and reports are available on the overall economic impacts of migration on receiving countries, there is very limited evidence to underpin the assessment as regards specific Directives. While comparable data on residence permits from 2008 are available, there are no comparable data on aspects such as the average time for processing permit applications. Most available assessments were carried out *ex ante*, to support Commission proposals, but not reflecting actual costs and benefits.

²⁶⁴ SWD, ICTD and S&RD are not analysed for efficiency.

²⁶⁵ ICF (2018), Annex 1A (Literature review).

²⁶⁶ Contact group on legal migration (May 2017, March 2018), EMN *ad hoc* query (December 2017).

²⁶⁷ One exception is a 2015 German study estimating whether the fees levied by administrative agencies cover the costs they incur in the performance of all their tasks relating to immigration law.

²⁶⁸ Most Member States reported processing times of several weeks and up to 185 days for the delivery of permits; this can be understood as the time taken to communicate a decision to the applicant, rather than as a full-time equivalent per application. Three Member States reported realistic full-time equivalent data that could be used for a case study in this analysis.

The assessment of efficiency is therefore, to a large extent, qualitative, although attempts were made to quantify the **direct administrative costs** for key stakeholders, in particular in relation to admission procedures (see below).

5.4.2 Qualitative identification of the types of costs and benefits linked to the legal migration *acquis*

The efficiency of the legal migration *acquis* is determined by the relationship between the direct resources used for the implementation of the Directives, on the one hand, and the impacts of the Directives at different levels, on the other. The costs and benefits can arise as a direct result of implementation (e.g. the cost of introducing new admission procedures or the costs and benefits associated with application fees) or indirectly (e.g. the costs and benefits of providing additional education and vocational training, or the benefits associated with higher employment, productivity and innovation). The impacts of implementing the Directives can be felt at micro level (e.g. TCNs, business, and specific administrations) and at macro level (e.g. society as a whole in both receiving and sending countries). TCNs, administrations, businesses, universities, research institutes and countries of origin are the main stakeholders affected.

When assessing the costs and benefits linked to the impacts of the legal migration *acquis*, one has to bear in mind that some impacts can be linked to all Directives (e.g. those linked to common admission procedures), while others may be specific to one or several Directives. For example, the economic and labour market impacts stem mostly from the RD, SPD and BCD (as well as the SWD and ICTD), although family members (FRD) and students (SD) may also be part of the labour market.

It is also important to note that a cost for one stakeholder can be a benefit for others. For example, equal treatment provisions may entail a cost for public administrations and a benefit for the individual. Similarly, permit fees represent a cost for the individual or the employer and a benefit for the public administration. Measures to improve access to the labour market or integration in general can have positive effects for the individual, and also bring wider economic and societal benefits, notably in terms of employment, growth and social cohesion.

The distinctions between direct and indirect effects, and between micro- and macro-level effects are therefore not always clear-cut. Wider societal impacts, e.g. on employment, labour productivity and innovation, are mostly studied for society as a whole and not related to the marginal effects of the Directives *per se*.

The efficiency of implementation also depends on the baseline for each Member State. As shown in Annex 7, some had to change procedures and TCNs' rights substantially, while others had less to change, and had lower marginal costs as a result.

Figure 21 lists the **main types of costs and benefit** identified per stakeholder, although only a few can be quantified and monetised (see Annex 4).

Figure 21. Main types of costs and benefit related to migration in general, for key stakeholders

	main types of cost	main types of benefit
third-country nationals	<p>Direct costs</p> <ul style="list-style-type: none"> - Charges: costs for application fees and regulatory charges. - Substantive compliance costs: costs related to gathering information on rights, conditions and procedures for legal migration and of familiarisation and training on new obligations (all). - Substantive compliance costs related to gathering the documentation needed to meet application requirements (e.g. proof of family ties or sufficient resources), recognition of academic and professional qualifications, obtaining visa; costs of complying with integration conditions or legal fees when seeking legal counsel. - ‘Hassle costs’, e.g. waiting time and delays, and the associated uncertainty. 	<p>Direct regulatory benefits</p> <ul style="list-style-type: none"> - Cost savings: benefits from using simplified procedures and increased legal certainty due to streamlining of application (including redress or appeal) procedures. - Improved well-being: <ul style="list-style-type: none"> - overall benefits to migrants arising from legal migration (legal entry and residence). - benefits from the protection of rights, e.g. right to family reunification and wider benefits thereof, notably better integration and well-being; benefits from equal treatment with nationals. - benefits from increased participation in the labour market and better integration of TCNs. - benefits from measures that facilitate intra-EU mobility (LTR, BCD, SRD, ICTD). - benefits from measures against exploitative employers (e.g. claims for compensation, unpaid wages).
public administrations	<p>Direct costs</p> <ul style="list-style-type: none"> - Administrative burden: costs of ensuring transparency and providing information on migration options, including IT tools, helpdesks, etc. - Administrative burden: costs of processing and reviewing applications, issuing permits or handling appeals. - Substantive compliance costs in reforming migration systems to introduce a single application procedure. - Substantive costs of verifying admission conditions, procedural safeguards. - Substantive compliance costs: direct local fiscal expenditure associated with provision of equal treatment, e.g. for education and vocational training, social security, state pension, provisions of goods and services available to the public. <p>Enforcement costs</p> <ul style="list-style-type: none"> - Costs of monitoring compliance with equal treatment and rights. 	<p>Direct regulatory benefits</p> <ul style="list-style-type: none"> - Cost savings related to the simplification of procedures due to the single application procedure, as the numbers of steps and public authorities involved are reduced, and from a single permit covering both residence and work. <p>Indirect regulatory benefits</p> <ul style="list-style-type: none"> - Indirect benefits from improved migration management arising from the approximation of admission procedures. <p>Indirect wider macroeconomic benefits</p> <ul style="list-style-type: none"> - Direct benefits to public finances from fiscal contributions by TCNs (income taxes, pension contributions, social security contributions). - Indirect fiscal receipts from migrants (VAT or excise tax) and consumption of social goods (e.g. education).

employers, universities and research institutions	<p>Direct costs</p> <ul style="list-style-type: none"> - Charges: cost for application fees and regulatory charges. - Substantive compliance costs related to gathering information on rights, conditions and procedures for legal migration, including costs of familiarisation and training on new obligations. - ‘Hassle costs’, e.g. waiting time and delays, and the associated uncertainty. <p>Indirect costs</p> <ul style="list-style-type: none"> - Indirect compliance costs: labour costs (wages and social security contribution), in particular when additional expenditure is needed to ensure equal treatment. - Indirect compliance costs: costs (sanctions) for employers related to identified cases of exploitation. 	<p>Direct regulatory benefits</p> <ul style="list-style-type: none"> - Cost savings: benefits from applying through simplified application procedures (and for one permit) and enjoyment of increased legal certainty, including redress or appeal procedures. - Wider range of labour available: benefits related to the labour market; increase in available workforce; contribution to alleviating specific labour shortages in filling specific niches. - Wider supply of labour due to increased attractiveness: benefits for employers of harmonised admission conditions making the EU a more attractive destination for TCNs and facilitating recruitment for companies operating in different Member States. <p>Indirect regulatory benefits</p> <ul style="list-style-type: none"> - Wider macroeconomic benefits: increased capacity for businesses in innovative sectors as they recruit highly skilled workers, which in turn increases the capacity for innovation and entrepreneurship.
Society as a whole (receiving society)	<ul style="list-style-type: none"> - Offsetting: possible negative impact on local wages and unemployment rates of resident population. - Offsetting: possible negative displacement effect on highly skilled workers and on the medium-skilled job market. 	<p>Direct regulatory benefits</p> <ul style="list-style-type: none"> - Benefits of specific admission conditions (e.g. variable minimum conditions for shortage sectors, BCD) and regulation of volumes of admission and labour market tests minimising labour market displacement. - Benefits of equal treatment with nationals in relation to pay and working conditions, and other measures to combat exploitation of third-country workers, to avoid negative impact on local wages and enhance social cohesion and integration. - Benefits related to intra-EU mobility, including potential positive impact on labour market functioning when facing asymmetric shocks within the euro area. <p>Indirect regulatory benefits</p> <ul style="list-style-type: none"> - Wider macro-economic benefits: fiscal benefits (income and other taxes paid by TCNs). - Wider macro-economic benefits: labour market benefits: increase in the available workforce, contribution to alleviating labour shortages in specific occupations, filling specific niches, positive impact on local wages when TCNs complement natives who can become more productive through occupational reallocation and specialisation in more advanced tasks; marginal shift in supply of tertiary-educated labour. - Wider macro-economic benefits: increase in long-term economic growth through the increase in the working-age population, income multiplier effect of third-country workers spending money in the local economy, technological progress through human capital development; enhancement of skills variety, innovation (and innovative networks) and research (S&RD, BCD),

		positive impacts on productivity. - Wider macro-economic benefits: positive spill-over effects on the local workforce as they learn from highly qualified TCNs and in turn an increased need for complementary low/medium-qualified jobs; nationals shift to less manual work with lower-skilled TCN workers.
Society as a whole (sending society)	Indirect costs - Offsetting: costs related to possible labour shortages in sending countries.	Indirect regulatory benefits - Benefits of circular migration, migrants returning with specific acquired skillsets. - Remittances of TCNs to countries of origin (all). - Alleviating labour surplus situations.

5.4.3 Quantification of selected direct costs of the implementation of the Directives

Due to the difficulties of attributing a specific ‘volume’ of legal migration to the Directives, it is not possible to assess precisely the associated costs and benefits²⁶⁹. Certain types of impact, such as the higher labour productivity and better integration of TCNs on the labour market that result from the right to a long-term residence, are particularly difficult to assess. It can nevertheless be argued that a long-term perspective of residence tends to strengthen both the incentives of migrants to invest in their human capital and recognition of skills and qualifications, and the incentives for employers to consider hiring them.

Other types of impact cannot be expressed in monetary terms, e.g.:

- the value of protecting the right to family life;
- the value of increased social cohesion arising from ensuring the equal treatment of TCNs; and
- the value of increased legal certainty arising from harmonised application procedures and safeguards.

Some more specific findings can be highlighted in relation to the assessment of the **direct/immediate impacts** of the implementation of the Directives for TCNs, businesses and public administrations, mostly focusing on **direct administrative costs**. The costs and benefits quantified below relate to the overall number of permits granted under the Directives

²⁶⁹ In the absence of ‘control’ variables to estimate a counterfactual in terms of volume (i.e. how would migration flows have differed in the absence of the legal migration Directives) and the information needed to estimate a quantitative impact (e.g. in the case of equal treatment in access to certain benefits), i.e. what is the difference between the benefits granted by the Directives and the benefits granted under national rules in the EU-25 or in the Member States not bound by the *acquis* (EU-3)?

and (due to the difficulties in using a counterfactual analysis) not to the *marginal (additional) impact* of the Directives on the number of permits granted²⁷⁰.

Figure 22. Annual direct administrative costs and benefits, by stakeholder²⁷¹

Type of stakeholder	Scope	Costs/ benefits	Results
TCN applicants	Permits issued under Directives (all EU-25)	Costs	Application fees: €210 million Costs in time spent: €186-622 million <u>Total</u> : €396-832 million
	n/a	Benefits	Substantial (not quantified due to methodological limitations and lack of data)
Public administrations	Permits issued under Directives in three MS (DE, FI and one other)	Costs ²⁷²	Costs of issuing permits: €26 million (0.001-0.007 % of overall public spending in three MS covered)
		Benefits	Benefits of collecting fees: €28.5 million
	Permits issued under Directives (all EU-25)	Costs	Not quantified (no or limited information submitted by most MS)
		Benefits	Application fees paid by TCN applicants: €210 million
Employers (including universities)	Permits issued under BCD, RD and SPD (only permits issued for remunerated activities) (EU-25)	Costs	Application fees + costs in time spent: €66-132 million
	n/a	Benefits	Substantial (not quantified due to methodological limitations and lack of data)

The **main direct costs incurred by TCNs** in the application process include:

- application fees;
- costs related to providing the required documentation; and
- costs linked to legal counsel.

In the absence of reliable data covering **all the costs** incurred by TCNs in the application process, estimates of two elements of the costs can be provided:

- estimates²⁷³ covering permits issued under the Directives²⁷⁴ suggest that the annual costs associated with **application fees** account for around EUR 210 million. While

²⁷⁰ For instance, without the RD, Member States currently applying the Directive would nevertheless have granted a number of permits to third-country researchers. In the absence of ‘control’ variables to estimate a counterfactual in terms of volume, the direct costs/benefits estimated in this section are based on all permits granted to researchers and not only on the *additional* ones driven by the adoption and implementation of the RD.

²⁷¹ Source: ICF 2018 study, see also Annex 4. Estimates based on latest data (2016) available at the time of the study.

²⁷² Only costs of issuing new permits annually were estimated. Costs related to renewing permits or fixed costs of implementing new Directives (training staff on new obligations or development of IT tools) could not be quantified due to missing information.

²⁷³ ICF (2018), *Study on the fitness check – REFIT evaluation*, Annex 4C (Economic analysis).

²⁷⁴ Covering BCD, SD, RD, FRD, SP and LTRD, and based on adjusted permit data (to avoid double-counting of single permits issued for family or study reasons) and information on application fees, with a number of assumptions (e.g. when values are missing, an average is applied).

this figure is a cost for TCNs applying for residence permits, it is a benefit for public authorities (revenue); and

- the costs for TCNs associated with the **time spent** on the preparation of applications for first permits are estimated to be in the range of EUR 186 million to EUR 622 million (2016), depending on the assumptions made²⁷⁵ as regards average time spent and hourly wage opportunity cost.

In total, the **overall cost for TCNs** (including the costs associated with fees and time spent on preparing the application) in the EU-25 is estimated at a range between EUR 396 and 832 million a year. Overall, the estimates suggest that **the costs for TCNs are much higher than those for public administrations** (see below). While these estimates are very sensitive to the assumptions made, the result is **quite consistent** with that provided by another estimation method: using the average *total expense* (including fees) for the application provided by OPC respondents (EUR 700), the total cost for TCNs, based on the number of permits issued under EU law, is around EUR 529 million.

The responses to the OPC suggest that TCNs who have applied for entry and residence in the EU tend to find that the cost and time incurred in the application process are either ‘not reasonable’ or ‘reasonable to a small extent’. The time taken (including to gather documents²⁷⁶) would appear to be considerable (several weeks) and the length of the application process is the most common issue raised.

Overall, these estimates point to **significant perceived costs for TCNs** applying for residence permits, especially as these are only part of the costs incurred in the application process. Nevertheless, the expected benefits (increased personal income, social mobility and life satisfaction) far outweigh the costs associated with the administrative process.

The **costs for employers** (including universities) in terms of fees to obtain residence permits and time spent on the preparation of applications were also estimated²⁷⁷. For 2016 (EU-25), these ranged from EUR 66 million to EUR 132.4 million, depending on assumptions in terms of average time spent on each application. The assessment of the immediate cost for employers can only be indicative, as no information is available on the proportion of the total costs borne by the employers. In the absence of reliable estimates or basis for assumptions, additional costs such as the following were not included:

²⁷⁵ The assumption underlying the low bound estimate was that TCNs spend on average three full-time days (3*8 = 24 hours) in preparing the application at an average equivalent wage of EUR 5/hour; as regards the high bound estimate, the values were 40 hours (five full-time days) and EUR 10/hour.

²⁷⁶ Respondents report that the most common documents required were as follows:

- a valid travel document;
- proof of educational qualifications;
- proof of sufficient resources;
- health insurance;
- documents from the school/higher education institution they were to attend;
- proof of accommodation;
- job offer/work contract; and
- bank guarantee.

²⁷⁷ Estimates assuming that employers bear the costs of applications relating to BCD permits, researchers and single permits issued for remunerated activities, but not costs relating to other permits, such as for family reunification.

- fees for external legal advice to prepare the application, which are necessary in most cases (as highlighted by the consultation process);
- training in-house HR staff for familiarisation with new Directives; and
- one-off costs for ‘qualifying’ to recruit TCNs (e.g. recognised sponsorship scheme fee in NL).

Public administrations face two types of direct costs:

- fixed costs (training staff on new obligations or development of IT tools to meet requirements); and
- costs related to issuing permits.

While fixed costs could not be assessed due to a lack of evidence, the costs of issuing permits related to EU legal migration directives were estimated for the three Member States that provided sufficient data through the EMN *ad hoc* query (financial cost or time needed in full time equivalent) to enable some form of quantification: Germany, Finland and a third Member State²⁷⁸. For those countries, the costs of issuing permits and the fees collected (the main direct benefits) were estimated for the last year for which data are available (2016) for most of the Directives on legal migration.²⁷⁹ The main direct benefits for public administrations are the fees collected.

The assessment suggests that **the fees collected are higher than, or broadly similar to, the costs of issuing permits**²⁸⁰ The total costs for issuing permits in the three Member States for which data are available amount to 26 million €²⁸¹, which represent minor amounts in relative terms (0.001-0.007 % of overall public spending)²⁸². The costs vary across countries, due to the fact that a wider range of costs is taken into account in one of them and to potentially more efficient practices on average. While in Finland a large part of the costs relates to **handling appeals** as regards family reunification, Germany spends more on **extensions and renewals**. A specific analysis for Germany²⁸³ showed that, while the costs incurred by the administration in delivering most permits exceed the relevant fees, renewals (of Blue Cards in particular) are relatively costly.

It should be noted that account could not be taken of some costs (in particular, fixed costs and costs related to renewals and appeals, in some cases) and some benefits (e.g. fees collected where applications were rejected and for the renewal of permits).

²⁷⁸ The third Member State cannot be disclosed. When replying to an EMN *ad hoc* query, Member States can decide whether or not their replies are to be made public.

²⁷⁹ BCD, SD, RD, FRD and LTRD.

²⁸⁰ Fees collected are 18 % higher than costs in Germany, 1 % higher in Finland and 1.5 % lower in the third Member State. The costs total EUR 26 million (Germany: EUR 12.5 million; Finland: EUR 9.6 million; third Member State: EUR 3.9 million).

²⁸¹ 12.5 million € for Germany, 9.6 million € for Finland, and 3.9 million € for the third country.

²⁸² ICF (2018), *Study on the fitness check – REFIT evaluation*, Annex 4C (Economic analysis).

²⁸³ Statistisches Bundesamt, WISTA (2015).

5.4.4 More efficient practices among Member States and potential for simplification

A key aspect of efficiency relates to the choices that Member States make when implementing the Directives. More or less efficient practices, as identified below, point to areas where further efficiency gains can be made by choosing simplified options. In this respect, this analysis supports the conclusions on the potential scope for simplification.

While different practices seem to lead to different direct and indirect costs for administrations, TCNs and employers, it was not possible to quantify or monetise possible efficiency gains, due to limitations in the relevant evidence available.

Available information suggests that cost differences between Member States are linked to **national implementation choices**, especially as regards:

- availability of information;
- administrative procedures;
- admission conditions and deadlines; and
- institutional set-up.

Such choices reflect different types of objective and efficiency is not necessarily a primary objective. Also, more efficient processes and approaches in a Member State may indicate lower perceived costs or risks related to migration management, rather than an objective of maximising efficiency. Moreover, while the costs associated with national practices can be compared across Member States to a certain extent, it is not always possible to assess the relative efficiency of national practices, which also depends on specific national objectives.

A number of practices directly linked to the application of the Directives have emerged from the evaluation, which could be considered as more efficient and as resulting in time and cost savings.

First, easy **access to information** (online, on request) that is clear and available in several languages tends to reduce the time spent by TCNs and businesses in gathering information and preparing a permit application, and the associated costs. It also tends to reduce the need for legal advice and/or interpretation services, which may even discourage TCNs from making an application²⁸⁴. However, not all Member States provide clear and accessible official information. In particular, responses to the stakeholder consultation suggest that information on **family reunification** is often not accessible, is unclear or is provided only in the national language. The information provided by Member States' diplomatic missions on options for migrating to the EU was also considered insufficient.

However, we identified a number of efficient practices to comply with the information obligations in the Directives. In most Member States, **online information** is generally available in the national language and English, and is easy to find²⁸⁵. One Member State's guides for international students and researchers were cited as good practice. **Transparency**

²⁸⁴ Interviews with ecosystems of entrepreneurs carried out by ICF.

²⁸⁵ ICF (2018), Annex 2A (Evidence practical application). Close to half of the Member States also provide information in French, Spanish or Russian, while a few provide information in languages such as Arabic and Turkish, and one has an information hotline in 60 languages.

facilitates the preparation of complete, correctly filled-in applications that can, in turn, be more easily processed by public administrations, thus reducing their costs.

Efficiency and costs were also found to differ across Member States in relation to **administrative procedures, admission conditions and deadlines**.

One of the main expected results of the legal migration *acquis* was to simplify national **administrative procedures** for the categories of migrant covered, in particular for third-country workers through the introduction by the SPD of a single application procedure. The evaluation showed mixed results in this respect. Some Member States' authorities reported that the implementation of the Directives led to a **simplification (and shortening) of existing procedures**, in particular due to the SPD's single procedure for a single permit for residence and work. Others highlighted that it is sometimes difficult to adjust the conditions of the Directives to the specific requirements of national administrative procedures or that simple, fast admission schemes for highly skilled migrants were already in place before the adoption of the BCD and ICTD.

In the consultation process, some stakeholders underlined that **complex and burdensome procedures still remain**. TCNs responding to the OPC confirmed this as one of the main obstacles to their applications for entry into the EU or for intra-EU mobility. However, the OPC did not provide elements that would allow to compare the situation before and after implementation of the Directives. In a focus group meeting, some social partners commented that, while the SPD has theoretically streamlined the procedures between different authorities, in practice those authorities still have overlapping mandates; this undermines the intended simplification. However, this is not a direct result of the introduction of EU rules, but of the way they are implemented by the Member States and, in some cases, their internal administrative structures.

The ease of use of application forms, their accessibility and the number of documents required are very important factors for the overall cost of the application procedure, in particular for TCNs and employers. OPC respondents considered some Member States' forms complex to fill in, requiring several hours and sometimes the assistance of specialised firms. On the other hand, some Member States' easily downloadable application forms and/or arrangements for full online submission facilitate the application process and reduce overall costs.

Requiring fewer documents also helps to reduce costs and time for TCNs and employers. Member States' implementation of some 'may' clauses, so as to require further documentation, tends to increase costs. The majority of Member States appear to have opted for costlier options²⁸⁶. For instance, requiring the following can substantially increase costs for TCNs:

- translations and legalised original documents;
- submission of certain documents in embassies in the country of origin; and
- applications only from outside the EU.

²⁸⁶ Exceptions concern integration measures (Article 7(2) FRD) and the requirement to submit blue card applications from outside the country (Article 10(4) BCD), not transposed by most Member States.

Similarly, requiring DNA tests can increase costs, while the additional benefits depend on the extent to which they improve certainty. Responses to the OPC indicate that TCNs generally spend up to four weeks collecting the necessary documents and up to three months in some cases.

Application fees vary greatly among Member States. In several, the amounts are equivalent to a high proportion of average income and weigh very significantly on TCNs' household budgets. A number of Member States require additional fees, e.g. for issuing or delivering permits or for biometric features on the permit. Including all charges in a single application fee, as is the practice in some Member States, would seem to reduce the time spent by authorities in processing payments and to optimise the overall process.

Short processing times lead to efficiency gains. The current large variations in **processing times** in different Member States and for different Directives point to possible scope for greater efficiency, even taking account of the fact that some Member States receive proportionally more applications than others. For example, times for processing applications under the FRD range from 21 to almost 400 days. Some Member States have **shorter processing times for equivalent national statuses**, which highlights further room for improvement. The time for processing applications also affects the costs for employers who have undertaken to hire a TCN, including the costs relating to handling uncertainty, as delays in processing may dissuade TCNs from coming to the EU after all, especially when global demand for their skills is high. Another relevant factor in national practices is whether the permit is linked to a specific employer. Many Member States require a new permit when there is a change in employment and the procedure in such cases varies considerably across countries²⁸⁷.

With regard to the time taken to **deliver the actual permit** (which is not regulated in the Directives), some Member States have very short deadlines (10-20 days), but 15 do not have a set timeframe. Establishing fixed and short deadlines for the delivery of the actual permit cuts down the overall application process and saves costs for employers, who may incur productivity losses while waiting for the arrival of the TCN.

The **institutional set-up** also plays an important role in the efficiency of application procedures. In some Member States, the fact that a single agency is responsible for issuing permits tends to result in simpler and quicker application and post-application processes. In the OPC, about a third of TCNs residing or having resided in the EU (34 %, n=178) mentioned that they had to contact one authority to apply and 31 % had to contact two authorities. With regard to the **market tests** (employment authorisations) sometimes required before the issuance of a work permit, in some Member States the competent authority (generally the migration authority) deals directly with the employment institutions in order to obtain clearance for the job offer. This is done within the permit application procedure and deadlines. Applicants have to deal with only one authority and the overall application procedure is simpler than in cases where they have to contact different authorities to obtain the employment authorisation.

²⁸⁷ The length of the procedure to change the permit ranges from 20 days to 119 days for some occupations for which a labour market test needs to be carried out. In seven Member States, the procedure takes 30 days whereas in four it takes 90 days. If the applicant does not change permit, 16 Member States apply (mainly financial) sanctions.

Facilitated **visa procedures** linked to a permit application can save significant time and costs for TCNs and employers. Three Member States have adopted such procedures for all types of permit and two do not require an entry visa for any of the permits. Two Member States have a 15-day deadline for issuing the required visa.

Conditions for the **renewal of permits** are also a significant driver of costs: the more frequently the permits need to be renewed, the higher the direct costs to the TCNs (fees and application process) and the indirect costs, in particular as employers are less likely to hire them if permits have to be renewed more frequently. Renewals are relatively costly for public administrations, even when fees are taken into account. A number of Member States have facilitated renewal procedures²⁸⁸.

Finally, with regard to **intra-EU mobility**, the majority of Member States continue to require the same procedures, conditions (including market tests) or proof of residence as for first-time applicants, both under EU and national schemes. This can raise the costs for TCNs, administrations and employers. However, facilitating practices identified in a few Member States include:

- shorter processing times; and
- mobile TCNs being exempted from:
 - meeting integration requirements again; and
 - providing evidence of sufficient means if they have already done so in the first Member State.

5.5 EU added value

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

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

The TFEU explicitly requires the Union to develop a **common immigration policy**, so this is a clear objective to be pursued at EU level. At the same time, legal migration is an area of shared competence between the EU and the Member States, and the Treaty also reserves explicitly to the Member States the right to set volumes of admission for labour migrants they admit.

As explained in detail in Section 5.1, the EU legislator has decided to take a gradual and sectoral approach to the development of policy in this area. As a result, the EU has not yet exercised its competence fully, leaving Member States wide room for manoeuvre in many respects, and this has affected the full achievement of the various objectives.

²⁸⁸ In five Member States, the application can be submitted in person or by post (one Member State requires physical presence later for recording biometric data); others accept applications by e-mail and online.

The ‘division of labour’ between the EU and the Member States has nevertheless shifted constantly since 1999, gradually extending the EU’s competence in this field. The shift is still ongoing, as it is closely linked to the overall process of EU integration. This is particularly evident in the field of labour migration: the greater the degree of integration and interconnection between EU economies and labour markets (and thus the greater degree of mobility required of all key components of the internal market, including the movement of persons), the more harmonisation is needed on labour migration.

As highlighted in previous sections, the evaluation showed that the legal migration Directives have had a number of positive effects that would not have been realised by Member States acting alone. While positions on specific aspects often vary (e.g. across Member States, NGOs, businesses, individual migrants), **all stakeholders, including Member States, confirmed the continued overall added value of the EU legal migration *acquis***. The relevance analysis fully confirmed this, while highlighting the existence of certain gaps. In the OPC, when asked whether immigration rules should generally be governed at EU or national level, around half the respondents agreed that they should be governed at EU level, albeit with a clear split between TCNs (70 %) and other respondents (40 %).

The following can be considered the areas in which EU action has brought the most positive effects and continues to be required, having shown the most EU added value:

- harmonised conditions, procedures and rights;
- simplified administrative procedures (see above under efficiency);
- increased legal certainty and predictability for TCNs and employers;
- improved recognition of TCNs’ rights across the EU;
- facilitated intra-EU mobility for (certain categories of) TCNs; and
- contribution to EU competitiveness and growth.

Harmonised conditions, procedures and rights

Following the implementation of the Directives, admission conditions to the EU for a large number of TCNs have been undergone a **degree of harmonisation**, including important aspects such as evidence of sufficient resources, sickness insurance, adequate accommodation and proof of address, and conditions relating to public policy, public security and public health. In the consultations, most stakeholders confirmed that this had been a positive effect of EU legislation and contributed to achieving the Treaty objectives of ensuring the efficient management of migration flows and the fair treatment of TCNs. In particular, most Member States reported that the Directives had had a positive effect on the management of migration flows, while stressing that this is an ongoing, long-term process.

Harmonised rules have EU added value on different levels:

- harmonised admission conditions and procedures benefit TCNs who see the overall EU, rather than individual Member States, as their migration destination;
- harmonised admission conditions and procedures benefit employers (e.g. multi-national companies recruiting highly skilled workers and their families in different Member States). They also counteract the creation of pull factors in one Member State over another;
- harmonised rights benefit third-country workers and prevent unfair competition between Member States, e.g. the granting of fewer rights; and
- efficient rules on intra-EU mobility can be established only at EU level.

Overall, the OPC results indicate that the gradual harmonisation of migration rules is an advantage. When asked whether all Member States should have the same conditions for admitting non-EU citizens to the EU, a majority of respondents replied positively, including 75 % of TCNs residing in the EU and around 50 % from the other groups. A similar pattern emerged as regards whether Member States should have harmonised application procedures and entry/residence conditions: 85 % of TCN respondents agreed, compared to around half of those in the other groups.

At the same time, the evaluation showed that **harmonisation has been limited**. In particular, experts, civil society representatives, the EESC and some members of the European Parliament noted that the Directives leave Member States a wide margin for manoeuvre as regards implementation and thus were not designed for full harmonisation. This means, *inter alia*, that TCNs and employers first have to understand how rules differ between Member States and then have to apply accordingly; this partly undermines the EU added value.

While Member States' representatives noted that national rules are in several respects better tailored to their needs than legislation at EU level²⁸⁹, the majority from other groups indicated that the complexity and fragmentation of the current EU system were a major obstacle to achieving the intended objectives, as they affected simplification, transparency and TCNs' rights.

In response to the OPC, a large majority of TCNs wishing to migrate to the EU said that the current conditions for entry/residence/work constitute a disincentive to migrate. The main obstacles identified concern:

- visa requirements;
- finding employment from outside the EU;
- the recognition of qualifications; and
- the complexity and length of the procedure.

²⁸⁹ Some Member State representatives claimed that national schemes may allow faster access to long-term residence or entail less paperwork than the EU schemes for the highly qualified, researchers or LTRs.

Accordingly, experts, NGOs, the EESC and some members of the European Parliament considered that more needs to be done in this area. More harmonised rules, e.g. in one or two framework Directives (as suggested by some MEPs), would add more value and improve legal certainty for TCNs and their potential employers.

Therefore, in spite of the positive effects that have been achieved thanks to the legal migration *acquis*, there is clearly **room for further harmonisation and simplification at EU level**.

Legal certainty and predictability

A transparent, quick and user-friendly admission system constitutes an important factor in TCNs' migration decisions and is an explicit aim of the EU legal migration *acquis*. More consistent and 'compliance-friendly' legislation is highly relevant not only for TCNs, but also for employers and host organisations. The introduction of **common admission conditions** for certain categories of migrant has improved legal certainty for applicants for residence permits, as Member States are not allowed to establish conditions which are additional to the ones provided for in the Directives²⁹⁰. Another positive effect of the EU legislation has been the introduction of **permits that did not exist previously** in some Member States, providing groups such as ICTs, the highly skilled (RD and BCD) and, to a lesser extent, students (SD) with greater legal certainty and making the EU more attractive as a migration destination for talented TCNs.

Some Member State authorities, experts and business representatives highlighted that employers appreciate that EU rules have brought **greater legal certainty** and that stricter deadlines save businesses time and money. For example, business representatives underlined the potential advantages of the ICTD and regretted that similar categories of TCN, such as business visitors, were excluded and continue to be subject to different rules, exposing companies to unintended non-compliance. Civil society representatives stressed the positive contributions of the FRD and the LTRD to legal certainty and equal treatment. For instance, the LTRD has played an important role as it ensures a permanent status for TCNs who would not otherwise satisfy the conditions for acquiring nationality.

Improved recognition of TCNs' rights across the EU

Although the equal treatment provisions differ somewhat across the Directives, **all consulted stakeholders recognised their added value**.

In particular, the **rights of TCNs' family members** have been significantly improved by the Directives – not only the FRD, but also the specific provisions on family members in other Directives. All categories of TCN who enjoy the right to family reunification see this as a clear benefit that enhances their integration and makes the EU more attractive. The CJEU has confirmed the added value of a right to family reunification that is recognised across all

²⁹⁰ With regard to the SD, this was confirmed by the CJEU judgment of 10 September 2014 in Case C-491/13, *Ben Alaya*.

Member States and affirmed that the FRD goes beyond international human rights instruments such as the ECHR, by requiring Member States, ‘in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor’s family, without being left a margin of appreciation’²⁹¹. Following the adoption of the Directive, several Member States introduced detailed rules on family reunification in their national legislation for the first time²⁹².

More generally, the majority of TCN respondents to the OPC (over 60 %) consider that they enjoy **equal treatment** as compared to EU nationals: this would indicate a perception among TCNs of greater legal certainty as regards the recognition of their rights across all Member States, which constitutes an important factor in their migration decisions and in the overall attractiveness of the EU.

While the legal migration *acquis* has had positive effects in terms of TCNs’ rights, this is also an area where further EU action will continue to be required. In particular, stakeholders referred to **labour rights, the exportability of social security benefits** and the **recognition of qualifications** as aspects where further action should be taken. Civil society representatives pointed to a need to ensure more harmonised protection of rights, especially for low-skilled and self-employed workers, and to consider the situation of women, who are often in a more vulnerable situation (notably due to their dependence on the sponsor in cases of family reunification).

Intra-EU mobility

The introduction, in the EU legal migration *acquis*, of procedures to facilitate intra-EU mobility represents **clear added value**, since no national migration policy has ever provided facilitations for applications from TCNs residing in another Member State²⁹³. Furthermore, it is important to remember that the Member States’ right to establish how many economic migrants they admit relates only to third-country workers from outside the EU, and does not apply to intra-EU mobility. Therefore, EU rules have an important influence on the efficient mobility of TCNs across the Member States.

Evidence²⁹⁴ suggests that the main reason why EU action enhancing intra-EU mobility can achieve more in scale and scope than Member States acting alone is that **the EU-wide labour market is more attractive for TCNs than individual Member States’ labour markets**, as it offers:

- more opportunities;

²⁹¹ Case C-540/03, *Parliament v. Council*, paragraphs 59-60.

²⁹² See first Commission report on the implementation of the Directive (COM(2008) 610 final), p. 14.

²⁹³ OECD and EU (2016).

²⁹⁴ Manning, A. and B. Petrongolo (2011).

- better matches with qualifications and between labour demand and supply across the EU; and
- the prospect for TCNs of earning higher wages²⁹⁵.

It is also important for businesses with cross-border activities and supply chains that entail the mobility of their staff.

Despite the differences with the freedom of movement enjoyed by EU citizens and some concerns about its effectiveness (see Section 5.3), some Member States (*inter alia*) identified intra-EU mobility during the stakeholder consultation as one of the main aspects of the added value of EU legislation.

However, the consultation also pointed to areas for further improvement as regards intra-EU mobility rights. The current provisions are considered very complex and require intensive cooperation and exchange of information between Member States. As explained in detail in the sections on coherence and effectiveness, the earlier Directives – in particular the LTRD and BCD – facilitate mobility only to a limited extent (Member States may check almost the same conditions as on a first application). However, the most recent Directives, i.e. the ICTD²⁹⁶ and the S&RD, grant quite far-reaching mobility rights to ICTs and researchers, leading in some cases – and under certain conditions – to *de facto* mutual recognition of national residence permits between Member States.

Greater intra-EU mobility for TCNs could allow labour market to respond better to economic shocks, since workers affected by adverse employment shocks in one part of a larger labour market can find work in another part – as was seen during the economic and financial crisis that started in 2007, when the mobility of EU workers increased and absorbed as much as a quarter of the asymmetrical labour market shock within a year²⁹⁷.

Most stakeholders confirmed that greater intra-EU mobility would benefit TCNs and national labour markets in the same way that it benefits EU citizens, and would foster the equal treatment of TCNs. At the same time, Member States seemed reluctant to recognise that well-functioning intra-EU mobility is incompatible with the ample discretion ensured by the current *acquis* (e.g. national schemes, ‘may’ clauses, etc.), the maintenance of which most of them regard as necessary.

Implementation of the ICTD and S&RD will show the extent to which their far-reaching provisions on mobility make a difference in terms of TCNs’ mobility across the EU and

²⁹⁵ OECD and EU (2016).

²⁹⁶ In transposing the ICTD, some Member States have opted for the least burdensome intra-EU mobility procedure, including no procedure at all in cases of short-term mobility.

²⁹⁷ Jauer, J. *et al.* (2014).

strengthening the culture of administrative cooperation between Member States, and the extent to which it might be necessary and useful to extend this to other categories²⁹⁸.

Contribution to EU competitiveness and growth

The analysis has shown that the EU legal migration *acquis* has the potential to contribute to the EU's overall competitiveness and growth by attracting the third-country workers that it most needs, bearing in mind that Member States ultimately retain the right to determine the numbers of first admissions for the purpose of work.

It is also clear that this potential has not yet been exhausted and EU action is still required to fully achieve this objective. For instance, harmonised admission schemes for low/medium-skilled third-country workers in sectors such as agriculture, construction, domestic services and care could help the EU address current and future skills shortages that affect its competitiveness. Similarly, EU rules covering the self-employed, investors and international service providers could make the EU more attractive for foreign investments in sectors that would benefit the overall EU economy.

²⁹⁸ The Commission's proposal to review the BCD involves enhanced intra-EU mobility for blue card holders.

6 CONCLUSIONS

6.1 Conclusions by evaluation criteria

Relevance

The analysis showed that the EU's legal migration policy remains broadly in line with the general objectives set at the 1999 European Council in Tampere and incorporated in the Lisbon Treaty, i.e. to ensure the efficient management of migration flows to the EU and the fair treatment of TCNs residing legally. At the same time, the policy-specific objectives have evolved, in line with the overall political framework in the field of migration, from setting common minimum standards on rights, admission and residence conditions for *all TCNs* to attracting *the TCNs that the EU economy needs*. This is reflected in the third *de facto* policy objective analysed in this fitness check: contributing to the strengthening of EU competitiveness and growth.

The evaluation has shown that the objectives of the Directives are still relevant to addressing the EU's needs in terms of legal migration; on the other hand, it has highlighted a number of **potential gaps** between objectives and needs, with particular regard to the Directives':

- **material scope**, which fails to address a number of problems throughout the various 'migration phases' (e.g. the procedures for obtaining an entry visa); and
- **personal scope**, which does not cover, at least in terms of admission conditions, important categories of TCNs (e.g. non-seasonal low/medium-skilled workers²⁹⁹, jobseekers, service providers covered by the EU's trade commitments except intra-corporate transferees, and the self-employed/entrepreneurs).

While the identified gaps are mostly covered under **national rules** (e.g. all Member States have national schemes for the admission of low/medium-skilled third-country workers or the self-employed)³⁰⁰, the result is an **overall fragmented system**, which also affects the coherence and the effectiveness of the legal framework (see below). However, in the consultation stakeholders expressed diverging views on the need, opportunity and added value to cover these gaps at EU level.

- The EU legal migration *acquis* is **still very relevant** to addressing current and future needs in this area.
- However, **some potential gaps** in terms of **personal and material scope** have been identified (though additional and more reliable data are needed to assess their magnitude).
- There is a need to understand better and take greater account of the impact of **evolving socio-economic** and **environmental** factors (including climate change) on the relevance of the *acquis*.

²⁹⁹ However, these categories are covered by EU rules on a *single admission procedure* and equal treatment through the SPD.

³⁰⁰ However, not all Member States have specific national schemes for jobseekers or investors.

Coherence

While the objectives of EU legal migration policy are overall coherent and complementary, the evaluation revealed a number of specific **internal coherence issues**, most due to:

- a) the **sectoral approach**, whereby different Directives regulate in different ways the specific needs and features of the categories of migrants covered; and
- b) the diverse **origins** of the Directives, each of which has its own peculiarities, policy constraints and negotiation history.

Looking at how the policy has evolved, it could be argued that a degree of fragmentation has been the price of gradual ‘Europeanisation’ in this very sensitive area³⁰¹. At the same time, however, this fitness check has shown that some internal coherence issues (e.g. in terms of different procedural requirements across different categories) have **affected the actual attainment of the Directives’ objectives** and/or created **unnecessary administrative burdens**.

Divergent national implementation choices – in particular, as regards the numerous ‘**may**’ **clauses** in the *acquis* and the existence of **parallel national schemes** (i.e. for the long-term residents and highly skilled workers) – have also contributed to certain inconsistencies.

As regards **external coherence**, the legal migration Directives interact with many other EU policies (in particular, other migration and home affairs policies, justice and fundamental rights, employment and education, trade and external relations). **No major inconsistencies** emerged from the evaluation, but there is some scope for **more efficient interaction and synergies**, in particular as regards the EU’s overall policy on growth and employment, and EU external policy.

- There is **overall coherence and complementarity** between the various legal migration Directives and their objectives.
- However, some **specific internal coherence issues** have been identified and will need to be addressed in future policy and legislative developments. In terms of external coherence, greater account will have to be taken of developments in the **external dimension of EU migration policy** and the role of legal migration in that context, particularly if the EU is to increase its leverage *vis-à-vis* third countries of origin for more effective cooperation in managing migration flows.
- The need to ensure further synergies with **EU labour, economic and growth policies** has also emerged strongly, in a context in which migration is likely to play an increasingly important role in addressing labour and skills shortages in an ageing European society.

³⁰¹ See *The cost of non-Europe in the area of legal migration*, CEPS (forthcoming).

Effectiveness

Due to the complexity of the overall framework on migration, where EU and national rules often operate in parallel and Member States have been left numerous implementation choices, it has been **difficult to isolate and thus precisely assess the effects and impacts** of the EU legal migration rules.

Nevertheless, a number of conclusions can be drawn from the analysis.

- following the transposition of the Directives, national legal migration systems have been **approximated to a certain extent** for the categories covered, with varying degrees of harmonisation (e.g. a greater degree of harmonisation for family migrants, students and researchers than for labour migrants). The introduction of **common admission conditions and procedures** has improved **legal certainty** for applicants, authorities and businesses. However, the same factors that have given rise to the coherence issues highlighted above (sectoral approach, parallel national schemes, ‘may’ clauses) have also hampered the full achievement of those objectives;
- the Directives have had an overall positive impact on **TCNs’ rights** and on the protection of family life. Nevertheless, some **transposition and implementation issues** (‘may’ clauses used in a restrictive way, incorrect implementation by Member States) still hamper the full achievement of the objective of ensuring fair treatment; and
- the legal migration *acquis* has contributed to the objective of ensuring the efficient management of economic migration flows into the EU, in order to help address labour and skills shortages in the EU labour market and thereby **increase the EU’s overall competitiveness**.

However, in relation to these objectives, the evaluation has identified **important limitations**:

- the limited coverage of labour migration at EU level (so that harmonised admission conditions cover only a small proportion of the overall number of economic migrants admitted to the EU);
- the fact that, even when harmonised rules exist, Member States maintain the right to determine the volumes of admission of labour migrants are admitted; and
- the impact of factors and policies external to migration on labour migration flows to Member States.

The potential of facilitated intra-EU mobility (for those Directives regulating it) also seems to be insufficiently exploited.

This implies that the Directives have had a comparatively limited impact to date on the overall admission of labour migrants into the EU. However, this is likely to change with the full application of the SWD and ICTD. Similarly, the impact of facilitated intra-EU mobility will need to be re-assessed once the most recent Directives with far-reaching intra-EU mobility procedures (ICTD and S&RD) are fully implemented.

- Within its limited sectorial scope, the legal migration *acquis* has helped to **improve, to some extent, the management of migration flows** in the EU, through more harmonised admission conditions and procedures, greater legal certainty and predictability, and some simplification. However, the direct impact of the *acquis* on EU growth and competitiveness could not be extensively demonstrated.
- The Directives have had a **positive impact on the level of rights** granted to TCNs through equal treatment provisions, and on the **protection of family life**. The impact as regards other specific objectives, such as fostering the **integration** of TCNs and **preventing labour exploitation**, has been more limited due to the fact that the Directives only partly help to address these issues.
- While some of the obstacles that prevented full achievement of these objectives are external to the *acquis* – and some to migration policy more broadly – **some issues are intrinsic to the EU framework** (e.g. fragmentation, limited coverage by EU rules, incorrect implementation or application of the common rules) and these will need to be addressed in the future.

Efficiency

The same challenges encountered in measuring the effectiveness of the legal migration Directives (especially in terms of external factors influencing the flows of migrants, and the fact that determining the volumes of admitted economic migrants is a national competence) also affected the evaluation of their efficiency. Moreover, some impacts (e.g. on integration and social cohesion, or on protection of family life) are very difficult to measure and impossible to monetise.

As a result, the efficiency assessment focused on:

- **qualitative identification** of the types of costs and benefits linked to the legal migration *acquis* for each group of stakeholders; and
- the **direct administrative costs and benefits** associated with the implementation of the Directives (i.e. compliance costs, administrative fees paid by applicants, and costs incurred by the public administration when reviewing applications, issuing permits and handling appeals).

On the latter, in particular, the (partial) evidence available suggests that, with the exception of renewals, the fees for most types of permits sufficiently cover the costs incurred by the public administrations. Overall, the administrative costs for TCNs seem to be higher than for public authorities, which is consistent with the feedback received through the public consultation. The administrative costs for employers are also estimated to be quite high.

Finally, the assessment of the practical application of the Directives identified **different implementation practices** across the Member States, with varying levels of efficiency (e.g. simple and easily accessible application forms, clear information on permits and rights in several languages, a single agency managing the application process, facilitated visa

procedures). This shows that there is **further scope for simplification** in the procedures for managing legal migration flows.

- There is **insufficient evidence** to assess the precise costs and benefits associated with the implementation of the legal migration Directives; this indicates a need to improve the collection of relevant data, at both national and EU level.
- TCNs seem to bear the highest **direct costs**, e.g. fees and other administrative costs.
- While the legal migration *acquis*, and particularly the SPD, has **simplified** to a certain extent the **procedures** for managing legal migration flows, this objective has been achieved only partly.

EU added value

The fitness check has helped identify the main positive effects of the legal migration Directives, which would have not been realised by the Member States acting alone:

- ✓ a degree of **harmonisation of conditions, procedures and rights**, helping to create a level playing-field across Member States;
- ✓ **simplified administrative procedures**;
- ✓ **improved legal certainty and predictability** for TCNs, employers and administrations;
- ✓ **improved recognition of TCNs' rights**, i.e. the right to equal treatment in a number of important areas (e.g. working conditions, access to education and social security benefits) and procedural rights; and
- ✓ **facilitated intra-EU mobility** for certain categories of TCN.

Despite all the positive changes brought about by the Directives, some shortcomings remain with respect to the full attainment of their objectives. The interaction between EU and national rules is not always effective and efficient, and there is scope for streamlining and simplifying the EU *acquis*.

- All stakeholders consulted for this fitness check, including Member States, confirmed **the continued added value of a common EU legal framework on legal migration**.
- The **key aspects of EU added value** are a degree of harmonisation of admission conditions and procedures, which has improved **legal certainty and predictability**; a degree of simplification of administrative procedures (while there is scope for further **simplification**); more harmonisation of TCNs' rights, which has generally led to **greater protection**; and to a lesser extent (due to current limitations) **facilitated intra-EU mobility of TCNs**.

6.2 Follow-up

As highlighted in the above conclusions, the legal migration Directives evaluated in this fitness check may be considered largely ‘fit for purpose’. Several **positive effects** of the EU framework on legal migration have been identified, proving the **continued relevance** and **added value** of having an EU framework to regulate this field.

However, the current legal migration framework had a limited impact vis-à-vis the overall migration challenges that Europe is facing, and the fitness check has identified a number of **critical issues** in this respect. If the EU wants fully to achieve the Treaty objective of developing a common legal migration policy as a key element of a comprehensive policy on management of migratory flows, these issues will need to be addressed in the future through a wide range of measures, such as:

- achieving a more harmonised and effective approach to **attract highly skilled workers** from third countries, as the Commission had proposed in the Blue Card reform;
- ensuring stronger **enforcement** of the directives, to improve their implementation and practical application – and therefore their overall effectiveness;
- promoting **information campaigns** to raise awareness of the rights and procedures established by EU legal migration instruments – this would help addressing the coherence issues with regard to the Member States’ implementation, and increasing the relevance and EU added value of these instruments;
- improving the **gathering of data, evidence and information** on the implementation of the *acquis* by supporting expert networks, research and studies, and improving the way Member States communicate statistics – this would contribute to improve the efficiency and effectiveness of the *acquis*;
- facilitating **information-sharing and cooperation between Member States**, especially in relation to the **intra-EU mobility** of third-country nationals – this would help exploiting to the fullest the EU added value and facilitate the application of the intra-EU mobility rules;
- providing Member States – through non-binding instruments – with **clarification and interpretative guidance** on applying the legal migration directives in a harmonised way – this would help addressing the identified coherence issues;
- considering putting forward **legislative measures** to tackle the inconsistencies, gaps and other shortcomings identified, so as to simplify, streamline, complete and generally improve EU legislation.

It is clear that any follow-up, particularly of a legislative nature, will have to undergo careful assessment as to its pros and cons, and its political feasibility.